

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Ammonium Nitrate and Regulated Ammonium Nitrate Materials

**I.D. No.** AAM-35-06-00006-E

**Filing No.** 973

**Filing date:** Aug. 10, 2006

**Effective date:** Aug. 10, 2006

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

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

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

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

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

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

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

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

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

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

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

#### Part 154

##### Ammonium Nitrate Security

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

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

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

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

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

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

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

154.4 Records. (a) Persons and entities required to be registered shall make and maintain, for a minimum of two years, a record in the following format for every sale of ammonium nitrate and regulated ammonium nitrate materials:

See Appendix.

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 7, 2006.

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

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

Section 146-f of the Agriculture and Markets Law provides that the Commissioner, in consultation with or upon the recommendation of, the Director of Homeland Security, may: set forth criteria for the registration of sellers of ammonium nitrate; suggest security measures; specify picture identification cards for purchaser identification; set forth additional records that must be maintained; and determine what regulated ammonium nitrate materials warrant regulation based on the potential explosive capacity of its ammonium nitrate content.

Section "3" of Chapter 620 of the Laws of 2005, by which Agriculture and Markets Law section 146-f was enacted, provides that any rules and regulations necessary to implement the provisions of the Act on its effective date are authorized and directed to be promulgated on or before such effective date.

##### 2. Legislative Objectives:

The rule accords with the public policy objectives of the Legislature sought to advance by enacting the above statutory authority in that it was developed in consultation with the State Office of Homeland Security and: sets forth criteria for the registration of sellers of ammonium nitrate; suggests security measures; specifies picture identification cards for purchaser identification; sets forth additional records that must be maintained; and determines what regulated ammonium nitrate materials warrant regulation based on the potential explosive capacity of its ammonium nitrate content.

##### 3. Needs and Benefits:

This emergency rule is necessary for the preservation of the public health, public safety and general welfare because it implements Chapter 620 of the Laws of 2005, effective November 28, 2005 which requires the registration of persons and entities in New York State that sell, offer for sale or otherwise make available ammonium nitrate or regulated ammonium nitrate materials. Ammonium nitrate is a common chemical compound used in fertilizer, but which is also an explosive chemical used to make bombs such as those used in the 1993 World Trade Center and 1995 Oklahoma City bombings.

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

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

##### 4. Costs:

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

The costs to regulated parties of completing and submitting the registration form are expected to be minimal. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to the registrants who already hold commercial fertilizer licenses. Those licensees, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee.

The costs to regulated parties of completing and maintaining the record for the sale of ammonium nitrate and ammonium nitrate materials, as required by Chapter 620 of the Laws of 2005, is also expected to be minimal, given the fact that it can be executed as part of the sales transaction. The format for the record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by sellers. By listing the permissible types of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005.

It is anticipated that the cost of the security measures that must be taken by those required to be registered will vary with the size of the business and the extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandalism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. Daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already be part of the business management practices of most sellers.

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

There will be no costs to local government or to the State, other than the cost to the Department. The cost to the Department, in addition to processing the registration forms and inspecting sellers for compliance with the recordkeeping and security measure requirements will depend upon the number of sellers required to be registered pursuant to Chapter 620 of the Laws of 2005. That number is currently unknown.

##### (c) Source:

Costs are based upon the Department's experience with similar registration and inspection programs.

##### 5. Local Government Mandates:

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

##### 6. Paperwork:

The rule establishes the form for persons who sell, offer for sale, or otherwise make available ammonium nitrate or regulated ammonium nitrate materials to use to register annually with the Department as required by Chapter 620 of the Laws of 2005.

The rule also establishes the format for the record of the sale of ammonium nitrate and regulated ammonium nitrate materials sellers are required to make and maintain for two years pursuant to Chapter 620 of the Laws of 2005.

##### 7. Duplication:

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

##### 8. Alternatives:

The only alternative considered was to not establish the registration form and sales record format by regulation. That alternative was rejected in favor of establishing them by this rule so that the form could be formally adopted, published in the *State Register* and codified in 1 NYCRR. The remainder of the rule relates to security measures, types of identification cards, additional records and what type of regulated ammonium nitrate materials warrant regulation based on the potential explosive capacity of its ammonium nitrate content. These requirements were developed in consultation with the State Office of Homeland Security and were based on best practices in the industry and consultation with federal agencies knowledgeable about explosive materials.

##### 9. Federal Standards:

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

##### 10. Compliance Schedule:

The rule establishes a form for immediate use by those who sell, offer for sale or otherwise make available ammonium nitrate or regulated am-

monium nitrate materials to register with the Department, as required by Chapter 620 of the Laws of 2005.

It also establishes the format for the record of the sale of ammonium nitrate and regulated ammonium nitrate materials.

It is anticipated that sellers of these materials will be able to immediately register and begin making and maintaining records of sale. The Department has made mailings advising fertilizer dealers of the requirements of Chapter 620 of the Laws of 2005. Some of these dealers may sell ammonium nitrate and regulated ammonium nitrate materials. The majority of these sales will take place during the next growing season. It is also anticipated that sellers of these materials will be able to implement security measures to protect the inventories of ammonium nitrate they will acquire prior to the next growing season.

#### **Regulatory Flexibility Analysis**

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

There are 9 persons or entities in New York State known to sell ammonium nitrate, the majority of which are small businesses. Since such sellers are not currently subject to registration, the actual number of small businesses that sell ammonium nitrate is not known.

##### 2. Compliance requirements:

Persons and entities in New York State that sell, offer for sale or otherwise make available ammonium nitrate or regulated ammonium nitrate materials are required by Chapter 620 of the Laws of 2005 to register annually with the Department for a fee of not more than \$50.00. Said Chapter also requires such persons and entities to make and maintain, for a minimum of two years, a record of those purchasing ammonium nitrate. This rule establishes the form and format for such registration and record-keeping. In addition, the rule requires that those selling ammonium nitrate display their registration certificate and take security measures to provide reasonable protection against vandalism, theft or other unauthorized access. They are also required to provide officers and employees of the New York State Department of Agriculture and Markets and the New York State Office of Homeland Security with access to the records of ammonium nitrate sales.

##### 3. Professional services:

None.

##### 4. Compliance costs:

The costs to regulated parties of completing and submitting the registration form are expected to be minimal. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to the registrants who already hold commercial fertilizer licenses. Those licensees, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee.

The costs to regulated parties of completing and maintaining the record for the sale of ammonium nitrate and ammonium nitrate materials, as required by Chapter 620 of the Laws of 2005, is also expected to be minimal, given the fact that it can be executed as part of the sales transaction. The format for the record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by sellers. By listing the permissible types of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005.

It is anticipated that the cost of the security measures that must be taken by those required to register will vary with the size of the business and the extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandalism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. The cost of daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already be part of the business management practices of most sellers.

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

Compliance with the rule is both economically and technologically feasible for the small businesses who sell, offer for sale, or otherwise make available ammonium nitrate materials. As discussed in "4" above, the registration and sale forms have been designed for ease of use by sellers of ammonium nitrate. The security measure that are required are similar to those that are anticipated to already be a part of the business management practices of most sellers.

##### 6. Minimizing adverse impact:

The rule is designed to minimize any adverse economic impact the rule may have on small businesses by closely following the requirements of Chapter 286 of the Laws of 2005 establishing registration forms that are designed for ease of use by sellers of ammonium nitrate. The registration form is similar to the form currently used in the licensing of commercial fertilizer dealers. The sales record form is designed for ease of use in the course of sales transactions involving ammonium nitrate. The approaches for minimizing adverse impact suggest in SAPA § 202b(1) and other similar approaches were considered.

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

The Department has conducted outreach via mailings to the approximately 300 licensed commercial fertilizer distributors in New York State to advise them of Chapter 620 of the Laws of 2005 and of the fact that regulations would be proposed pursuant to that Chapter. The Department has also followed up by telephone with those known to handle ammonium nitrate. When the emergency rule is proposed for permanent adoption small businesses and other regulated parties will have an opportunity to participate in the rule making process.

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

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

The 9 persons or entities in New York State known to sell ammonium nitrate are located throughout the rural areas of the State.

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

Persons and entities in New York State that sell, offer for sale or otherwise make available ammonium nitrate or regulated ammonium nitrate materials that are small businesses are not likely to need professional services to comply with the rule. The rule establishes the form to use to register with the Department as required by Chapter 620 of the Laws of 2005. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to registrants who already hold commercial fertilizer licenses. Those licensees, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee.

The rule also establishes the format for the record of the sale of ammonium nitrate and ammonium nitrate materials required by Chapter 620 of the Laws of 2005. The format for this record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by such sellers. By listing the permissible type of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005 that the identity of those purchasing ammonium nitrate and regulated ammonium nitrate materials be verified and recorded.

The requirements in the rule requiring security measures be taken to provide reasonable protection against vandalism, theft or other unauthorized access are those commonly in use by small businesses to protect their inventory.

It is not anticipated that professional services are likely to be needed in a rural area to comply with the proposed rule.

##### 3. Costs:

The costs to regulated parties of completing and submitting the registration form are expected to be minimal. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to the registrants who already hold commercial fertilizer licenses. These licenses, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee. It is not anticipated there will be a variation in the cost for different types of public and private entities in rural areas.

The cost to regulated parties of completing and maintaining the record for the sale of ammonium nitrate and ammonium nitrate materials, as required by Chapter 620 of the Laws of 2005, is also expected to be minimal, given the fact that it can be executed as part of the sales transaction. The format of the record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by sellers. By listing the permissible types of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005. It is not anticipated that there will be a variation in such costs for different types of public and private entities in rural areas.

It is anticipated that the cost of the security measures that must be taken by those required to register will vary with the size of the business and the

extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandalism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. Daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already be part of the business management practices of most sellers.

#### 4. Minimizing adverse impact:

As set forth in "2" and "3" above, the rule is designed to minimize any adverse impact on rural areas, by making the forms established by the rule user friendly and directed and limited to that which is necessary to implement Chapter 620 of the Laws of 2005. The approaches suggested by SAPA § 202-bb(2) and other similar approaches were considered.

#### 5. Rural area participation:

The Department has conducted an outreach by mail to 300 licensed fertilizer dealers trying to determine those that sell ammonium nitrate. The Department will be proposing this emergency rule for permanent adoption. Through the notice and comment process of the Administrative Procedure Act, regulated parties will have the opportunity to participate in the rule making process. The adoption of the rule on an emergency basis was necessary to implement Chapter 620 of the Laws of 2005 by the effective date of November 28, 2005.

#### Job Impact Statement

##### 1. Nature of impact:

By providing for the protection of ammonium nitrate, while permitting its continued use as a fertilizer for agricultural and horticultural purposes, the rule will help preserve jobs and employment opportunities in those important economic sectors.

##### 2. Categories and numbers affected:

The number of persons employed by the 9 known sellers of ammonium nitrate is not known.

##### 3. Regions of adverse impact:

The sellers of ammonium nitrate and the agricultural and horticultural businesses that utilize ammonium nitrate as a fertilizer are located in the rural areas of the State. As noted in "1" above, the rule would have a positive impact on jobs and employment opportunities.

##### 4. Minimizing adverse impact:

The rule was designed to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities in that it will help keep fertilizer dealers that sell ammonium nitrate and their agricultural and horticultural customers in business. The rule was designed to minimize any adverse impact on sellers and customers by making the forms established by the rule easy to use and by limiting the rule to that which is necessary to implement Chapter 620 of the Laws of 2005.

**Purpose:** To provide a new residential treatment program for adolescents and add the rate setting methodology for proposed Part 817 of Title 14 NYCRR and consolidate and clarify Medicaid billing and reporting rules for chemical dependence providers.

**Substance of final rule:** The New York Office of Alcoholism and Substance Abuse Services proposes to add a new Part 817 to 14 NYCRR to establish a new category of service — Chemical Dependence Residential Rehabilitation Services for Youth.

Section 1 of this Part provides the legal authority for the Commissioner of the Office of Alcoholism and Substance Abuse Services to develop the rule.

Section 2 describes the general service standards necessary for certification which includes the following:

(a) written policies and procedures to be developed by the governing authority;

(b) service goals;

(c) clinical services including counseling, recovery support services, medical services and assessments;

(d) minimum hours of service per week;

(e) methadone treatment,

(f) food and nutrition services;

(g) physical plant requirements; and

(h) prohibition on the use restraints and seclusion; and

(i) Medicaid billing requirements.

Section 3 describes the admission procedures including the level of care determination, prohibition against discrimination, and additional admission requirements for Medicaid recipients including the establishment of a pre-admission review team.

Section 4 describes the post admission procedures including the development of a comprehensive evaluation, medical history, treatment plan, review and documentation of the treatment plan, and discharge planning.

Section 5 describes the recordkeeping requirements including confidentiality requirements.

Section 6 describes the process for quality improvement and utilization review.

Section 7 describes medical policy and procedures.

Section 8 describes the staffing requirements including staff assignments, training, clinical and direct care staffing requirements, and the multidisciplinary team requirements.

Section 9 prohibits the use of restraints or seclusion.

The New York Office of Alcoholism and Substance Abuse Services also proposes to amend Part 841 of 14 NYCRR — Medical Assistance for Chemical Dependence Services. The amendment will add a new reimbursement methodology for the proposed Chemical Dependence Residential Rehabilitation Services for Youth program and conform existing requirements with this new service category. The regulations will also consolidate separate audit, rate revision, capital costs and related party transaction requirements in new sections. In addition new capital cost and related party transaction requirements will provide clarity to providers regarding compliance with these categories.

Section 841.5 is amended to require providers to submit a copy of the providers certified financial statements including financial and statistical data.

Section 841.10 is amended as follows:

(a) Adds a definition of "Billable Services";

(b) Deletes audit sections which are moved to a new Section 841.13;

(c) Deletes related party transactions sections which are moved to a new Section 841.15;

(d) Adds to paragraph 9 of subdivision (h) a new definition of the trend factor to be based on the federal consumer price index;

Adds a new Section 841.12 — Medical assistance payments for residential rehabilitation services for youth. This section describes the fee setting methodology for this proposed service. The methodology describes the calculation of the service fees, description of the service fee geographic regions, capital cost reimbursement, reimbursement of the admission review team, reimbursement of medical service costs, utilization control, and audits and appeals.

A new Section 841.14 describes the reimbursement methodology for capital costs for programs with Medicaid reimbursement. This includes a description of allowable capital costs, methodology to determine historical capital costs, useful life of depreciable assets, calculation of capital indebtedness, costs relating to State Dormitory Authority loans and leasing costs.

A new Section 841.15 — Related party transactions is added. This section describes the factors the Office will use in determining whether there is a related party transaction for providers of services. If there is a

## Office of Alcoholism and Substance Abuse Services

### NOTICE OF ADOPTION

#### Chemical Dependence Residential Services for Youth; Medical Assistance for Chemical Dependence Services

**I.D. No.** ASA-13-06-00010-A

**Filing No.** 981

**Filing date:** Aug. 15, 2006

**Effective date:** Aug. 30, 2006

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

**Action taken:** Addition of Part 817 and sections 841.12-841.15; amendment of sections 841.4, 841.5, 841.10 and 841.11 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(e), 19.09(b), 19.15(a), 19.40, 32.01, 32.07(a), 32.09, 43.01 and 43.02; Social Services Law, section 364

**Subject:** Chemical dependence residential services for youth; medical assistance for chemical dependence services.

related party transaction the regulation describes safeguards and procedures which must be followed by the parties.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 817.2(a)(l), (16), (e), 817.3(a)(1), (i), (l), 817.4(a)(2), (4)(v)(F), (c)(1), 817.5(c), (f), 817.13(h), (u), (v), 817.14(c), (d), (f), (g), (l), (o), (p), 841.4(c), 841.10(d), 841.12(a)-(c), 841.13(a), (c), (g), (i)-(k).

**Text of rule and any required statements and analyses may be obtained from:** Kenneth Hoffman, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203-3526, (518) 485-2317, e-mail: KenHoffman@OASAS.State.NY.US

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

Changes made to the amendments to Part 841 and the proposed Part 817 do not necessitate revision of the previously published Consolidated Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

**Assessment of Public Comment**

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 as to the reasons why alternative suggestions were not incorporated into the rule, and description 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 text rule.

1. Comment — The regulations require that the level of care determination must incorporate the use of LOCADTR or another Office approved protocol. The LOCADTR is geared toward individuals who are 18 years of age or older.  
Response — OASAS will develop an amended LOCADTR or another protocol which will include criteria for individuals under the age of 18.
2. Comment — The certified capacity of a service should be allowed to be exceeded in an emergency.  
Response — OASAS believes that the capacity requirement must not be exceeded to ensure the health and safety of patients. OASAS will work individually with providers to appropriately address emergencies which may impact capacity.
3. Comment — Group counseling sessions should be increased from 1 staff member for every 12 patients in a session to 1 staff member for every 16 patients in a session.  
Response — Best practices and literature support a group size of between 8 and 12 patients as optimal. This was also the consensus of the provider panel which reviewed the regulations.
4. Comment — Blood counts and urinalysis should not be required as part of the physical examination but should only be performed at the physician's discretion.  
Response — OASAS believes it is good medical practice to obtain a blood count and routine and microscopic urinalysis for individuals entering treatment.
5. Comment — Add progress notes to section 817.2(a).  
Response — Progress notes have been added to section 817.2(a)(2)
6. Comment — Group counseling sessions should have a minimum duration.  
Response — It was decided not to include a minimum duration time for group sessions. In residential settings, group counseling sessions may vary depending on the purpose of the session. It was decided to allow services the flexibility to structure group counseling sessions according to program and patient needs. Other regulations will ensure the quality and effectiveness of group counseling.
7. Comment — Services should document that group sessions consist of no more than 12 patients.  
Response — This is a quality assurance issue where the form of documentation is best determined by providers. Examples would include attendance sheets.
8. Comment — Recovery support services should have minimum duration standards and type and duration should be documented.  
Response — The Office wants to balance the need for excessive recordkeeping and documentation requirements with quality outcomes. Standards for recovery support and other services will be described in clinical practice guidelines to encourage flexibility and new approaches in treatment.

9. Comment — Will attendance in school programs count towards the aggregate of 40 hours of service?  
Response — School programs will count towards the 40 hour minimum amount of services. However, since there are many services that are required to be provided under the regulations, the Office believes that all patients will receive all necessary services, even if educational services are included in the 40 hour minimum requirement.
10. Comment — Providers should document all services, including type and duration, provided under the 40 hour minimum requirement.  
Response — The provider is responsible for ensuring compliance with all requirements and, upon request, providing sufficient documentation demonstrating that these requirements are met. The Office will allow providers the flexibility to structure a method to show compliance with these requirements without imposing an onerous recordkeeping requirement.
11. Comment — Under section 817.3 does the ART review constitute the admissions date?  
Response — The ART does not admit patients. The ART confirms the patient's eligibility for the program. The admission date is determined by the provider when the admissions process is completed.
12. Comment — Under section 817.4, is the comprehensive evaluation complete when signed by the QHP?  
Response — Yes
13. Comment — Section 817.4 requires the treatment plan to be reviewed, signed and dated by a responsible clinical staff member. Does the use of the word review indicate that the treatment plan is already existence at the time of the review?  
Response — Yes, the treatment plan has already been developed by the treatment team when it is reviewed for signature by the responsible clinician.
14. Comment — Records should specifically mention attendance and duration of all counseling sessions.  
Response — This is not necessary. This information is already reflected in the records and schedules of the patients.
15. Comment — 817.4(l) should state that the treatment plan should be reviewed by a physician who is the program's medical director.  
Response — The treatment team physician signing the treatment plan does not have to be the medical director. The Medical Director should direct and supervise all medical staff but is not responsible for all treatment plan approvals as this may be done by another physician, especially in larger programs in which it would not be practical for one physician to sign all treatment plans.
16. Comment — Because it is a Medicaid program, Part 817 will dramatically alter the clinical process for adolescents in treatment by standardizing requirements.  
Response — Part 817 provides minimum standards which allow programs much flexibility and opportunity to provide innovative services. The Office believes that Part 817 incorporates the best of the current regulations for adolescent services. The regulations were developed in close cooperation with a broad range of service providers to ensure that the best approaches to treatment were incorporated into the regulations.
17. Comment — Individual counseling sessions of once per week for 45 minutes should be the standard instead of the section 817.2(c)(1)(A)(i) requirement of two sessions for an aggregate of 90 minutes.  
Response — The Office believes that two sessions are clinically appropriate for adolescents. One session is with the primary counselor but the second session may be with a clinician or QHP and can address any number of services such as educational, medical or vocational services.
18. Comment — Section 817.4 (b) (6) requires a comprehensive treatment plan be developed in 14 days and reviewed at least every 30 days thereafter. This should be changed to 30 days and 60 days respectively since in many cases these are longer term programs where goals and objectives are geared toward longer periods of time.  
Response — The timeframes established in the regulations are consistent with federal utilization review standards and it is not good clinical practice to wait 60 days before updating a treatment plan for adolescents.

19. Comment — Section 817.4 (p) requires that a discharge plan for a minor must be developed in consultation with his or her parent or guardian. “If feasible” should be added to take into account cases where the parent or guardian is absent or uncooperative.  
Response — The Office believes that it is important that parents or guardians are included in discharge planning and programs must make their best efforts to encourage family participation. Clearly, in some cases the parent is not available and the provider should document the efforts made to include parents.
20. Comment — Section 817.8(e) states that the Medical Director may also serve as the Medical Director of another chemical dependence program. This should be expanded to include any other health care service provider.  
Response — The Section as written does not preclude the Medical Director from serving as the Medical Director of another health care service, however another agency may not allow this, therefore this regulation is limited to CD service providers.
21. Comment — Section 817.8 (h) should allow personnel to be available on site or “on call”  
Response — On call will be added to this section.
22. Comment — Section 817.8 (k) requires at least two staff members on duty, one of whom is a clinical or medical staff member, for up to 100 beds. There should not be a requirement for a clinician or medical staff, as long as there is a QHP on call in case of emergencies.  
Response — The Office believes that the presence of a clinical or medical staff person is essential to ensure the safety and health of patients in larger programs. This was the consensus in the provider work group.
23. Comment — The regulations do not contain provisions that “protects the length of stay”.  
Response — Treatment can continue to be provided to patients in Part 817 programs as long as it is clinically appropriate.
24. Comment — Providers in rural areas should be able to “opt out” of Part 817 because of the difficulty of obtaining staff.  
Response — Part 817 programs are staffed very closely to the staffing requirements of Part 820. The Office will work closely with providers in the conversion to Part 817 to allow sufficient time to obtain needed staffing.
25. Comment — There is a concern that providers who do not generate enough Medicaid revenue will have services impacted and will not be able to serve non — Medicaid eligible patients such as the working poor and uninsured individuals.  
Response — The Office projects that there will be sufficient funding to serve uninsured patients.
26. Comment — Participating in the Part 817 service should be voluntary. Part 820 and Part 819 programs should continue as an option.  
Response — The Office understands that this discussion in the regulatory impact statement may be taken by some existing adolescent service providers as meaning that they may continue to operate under existing adolescent services models. The meaning of voluntary in this case is simply that a program may choose not to become a Part 817 provider, however it is the intention of the Office that Part 817 will replace the existing Part 820. There was discussion of the impact of conversion on Part 820 programs and how these costs will be reimbursed in the Medicaid fee. The phase-in conversion was also discussed. Part 819 may be a viable option for some adolescents, particularly older adolescents.
27. Comment — The Office Five-year plan provides for the use of pilot and demonstration programs. Part 817 should be implemented as a pilot.  
Response — This program was studied extensively, with cooperation and participation of a majority of adolescent programs and a cross section of types of programs and service areas with the intention of creating a new service model that would replace the Part 820 and Part 819 service model for adolescents.
28. Comment — The regulation does not contain the ART review criteria.  
Response — The criteria will be detailed in a request for proposal that the Office is developing to obtain a contractor to operate the ART. The criteria in the request for proposal will match the existing requirements in Part 817.
29. Comment — The process of admission should be left to the discretion of the provider and not prescribed by regulation.  
Response — The provider has discretion to admit but must follow the regulatory requirements relating to admission.
30. Comment — The staffing requirements overlap, do not provide enough specificity or interfere with personnel practices.  
Response — The regulations attempt to balance the potential for specifying too many requirements with the need for minimum requirements. The Office believes that these staffing requirements, which address Medicaid standards and were developed in collaboration with the provider working group, achieve that balance.
31. Comment — Does the term “such persons” in the third sentence of 817.8 (h) include all of the previously mentioned medical staff?  
Response — Yes
32. Comment — Section 817.8(k) needs to clarify clinical staff availability at all times to the requirement of two staff members on duty and awake in this section.  
Response — Section 817.8 (k) is clarified to indicate that there must be clinical staff on-site at all times.
33. Comment — Section 817.8(n) requires 50% of all direct care staff be QHP’s. This may require a provider to reduce staff to meet this requirement. Provide staffing ratio’s instead.  
Response — The 50% QHP requirement is required in several OASAS regulations. The goal is to assure adequate professional staffing be available to patients and this regulation meets this need. This requirement has worked successfully with other regulations but OASAS will continue to monitor the impact of this requirement. It should be noted that since CASAC trainees are allowed to be counted toward meeting the 50% requirement, there should be no impact on direct care staff.
34. Comment — Section 817.8 contains duplicative requirements.  
Response — There is no duplication. Some sections provide more guidance on how to meet a particular staffing standard or patient need.
35. Comment — Section 817.8 requires one clinician and one other staff awake and on-site, is this in addition to the medical staff requirement?  
Response — Yes, however the regulation has been clarified to require on-site or on-call medical staff.
36. Comment — There is no definition of health coordinator in Section 817.8 but a description of duties. There are definitions of other professionals but no description of duties.  
Response — The definition of health coordinator is necessary because this is not a licensed category of professional, it is a position created by this regulation. The other professionals are fully licensed categories with qualifications set by the State Education Department. The duties of other professionals in Part 817 will be the duties performed under their professional licenses.
37. Comment — Sections 817.8(u) and (v) do not establish minimum staffing requirements.  
Response — The purpose of these sections is to establish the multidisciplinary team requirements and not minimum staffing requirements.
38. Comment — Section 817.8(h) requires one registered nurse and other medical staff for patients with co-existing medical conditions. Instead assign the one nurse only .  
Response — This regulation has been clarified to indicate that other medical staff must be on-site or on-call at all times.
39. Comment — Eliminate 817.8(p),(q),(r),(s) and allow a social worker to perform all these functions.  
Response — The provider may utilize staff with appropriate qualifications as they see fit, however the number of staff delineated in this section must be met.
40. Comment — Eliminate 817.8(u) and (v) and reword 817.4(l)  
Response — 817.8(u) and (v) has been clarified but not eliminated. The Office believes that a separate discussion of the multidisciplinary team be placed in the regulation separate from the treatment plan review process.
41. Comment — Add language that it is better to have more to have more staff than less staff.  
Response — The Office believes that the staffing above the minimum standards should be based on what best meets the needs of the patients. That is why minimum staffing is described in the regulations. Staffing levels above the minimum should be based on this need which is the decision of the service provider.

- 42. Comment — Section 817.4(g) allows an updated treatment plan for patients transferring from another service. Patients transferring from a crisis service should be required to have a new treatment plan developed.  
Response — It is the responsibility of the Part 817 provider to review the existing plan, regardless of the previous service, and ensure that the update will result in an appropriate plan.
- 43. Comment — Section 817.4(c) and (d) should include the comprehensive evaluation and the medical history.  
Response — Change made.
- 44. Comment — Section 817.4(o) should discuss what happens when a patient reaches the age of 22 years.  
Response — This clarification has been added to the regulation. Where clinically appropriate a patient may remain in the program after the age of 22 years, however Medicaid cannot be billed.
- 45. Comment — Section 817.5(c) and (d) are not recordkeeping requirements and should be moved.  
Response — Section 817.5(c) has been deleted. Section 817.5(d) discusses a medical order and will remain.
- 46. Comment — 817.8(f) and (g) should be deleted since the requirements are duplicated in 817.8(a).  
Response — These sections will remain. These sections ensure that there is sufficient staffing for patients with mental health needs.
- 47. Comment — Why is the counseling requirement minimal when counselors are required to have nine and one-half shifts per week?  
Response — These staffing standards were agreed to based on a consensus of providers who assisted in the review of the regulations. Clinical practice guidelines will provide staffing guidelines. Each counselor is not required to have a certain number of shifts. The program is required to have counseling coverage for one and one-half shifts for five days and one shift for two days (usually weekends).
- 48. Comment — The federal regulatory requirements should be incorporated into the regulations.  
Response — The Office has incorporated the federal requirements in the regulations. In most cases the requirements, where applicable, were incorporated into specific service standards and procedures throughout the regulation.
- 49. Comment — The federal requirement for accreditation is not in the regulation.  
Response — The federal requirement is for an accreditation or “comparable standards that is recognized by the state” These regulations represent these comparable standards.
- 50. Comment — The regulations do not address the requirement that the services be under the direction of a physician.  
Response — The regulations incorporate this provision. For example the regulations require the medical director of the facility to direct medical services and require a physician to approve written treatment plans with knowledge of the contents of the plan.
- 51. Comment — Minors should be defined.  
Response — The term minors has been replaced with individuals 18 years of age or under.

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

**Specific reasons underlying the finding of necessity:** Chapter 629 of the laws of 2002, which became effective on April 7, 2003, made substantial changes to the conduct of the business of budget planning in this state. Amendments made to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law necessitated the emergency adoption of Part 402 of the Superintendent’s Regulations on that date.

It has come to the attention of the Banking Department that many licensed budget planners utilize third party entities to assist them in distributing the monies of debtors to their creditors. Likewise, many applicants for a budget planning license have indicated in their application that they intend to conduct their budget planning activities in a similar fashion. This type of “outsourcing”, in which an entity other than the licensee which has a contract for budget planning services with a debtor has access to or controls the monies of debtors, raises the possibility that those monies will not be sufficiently protected, as intended by the Legislature. The rule is necessary in order to provide protection to debtors when a third party “outsourcer” is used in the process of paying debtor funds to creditors of the debtors. Specifically, if the third party “outsourcer” is another budget planner licensed under Article 12-C of the New York Banking Law, the amount of that licensee’s bond or assets placed on deposit, as the case may be, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not been properly distributed to their creditors, must be increased to reflect the additional amount of debtors’ funds that it has access to or controls as a result of its “outsourcing” activities. However, if the licensed budget planner which utilizes another licensed budget planner as an “outsourcer” places assets on deposit pursuant to Section 580(4) of the Banking Law in an amount sufficient to cover the debtors’ funds that the licensed “outsourcer” has access to or controls, then the licensed “outsourcer” would not be required to obtain a surety bond in a greater amount, or place additional assets on deposit to cover the additional amount of debtors’ funds that it has access to or controls, as a result of its outsourcing activities. In such case, the monies of debtors would be fully protected by the original licensee’s asset deposit.

If the third party “outsourcer” is not a licensed budget planner in New York State, the issue of the safety of the monies of the debtors becomes more paramount as an entity unregulated by and probably unknown to the Banking Department will have access to or control of the monies of debtors. In such case, unless the licensed budget planner places assets on deposit sufficient to cover the debtors’ funds that the non-licensed “outsourcer” has access to or controls, the non-licensed “outsourcer” would be required to place assets on deposit sufficient to protect the monies of the debtors that it has access to or controls as a result of its “outsourcing” activities.

The rule also contains provisions relating to the contractual relationship between the licensed budget planner and the service provider, which give protection to debtors who may be adversely affected if the contract between the licensee and the service provider is terminated.

The primary legislative objective of Chapter 629 is to provide greater consumer protection to New York residents who contract with licensed budget planners for budget planning services. Accordingly, considering the foregoing, emergency adoption of this rule is necessary and appropriate.

**Subject:** Regulation of budget planning activities conducted by entities licensed under art. 12-C of the New York Banking Law.

**Purpose:** To set forth the regulatory requirements and standards of operation for entities licensed under art. 12-C of the New York Banking Law to conduct the business of budget planning when the licensee uses the services of third party entities in making payments of debtor funds to creditors of the debtors.

**Text of emergency rule:**

PART 404

BUDGET PLANNERS/DELEGATION OF CERTAIN ACTIVITIES  
(Statutory authority: Banking Law, § 587)

§ 404.1 Definitions.

For purposes of this Part:

(a) The term “debtor” shall mean an individual who enters into a contract with a licensee and is at that time a New York resident.

(b) The term “licensee” shall mean an entity licensed pursuant to Article 12-C of the New York Banking Law.

(c) The term “licensee service provider” shall mean an entity licensed pursuant to Article 12-C of the New York Banking Law that holds, or has access to, or can effectuate possession of, by any means, the monies of

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## Banking Department

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### EMERGENCY RULE MAKING

**Regulation of Budget Planning Activities**

**I.D. No.** BNK-35-06-00004-E

**Filing No.** 972

**Filing date:** Aug. 10, 2006

**Effective date:** Aug. 13, 2006

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

**Action taken:** Addition of Part 404 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-C, section 587

another licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include entities that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

(d) The term "non-licensee service provider" shall mean an entity that holds, or has access to, or can effectuate possession of, by any means, the monies of a licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include entities that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

(e) The term "control party" shall mean with respect to a licensee, any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a licensee. With respect to a non-licensee service provider it shall mean any individual or entity that has a 10% or more ownership interest in the non-licensee service provider and/or any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a non-licensee service provider.

#### § 404.2 Explanatory note.

Section 580.4 of Article 12-C of the New York Banking Law requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, maintain certain assets on deposit, which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed by the licensee to the creditors of the debtors. In circumstances in which a licensee uses a licensee service provider or a non-licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of a licensee's debtors, the services of such service providers shall be subject to the terms and conditions set forth in sections 404.3, 404.4, 404.5 and 404.6 of this Part, in order to provide the consumer protections afforded to licensees' debtors as mandated under Article 12-C of the New York Banking Law.

In complying with these terms and conditions, a licensee that obtains a surety bond pursuant to Section 580.4 of the Banking Law and uses the services of a licensee service provider as described, is required to use a licensee service provider that either obtains a surety bond or maintains assets on deposit, in accordance with the provisions of Banking Law Section 580.4. Similarly, if the licensee obtains a surety bond and uses the services of a non-licensee service provider as described, the licensee is required to use a non-licensee service provider that maintains assets on deposit, in accordance with the provisions of Section 404.4(c)(2) of this Part.

If, however, a licensee elects to maintain assets on deposit pursuant to Banking Law Section 580.4 and uses the services of a licensee service provider or a non-licensee service provider as described, there is no requirement that the licensee service provider or the non-licensee service provider obtain a surety bond or maintain assets on deposit. The licensee service provider would, of course, be required to obtain a surety bond or maintain assets on deposit with respect to its own contracts with debtors for budget planning services, pursuant to Banking Law Section 580.4.

#### § 404.3 Servicing By a Licensee Service Provider.

(a) If a licensee seeks to utilize a licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of another licensee's debtors in contract with the licensee for budget planning services, or to distribute, or be in the chain of distribution of such monies to creditors of the licensee's debtors, the licensee shall give the Superintendent ten days written notice of its intention to do so.

(b) Notice to the Superintendent shall contain the following information:

(1) Name and address of the licensee service provider.

(2) A description of the services to be provided by the licensee service provider.

(3) A copy of the agreement or contract between the licensee and the licensee service provider with respect to the provision of any or all of the services described in section 404.3(a) of this Part.

(4) The highest daily amount of debtor funds of the licensee to be held by the licensee service provider, or to which access is given to the licensee service provider, or to which possession can be effectuated, by any means, by the licensee service provider, or which are distributed by the licensee service provider, or are in the chain of distribution, to the creditors of the licensee's debtors.

(c) Unless the licensee maintains assets on deposit in lieu of a surety bond, pursuant to Banking Law Section 580.4, the Superintendent, in his/her discretion, may require the licensee service provider to obtain a larger

surety bond or maintain a greater amount of assets on deposit for the protection of debtors in accordance with the terms and conditions as set forth in Superintendent's Regulation Parts 402.5, 402.6 and 402.7 in connection with the services being provided by the licensee service provider to the licensee as described in section 404.3(a) of this Part.

(d) A licensee shall not use a licensee service provider until the licensee receives written notice from the Superintendent confirming that the Superintendent has received a copy of the licensee service provider's bond or asset deposit agreement, if required under Section 404.3(c) of this Part.

(e) Notwithstanding the provisions of Section 404.3(c) of this Part, if a licensee maintains a surety bond and seeks to utilize a licensee service provider, as defined in section 404.1(c) of this Part, the Superintendent, in his/her sole discretion, may permit the use of an alternate mechanism to the licensee service provider obtaining a larger surety bond or maintaining a greater amount of assets on deposit, consistent with the purposes of Section 580.4 of Article 12-C of New York's Banking Law and the requirements of this Part.

(f) If the use of an alternate mechanism pursuant to Section 404.3(e) of this Part is proposed by a licensee, the licensee must provide a description of the alternate mechanism and a copy of all applicable documents and records, as well as any other information requested by the Superintendent, in connection with obtaining and/or using the alternate mechanism, including all contracts/agreements pertaining or related thereto.

(g) If a licensee proposes the use of an alternate mechanism to a licensee service provider obtaining a larger surety bond or maintaining a greater amount of assets on deposit, pursuant to Section 404.3(e) of this Part, use of the alternate mechanism shall not be permitted until the licensee receives written notice from the Superintendent that he/she has no objection to such alternate mechanism.

#### § 404.4 Servicing By A Non-Licensee Service Provider.

(a) If a licensee seeks to utilize a non-licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of the licensee's debtors in contract with the licensee for budget planning services, or to distribute, or to be in the chain of distribution of such monies, to the creditors of the licensee's debtors, the licensee shall give the Superintendent ten days written notice of its intention to do so.

(b) Notice to the Superintendent shall contain the following information:

(1) Name and address of the non-licensee service provider.

(2) Name, address, social security number and resume of the officers and directors of the non-licensee service provider, any other individual(s) who supervises the daily operations of the non-licensee service provider and any persons having a 10% or more ownership interest, directly or indirectly, in the non-licensee service provider. If an individual(s) has a 10% or more ownership interest in the non-licensee service provider and such individual is not a control party of the licensee with whom the non-licensee service provider is in contract to provide the services described in section 404.4(a) of this Part, such individual shall provide an affidavit attesting to that fact.

(3) A description of the services to be provided to the licensee by the non-licensee service provider.

(4) A copy of the agreement or contract between the licensee and the non-licensee service provider with respect to the provision of any or all of the services described in section 404.4(a) of this Part.

(5) The highest daily amount of debtor funds to be held by the non-licensee service provider, or to which access is given to the non-licensee service provider, or to which possession can be effectuated, by any means, by the non-licensee service provider, or which are distributed by the non-licensee service provider, or are in the chain of distribution, to the creditors of the debtors.

(c) A licensee shall not use a non-licensee service provider for the services described in section 404.4(a) of this Part until:

(1) The non-licensee service provider gives the Superintendent or his/her authorized representative written authorization to examine all books, records, documents and materials, including those maintained in electronic form, as they relate to the debtors monies held by, or distributed by the non-licensee service provider to the creditors of the debtors, as the superintendent in his/her discretion deems necessary to protect the interests of the debtors. The cost of such examination shall be borne by the licensee in contract with the non-licensee service provider; and

(2) Unless the licensee maintains assets on deposit in lieu of a surety bond, pursuant to Banking Law Section 580.4, the non-licensee service provider shall maintain assets on deposit for the protection of the debtors whose monies it holds, or has access to, or can effectuate possession of, by any means, or which are distributed, or are in the chain of distribution, by

the non-licensee service provider, to the creditors of the debtors. The maintenance of such assets shall be in accordance with the terms and conditions as set forth in Superintendent's Regulation Parts 402.6 and 402.7; and

(3) All information required in subdivision (b) of this section and a copy of the non-licensee service provider's asset deposit agreement, if required under Section 404.4(c)(2) of this Part, have been provided to the Superintendent, and the licensee receives written notice from the Superintendent confirming that the Superintendent has received all such information.

(d) Notwithstanding the provisions of Section 404.4(c)(2) of this Part, if a licensee maintains a surety bond and seeks to utilize a non-licensee service provider, as defined in Section 404.1(d) of this Part, the Superintendent, in his/her sole discretion, may permit the use of an alternate mechanism to the non-licensee service provider maintaining assets on deposit, consistent with the purposes of Section 580.4 of Article 12-C of New York's Banking Law and the requirements of this Part.

(e) If the use of an alternate mechanism pursuant to Section 404.4(d) of this Part is proposed by a licensee, the licensee must provide a description of the alternate mechanism and a copy of all applicable documents and records, as well as any other information requested by the Superintendent, in connection with obtaining and/or using the alternate mechanism, including all contracts/agreements pertaining or related thereto.

(f) If a licensee proposes the use of an alternate mechanism to a non-licensee service provider maintaining assets on deposit pursuant to Section 404.4(d) of this Part, use of the alternate mechanism shall not be permitted until the licensee receives written notice from the Superintendent that he/she has no objection to such alternate mechanism.

#### § 404.5 Termination of Agreements or Contracts.

(a) Every agreement or contract between a licensee and a licensee service provider, or a non-licensee service provider, to hold, or have access to, or to effectuate possession of, by any means, the monies of the licensee's debtors in contract with the licensee for budget planning services, or to distribute, or be in the chain of distribution of such monies, to creditors of such debtors, shall provide that the agreement or contract shall not be terminated without at least 30 days written notice to the party against whom termination is being sought.

(b) A licensee shall immediately notify the Superintendent, in writing, of such termination, upon the sending of by the licensee, or upon the receipt by the licensee, of the notice of termination.

#### § 404.6 Compliance.

Compliance with this Part shall be required on or before May 18, 2004.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 7, 2006.

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Section 587 of Article 12-C of the New York Banking Law, as amended by chapter 629 of the laws of 2002, provides the statutory authority for the Superintendent to propose this rule with respect to entities licensed under Article 12-C of the Banking Law to conduct the business of budget planning. Provisions of chapter 629 include the enactment of amendments to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law that relate to the business of budget planning. Article 12-C of the New York Banking Law provides for the licensing and regulation of entities engaged in the business of budget planning. The business of budget planning is defined in Section 455 of Article 28-B of New York's General Business Law.

##### 2. Legislative Objective:

Entities that are licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning are authorized to enter into contracts with individuals ("Debtors") who seek to pay off their debts. The Debtors agree to pay sums of money periodically to the licensed budget planner. The licensed budget planner in turn uses the money received from the Debtors to pay the creditor(s) of the Debtors based on payment terms set forth in the contracts between the licensed budget planner and the Debtors. Debtors pay a fee to licensed budget planners for this service.

Typically, Debtors who enter into such contracts with licensed budget planners have incurred significant amounts of consumer debt primarily through credit-card financed purchases. The expansion of unsecured con-

sumer credit to the general public has resulted in an explosion of consumer debt. This has created situations where credit has been extended to, and utilized by, individuals who, if not for the available credit, would have been unable to engage in such consumer spending based on their disposable income. Individuals who have no funds to repay such debts may only possibly resolve their financial problems by either seeking out personal bankruptcy or by looking to the services provided by credit counselors or licensed budget planners. Debtors often have little ability to satisfy their creditors without the use of a structured payment plan negotiated with the creditors that may include some modification of the outstanding debt due to the creditor. Licensed budget planners perform an intermediary role between the Debtors and the creditors in negotiating a payment plan and in insuring that periodic payments are made to the creditors.

Under these circumstances the individuals in debt are often in dire economic circumstances. Consequently, they are potential targets of persons or entities that may seek to take advantage of them by accepting fees for the promise of services or programs that may not actually eliminate the debt.

The Legislature in amending various sections of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of entities engaged in the business of budget planning, did so generally to establish a more rigorous regulatory environment within which entities licensed under New York law may engage in the business of budget planning. The Legislature addressed, among other things, the inherent risks associated with the payment of Debtor funds to creditors when Debtors choose to have such payments made via the services of a licensed budget planner instead of paying their creditors directly. Specifically, as one way of increasing consumer protections for the Debtors who contract with licensed budget planners in order to pay the debts they owe to creditors, Article 12-C was amended to require licensed budget planners to obtain a surety bond or place assets on deposit, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not properly been paid to their creditors.

In addition to the amendments to Article 12-C of the New York Banking Law, amendments were also made to Article 28-B of the New York General Business Law in connection with the business of budget planning. Specifically, Section 455 of Article 28-B of the New York General Business Law requires a person or entity, wherever located, that enters into a contract for budget planning with an individual then resident in New York State, to first obtain a license from the Superintendent of Banks to conduct the business of budget planning. Such a license is obtained pursuant to Article 12-C of the New York Banking Law. Because of the requirement that out-of-state entities that contract with New York residents for budget planning services be licensed under the Banking Law, New York residents who partake of the budget planning services offered by the out-of-state entities will also be afforded the consumer protections that have been put in place under Article 12-C of the Banking Law.

The proposed New Part 404 sets forth a framework for the regulation of entities licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning, when such licensees use third party entities in distributing the monies of Debtors to creditors. New Part 404 was drafted in furtherance of the public policy objectives that the Legislature sought to advance in enacting the amendments to Article 12-C of the New York Banking Law, in particular, Section 580(4), by providing protection when third party entities are used in distributing Debtor monies to creditors.

##### 3. Needs and Benefits:

Proposed New Part 404 is needed to enable the Banking Department to carry out its existing supervisory and regulatory responsibilities with respect to entities licensed under Article 12-C of New York's Banking Law to conduct the business of budget planning. Specifically, when Banking Law Section 580(4) was recently enacted, it placed the requirement upon licensed budget planners to obtain a surety bond or place assets on deposit, the proceeds of which constitute a trust fund to reimburse payments made by Debtors that have not been properly paid to their creditors. Since the enactment of the legislation, members of the Banking Department staff have received numerous applications from prospective licensees. Extensive discussions were had at meetings and in telephone conversations with a number of the prospective licensees, as well as with current licensees, regarding the operations of their budget planning businesses. This was done in order to assess whether the business practices of the budget planning industry conformed to the consumer protections standards set forth in the new laws. The Department learned from many of the prospective and current licensees that with respect to the Debtors that they are in contract with for budget planning services, it is their practice to use third

party entities in distributing the Debtors' monies to creditors. The third party entities that they contract with for such services are generally for-profit entities that are not, themselves, licensed to conduct the business of budget planning. However, one current licensee indicated that it uses the services of another New York State licensed budget planner in order to distribute Debtors' monies to creditors. The current and prospective licensees explained that it is necessary for them to use the services of third party entities in this way primarily because they do not have the computerized technology, staffing, and budgetary resources to provide the critical services performed by the third party entities.

Nevertheless, this type of "outsourcing" to a third party entity, in which an entity other than the licensee which has a contract for budget planning services with a Debtor, holds, or has access to, or can effectuate possession of, by any means, the monies of a licensee's Debtors, or distribute, or is in the chain of distribution of such monies, to the creditors of such Debtors, raises the possibility that those monies will not be sufficiently protected, as intended by the Legislature when it put into law the bond/asset deposit requirement as set forth in Section 580(4) of New York's Banking Law.

The rule is proposed in order to accommodate the budget planning industry's operational need to use the third party entities in distributing Debtor funds to creditors. At the same time, the rule provides the consumer protections afforded by the recently enacted budget planning legislation as set forth in Banking Law Section 580(4). In particular, if the licensee uses a third party entity in distributing Debtor funds to creditors, and the licensee elects to place assets on deposit, which assets constitute a trust fund to reimburse payments made by Debtors if not properly paid to their creditors, the rule allows for the use of such a third party entity and places no additional bond/asset deposit requirements on the third party entity. If, on the other hand, the licensee elects to obtain a surety bond rather than place assets on deposit, the licensee may only use a third party entity in distributing Debtor funds if the third party entity places assets on deposit or obtains a surety bond, as the case may be.

Budget Planning is a regulated financial service in New York State. Therefore, it is the obligation of the Superintendent of Banks, as the State financial regulator, to establish a rule as proposed in accordance with the legislative intent to protect vulnerable consumers from entities that may operate without the necessary business standards required to appropriately provide budget planning services. It is the Banking Department's belief that the rule as proposed is necessary. It provides the mechanism by which the budget planning entities that are currently licensed, as well as those seeking to obtain such a license, can continue to operate using the services of third party entities in distributing Debtor funds to creditors. At the same time, the rule satisfies the legislative requirement as set forth in Banking Law Section 580(4) to provide certain protection to Debtors in contract with licensees, in cases where third party entities are used by the licensees in distributing Debtor funds to creditors.

#### 4. Costs:

##### (a) Costs to State Government:

None.

Any and all additional examination costs that may be incurred by the Banking Department, as a result of the requirements of the rule imposed on the licensees that use third party entities in the distributing Debtor funds to creditors, will be borne by the licensees.

##### (b) Costs to Local Government:

None.

##### (c) Costs to Regulated Entities:

The proposed rule allows licensees to use third party entities in distributing Debtor funds to creditors. In summary, Part 404 provides the following. If a licensee elects to maintain assets on deposit and utilizes the services of a third party entity in distributing Debtor funds to creditors, (whether or not the third party entity is, or is not, another budget planner licensed in New York) there is no requirement that the third party entity obtain a surety bond or place assets on deposit with respect to the business of the licensee that it is servicing. If a licensee elects to obtain a surety bond and utilizes the services of a third party entity in distributing Debtor funds, which entity is also a licensed budget planner in New York, the third party entity must either obtain a surety bond or maintain assets on deposit with respect to the business of the licensee that it is servicing. If the licensee elects to obtain a surety bond and utilizes the services of a third party entity in distributing Debtor funds, which entity is not a New York licensed budget planner, the third party entity must maintain assets on deposit with respect to the business of the licensee that it is servicing.

A licensee is likely to incur no costs if it uses a third party entity in distributing Debtor funds and elects to maintain assets on deposit, rather than a surety bond. The reason being, that a licensee has to purchase a

surety bond, whereas, by placing assets on deposit, the licensee does not have to make such a purchase. Moreover, when assets are placed on deposit, the licensee has the ability to earn interest on the deposited funds.

It is possible, however, that in circumstances where a licensee may not have all, or part of, the necessary funds to place on deposit, that it could incur some costs in connection with borrowing funds for its required deposit. The Banking Department is unable to determine what the costs to the licensees would be under those circumstances since the cost of borrowing funds is typically dependent upon factors such as, the amount of the borrowing and the financial condition of the entity doing the borrowing. Therefore, it is not possible to estimate, even in a general way, such borrowing costs. However, should costs be incurred to make the asset deposit, those costs will not outweigh the benefits derived by maintaining the assets on deposit should Debtor funds not be properly paid to creditors.

(d) Costs to the Banking Department for Implementation and Continuation Administration of the Rule: The rule requires Banking Department staff to review contracts or agreements that licensees have entered into, or plan to enter into, regarding the licensees use of third party entities in distributing Debtor funds to creditors. This review is done in order to assess compliance with rule to ensure, that where third party entities are involved, the Debtors in contract with the licensees are afforded the consumer protections provided by the bond/asset deposit requirements of Section 580(4) of the New York Banking Law. The Banking Department expects that its costs to implement and administer the rule will be minimal.

#### 5. Local Government Mandates:

The proposed rule imposes no burdens on local governments.

#### 6. Paperwork:

The reporting requirements as set forth in the rule will enable the Banking Department to provide the necessary supervisory oversight of the licensees, in furtherance of the legislative objective to provide more consumer protections for debtors in contract with licensees for budget planning services.

Under the proposed rule, licensed budget planners will have to provide the Banking Department with the following information: a) the name and address of the third party entity used in distributing Debtor funds to creditors, b) a description of the services being provided by the third party entity, c) a copy of the agreement or contract entered into with the third party entity, d) information regarding the highest daily amount of Debtor funds that the third party entity will be providing services for under the contract or agreement, and e) information with respect to the termination of any such agreement or contract. All of this information is of the type that licensees using third party entities in distributing Debtor funds will have readily available to provide to the Banking Department.

#### 7. Duplication:

None.

#### 8. Alternatives:

(a) Proposal – As is previously discussed in the Legislative Objective Section contained herein, the recent amendments to Article 12-C, Section 580(4) of New York's Banking Law include the requirement that New York State licensed budget planners obtain a surety bond, or in lieu of such bond, place certain assets on deposit to be used to reimburse payments made by Debtors that have not been properly distributed to creditors.

Since the enactment of the legislation, Banking Department staff met with current and prospective licensees and learned that these businesses require the use of the services provided by third party entities in distributing Debtor funds. The rule was proposed keeping in mind both the legislative intent in enacting the bond/asset deposit requirements to provide increased consumer protection to New York residents in contract with licensees should their payments not be properly distributed to creditors, and the need that current and prospective licensees have in using the services of third party entities in distributing such payments. The rule allows licensees to use the services of third party entities in this way, and also provides the Debtors in contract with the licensee the consumer protections afforded under Section 580(4) of the Banking Law, as mandated by the Legislature.

##### (b) Do not propose the rule.

If this alternative were considered, the Banking Department would have to require that licensees not use the services of third party entities in distributing Debtor funds to creditors, in order to provide Debtors the consumer protections afforded under Section 580(4) of the Banking Law. This alternative is not feasible because, as many current and prospective licensees explained to the Banking Department, they need to use the services of the third party providers in distributing Debtor funds. The need results primarily because they do not have the computerized technology,

staffing and budgetary resources to provide the critical services that they perform.

Under these circumstances, the Banking Department believes that if the rule was not proposed, licensed budget planners would have to be prohibited from using third party entities in distributing Debtor funds. This could be severely harmful to the budget planning industry, particularly since, the inability to use the third party entities may prevent the licensees from continuing to operate their businesses. Moreover, the inability to use the third party entities may prevent many prospective licensees from seeking a budget planning license in New York because they may not be able to operate without the services of the third party entities. Accordingly, the proposed rule is needed not only to provide consumer protection to Debtors as mandated by Section 580(4) of the Banking Law, but also to prevent putting certain current licensees out of business, and to enable certain prospective licensees the opportunity to conduct the business of budget planning in New York.

9. Federal Standards:

None.

10. Compliance Schedule:

Compliance with the rule is required on or before May 18, 2004.

#### **Regulatory Flexibility Analysis**

The rule affects entities that are licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning. Section 579 of Article 12-C requires entities that conduct the business of budget planning to be Type B not-for-profit corporations under New York's Not-For-Profit Corporation Law. Under New York's Not-For-Profit Corporation Law, there can be no ownership interest in Type B not-for-profit corporations. Accordingly, there can be no ownership interest in budget planners licensed in New York.

No local governments are licensed to conduct the business of budget planning, and all of the budget planners currently licensed under Article 12-C of the New York Banking Law have less than 100 employees.

When the Legislature enacted the recent amendments to Article 12-C of the New York Banking Law, it established a more rigorous regulatory environment within which entities licensed under New York Law were to engage in the business of budget planning. This was done in order to provide increased consumer protection to New York residents that contract for budget planning services with licensees.

The recent amendments to Article 12-C of the New York Banking Law include the bonding/asset deposit requirements set forth under Section 580(4) of Article 12-C. In particular, Section 580(4) requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, maintain certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed to creditors.

In response to the legislation, members of the Banking Department staff met with and/or had conversations with current and prospective licensees. As is more fully described in the Regulatory Impact Statement, the Banking Department learned that many of the current and prospective licensees require the services of certain third party entities in distributing debtor funds to creditors. Accordingly, the rule was proposed in response to the industry need to use third party entities in this way. The rule is flexible in that it allows licensees to use the services of third party entities, who may be small business, in distributing debtor funds to creditors. At the same time, it provides the consumer protections afforded under Section 580(4) of the Banking Law, as mandated by the Legislature, to the debtors in contract with the licensees for budget planning services. The rule ensures that debtors' funds will be protected, as mandated by the statute, irrespective of which entity has control over and/or access to the funds.

Specifically, due to the servicing relationship between the licensee and the third party entities, when a licensee elects to use a third party entity in distributing debtors funds to creditors, under the proposed rule, the licensee can choose to either place assets on deposit, or obtain a surety bond. If the licensee places assets on deposit, there are no bond/asset deposit requirements placed on the third party entity. If the licensee elects to obtain a bond, the third party entity can either place assets on deposit or obtain a surety bond, as the case may be, with respect to the budget planning business of the licensee that it services.

Based on the dialogue that the Banking Department had with current and prospective licensees regarding their need to use third party entities in

distributing debtor funds to creditors, it is not apparent, thus far, that the rule will impose any appreciable or substantial adverse impact on entities licensed under New York Law to conduct the business of budget planning.

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

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. The legislature mandated under Section 580(4) of the New York Banking Law, that licensees obtain a surety bond or place certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly paid to creditors. In order to provide debtors with the consumer protections afforded under Section 580(4), the proposed rule allows licensees that use third party entities in distributing debtor funds to creditors to either place assets on deposit or obtain a surety bond. If the licensee elects to obtain the surety bond, it must only use the services of a third party entity that also places assets on deposit or obtains a surety bond, as the case may be, in connection with the licensees business that it is servicing. If the licensee elects to place assets on deposit, no bond/asset deposit requirements are placed on the third party entity.

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

To the extent that the rule, if adopted, may have any impact on rural areas, it has the ability to provide increased consumer protection to debtors residing in rural areas who enter into contracts with licensees for budget planning services, when such licensees use the services of third party entities in distributing debtors funds to creditors.

#### **Job Impact Statement**

The purpose of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of persons or entities engaged in the business of budget planning, is to ensure that budget planners operate in accordance with rigorous standards. Recent amendments to Article 12-C of New York Banking Law and Article 28-B of New York's General Business Law were adopted in connection with the business of budget planning to increase consumer protections for the clients of licensed budget planners.

In particular, Section 580(4) of Article 12-C of the New York Banking Law was recently amended in connection with budget planning in New York State. It requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, to maintain certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed to creditors.

As is explained in the Regulatory Impact Statement, it has come to the attention of the Banking Department that both current and prospective licensees require the services of third party entities in distributing debtors to creditors. The rule has been proposed in order to allow the licensees to continue using such third party entities in the operations of their businesses. At the same time, the rule provides the consumer protections afforded under Section 580(4) to debtors that contract with licensees for budget planning services when the licensees use third party entities in distributing the funds of the debtors to creditors.

Under the rule, if a licensee elects to use a third party entity in distributing debtor funds to creditors, a licensee can choose to either place certain assets on deposit or obtain a surety bond, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not been properly paid to creditors. If a licensee places assets on deposit, there is no bond/asset deposit requirement placed on the third party entity. If a licensee, instead, chooses to obtain a surety bond, the rule requires that the third party entity place certain assets on deposit, or obtain a surety bond, as the case may be, with respect to licensees business that it services.

Accordingly, based on the rule's requirements, it will have no impact on jobs in New York State.

## Office of Children and Family Services

### EMERGENCY RULE MAKING

#### Caseworker Contacts with Foster Children, Their Relatives and Caregivers

**I.D. No.** CFS-35-06-00002-E

**Filing No.** 970

**Filing date:** Aug. 15, 2006

**Effective date:** Aug. 15, 2006

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

**Action taken:** Amendment of sections 441.21 and 443.4 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), and 398(6)(a)

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

**Specific reasons underlying the finding of necessity:** This rule making revises the frequency and location of certain casework contacts with children in foster care, their relatives and their caretakers and clarifies the purposes for such contacts. Casework contacts are important to assess and maintain the safety of foster children and to determine whether they are receiving appropriate care, supervision and services that support their health and well-being and promote permanency. The regulations need to be adopted on an emergency basis so that the casework contact requirements better promote the health, safety and welfare of foster children as soon as possible.

**Subject:** Caseworker contacts with foster children, their relatives and caregivers.

**Purpose:** To revise the casework contacts requirements for foster children, their relatives and caretakers to better promote the health, safety and welfare of foster children.

**Text of emergency rule:** Subdivisions (b) through (e) of section 441.21 are amended to read as follows:

(b) Casework contact with parent or relatives.

(1) Casework contacts with the child's parents or relatives [shall be] *is defined as individual or group face-to-face contacts between the case planner, or assigned caseworker, as directed by the case planner, or the case manager, and the child's parents or relatives for the purpose of assessing whether the child would be safe if he or she was to return home, and the potential for future risk of abuse or maltreatment if he or she was to return home. Such contacts are also for the purpose of guiding the child's parents or relatives towards a course of action aimed at resolving problems or needs of a social, emotional, developmental or economic nature [which] that are contributing to the reason(s) why such child is in foster care. In the case of children with the permanency planning goal of another planned living arrangement with a permanency resource or adult residential care, such contacts are for the purpose of mobilizing and encouraging family support of the youth's effort's to function independently, and to increase his/her capacity to be self-maintaining; evaluating the ability of the parents or relatives to establish or reestablish a connection with the youth and serve as a resource to the youth; and, where appropriate, encouraging an ongoing relationship between the parents or relatives and the youth.* For purposes of this section, a *case planner* is defined as the person who is responsible for assessing the need for, providing or arranging for, coordinating and evaluating the provision of services to children in foster care and services to parents of children in foster care and such additional responsibilities as set forth in *subdivision (c) of section 428.2[c]* of this Title.

(2) Frequency of casework contacts with parents or relatives. During the first [month] *30 days* of placement, casework contacts [shall] *are to be held with the child's parents or relatives as often as is necessary [to implement the services tasks in the family and children's services plan], but at a minimum, [shall] must occur at least twice unless compelling reasons are documented why such contacts are not possible. After the first [month] 30 days* of placement, casework contacts [shall] *are to be held*

with the child's parents or relatives at least once every month [if the permanency planning goal for the child is return to parents or relatives and at least quarterly if the child's permanency planning goal is adult residential care or another planned living arrangement with a permanency resource] unless compelling reasons are documented why such contacts are not possible. [In the case of children with the permanency planning goal of another planned living arrangement with a permanency resource or adult residential care, the local social services district or the purchase of service agency shall facilitate such monthly contacts for the purpose of mobilizing and encouraging family support of the child's efforts to function independently, and to increase his/her capacity to be self-maintaining.]

(3) [Frequency of in-home] *Location of casework [contact] contacts with parents or relatives.*

(i) For children with a permanency planning goal of return to parents or relatives, casework contacts with the child's parents or relatives are to be scheduled to occur in the home of the parents or relatives to whom the child will be discharged as often as is necessary [to implement the service tasks in the family and children's services plan], but no less than the required frequency noted in subparagraph (ii) of this paragraph, unless compelling reasons are documented why such contacts are not possible.

(ii) Casework contacts with the child's parents or relatives are to be scheduled to occur in the home of the parents or relatives:

(a) at least once during the first [90] *30 days* of placement; and

(b) at least once [within] *every 90 days thereafter, for as long as the child remains in foster care, unless compelling reasons are documented why such contacts are not possible* [before the planned discharge of the child to the home of the parents or relatives; and

(c) at least twice every 12 months following the contact referred to in clause (a) of this subparagraph if the necessity of placement in foster care is due in some extent to a circumstance related to the health and safety of the child, as described in section 430.10(c)(1) of this Title, or a parent service need, as described in section 430.10(c)(4) of this Title; or

(d) at least once every 12 months following the contact referred to in clause (a) of this subparagraph if the necessity of placement in foster care is due entirely to a circumstance other than one related to the health and safety of the child as described in section 430.10(c)(1) of this Title, or a parent service need as described in section 430.10(c)(4) of this Title].

(4) [For all children with a permanency planning goal of return to parents or relatives, the] *The local social services district or the purchase of service agency, if required by the purchase of service agreement, is to facilitate casework contacts by scheduling contacts at least as often as required by this subdivision and by providing notice of the scheduled contact to the parents or relatives either by phone or through the mail. [In those cases where the parents or relatives have failed to attend the scheduled session, the case planner or, the caseworker as directed by the case planner, must attempt to contact the parents or relatives and schedule another session. If the parents or relatives fail to meet with the case planner or, the caseworker as directed by the case planner, for a period of two months despite diligent efforts at contacting the parents or relatives and rescheduling missed contacts, the case planner or, the caseworker as directed by the case planner, must have an in-home contact with the parents or relatives. This contact is to be considered the monthly contact required to be held by paragraph (2) of this subdivision and must be held prior to the end of the month which necessitated the scheduling of this contact.*

(5) The provisions of paragraphs (3) and (4) of this subdivision concerning in-home casework contact requirements shall be waived with respect to children with a permanency planning goal of return to parents if such children are 13 years of age or older and placed by the court as PINS or juvenile delinquents in an institution more than 100 miles from their homes. Appropriate in-home contacts with the parents shall be arranged at the time a discharge plan is developed for such children.]

(5) *The provisions of subdivision (b) of this section are waived for any parent who has had his or her rights to the child in foster care terminated.*

(6) *The provisions of subdivision (b) of this section are waived for any parent, where the court has issued a finding that reasonable efforts to return the child to his or her home are no longer required, except that ongoing casework contacts must be made, to the extent practicable, for the purpose of discussing alternatives to termination of parental rights in accordance with section 384-b of the Social Services Law, such as surrender, including conditional surrender; and counseling the parent with respect to relinquishing the child and how the parent could help the child come to terms with the possibility and consequences of relinquishment.*

(c) Casework contacts with *the child.*

(1) Casework contacts with the child [shall be] *is* defined as individual or group face-to-face contacts between the case planner, or the caseworker assigned to the child, as directed by the case planner, *or the case manager*, and the child. The purpose of the contacts is to *assess the child's current safety and well being, to evaluate or re-evaluate the child's permanency needs and permanency goal, and to guide the child towards a course of action aimed at resolving problems of a social, emotional or developmental nature [which] that are contributing towards the reason(s) why such child is in foster care.*

(2) During the first [month] *30 days* of placement, casework contacts [shall] *are to* be held with the child as often as is necessary to implement the services tasks in the family and children's services plan but [shall] *must* occur at least twice. *At least one of the two contacts must be held at the child's placement location. The focus of the initial contacts with the child must include, but need not be limited to, determining the child's reaction to the separation and his/her adjustment to the out-of-home placement and arranging for services necessary to meet his/her needs.* After the first [month] *30 days* of placement, casework contacts [shall] *are to* be held with the child at a minimum of once a month [if the necessity of a child's placement in foster care is due in whole or in part to a circumstance related to a child service need as described in section 430.10(c)(5) of this Title, or at a minimum, quarterly if the necessity of a child's placement in foster care is due entirely to a parent or child circumstance other than a circumstance related to a child service need as described in such paragraph. In all cases, the focus of the initial contact with the child shall include, but need not be limited to determining the child's reaction to the separation and his/her adjustment to the out-of-home placement and arranging for services necessary to meet his/her needs]. *At least two of the monthly contacts every 90 days must be at the child's placement location. If the youth is age 18 or older and is attending an educational or vocational program 50 miles or more outside the local social services district, the casework contacts may be made by telephone or mail.*

(d) Casework contacts with the *child's* caretakers.

(1) Casework contacts with the child's caretaker [shall be] *is* defined as face-to-face contacts by the case planner, or the caseworker assigned to the child, as directed by the case planner, *or the case manager* with those persons immediately responsible for the child's day-to-day care for the purpose of obtaining information as to the child's adjustment to foster care and for facilitating the caretaker's role in achieving the desired course of action specified in the child and family services plan.

(2) During the first [month] *30 days* of placement, casework contacts *are to* be held with the child's caretaker as often as is necessary, [to implement the services tasks in the family and children's services plan] but at a minimum must occur at least [twice] *once at the child's placement location.* After the first [month] *30 days* of placement, casework contacts must be held with the child's caretaker at least [quarterly] *monthly, and at least one of the monthly contacts every 90 days must be at the child's placement location.* [In addition, the case planner or, the caseworker as directed by the case planner, must maintain, at a minimum, monthly contacts with the child's caretaker which may include either face-to-face contacts or telephone consultations].

(e) Services, contacts, visits, interviews and information required by this section [shall] *must* be recorded in progress notes in accordance with section 428.5 of this Title.

Section 443.4 is amended to read as follows:

Section 443.4 Supervision.

Supervision of children placed in foster homes [shall] *is to* be maintained [by the placing agency or its representative through visits made to the home at least quarterly in the case of children at board, at least semiannually in the case of children in free homes, or at such shorter period as may be required by this Title. A written record of such visits showing dates and findings of visitation shall be kept by the placing agency. Such supervision shall be continued in each case until the child reaches the age of 21 or is adopted or placed under legal guardianship, or married or transferred to the care of another agency or otherwise discharged] *through the provision of casework contacts in accordance with section 441.21 of this Title.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 12, 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 powers and 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 398(6)(a) of the SSL requires the local commissioners of social services to determine what assistance and care, supervision or treatment foster children require.

Section 471(a)(15) (b)(ii) of the Social Security Act requires local social services district commissioners to make reasonable efforts to enable foster children to return home safely or to finalize the children's permanency plans.

#### 2. Legislative objectives:

Enhanced casework contact standards support the legislative overall goal that children be served by the child welfare system in settings where they are safe and receiving appropriate care and supervision, and that such children reside in permanent homes as soon as reasonably can be accomplished. Frequent casework contacts with foster children are important to assess and maintain the children's safety and well-being. Similarly, regular casework contacts with the children's caretakers are an important factor in evaluating placement stability and ascertaining the foster children's services needs. And, on-going casework contacts with the foster children's parents or relatives are necessary to pursue reunification or to determine whether another appropriate permanency goal needs to be pursued.

#### 3. Needs and benefits:

The regulations expand the casework contact requirements for children who are placed in foster care solely due to a parent service need to be consistent with the monthly casework contact requirements that already exist for children placed in foster care due to a child service need or a combination of a parent and child service need. They also clarify the purpose of casework contacts and revise where some of the existing casework contacts must occur to provide for more reviews of the places where foster children are living and the homes to which they are scheduled to return.

New York State is one of only seven states that did not require monthly casework contacts with all foster children. In addition, the federal Administration for Children and Families (ACF), as part of the required Child and Family Service Reviews (CFSRs) it conducts in each state, reviews the state's casework contacts with foster children to determine the sufficiency of such contacts to monitor the children's safety and well-being and whether the contacts appropriately focus on issues pertinent to case planning, service delivery and goal attainment. As a result of New York's first CFSR, the state was required to submit a Program Improvement Plan to ACF. One of the initiatives detailed in that plan dealt with assessing the regulatory and practice structure for casework contacts with children in foster care, their parents and caretakers. A workgroup of local districts, including the Administration for Children's Services (ACS) in New York City and voluntary authorized agencies obtained information about casework contacts from child welfare professionals in New York State and information regarding the policies of other states, to help formulate recommendations. OCFS considered the workgroup's recommendations in developing these regulations.

ACF indicates that in 14 other states that have had a CFSR, a correlation exists between the number of casework contacts and positive outcomes for foster children, including: achieving reunification or other permanent placements; preserving the foster child's connections and relationship with family members; and involving children and parents or relatives in case planning. In addition, the Child Welfare League of America recommends monthly visits as a protective measure.

In New York State, monthly casework contacts are already required for foster children with a child service need. In addition, many social services districts, including ACS, already exceed the current regulatory requirements by providing monthly casework contacts for all foster children. These emergency regulations expand the monthly casework contact requirements for all districts to include children placed in foster care due solely to a parent service need, thereby, providing a consistent, statewide standard that reflects the generally accepted good child welfare practice regarding the frequency of such contacts.

#### 4. Costs:

The regulations expand the casework contact requirements for children who are placed in foster care solely due to a parent service need to be

consistent with the requirements for children placed in foster care due to a child service need or a combination of a parent and child service need. Foster children who are placed in foster care solely due to a parent service need constitute approximately seven percent of the total number of children in foster care. In addition, more than half of the social services districts currently provide at least monthly casework contacts with all children in foster care, consistent with these emergency regulations. These districts account for approximately 77 percent of the children in care. Therefore, it is estimated that less than two percent of the children in foster care (444 children) would be impacted by this regulatory amendment, which will generate an additional 3,552 visits annually. It is projected that this could potentially require seven full-time equivalent caseworkers statewide at a total estimated gross cost of \$378,000. These expenditures may be eligible for Title IV-E Federal reimbursement. Alternatively, depending on local district caseworker caseload, these added visits may be assigned to currently funded caseworkers.

#### 5. Local government mandates:

The social services districts that are not already conducting monthly casework contacts with children placed in foster care solely due to a parent service need will have to increase these contacts. It is estimated that this new requirement will affect less than half of the social services districts and apply to less than two percent of the children in foster care. However, the regulations provide expand the persons who are permitted to make casework contacts to include the child's case manager. The regulations also clarify certain instances where contacts with the children's parents or relatives are not required.

#### 6. Paperwork:

All casework contacts must be documented in the Uniform Case Record in accordance with 18 NYCRR Part 428. Documentation of casework contacts by paper is not allowed. Such documentation must be made electronically in the state's CONNECTIONS system. Existing case workers and other staff who will be required to enter the additional casework contacts required by these regulations into the Progress Notes dialog in CONNECTIONS have been comprehensively trained to use the system.

#### 7. Duplication:

The regulations do not duplicate other State requirements.

#### 8. Alternatives:

These regulations are necessary to improve the health, safety and well-being of foster children. Therefore, there are no alternatives to these regulations.

#### 9. Federal standards:

There are no specific federal standards that address casework contacts. However, this proposal promotes safety and facilitates permanency planning for foster children and assists New York State to comply with federal standards set forth in the federal Adoption and Safe Families Act of 1996 (ASFA).

#### 10. Compliance schedule:

Compliance with the regulations must begin immediately upon emergency filing.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The regulations will affect the 58 social services districts and the St. Regis Mohawk Tribe, which is authorized by section 371(1)(b) of the Social Services Law 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 111 such agencies.

#### 2. Compliance Requirements:

The regulations impose new requirements on local social services districts and voluntary authorized agencies in relation to making casework contacts with foster children, their parents or relatives and caretakers. The regulations expand the casework contact requirements for children who are placed in foster care solely due to a parent service need to be consistent with the monthly casework contact requirements that already exist for children placed in foster care due to a child service need or a combination of a parent and child service need. This new requirement will affect less than two percent of the children in foster care. The regulations also clarify the purpose of casework contacts and revise where some of the existing casework contacts must occur to provide for more reviews of the places where foster children are living and the homes to which they are scheduled to return.

#### 3. Professional Requirements:

It is expected that most social services districts and voluntary authorized agencies will not have to hire additional staff to implement the regulations as they can be assigned to existing staff. Caseworkers will have

to enter the additional casework contacts required by the regulations into the Progress Notes dialog in CONNECTIONS system. They have been comprehensively trained to use the system.

#### 4. Compliance Costs:

The regulations expand the casework contact requirements for children who are placed in foster care solely due to a parent service need to be consistent with the requirements for children placed in foster care due to a child service need or a combination of a parent and child service need. Foster children who are placed in foster care solely due to a parent service need constitute approximately seven percent of the total number of children in foster care. In addition, more than half of the social services districts currently provide at least monthly casework contacts with all children in foster care, consistent with these emergency regulations. These districts account for approximately 77 percent of the children in care. Therefore, it is estimated that less than two percent of the children in foster care (444 children) would be impacted by this regulatory amendment, which will generate an additional 3,552 visits annually. It is projected that this could potentially require seven full-time equivalent caseworkers statewide at a total estimated gross cost of \$378,000. These expenditures may be eligible for Title IV-E Federal reimbursement. Alternatively, depending on local district caseworker caseload, these added visits may be assigned to currently funded caseworkers.

#### 5. Economic and Technological Feasibility:

Those social services districts that are not already conducting monthly casework contacts with foster children who are placed in foster care due solely to a parent service need will have to increase these contacts. However, the regulations provide increased flexibility regarding the persons who are permitted to make such contacts. The regulations also clarify certain instances where such contacts are not required. Therefore, it is estimated that a maximum of seven new caseworkers will be needed statewide. Districts and agencies will not need additional computers to perform these regulatory functions beyond those they already have.

#### 6. Minimizing Adverse Impact:

The revisions to the casework contact requirements included in the regulations are necessary to better promote the health, safety and well-being of foster children. However, to minimize any potential adverse impact on the social services districts and voluntary authorized agencies, the regulations expand the persons who are permitted to make casework contacts to include the child's case manager. The regulations also clarify certain instances where casework contacts with a child's parents or relatives are not required.

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

A workgroup of local districts, including the Administration for Children's Services (ACS) in New York City and voluntary authorized agencies, obtained information on casework contacts from child welfare professionals in New York State and information regarding the policies of other states, to help formulate recommendations. OCFS considered the workgroup's recommendations in developing these regulations.

### **Rural Area Flexibility Analysis**

#### 1. Effect on Rural Areas:

The regulations will affect the 44 social services districts that are in rural areas and the St. Regis Mohawk Tribe, which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with OCFS. Those voluntary authorized agencies in rural areas that contract with social services districts to provide foster care and adoption services also will be affected by the regulations. Currently, there are approximately 29 such agencies.

#### 2. Compliance Requirements:

The regulations impose new requirements on local social services districts and voluntary authorized agencies in relation to making casework contacts with foster children, their parents or relatives and caretakers. The regulations expand the casework contact requirements for children who are placed in foster care solely due to a parent service need to be consistent with the monthly casework contact requirements that already exist for children placed in foster care due to a child service need or a combination of a parent and child service need. This new requirement will affect less than two percent of the children in foster care. The regulations also clarify the purpose of casework contacts and revise where some of the existing casework contacts must occur to provide for more reviews of the places where foster children are living and the homes to which they are scheduled to return.

#### 3. Professional Services:

It is expected that most social services districts and voluntary authorized agencies will not have to hire additional staff to implement the regulations. The additional casework contacts required by the regulations

will have to be entered into CONNECTIONS, the state's computerized child welfare case management system. Case workers and other staff who will be required to enter casework contacts into the Progress Notes dialog in CONNECTIONS have been comprehensively trained to use the system.

#### 4. Compliance Costs:

The regulations expand the casework contact requirements for children who are placed in foster care solely due to a parent service need to be consistent with the requirements for children placed in foster care due to a child service need or a combination of a parent and child service need. Foster children who are placed in foster care solely due to a parent service need constitute approximately seven percent of the total number of children in foster care. In addition, more than half of the social services districts currently provide at least monthly casework contacts with all children in foster care, consistent with these emergency regulations. These districts account for approximately 77 percent of the children in care. Therefore, it is estimated that less than two percent of the children in foster care (444 children) would be impacted by this regulatory amendment, which will generate an additional 3,552 visits annually. It is projected that this could potentially require seven full-time equivalent caseworkers statewide at a total estimated gross cost of \$378,000. These expenditures may be eligible for Title IV-E Federal reimbursement. Alternatively, depending on local district caseworker caseload, these added visits may be assigned to currently funded caseworkers.

#### 5. Minimizing Adverse Impact:

The revisions to the casework contact requirements included in the regulations are necessary to better promote the health, safety and well-being of foster children. However, to minimize any potential adverse impact on the social services districts and voluntary authorized agencies, the regulations expand the persons who are permitted to make casework contacts to include the child's case manager. The regulations also clarify certain instances where such contacts with a child's parents or relatives are not required.

#### 6. Small Business Participation:

A workgroup of local districts, including the Administration for Children's Services (ACS) in New York City and voluntary authorized agencies, obtained information on casework contacts from child welfare professionals in New York State and information regarding the policies of other states, to help formulate recommendations regarding casework contacts. OCFS considered the workgroups recommendations in developing these regulations.

#### Job Impact Statement

The regulations address functions of social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies in relation to making casework contacts with foster children and their parents or relatives and caretakers. It is anticipated that for those social districts and agencies that are not currently making the number of contacts required by the emergency regulations, the additional contacts will be able to be made by their current staff for the most part. However, a few districts or voluntary agencies may need to hire a staff person on a full or part-time basis to meet the requirements. The regulations will not have a negative impact on jobs or employment opportunities in either public or private child welfare agencies. A full job statement has not been prepared for these regulations as it is assumed that the regulations will not result in the loss of any jobs.

## EMERGENCY RULE MAKING

### Child Protective Investigations

**I.D. No.** CFS-35-06-00009-E

**Filing No.** 980

**Filing date:** Aug. 15, 2006

**Effective date:** Aug. 15, 2006

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

**Action taken:** Amendment of section 432.2 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 421(3)

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

**Specific reasons underlying the finding of necessity:** The rule clarifies important child protective services investigatory procedures to obtain access to the children or home and obtaining information from collateral contacts, thus potentially averting serious threats to the health, safety and welfare of children who are involved in these cases.

**Subject:** Child protective investigations.

**Purpose:** To clarify the procedures for cases where a child or home cannot be accessed by child protective service staff to conduct a safety assessment and clarify the possible collateral contacts who may provide information relevant to a child protective investigation.

**Text of emergency rule:** Subparagraph (ii) of paragraph (3) of subdivision (b) of section 432.2 is amended to read as follows:

(ii) The full child protective investigation [shall] *must* include the following activities:

(a) face-to-face interviews with subjects of the report and family members of such subjects, including children named in the report. *If at any time during an investigation the subject of the report or another family member refuses to allow a child protective service worker to enter the home and/or to observe or talk to any child in the household, or if a child in the household cannot be located, the child protective service worker must assess whether it is necessary to seek a court order to obtain access to the child or home or to compel production of the child or whether other emergency action must be taken. The assessment must be made, at a minimum, in consultation with a child protective service supervisor as soon as necessary under the circumstances, but no later than 24 hours after the refusal or failure to locate the child or access the home. When it is assessed that it may be appropriate to seek a court order, legal staff who represent the child protective service must also be consulted, if possible. The assessment and the decision must be clearly documented in the progress notes for the investigation;*

(b) [the] obtaining [of] information from the reporting sources and other collateral contacts [such as] *which may include, but are not limited to, hospitals, family medical providers, schools, police, [and] social service agencies and other agencies providing services to the family, relatives, extended family members, neighbors and other persons who may have information relevant to the allegations in the report and to the safety of the children;* provided however, the name or other information identifying the reporter and/or source of a report of suspected child abuse or maltreatment, as well as the agency, institution, organization, [and/or] program *and/or other entity* with which such person(s) is associated must only be recorded or documented in progress notes and such documentation must be recorded in the manner specified by OCFS pursuant to section 428.5 (c)(2) of this Title;

(c) within seven days of receipt of the report, conducting a preliminary assessment of safety to determine whether the child named in the report and any other children in the household may be in immediate danger of serious harm. If any child is assessed to be unsafe, undertaking immediate and appropriate controlling interventions to protect the child(ren); the results of each safety assessment must be documented in the case record in the form and manner required by [the department] OCFS;

(d) a determination of the nature, extent and cause of any condition enumerated in such report and any other condition that may constitute abuse or maltreatment;

(e) obtaining the name, age and condition of other children in the home; and

(f) after seeing that the child or children named in the report are safe, notifying the subjects and other persons named in the report, except children under the age of 18 years, in writing, no later than seven days after receipt of the oral report, of the existence of the report and the subject's rights pursuant to title 6 of article 6 of the Social Services Law concerning amendment or expungement of the report.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 12, 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 New York State Office of Children and Family Services (OCFS), as successor agency to the former New York State Department of Social Services, to establish rules, regulations and policies to carry out its powers and duties under the SSL.

Section 421(3) of the SSL requires OCFS to promulgate regulations setting forth requirements for the performance by local social services districts of the duties and powers imposed and conferred upon them by the provisions of Title 6 of Article 6 of the SSL regarding child protective

services and Article 10 of the Family Court Act regarding child protective proceedings.

#### 2. Legislative Objectives:

The regulations carry out the intent of Section 421(3) of the SSL, which requires OCFS to promulgate regulations governing the provision of child protective services. Additionally, the regulations support the legislative findings and purpose contained in Section 411 of the SSL, as it pertains to having local district child protective services “. . . capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment . . .”

#### 3. Needs and Benefits:

These regulations clarify two important aspects of child protective investigation practice relating to obtaining access to children involved in reports of suspected child abuse or maltreatment and obtaining information from collateral contacts. Recently, OCFS discovered that some child protective service staff are confused regarding these practices. Therefore, it is necessary to adopt these regulatory clarifications on an emergency basis to reinforce the existence of these practices that help to preserve the health, safety and welfare of children involved in child protective services cases.

Existing statute and regulations require child protective service staff to conduct a preliminary assessment of the safety of the children involved in a report of suspected child abuse or maltreatment to determine whether the children are in immediate danger and to assess whether family court or criminal court intervention is necessary. Training for child protective service staff further explains the various legal options available to protect the children involved in a report including what actions should be taken when the children or home cannot be accessed. However, the existing regulations do not specify what child protective workers must do when they are unable access the children or the home. Therefore, the emergency regulations explicitly require that when a child protective service worker is prevented from entering the home or from seeing or talking to a child and/or when a child cannot be located, the worker must assess whether it is necessary to seek a court order to obtain access to the child or home or to compel production of a child, or whether other emergency action must be taken. This assessment must be done with a child protective service supervisor as soon as necessary under the circumstances but no later than 24 hours after access has been refused or failed. When a court order is thought to be necessary, legal staff also must be consulted if possible. While most child protective service staff regularly uses these practices, the new regulatory requirements codify these important practices. It is necessary to adopt these regulatory provisions on an emergency basis given the inability of child protective service staff to assess accurately the potential danger to a children if the children or home are intentionally or unintentionally made unavailable to child protective service staff, especially when the children are not in regular contact with other institutions such as schools.

Existing regulations also require that a child protective investigation include obtaining information from collateral contacts such as hospitals, schools, police and social services agencies. The intent of the existing regulations is for child protective service staff to contact those entities and persons who may have information relevant to the allegations made in the child protective services report and to the safety of children in the home. This intent is reinforced in the current training and other information provided to child protective service staff. OCFS recently learned that despite the wording of the existing regulations that indicates the list is illustrative and despite the fact that more complete information is currently provided in training, some district staff incorrectly believes that the only collateral contacts they can make are with the four types of entities listed as examples in the existing regulations. Therefore, the emergency regulations clarify that collateral contacts also may include family medical providers, other agencies providing services to the family, relatives, extended family members, neighbors, and other persons who may have information relative to the investigation and to the safety of the children. This clarification should avoid future confusion on the part of child protective service staff regarding the collateral contacts they should make.

#### 4. Costs:

These regulations clarify and codify existing child protective services investigation practices. Therefore, there is no fiscal impact on the State or local social services districts.

#### 5. Local Government Mandates:

These regulations make explicit two existing child protective services investigation practices. As such, they are not new mandates on local governments. These regulations support child protective service staff's overall statutory mandates to investigate reports of suspected child abuse and maltreatment and to protect children from further abuse or maltreatment.

#### 6. Paperwork:

No new forms or other paperwork are required by these regulations. However, these activities, like all case activities performed by child protective service staff, must be clearly documented in the appropriate part of the child protective services electronic case record.

#### 7. Duplication:

These regulations do not duplicate or impede any other state or federal requirements.

#### 8. Alternate Approaches:

Significant alternatives to the proposed regulations were not considered once the Office discovered that some local district staff involved in child protective services were confused regarding these existing practices. The Office determined that emergency regulations were the best way to clarify these existing child protective services investigation practices that help protect New York State's vulnerable children.

#### 9. Federal Standards:

These regulations exceed the minimum standards of the federal government in that federal standards do not specify activities for investigations of allegations of suspected child abuse and maltreatment. These activities need to be included in State regulations as they reflect important practices in serving New York's vulnerable children.

#### 10. Compliance Schedule:

The actions required in these regulations are already part of good practice in New York's local social services districts. As such, districts should not need any additional time to comply with the regulations. Therefore, compliance will be required upon the effective date of the regulations.

### **Regulatory Flexibility Analysis**

#### 1. Effect on Small Businesses and Local Governments:

The regulations apply to all fifty-eight (58) of New York State's local social services districts.

#### 2. Compliance Requirements:

These regulations clarify two important aspects of child protective services investigation practice relating obtaining access to children and the homes involved in reports of suspected child abuse or maltreatment and to obtaining information from collateral contacts during child protective services investigations.

The regulations explicitly require that when a child protective service staff is prevented from entering the home or from seeing or talking to a child and/or when a child cannot be located, the staff must assess if it is necessary to seek a court order to obtain access to the child or home or compel production of the child, or if other emergency action must be taken. This assessment must be done as soon as necessary under the circumstances but no later than 24 hours of the refusal or failure to locate the child, and must be completed in consultation with a child protective service supervisor and, when a court order is necessary, legal staff. As with all child protective services practice, actions and results must be appropriately documented in the case record.

Furthermore, the intent of existing regulations is for the child protective service staff to contact those entities and persons who may have information relevant to the allegations contained in a child protective services report during the investigation of such report. Therefore, the emergency regulations amend the existing regulations to clarify that collateral contacts also may include family medical providers, other agencies providing services to the family, relatives, extended family members, neighbors, and other persons who may have information relative to the investigation and to the safety of the children. This clarification should avoid future confusion on the part of child protective service staff regarding the collateral contacts they should make.

#### 3. Professional Services:

The regulations do not create the need for additional professional services.

#### 4. Compliance Costs:

These regulations clarify and codify existing child protective services practices. Therefore, there is no fiscal impact on the State or local social services districts.

#### 5. Economic and Technological Feasibility:

Social services districts currently have the economic and technological ability to comply with the regulations through the case recording system and the legal offices associated with each child protective service.

#### 6. Minimizing Adverse Impact:

These regulations make explicit two existing child protective services investigation practices. As such, they are not new mandates and will not result in any adverse impact on social services districts.

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

The regulations clarify existing practices and are designed to eliminate any confusion about how the child protective services should and may proceed. As such, at this time no participation of local government is necessary.

### **Rural Area Flexibility Analysis**

#### 1. Effect on Rural Areas:

The proposed regulations will apply to the 44 social services districts that are in rural areas and the St. Regis Mohawk Tribe, which is authorized by section 371(10)(b) of the Social Services Law to provide child protective services pursuant to its State/Tribal Agreement with the Office of Children and Family Services.

#### 2. Compliance Requirements:

These regulations clarify two important aspects of child protective services practice relating to obtaining access to the children and homes involved in reports of suspected child abuse or maltreatment and obtaining information from collateral contacts during child protective services investigations.

The regulations explicitly require that when a child protective service staff is prevented from entering the home or from seeing or talking to a child and/or when a child cannot be located, the staff must assess if it is necessary to seek a court order to obtain access to the child or home or compel production of the child, or if other emergency action must be taken. This assessment must be done as soon as necessary under the circumstances but no later than 24 hours of the refusal or failure to locate the child, and must be completed in consultation with a child protective service supervisor and, when a court order is necessary, legal staff. As with all child protective services practice, actions and results must be appropriately documented in the case record.

Furthermore, the intent of existing regulations is for the child protective service staff to contact those entities and persons who may have information relevant to the allegations contained in a child protective services report during the investigation of such report. Therefore, the emergency regulations amend the existing regulations to clarify that collateral contacts also may include family medical providers, other agencies providing services to the family, relatives, extended family members, neighbors, and other persons who may have information relative to the investigation and to the safety of the children. This clarification should avoid future confusion on the part of child protective services staff regarding the collateral contacts they should make.

#### 3. Professional Services:

No additional professional service beyond the child protective services staff is required.

#### 4. Costs:

These regulations clarify and codify existing child protective services practices. Therefore, there is no fiscal impact on the State or local social services districts.

#### 5. Minimizing Adverse Impact:

These regulations will not result in any adverse impact upon small businesses or social services districts in rural areas.

#### 6. Rural Area Participation:

The regulations clarify existing practices and are designed to eliminate any confusion about how the child protective services should and may proceed. As such, no participation of local interests in rural areas is necessary at this time.

### **Job Impact Statement**

The Office of Children and Family Services has determined that these regulations would not result in the loss of any jobs. It is apparent from the nature and purpose of the regulations that they will not have any impact on jobs and employment opportunities. As such, a full job impact statement is not necessary for these regulations.

## Department of Environmental Conservation

### EMERGENCY RULE MAKING

#### **Architectural and Industrial Maintenance Coatings**

**I.D. No.** ENV-35-06-00001-E

**Filing No.** 969

**Filing date:** Aug. 9, 2006

**Effective date:** Aug. 9, 2006

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

**Action taken:** Amendment of Part 205 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301, and 19-0305

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

**Specific reasons underlying the finding of necessity:** To achieve the reductions of emissions of volatile organic compounds necessary to demonstrate attainment with the ozone national ambient air quality standards. Attainment of this standard is necessary to protect the public health and welfare.

**Subject:** Architectural and industrial maintenance coatings.

**Purpose:** To end the small manufacturer exemption on December 31, 2006 and establish a sell-through end date of May 15, 2007 to eliminate the unlimited sell-through of non-complying coatings manufactured before January 1, 2005.

**Text of emergency rule:** Sections 205.1 through 205.2 remain unchanged.

Section 205.3(a) is amended to read as follows:

Section 205.3 Standards.

(a) 'VOC content limits.' Except as provided in [subdivision] *subdivisions* (b) and (g) of this section, no person shall manufacture, blend, or repackage for sale within the State of New York, supply, sell, or offer for sale within the State of New York or solicit for application or apply within the State of New York any architectural coating manufactured on or after January 1, 2005 which contains volatile organic compounds in excess of the limits specified in the following Table of Standards. Limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water, exempt compounds, or colorant added to tint bases. 'Manufacturer's maximum recommendation' means the maximum recommendation for thinning that is indicated on the label or lid of the coating container.

The remainder of section 205.3(a) remains unchanged.

Sections 205.3(b) through 205.3(f) remain unchanged.

New Section 205.3(g) is added to read as follows:

(g) 'Sell Through of Coatings.' A coating manufactured prior to January 1, 2005, or previously granted an exemption pursuant to Section 205.7, may be sold, supplied, or offered for sale until May 15, 2007, so long as the coating complied with standards in effect at the time the coating was manufactured.

Sections 205.4 through 205.7(e) remain unchanged.

Section 205.7(f) is amended to read as follows:

(f) Any exemption granted under subdivision (d) of this section may remain in effect no later than December 31, [2007] 2006.

Section 205.7(g) is deleted.

Section 205.7(h) is renumbered as follows:

[(h)](g) Limited exemptions for small AIM coatings manufacturers as approved by the director, Division of Air Resources, Department of Environmental Conservation under this Part, will be submitted to the EPA as State Implementation Plan revisions for approval.

Section 205.8 remains unchanged.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 6, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Daniel S. Brinsko, P.E., Department of Environmental

Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: 205aim@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to Article 8 of the (State Environmental Quality Review Act), a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

#### **Regulatory Impact Statement**

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings).

The Department now proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." The Department proposes to end the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" end date provision so that products manufactured prior to January 1, 2005, or granted a SME, which do not meet Part 205 VOC content limits, cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

In 2005, the Department granted SMEs to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for approximately 4 tons of VOC emission reductions per ozone season day (tpd) out of the 14 tpd of reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rulemaking is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from the continued sale of AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre-2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007, after which all AIM products sold in New York State must comply with the low VOC content limits in Part 205. By eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress towards attaining the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs will not end until December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the Ozone Transport Region with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

The promulgation of these Part 205 amendments is authorized by the following sections of the Environmental Conservation Law which, taken together, clearly empower the Department to establish and implement the Program: Section 1-0101; Section 3-0301; Section 19-0103; Section 19-0105; Section 19-0301 and Section 19-0305.

Part 205 currently includes the SME provision that allows the Department to grant an exemption to a small AIM coatings manufacturer in order to allow more time for the manufacturer to acquire the technology to comply with the new VOC content limits. Twenty-two small manufactur-

ers applied for and twenty received SMEs. Revised Part 205 was estimated to achieve VOC emission reductions of 14 tons per ozone season day (tpd) and the Department has determined that as a result of granting the SMEs, 4 tpd of VOC emission reductions that had been anticipated were not realized. These emission reductions are essential to the Department's strategy to bring NYCMA, and the other nonattainment areas of the state into attainment with the eight-hour NAAQS for ozone. In a letter dated January 27, 2006 from Raymond Werner, Chief, Air Programs Branch, USEPA Region 2 Office, to Dave Shaw, Director Division of Air Resources of DEC, EPA requested an accounting of the shortfall measures to meet the 42 tpd VOC emission reduction shortfall. New York cannot make this demonstration unless it is able to take credit for all of the emission reductions anticipated through implementation of the six "shortfall measures", which included the 14 tpd from Part 205, the AIM Coatings rule.

In addition to evaluating the SME provision, the Department also reviewed a provision that was considered during the last rulemaking but not included in the final adopted rule in 2003. Part 205 currently does not contain a "sell-through" end date for sales of AIM coatings manufactured before January 1, 2005 and thus allows the sale of AIM coatings manufactured before 2005 to continue indefinitely. Because the Department believed that AIM coatings moved quickly through the market (based upon discussions with industry during the rulemaking process), it was believed that there was not a need for a cut-off date. Since adoption of the final rule in 2003, the Department has discovered that some of these products do have long shelf lives and have remained in the market for periods sometimes exceeding two years. Moreover, the Department has also been advised that some manufacturers stockpiled AIM coatings manufactured prior to the rule implementation date of January 1, 2005 to ensure that they could continue to sell 2004 formulations after the revised rule took effect. As a result, it is important to establish a "sell-through" end date to ensure that the entire 14 tpd of VOC emission reductions are realized as soon as possible. The Department now concludes that if a "sell-through" end date is not invoked then noncompliant products will continue to be sold for a long time, and New York State will not realize the full potential of the VOC emission reductions expected during the rulemaking process. The Department's selection of May 15, 2007 as a "sell-through" end date effectively provides the regulated community with a "sell-through" period nearly two and a half years. Also, May 15th corresponds to the beginning of the ozone season, so removing these higher VOC products from the market before the start of the ozone season will improve New York's ability to attain the ozone NAAQS.

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. Ozone at ground level causes throat irritation, congestion, chest pains, nausea and labored breathing. It aggravates respiratory conditions like chronic lung and heart diseases, allergies and asthma. Ozone damages the lungs and may contribute to lung disease. Even exercising healthy adults can experience 15 percent to 20 percent reductions in lung function from exposure to low levels of ozone over several hours. Children are most at risk from exposure to ozone. Because their respiratory systems are still developing, they are more susceptible than adults. This problem is exacerbated because ozone is a summertime phenomenon. Children are outside playing and exercising more often during the summer which results in children being exposed to ozone more than adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone.

Implementation of the Part 205 revisions will, in concert with similar regulations adopted by other States and other measures undertaken by New York, lower levels of ozone in New York State and will decrease the adverse public health and welfare effects described above.

The cost of the proposed regulations will mostly affect the twenty SME manufacturers to whom the Department granted a SME. There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but Department staff expects this to be minor. Large manufacturers who have existing inventories of product manufactured prior to January 1, 2005 will have to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

Small manufacturers may have increased costs associated with the production of compliant AIM coatings and may experience a reduction in profits to the extent that their sales increased during the SME as a result of their ability to make and sell higher VOC products. These manufacturers must now make and sell complying coatings and accordingly their production costs may increase slightly and they may sell less product. Since

compliant formulations are available for all coating categories, however, the Department expects that the financial effects of this rule are beneficial to the overall market since all manufacturers must meet the same VOC content limits.

It should be noted that the impact to consumers is expected to be minimal since there are already a large amount of complying coatings on store shelves (produced by manufacturers that did not receive a SME). Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases.

The Department evaluated several alternatives and determined that the most preferable alternative is to end the SME in December 2006 and the "sell-through" in May 2007. This option provides time for the manufacturers who have products granted a SME or products manufactured prior to January 1, 2005 to "sell-through" any remaining inventory. In particular, ending the "sell-through" by May 15, 2007 allows manufacturers time to liquidate inventory while ensuring that sale of non-complying products is curtailed by the 2007 ozone season. This is the preferred option because it ensures New York can realize the necessary VOC emission reductions.

EPA approved Part 205 into New York's State Implementation Plan on December 13, 2004. As a result of EPA's action, the VOC content limits in Part 205 represent the Federal standards for AIM coatings in New York. EPA has asked New York to demonstrate compliance with the ozone NAAQS. To do this, the Department needs to demonstrate 42 tpd of VOC emission reductions identified by EPA as the shortfall. In order to achieve the 42 tpd of shortfall reductions, the Department adopted six VOC control measures including the Part 205 AIM coatings rule. The AIM coatings rule was expected to produce 14 tpd of the VOC shortfall emission reductions but because of the SME and the unlimited sell-through provisions the Department is not able to make its shortfall demonstration to EPA. These revisions will allow the Department to comply with that federal mandate.

#### **Regulatory Flexibility Analysis**

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings).

On July 18, 1997 the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). EPA has designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. Previously, New York State had been subject to the one-hour ambient air quality standard for ozone, which remained in effect until June 2005. New York State is required to develop and implement enforceable strategies to get those areas into attainment by 2009. Attainment is measured over a three year average, so NOx and VOC emission reductions are needed before the ozone season (May through October) of 2007 in order to have the best chance of measuring attainment.

The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." The Department proposes to end the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" provision so that products manufactured prior to January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

In 2005, the Department granted a SME to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for 4 tons per ozone season day (tpd) out of the 14 tpd of VOC emission reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rulemaking is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In

addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre 2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007 which would require that only VOC compliant coatings be sold after that date. By eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress in its efforts to attain the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs will not end until December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the OTR with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

1. **Effects on Small Businesses and Local Governments.** No local governments will be directly affected by the revisions to 6 NYCRR Part 205, the Architectural and Industrial Maintenance (AIM) Coatings regulation. Small businesses that manufacture AIM coatings for sale pursuant to a small manufacturer exemption (SME) provision for certain products under section 205.7 had a three year exemption that would have ended on December 31, 2007. With these rule revisions, the SME will end on December 31, 2006. In addition, as a result of the new sell through provision, AIM coatings manufacturers will have until May 15, 2007 to sell products which were grandfathered or received a SME.

2. **Compliance Requirements.** Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Small businesses which were not granted a SME will face no additional requirements. Manufacturers who were granted a SME will have to comply with the low VOC content limits of Part 205, which may involve reformulating some of their coatings. Contractors and retailers who use or sell AIM simply need to continue to purchase compliant coatings.

3. **Professional Services.** Local governments are not directly affected by the revisions to 6 NYCRR Part 205. It is not anticipated that small businesses that manufacture architectural coatings will need to contract out for professional services to comply with this regulation. In the few cases where small manufacturers do not already have compliant formulations to replace those SME products complying formulations are available at little or no cost from both the solvent and the raw material suppliers to this industry. See Chemidex.com on the web.

4. **Compliance Costs.** There are no additional compliance costs for small businesses and local governments as a result of this rule except for the 11 New York State manufacturers granted a SME. Since there are compliant coatings now available in all AIM categories, small businesses and local governments that previously purchased AIM coatings that received a SME, they are not expected to see a price increase for the purchase of compliant AIM coatings.

There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but the Department expects this to be minor. Manufacturers that have existing inventories of product manufactured before January 1, 2005 will need to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

The proposed regulations will mostly affect the eleven New York urban/suburban businesses that received an SME for certain products. Some of manufacturers may have increased costs associated with the production of compliant AIM coatings. The Department is aware of some small manufacturers who, after having been granted a SME, were able to increase sales and market share of their products. These manufacturers will now be required to produce compliant coatings which will have to compete in the market place with the compliant coatings of other manufacturers. Consequently, they might experience reduced profits to the extent they cannot maintain the same level of sales with compliant VOC coatings as they did with their higher VOC content coatings. Compliant formulations

are available for all coating categories, however, so all manufacturers should be able to access that technology going forward. Department staff believe that the financial effects of this rule are beneficial to the overall market since this rule would no longer provide a market advantage to those companies that received the SMEs or had large inventories of products manufactured before January 2005.

It should be noted that the impact to consumers is expected to be minimal since there are already large amounts of complying coatings on store shelves (produced by manufacturers that did not receive a SME). Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases.

5. Minimizing Adverse Impact. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. The emergency adoption of these revisions ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date. The Department is providing four months advance notice of the end of the SME and almost nine months notice of the sell through end date. This will provide manufacturers time to liquidate their existing inventories, or transfer those inventories to non-OTR states.

6. Small Business and Local Government Participation. Since local governments are not directly affected by this regulation, the Department did not contact local governments directly. On September 21, 2005 the Department notified all the manufacturers who had been granted a SME of its intent to end the SME by December 31, 2007, with no extensions. Only two (one New York company) of the twenty companies with SMEs responded and also that those responses were many months after the initial notification. While the one New York company indicated that they would like to see the SME provision remain as well as the ability to sell non-complying manufactured before January 1, 2005, indications are that they now have the ability to reformulate their products to comply with Part 205. The Department will also be giving official notice of this rule making to each of the twenty companies with SMEs.

7. Economic and Technological Feasibility. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Compliant products are available in all coating categories statewide to meet all consumer needs. The VOC content limits adopted in 2003 were based in large part on the 2000 California Air Resources Boards (CARB) suggested control measure (SCM) for AIM coatings. The SCM is a model AIM coatings rule that is used as a template by the California Air Districts for their AIM coatings regulations. The SCM is based on a 1998 AIM coatings survey by CARB in which they determined the technical feasibility of VOC content limits for each AIM coating category. In effect, the availability of products in a particular coating category at or below a specific VOC content limit indicated the feasibility of that category establishing a standard at that content limit. Since inception of the SCM VOC content limits into California in 2003, there have been no known complaints by small businesses with regards to compliance with the new AIM coatings standards. Likewise, according to CARB, there have been no known small manufacturers to go out of business as a result of the new AIM coatings regulations. By eliminating the SMEs and invoking a "sell-through" end date, this will keep New York State consistent with California as well as the other OTC states that don't have an SME provision.

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

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings). See 6 NYCRR Part 205.

On July 18, 1997 the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). EPA has designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. Previously, New York State had been subject to the one-hour ambient air quality standard for ozone, which remained in effect until June 2005. New York State is required to develop and implement enforceable strategies to get those areas into attainment by 2009. Attainment is measured over a three year average, so NO<sub>x</sub> and VOC emission reductions are needed before the ozone season (May through October) of 2007 in order to have the best chance of measuring attainment.

The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." The Department proposes to end the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" provision so that products manufactured prior to January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

In 2005, the Department granted a SME to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for 4 tons per ozone season day (tpd) out of the 14 tpd of VOC emission reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rule making is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre 2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007 which would require that only VOC compliant coatings be sold after that date. By eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress in its efforts to attain the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs will not end until December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the OTR with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

1. Types and estimated number of rural areas: Rural areas are not particularly affected by the revisions. Part 205 will continue to apply on a statewide basis. This is due in large part to the fact that only eleven of the twenty manufacturers granted SMEs are located in New York State. Of the eleven, nine manufacturers are located in NYCMA, and the other two are located in upstate New York in urban/suburban communities. None of the eleven manufacturers are located in rural communities. The impact to rural consumers, if any, is expected to be minimal since there is already a large number of compliant AIM coatings available for retail sale throughout the state.

2. Reporting, record keeping and other compliance requirements: Part 205 will continue to apply on a statewide basis. Rural areas are not particularly affected by the revisions. Reporting, record keeping, and labeling requirements are essentially unchanged since January 2005 when the Part 205 revisions went into effect. Eleven of the current twenty SMEs are for businesses located in New York urban or suburban communities. Rural area businesses are not expected to be effected by these revisions. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs: The cost of the proposed regulations will mostly affect the eleven New York urban/suburban businesses that received an SME for certain products. There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but the Department expects this to be minor. Manufacturers that have existing inventories of product manufactured prior to January 1, 2005 will need to

ensure that the product is sold before the “sell-through” end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

It is expected that the small manufacturers may have increased costs associated with the production of compliant AIM coatings. The Department is aware of some small manufacturers who, after having been granted a SME, were able to increase sales and market share of their products. These manufacturers will now be required to produce compliant coatings which will have to compete in the market place with the compliant coatings of other manufacturers. Consequently, they might experience reduced profits to the extent they cannot maintain the same level of sales with compliant VOC coatings as they did with their higher VOC content coatings. Compliant formulations are available for all coating categories, however, so all manufacturers should be able to access that technology going forward. Department staff believe that the financial effects of this rule are beneficial to the overall market since this rule would no longer provide a market advantage to those companies that received the SMEs or had large inventories of products manufactured before January 2005.

It should be noted that the impact to consumers is expected to be minimal since there are already large amounts of compliant coatings on store shelves (produced by manufactures that did not receive a SME). Competition from these existing compliant coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases. Since eleven of the current twenty SMEs are for businesses located in New York urban or suburban communities, rural area businesses are not expected to be effected by these revisions.

4. Minimizing adverse impact: Part 205 was not anticipated to have an adverse effect on rural areas when it was promulgated in 2003 and took effect in January 2005. To date, the Department is unaware of any particular adverse impacts experienced by rural areas as a result of the promulgation of Part 205 in 2003. Rather, the rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants. These revisions are not expected to adversely impact on rural areas since many of the products affected are currently not sold in rural areas and compliant products are available in all coating categories statewide to meet all consumer needs. Ending the SMEs by December 31, 2006 and establishing a May 15, 2007 “sell-through” end date ensures a fair and level playing field for all AIM coatings manufacturers and, more importantly, that the State, as a whole, can achieve compliance with the NAAQS for ozone in a timely manner.

5. Rural area participation: Rural areas are not particularly affected by the revisions. Eleven of the current twenty SMEs were granted to businesses located in New York, all of which are located in urban or suburban communities and non are located in rural areas. Consequently, the Department did not see a need to reach out to rural communities.

#### **Job Impact Statement**

1. Nature of impact: The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. Under the Department’s proposal, this exemption, otherwise known as the small manufacturers’ exemption or “SME”, will now end on December 31, 2006, one year earlier, and cannot be extended thereafter. These businesses must stop manufacturing non-complying products by December 31st and will have to reformulate their AIM coatings to comply with the content limits in Part 205 if they do not already have compliant formulations. The Department is aware that some manufacturers already have compliant formulations and thus will be able to make this transition easily. Second, the Department proposes to include a “sell-through” provision so that products manufactured before January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot continue to be sold indefinitely. Companies will have until May 15, 2007 to liquidate their existing inventory or move it out of the State. In most cases, manufacturers have already sold all products manufactured before 2005 or will be able to sell it before May 15, 2007 and will therefore, not be adversely impacted by this rule.

These revisions are not expected to have an adverse impact on jobs and employment opportunities in the State. Part 205 has applied Statewide since it was promulgated in 2003 and it will continue to apply on a statewide basis. Since the VOC content limits went into effect on January 1, 2005, there has been no evidence of an adverse impact on employment as a result of regulating AIM coatings. If anything, these revisions will

have a positive economic impact in terms of placing all AIM manufacturers on a level economic playing field.

2. Categories and numbers affected: This rule will affect eleven in-State and nine out-of-State small manufacturers who were granted a SME by the Department. In addition, the rule will affect manufacturers who have remaining inventories of AIM coatings manufactured prior to January 1, 2005 that does not comply with Part 205 VOC content limitations.

3. Regions of adverse impact: The Department does not expect there to be regions of adverse impact in the State. The VOC emission limits in Part 205 have applied state-wide since January 1, 2005, and there has been no resulting adverse impact on any particular region of the State. Of the eleven in-state manufacturers who were granted a SME, nine are located in the New York City Metropolitan Area (NYCMA). The Department, however, expects that these coatings manufacturers will be able to readily reformulate their products through the purchase of commercially available technology and that there will be no adverse impact on employment as a result of this rule making.

4. Minimizing adverse impact: The Department is providing advance notice of these rule revisions to the regulated community so that companies have sufficient time to take the necessary steps to come into compliance with Part 205. These steps include reformulating products and ensuring that existing inventories of non-complying products are sold prior to May 15, 2007, or moved out of the State. Compliant formulations are available for all AIM coating categories and are currently being sold throughout the State. The Department, therefore, does not anticipate any adverse impacts on employment from the adoption of these rule revisions. The Department, moreover, believes that this rule will have a positive economic impact on the AIM coatings market because all manufacturers will be operating on a level playing field. Competition will likely constrain manufacturers from passing on production costs to consumers. In sum, the Department does not expect this regulation to have an adverse effect on employment in the State.

5. Self employment opportunities: Not applicable.

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

#### **Trapping of Fisher and Bobcat**

**I.D. No.** ENV-35-06-00010-P

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

**Proposed action:** Addition of section 6.4 to Title 6 NYCRR.

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

**Subject:** Trapping of fisher and bobcat.

**Purpose:** To establish a three year experimental research trapping season for fisher and bobcat.

**Text of proposed rule:** A new section 6.4 is added to Title 6 of the New York Code, Rules and Regulations to read as follows:

§ 6.4 *Experimental Research Trapping Seasons for Bobcat and Fisher.*

(a) *Purpose.* The purpose of this section is to establish Experimental Research Trapping Seasons (ERTS) for both bobcat and fisher. Data collected from trappers participating in these seasons will contribute to the Department’s ability to assess population status and make decisions concerning future management of these species.

(b) *Duration.* ERTS for both bobcat and fisher shall be held only during license years 2006-2007, 2007-2008, and 2008-2009.

(c) *Bobcat ERTS.*

(1) Any person holding a valid New York State trapping license shall be eligible to apply for a special ERTS permit for bobcat.

(2) Permit applications are available only at the Department’s Region 4 office in Stamford, New York (by mail or in person).

(3) No person shall trap bobcat during the ERTS bobcat season established in this section unless the person holds both a valid New York State trapping license and a special ERTS permit for bobcat issued by the Department.

(4) *ERTS season dates:* October 25-February 15.

(5) *Open areas:* Wildlife management units 4F, 4N, and 4O.

(6) The following special permit conditions shall apply during the ERTS for bobcat:

(i) The carcasses, or parts of carcasses (as stated on the ERTS permit), shall be submitted to the Department within five (5) business days from the date on which a bobcat was taken.

(ii) Each holder of an ERTS permit for bobcat shall submit a completed trapping activity diary within five (5) business days following the close of the ERTS.

(d) Fisher ERTS.

(1) Any person holding a valid New York State trapping license shall be eligible to apply for a special ERTS permit for fisher.

(2) Permit applications are available only at the Department's Region 6 office in Watertown, New York (by mail or in person).

(3) No person shall trap fisher during the ERTS fisher season established in this section unless the person holds both a valid New York State trapping license and a special ERTS permit for fisher issued by the Department.

(4) ERTS season dates: October 25-January 10.

(5) Open areas: Wildlife management units 6A, 6C, and 6H.

(6) The following special permit conditions shall apply during the ERTS for fisher:

(i) The carcasses, or parts of carcasses (as stated on the ERTS permit), shall be submitted to the Department within five (5) business days from the date on which a fisher was taken.

(ii) Each holder of an ERTS permit for fisher shall submit a completed trapping activity diary within five (5) business days following the close of the ERTS.

**Text of proposed rule and any required statements and analyses may be obtained from:** Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, e-mail: gbatche@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 establishes the general purposes and policies governing the manner by which the Department of Environmental Conservation (Department) manages the fish and wildlife resources of the State. This authority includes the improvement of such resources as natural resources and the "development and administration of measures for making them accessible to the people of the state." The Department is directed to use research programs as one means to obtain this result. Section 11-1103 of the Environmental Conservation Law states that the Department may by regulation permit the trapping of fisher and bobcat (and other species), and may regulate the taking, possession and disposition of fisher and bobcat. This proposed regulation establishes an experimental research trapping season to improve the management of these species, and includes specific requirements for the taking, possession and disposition of fisher and bobcat in selected wildlife management units (WMUs).

##### 2. Legislative Objectives:

The legislative objectives behind the statutory provisions listed above are to authorize the Department to establish the conditions under which fisher and bobcat may be taken by trapping, and to use research to improve the management of these species. This authority may be used by the Department to provide for effective scientific management of fisher and bobcat, including the use of research to understand their population status, thereby facilitating the establishment of appropriate management programs for these species.

##### 3. Needs and Benefits:

The Department proposes to establish an experimental research trapping season (ERTS) for fisher and bobcat in selected areas of New York. The experimental research trapping seasons would occur annually over a three year period, beginning with the 2006-2007 license year. The specific elements of the ERTS are:

(1) Establish a bobcat trapping season from October 25 - February 15 in wildlife management units (WMUs) 4F, 4N, and 4O.

(2) Establish a lengthened fisher trapping season from October 25 - January 15 in WMUs 6A, 6C, and 6H. (These units are already open to fisher trapping, but the ERTS would extend the season from the current closing date of December 10 to January 15.)

(3) For the experimental seasons described in (1) and (2) above, trappers would have to obtain a special revokable ERTS permit issued by the Regional Department of Environmental Conservation offices in Stamford and Watertown. The ERTS permit would require submission of all carcasses from trapped animals, and completion of a special trapper's diary to record details of each catch. This system would be very similar to the existing permit system used to allow the trapping of American marten.

The Department is currently developing a furbearer population and harvest assessment system based on research focused on fisher, river otter,

and bobcat. This is designed to enable science-based decision making on future management of these species using simple procedures involving submission of data from trappers.

The specific research objectives of the proposed rule are as follows: (1) Estimate mortality and population growth rate of fisher and bobcat during an experimental, three year program in selected wildlife management units. (2) Evaluate the usefulness of information collected from trappers (catch-per-unit-effort) and from the carcasses of animals turned over to the Department to assess changes, if any, in the population condition of these species. (3) Determine what effect, if any, the opening of areas currently closed to bobcat trapping and the lengthening of the current season for fisher in some areas will have on short-term population conditions, and movement of these animals to adjacent areas via dispersal.

The requirements to submit both carcasses and trapping diaries will provide an opportunity for careful evaluation of the effects of harvest on fisher and bobcat, thereby enabling more informed policies about management of these species.

A key component of the research is the collection of data on "catch per unit of effort." These data can easily be obtained from trappers, but not from hunters. Trappers issued an ERTS permit will be required to maintain a trapping diary and record information on traps set and animals caught. This is a standard research tool for assessing the condition of a given population, especially in comparison to comparable areas. However, these data are not available from hunters because hunters either "opportunisticly" take a bobcat while hunting for other species (e.g., turkey or deer) or hunt with hounds. In both cases, techniques for monitoring catch per unit of effort are not available. For these reasons, the bobcat ERTS is restricted to trappers only.

##### 4. Costs:

The Department will incur a small expense to administer the ERTS.

##### 5. Local Government Mandates:

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

##### 6. Paperwork:

Trappers who participate in the ERTS will be required to maintain a trapping diary where they record information on traps set, animals caught, and effort.

##### 7. Duplication:

There are no other local, state or relevant federal regulations concerning the taking of fisher or bobcat.

##### 8. Alternatives:

The no action alternative would mean that the management of fisher and bobcat in New York would not be improved through the research findings expected from the experimental research trapping season.

##### 9. Federal Standards:

There are no relevant federal government standards for the taking of fisher and bobcat. The Department uses a federally-issued plastic pelt seal for bobcat to verify legal acquisition. The use of these seals for bobcat will continue during this experimental research trapping season.

##### 10. Compliance Schedule:

Trappers will be permitted to participate in the ERTS upon promulgation of the final rule during the 2006-2007 trapping season.

#### Regulatory Flexibility Analysis

This proposed rule making will establish a three year experimental research trapping season in two areas of New York. The Department of Environmental Conservation (Department) has historically revised its trapping regulations to respond to changing population status of harvested species, changing public desires concerning species management, or both. Based on the Department's experience in promulgating those revisions, the Department has determined that this rule making will not impose an adverse economic impact on small businesses or local governments. The proposed regulations do not apply directly to local governments. Few, if any, persons actually trap as a means of employment; therefore the regulations do not directly apply to small businesses. However, even for a trapper who does pursue trapping as a means of income, the proposed regulations will benefit any such small business by helping to ensure that fisher and bobcat populations are managed in an appropriate and scientifically-based manner. The proposed regulations are not expected to significantly change the number of participants or the frequency of participation in the regulated activities.

The Department has further 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 trapping are administered by the Department.

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

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

This proposed rule making will establish a three year experimental research trapping season for fisher and bobcat in two areas of New York. The Department of Environmental Conservation (Department) has historically revised its trapping regulations to respond to changing population status of harvested species, changing public desires concerning species management, or both. Based on the Department's experience in promulgating those revisions, the Department has determined that this rule making will not impose an adverse economic impact on rural areas. The proposed revisions are not expected to significantly change the number of participants or the frequency of participation in the regulated activities.

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 trapping are administered by the Department.

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

#### **Job Impact Statement**

This proposed rule making will establish a three year experimental research trapping season for fisher and bobcat. The Department of Environmental Conservation (Department) has historically revised its trapping regulations to respond to changing population status of harvested species, changing public desires concerning species management, or both. Based on the Department's experience in promulgating those revisions, the Department has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities. Moreover, the number of participants in the affected area is expected to be less than 100 persons. Few, if any, persons actually trap as a means of employment. Trappers will not suffer any substantial adverse impact as a result of this proposed rule making because it is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. 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.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **NYS AP-DRG Patient Classification System**

**I.D. No.** HLT-20-06-00002-E

**Filing No.** 977

**Filing date:** Aug. 14, 2006

**Effective date:** Aug. 14, 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 68-1.63 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) and modify existing and add new DRGs to more accurately reflect the 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 the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-20-06-00002-P, Issue of May 17, 2006. The emergency rule will expire October 12, 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: regsna@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 reim-

bursement 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: regsqna@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	Montrose	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**

**Self Attestation of Resources for Medicaid Applicants and Recipients**

**I.D. No.** HLT-35-06-00008-E

**Filing No.** 976

**Filing date:** Aug. 14, 2006

**Effective date:** Aug. 14, 2006

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

**Action taken:** Amendment of section 360-2.3(c)(3) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 366-a(2)

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

**Specific reasons underlying the finding of necessity:** Chapter 1 of the Laws of 2002 provides that Medicaid applicants and recipients seeking coverage of long-term care services, other than short-term rehabilitation, must provide adequate documentation to verify the amount of their accumulated resources. Persons who are not seeking coverage of long-term care services, or who are seeking coverage of short-term rehabilitation

services, as defined by the Commissioner of Health, are allowed to attest to the amount of their resources.

The proposed regulation would provide the definition of the term "short-term rehabilitation" required by Chapter 1 of the Laws of 2002 and necessary to implement the provisions of such Chapter. The sooner the provisions of the statute can be implemented, the sooner the statutory goal of simplifying Medicaid enrollment and recertification will be achieved, with a consequent benefit to public health in terms of easier access to necessary health care. Therefore, complying with the normal rule making requirements would be contrary to the public interest, and the immediate adoption of the rule is necessary.

**Subject:** Self attestation of resources for Medicaid applicants and recipients.

**Purpose:** To allow an applicant or recipient to attest to the amount of his or her resources unless the applicant or recipient is seeking Medicaid payment for long term care services.

**Text of emergency rule:** Paragraph (3) of subdivision (c) of Section 360-2.3 is amended to read as follows:

(3) Verification of resources. (i) *The applicant may attest to the amount of his or her resources, unless the applicant is seeking coverage for long-term care services. For purposes of this paragraph, long-term care services shall include those services defined in subparagraph (ii) of this paragraph, with the exception of short-term rehabilitation as defined in subparagraph (iii) of this paragraph.* The applicant must provide documentation of all available or potentially available resources when applying for long-term care services. The social services district must record the documentation provided and determine the availability of such resources.

(ii) *Long-term care services shall include, but not be limited to care, treatment, maintenance, and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided in an intermediate care facility certified under article sixteen of the mental hygiene law; provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant to Section 31.02(a)(4) of mental hygiene law; provided in a developmental center operated by the Office of Mental Retardation and Developmental Disabilities; provided by a home care services agency, certified home health agency or long-term home health care program as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the department of health; provided by a personal care provider licensed or regulated by any other state or local agency; provided in a hospital that is equivalent to the level of care provided in a nursing facility; and provided by an assisted living program in accordance with regulations of the department of health. Long-term care services also shall include: private duty nursing; limited licensed home care services; hospice services including services provided by the hospice residence program in accordance with the regulations of the department of health; services provided in accordance with the consumer directed personal assistance program; services provided by the managed long-term care program; personal emergency response services; and care, services or supplies provided by the Care at Home Waiver program, Traumatic Brain Injury Waiver program, or Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program.*

(iii) *Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 11, 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: regsna@health.state.ny.us

**Regulatory Impact Statement**

Statutory Authority:

Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the Medical Assistance program, pursuant to titles eleven, eleven-A, and eleven-B of the Social Services Law (SSL). Section 363-a(2) of the SSL requires the Department to establish such regulations as may be necessary to implement the program of medical assistance for needy persons (Medicaid). Section 366-a(2)(a) of the SSL provides that a Medicaid applicant must provide infor-

mation and documentation necessary for the determination of initial and ongoing eligibility. A new section 366-a(2)(b) of the SSL, as enacted by the Health Care Reform Act of 2002, provides that an applicant may attest to the amount of his or her resources, unless the applicant is seeking Medicaid coverage of long-term care services. An exception is made for short-term rehabilitation. For purposes of this provision, section 366-a(2)(b) of the SSL references the long-term care services described in paragraph (b) of section 367-f(1) of the SSL and authorizes the Commissioner of the Department to define the term "short-term rehabilitation".

#### Legislative Objectives:

Section 363-a of the SSL designates the Department as the single State agency responsible for implementing the Medicaid program in this State, and requires the Department to promulgate any necessary regulations which are consistent with federal and State law. The proposed regulatory amendment is necessary to define long-term care services and short-term rehabilitation for purposes of attestation of resources.

#### Needs and Benefits:

The purpose of the proposed regulatory amendment is to revise section 360-2.3(c)(3) of the Medicaid regulations concerning verification of resources. Currently, in determining whether an applicant is financially eligible for Medicaid, the applicant must provide documentation of all available or potentially available resources. A new subdivision (2) of section 366-a of the SSL, as enacted by the Health Care Reform Act of 2002, allows an applicant to attest to the amount of his or her resources, unless the applicant is seeking Medicaid coverage of long-term services. The section also allows an applicant to attest to the amount of his or her resources if Medicaid coverage is needed for short-term rehabilitation. The proposed regulatory amendment to section 360-2.3(c)(3) allows certain applicants to attest to the amount of their resources and to define the long-term care services for which resource documentation will still be required. Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.

As required by section 366-a(2)(b) of the SSL, the proposed regulatory amendment includes in the definition of long-term care services, those services described in section 367-f(1)(b) of the SSL. These services include care, treatment, maintenance and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided by a home care services agency, certified home health agency or long term home health care program, as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the Department of Health; or provided by a personal care provider licensed or regulated by any other state or local agency. In addition, the proposed regulatory amendment designates as long-term care services, for purposes of resource attestation, the following: a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility ("alternate level of care"); services provided in an intermediate care facility certified under article sixteen of the mental hygiene law; services provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant to Section 31.02(a)(4) of the mental hygiene law; services provided in a developmental center operated by the Office of Mental Retardation and Developmental Disabilities; services provided by an assisted living program; private duty nursing; limited licensed home care services; hospice care including the hospice residence program; services provided in accordance with the consumer directed personal assistance program; services provided by the managed long-term care program; personal emergency response services; and care, services or supplies provided by the Care at Home Waiver program, Traumatic Brain Injury Waiver program, or Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program.

Section 366-a(2)(b) of the SSL allows attestation of resources by applicants seeking Medicaid coverage of short-term rehabilitation as defined by the Commissioner of the Department. Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.

#### Costs:

There should be no additional costs associated with this regulatory amendment. An analysis of several eligibility simplification proposals was performed in 2001 and it was concluded that while a fiscal impact could occur if applicants provided inaccurate information about their resources, this was unlikely. Since neither the Child Health Plus (CHP) nor the Family Health Plus (FHP) program have resource tests, it was determined

that those Medicaid applicants who had excess resources would most likely still be eligible for either CHP or FHP. Therefore, this proposal has been considered to be cost neutral.

#### Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates. The amendment would remove the requirement that a Medicaid applicant submit proof of his or her resources for purposes of determining Medicaid eligibility, if the applicant is not seeking Medicaid coverage of long-term care services. The change simplifies the documentation requirements for local departments of social services administering the Medicaid program at the county level.

#### Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment. Currently, in determining Medicaid eligibility for long-term care services, social services districts must review resource documentation.

#### Duplication:

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

#### Alternatives:

Section 366-a(2)(b) of the SSL requires that the services specifically listed in Section 367-f(1)(b) of the SSL be included in the definition of long-term care services. No alternatives were considered to the inclusion of these services in the definition.

In addition, in accordance with the authority granted in Section 367-f(1)(b) of the SSL, the proposed regulatory amendment designates a number of services as long-term care services for purposes of resource attestation: hospice care; private duty nursing; alternate level of care in a hospital; assisted living program; intermediate care facility; residential treatment facility; developmental center; the Care at Home Waiver program; the Traumatic Brain Injury Waiver program; the Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program; limited licensed home care services; personal emergency response services; and the consumer directed personal assistance program. Alternatives were considered with respect to the inclusion or exclusion of particular services in this list. However, given the nature, duration, and cost of these services, as well as the fact that many of these services are delivered by the same providers who furnish the long-term care services specifically listed in SSL Section 367-f(1)(b), the Department determined that the best alternative was to require documentation of resources by applicants seeking coverage of these services.

For purposes of defining short-term rehabilitation, the Department formed a work group with representatives from local social services districts and solicited feedback from the local social services districts' provider community. It was reported that there is no durational difference between inpatient and community-based short-term rehabilitation. Therefore, the workgroup recommended that short-term rehabilitation not be defined solely by type of service. The workgroup recommended defining short-term rehabilitation as receipt of one annual episode of services lasting less than 30 days, because 30 days was the median length of stay for rehabilitation purposes according to information gathered from providers, and because this would eliminate cases that are subject to spousal impoverishment budgeting, which is not viewed as short-term care.

The workgroup recommended that alternate level of care in a hospital not be included in the definition, because the average alternate level of care stay extends beyond 30 days and because none of the providers viewed this as a short-term rehabilitation situation. Similarly, investigation by Department staff indicated that personal care services are provided to individuals who are chronically ill and require care on a long-term basis. Consequently, these services were not included in the definition of short-term rehabilitation.

#### Federal Standards:

The proposed regulatory amendment complies with federal statute.

#### Compliance Schedule:

Social services districts will be advised of the change when the amendment becomes effective.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, recordkeeping or other compliance requirements on a business.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would allow certain Medicaid applicants to attest to the amount of their

resources for purposes of determining Medicaid eligibility. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

**Job Impact Statement**

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to allow certain Medicaid applicants to attest to the amount of their resources for purposes of determining eligibility for Medicaid.

**NOTICE OF ADOPTION**

**NYS AP-DRG Patient Classification System**

**I.D. No.** HLT-20-06-00002-A

**Filing No.** 978

**Filing date:** Aug. 14, 2006

**Effective date:** Aug. 30, 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)

**Subject:** NYS AP-DRG's, service intensity weights and group average arithmetic inlier length of stay.

**Purpose:** The Department of Health is statutorily required 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) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-20-06-00002-P, Issue of May 17, 2006.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Reimbursement of Paid Medical Expenses**

**I.D. No.** HLT-20-06-00011-A

**Filing No.** 975

**Filing date:** Aug. 14, 2006

**Effective date:** Aug. 30, 2006

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

**Action taken:** Amendment of section 360-7.5(a) of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 206(1)(f); and Social Services Law, section 363-a

**Subject:** Reimbursement of paid medical expenses.

**Purpose:** To implement the Federal district court orders in Greenstein and Carroll and the order of the Appellate Division, First Department in Seitelman.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-20-06-00011-P, Issue of May 17, 2006.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**Insurance Department**

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

**Charges for Professional Health Services**

**I.D. No.** INS-35-06-00007-P

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

**Proposed action:** This is a consensus rule making to amend Part 68 (Regulation 83) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2601, 5221, and art. 51

**Subject:** Charges for professional health services.

**Purpose:** To update the addresses of the New York State Department of Health and the New York State Education Department for the purposes of reporting patterns of health provider overcharges, excessive treatment or any other improper actions and the name of the New York State Insurance Department Bureau that is collecting the data.

**Text of proposed rule:** Subdivision (a) of Section 68.8 is amended to read as follows:

(a) Insurers shall report any pattern of overcharging, excessive treatment or any other improper actions by a health provider, within 30 days after such insurer has knowledge of such pattern to the No-Fault Unit, Property [and Casualty Insurance] Bureau, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, and to the following:

(1) Complaints about:

(i) Physicians and physicians' assistants.

[(a) Services rendered in New York City:  
Supervising Investigator  
Office of Professional Medical Conduct  
New York State Department of Health  
5 Penn Plaza  
New York, NY 10001

(b) Services rendered in remainder of State:  
Director  
Office of Professional Medical Conduct  
New York State Department of Health  
433 River Street, Suite 303  
Troy, NY 12180-2299]

*New York State Department of Health  
Office of Professional Medical Conduct  
433 River Street, Suite 303  
Troy, NY 12180*

(ii) Hospitals.

[Deputy Director  
Division of Health Care Financing  
New York State Office of Health Systems Management  
Corning Tower  
Empire State Plaza  
Albany, NY 12237]

*New York State Department of Health  
Centralized Hospital Intake Program  
433 River Street, 6th Floor  
Troy, NY 12180*

(iii) Other health providers. (*Complaint should be sent to the nearest office based on the location of the health provider.*)

[Director  
Office of Professional Discipline  
New York State Education Department  
475 Park Avenue South  
New York, NY 10016]

*Central Administration  
Office of Professional Discipline  
New York State Education Department  
475 Park Avenue South 2nd Floor  
New York, NY 10016-6901*

*Albany*

Office of Professional Discipline  
New York State Education Department  
80 Wolf Road, 2nd Floor  
Albany, NY 12205-2643

*Brooklyn, Staten Island*

Office of Professional Discipline  
New York State Education Department  
195 Montague Street, 4th Floor  
Brooklyn, NY 11201

*Buffalo*

Office of Professional Discipline  
New York State Education Department  
295 Main Street, Suite 756  
Buffalo, NY 14203

*Bronx/Queens*

Office of Professional Discipline  
New York State Education Department  
2400 Halsey Avenue  
Bronx, NY 10461

*Mid-Hudson Region*

Office of Professional Discipline  
New York State Education Department  
One Gateway Plaza, 3rd floor  
Port Chester, NY 10573

*Nassau/Suffolk*

Office of Professional Discipline  
New York State Education Department  
1121 Walt Whitman Road, Suite 301  
Melville, NY 11747

*Manhattan*

Office of Professional Discipline  
New York State Education Department  
163 West 125th Street, Room 819  
New York, NY 10027

*Syracuse*

Office of Professional Discipline  
New York State Education Department  
State Tower Building  
109 South Warren Street - Suite 320  
Syracuse, New York 13202

*Rochester*

Office of Professional Discipline  
New York State Education Department  
220 Idlewood Road, Room 106  
Rochester, NY 14618

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

**Data, views or arguments may be submitted to:** Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: bcheung@ins.state.ny.us

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

**Consensus Rule Making Determination**

Sections 201, 301, 2601, 5221 and Article 51 of the Insurance Law authorize the Superintendent to promulgate regulations governing charges for professional health services. No person is likely to object to the rule as the changes made are merely to update the addresses of the New York State Department of Health and the New York State Education Department for the purposes of reporting patterns of health provider overcharges, excessive treatment or any other improper actions. The rule also updates the name of the New York State Insurance Department Bureau that is collecting the data.

**Job Impact Statement**

The proposed rule change will have no impact on jobs and employment opportunities in New York State because it merely updates the addresses of the New York State Department of Health and the New York State Education Department for the purposes of reporting patterns of health provider overcharges, excessive treatment or any other improper actions. The rule also updates the name of the New York State Insurance Department Bureau that is collecting the data.

## Office of Mental Retardation and Developmental Disabilities

### EMERGENCY RULE MAKING

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

**I.D. No.** MRD-35-06-00003-E

**Filing No.** 971

**Filing date:** Aug. 10, 2006

**Effective date:** Aug. 10, 2006

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

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

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

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

**Specific reasons underlying the finding of necessity:** Since January 1, 2006 Medicare beneficiaries have been able to have their prescription drugs paid for under Medicare Part D. Certain individuals with both Medicare and Medicaid benefits, known as dually eligible persons, were automatically enrolled in Medicare Part D effective January 1, 2006. Unlike Medicaid and traditional Medicare, Part D benefits are paid not by the government, but by private companies, known as prescription drug plans. In order to receive these benefits, a person must enroll in a prescription drug plan.

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

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

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

This regulation authorizes certain people to make enrollment and exceptions and appeals decisions for consumers receiving services from OMRDD or from an OMRDD regulated provider. Without the regulation, these parties cannot enroll consumers in a prescription drug plan, change plans for consumers or request that plans cover additional drugs for a consumer. Consumers would be left without a prescription drug plan or, if dually eligible, could be enrolled in plans that do not meet their needs. Consumers also could be unable to request coverage for drugs not on a plan's formulary. Consumers would then have to pay for their prescriptions themselves or, in the case of consumers living in residential facilities certified by OMRDD, the operator of the residential facility would have to pay for the prescriptions. The regulation needs to be effective immediately so that enrollment changes, initial enrollments, and other actions related to a Medicare Part D prescription drug plan can take place for these consumers.

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

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

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

*Subpart 635-11 Enrollment in a Medicare prescription drug plan.  
Section 635-11.1 Applicability and definitions.*

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

(b) Definitions. As used in this subpart:

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

(i) filing a grievance;

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

(iii) requesting and obtaining a coverage determination (including, but not limited to, a request for prior authorization, an exception to a tiered cost sharing structure, a formulary exception and a request for expedited procedures); and

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

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

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

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

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

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

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

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

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

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

(2) Process to request a different PDP.

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

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

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

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

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

(3) Notwithstanding any other provision of this Title, if the person enrolls in a PDP (or a parent, guardian or appointee enrolls him or her) and the CEO or designee notifies the person, guardian, parent or appointee of the agency or sponsoring agency of the objection to the selection of the PDP, the agency or sponsoring agency is not fiscally responsible for any excess costs that may be incurred, as a result of the selection of the PDP, compared to the costs of the PDP that would have been selected by the CEO or designee. The agency or sponsoring agency's written notification of the objection must inform the person, guardian, parent or appointee that the excess costs are not the responsibility of the agency or sponsoring agency and that the person, guardian, parent or appointee (whoever completed the enrollment) is responsible for the additional costs. Receipt of the written notification must be documented.

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

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

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

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

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

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

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

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

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

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

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

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

(e) Nothing in this Subpart shall be deemed to diminish or remove the authority of a physician to request a coverage determination or an expedited redetermination on behalf of a beneficiary.

● Revisions to § 635-99.1 Glossary

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 7, 2006.

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

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

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

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

3. Needs and Benefits: The new Medicare prescription drug program began January 1, 2006. This program is also known as Medicare Part D. Persons who are in Part D have their prescription drugs paid for through private insurance plans, known as prescription drug plans. Persons who have Medicare must enroll in a prescription drug plan in order to receive

this benefit. However, persons who have Medicare and Medicaid are automatically enrolled in a plan. These persons are known as dual eligible persons.

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

Unlike Medicare-only beneficiaries, dual eligible persons can change prescription drug plans at any time. From November 15 to December 31, 2005, dual eligible persons could change plans as often as they want. Since January 1, 2006, dual eligible persons can change plans once a month.

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

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

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

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

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

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

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

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

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

6. Paperwork: There are minimal new paperwork requirements resulting from the regulations. If the residential agency chooses to enroll re-

sidents the agency is required to notify the advocate or correspondent of the resident. On the other hand, paperwork associated with seeking guardianship and making guardianship decisions is avoided, if guardianship is necessary only to facilitate enrollment in a Medicare prescription drug plan. Paperwork necessary to enroll beneficiaries and act in the Part D review process would be necessary regardless of the promulgation of these regulations.

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

7. Duplication: None.

8. Alternatives: If OMRDD did not promulgate the emergency amendments, consumers receiving OMRDD services who are eligible for Medicare only, without the ability to choose a plan and without a guardian would be unable to participate in the Medicare Part D program. Consumers who are dually eligible and without the ability to choose the plan and without a guardian would be unable to move from plans that did not meet their needs, and possibly have to pay for medicines out-of-pocket (or have their residential providers incur such expenses), and have to pursue time-consuming exceptions and appeals that could be avoided by simply switching plans. For some consumers, even the most suitable will not cover all medications they need, and consumers in those plans will need to pursue coverage determinations, exceptions and appeals. Without this regulation, adult consumers without guardians who do not have the ability to pursue coverage determinations, exceptions and appeals would be unable to do so.

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

10. Compliance Schedule: No time is necessary for regulated parties to achieve compliance with the rule because similar standards have been in effect as an emergency rule since November 15, 2005. In addition, the rule itself does not contain any compliance requirements for the regulated parties. Instead, the rule establishes processes which may be utilized by regulated parties and others at their discretion.

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

4. Compliance costs: There are no costs to local governments or small businesses.

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

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

7. Small business and local government participation: OMRDD convened several task forces and committees concerning the implementation of the new Federal Medicare Part D benefit, including a work group that had as one of its specific charges the development of the emergency

amendments. Membership of the various groups included providers of services, both State and voluntary-operated, provider association representatives, family members of consumers and other advocates for persons with mental retardation and developmental disabilities. Several of the task forces, committees and sub-committees will continue to meet to oversee the Part D implementation throughout 2006.

Presentations and ongoing discussions have occurred with the Commissioner's Advisory Council on Family Care and the Statewide Committee on Family Support Services and also with the Part D task force (mentioned above) that helped develop this regulation. A series of informational mailings and frequent e-mail updates regarding Part D generally have been sent to affected providers beginning in June 2005. OMRDD promulgated a similar emergency regulation on November 15, 2005, February 13, 2006 and on May 12, 2006 and sent informational mailings about the regulations to affected parties. OMRDD has also posted relevant information on its website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

OMRDD has received only positive feedback on the amendments from providers of services, both voluntary and state-operated and family members of consumers since similar amendments first became effective on November 15, 2005.

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

A Rural Area Flexibility Analysis for the emergency amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The emergency amendments identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

#### **Job Impact Statement**

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

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## Department of Motor Vehicles

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### NOTICE OF ADOPTION

#### **County Motor Vehicle Use Tax**

**I.D. No.** MTV-25-06-00014-A

**Filing No.** 974

**Filing date:** Aug. 14, 2006

**Effective date:** Aug. 30, 2006

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

**Action taken:** Amendment of Part 29 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** County motor vehicle use tax.

**Purpose:** To make technical amendments to motor vehicle use tax.

**Text or summary was published** in the notice of proposed rule making, I.D. No. MTV-25-06-00014-P, Issue of June 21, 2006.

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

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

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

The agency received no public comment.

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## Niagara Frontier Transportation Authority

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

#### Procurement Guidelines

I.D. No. NFT-35-06-00005-P

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

**Proposed action:** This is a consensus rule making to amend section 1159.4 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1299-e(5) and 1299-t

**Subject:** Procurement guidelines.

**Purpose:** To amend the NFTA's procurement guidelines to clarify internal review requirements.

**Text of proposed rule:** Subsection (5) of subdivision (z) of section 1159.4 is amended to read as follows:

(5) The Office of General Counsel shall provide interpretations of the procurement guidelines, advice to the User and Procurement Departments on statutory and regulatory compliance and assist in the Board Agenda process for awards requiring Board approval. *All issues regarding disqualification and/or release of a low bidder must be reviewed by the Office of General Counsel prior to a decision being made.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott St., Buffalo, NY 14203, (716) 855-7398, e-mail: Ruth\_Keating@nfta.com

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

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

#### Consensus Rule Making Determination

The Niagara Frontier Transportation Authority has determined that no person is likely to object to the rule being repealed or the rule as written for the following reasons:

1. The only change is to clarify internal review requirements.
2. The changes is not controversial.

#### Job Impact Statement

The Niagara Frontier Transportation Authority has determined adoption of the proposed rule will have no impact on jobs or employment opportunities for the following reasons:

1. The subject of the proposed rule is to clarify internal reporting requirements contained in the NFTA's Procurement Guidelines. Changes to the rules will not impact the level of procurements made by the NFTA, and therefore will not impact jobs or employment opportunities.