

RULE MAKING ACTIVITIES

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

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

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

Office of Alcoholism and Substance Abuse Services

NOTICE OF ADOPTION

Chemical Dependence Outpatient Services

I.D. No. ASA-42-06-00017-A

Filing No. 1483

Filing date: Dec. 8, 2006

Effective date: Dec. 27, 2006

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

Action taken: Amendment of Part 822 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(e), 19.09(b), 19.15(a), 19.40, 32.01 and 32.07(a)

Subject: Chemical dependence outpatient services.

Purpose: To amend utilization review, add excessive services indicators, treatment of compulsive gambling, add provisions relating to group size and other service requirements.

Substance of final rule: The New York Office of Alcoholism and Substance Abuse Services proposes to amend Part 822 of 14 NYCRR, Chemical Dependence Outpatient Services. This amendment will add a provision for treating individuals who are compulsive gamblers as well as have chemical dependence. It will also add provisions relating to utilization review, excessive provision of services, and clarify requirements relating to group and individual counseling.

Section 822.2 is amended to clarify policies and procedures requirements and service provision requirements. Subdivision (c) of section 822.2 is amended to add a requirement that every patient have at least one individual counseling session for every ten counseling sessions unless the multidisciplinary team determines a different frequency or intensity is clinically appropriate. In addition this section specifies that providers who receive funding from OASAS are required to meet the requirements of Part 96 of the Code of Federal Regulations which deals with the federal substance abuse and treatment block grant.

Section 822.3 clarifies procedures to follow where a provider objects to a patient's continued use of prescription drugs.

Section 822.4 adds a review of a patient's drug use and gambling history be added to the comprehensive evaluation, as well as a plan to deal with a patient's tobacco dependence and compulsive gambling, if applicable. A provision was added which describes the required contents of a patient's progress note has been removed. A provision is added describing the manner in which a case record must record a transfer between an outpatient and outpatient rehabilitation program.

Section 822.6 adds a provision for utilization review which includes minimum review requirements. There is also a provision which requires a utilization review every 90 days for patients who are in a program over 365 days.

Section 822.7 amends the staffing requirements in relation to staff training. It provides a description of the types of staff training and the frequency of staff training. It requires the provider to ensure that training is accomplished and the provider may meet this requirement by directly providing training, arranging for the training or allowing clinicians to receive training as part of their professional license requirements.

Section 822.10 is added to describe the standards applicable outpatient programs that provide compulsive gambling treatment for individuals who are chemically dependent and who also are compulsive gamblers. This includes treatment planning, individual counseling and group counseling sessions.

Section 822.11 is amended to add a provision relating to the excessive provision of services. This provision describes the indicators used by which the Office which will determine whether a service provider may be providing excessive services or approaching a level of excessive provision of services.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 822.2(a)(20), (c)(1), (d)(8); 822.3(a)(2), (f); 822.4(r), (s), (t); 822.6(c), (e); 822.7(c), (h), (i); 822.10(a); and 822.11(j), (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 amendments to Part 822 do not necessitate revision of the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or 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 a description of non-substantial changes made to the rule as a result of such comments are

found below. Response to comments regarding sections of the rule that were not proposed to be amended are only commented on when such section has been impacted by the proposed amendments. Additionally several technical and grammatical changes were made and incorporated into the text of the final rule.

1. Comment - OASAS received many comments from individuals, legislators and chemical dependence providers regarding Section 822.11(k) – “excessive provision of services”. Many of the comments suggested that this amendment placed a “cap” on services a patient can receive, mandated patient discharge before attainment of successful treatment and placed limits on treatment. Other comments suggested that other enforcement agencies undertake the determination of excessive services in relation to Medicaid fraud investigations.

Response – OASAS has a statutory responsibility to ensure that individuals receive adequate treatment from OASAS certified providers. Services that are provided in excess of the clinical needs of the patient is not good treatment or a proper expenditure of funds. These regulations were drafted in response to significant concerns identified by the Attorney General, the Office of the Medicaid Inspector General, and the Department of Health as well as OASAS. OASAS has identified and taken action against some providers which were delivering and billing services in excess of actual patient need and far in excess of what other comparable providers provide to their patients. These same providers failed to conduct adequate or appropriate utilization review and as result failed to equip their patients to develop the skills to achieve and maintain recovery.

These regulations provide guidance to providers by including the indicators used by OASAS in determining whether providers may be providing excess services. OASAS has an obligation under law to provide notice to providers regarding OASAS regulatory expectations. In addition, federal Medicaid law requires OASAS to determine whether services meet federal reimbursement requirements. Federal Medicaid law also prohibits the provision of excess services. The regulation in no way limits or places a “cap” on services to individual patients and clarifies that a patient receives all the services that are determined as necessary, pursuant to their documented multidisciplinary treatment plan.

OASAS proposed establishing a calculated average number of visits during a twelve month period that would result in a survey of the program by OASAS to determine if patients were receiving services in excess of their clinical needs. OASAS will eliminate this provision from the final regulation. This section will now only include indicators that a program may be providing excessive services.

2. Comment - OASAS should eliminate the requirement that at least one of every ten counseling sessions should be an individual counseling session with the patient’s primary counselor. There are some clients who require fewer individual counseling sessions, particularly when the patient is nearing discharge.

Response – OASAS believes that it is good clinical practice to include individual counseling sessions for patient’s at a frequency which will ensure that the patients needs are addressed by the patient’s primary counselor. For example, a patient who receives outpatient services two to three times per week would see their counselor approximately once per month. The proposed amendment does provide that the treatment team may recommend a different frequency if they believe it is clinically appropriate. This section has been modified to emphasize that the treatment team makes the final determination on frequency and intensity of counseling sessions.

3. Comment – The amended utilization review requirements adds to paperwork burdens of clinicians. The requirements are complex, time consuming and unreasonable.

Response - Utilization review is currently a requirement for outpatient services. Utilization review is a vital component of good treatment and recognizes the need to review the care of patient’s to determine whether their needs are best met at the existing level and frequency of care, and whether they would be better served through referral for other services. The current regulation provides little guidance on what makes a good utilization review plan. This amendment to Part 822 provides additional guidance to providers on what constitutes a good UR plan but allows the providers flexibility in developing their plan.

4. Comment – Section 822.10 should also include problem gambling in addition to compulsive gambling.

Response – Problem gambling has been added to the definition of compulsive gambling.

5. Comment – The section 822.7 (i) requirement that a program have at least one qualified health care professional be full-time and a CASAC, and at least one full-time qualified health care professional be full-time and

qualified in a field other than alcohol or substance abuse counseling, will be difficult for smaller providers and rural providers to meet due to the size of the agency and the inability to locate qualified staff.

Response – OASAS recognizes that providers need some flexibility in meeting this requirement. Therefore the regulation has been modified to allow a provider to obtain OASAS approval to use a different staffing component to meet this requirement.

6. Comment – Section 822.2 needs to specify that the requirements for certification of an outpatient program must be met separately from requirements for certification of other programs that may be operated by the provider pursuant to certification by another state agency.

Response – A new subdivision (20) has been added to section 822.2(a) adding this requirement.

7. Comment – Section 822.4 (r) is amended to substitute a “session” note with the current requirement that an attendance note be taken when a service is provided. The session note requires additional documentation on the part of staff and adds to the recordkeeping burdens on programs.

Response – OASAS has attempted to limit additional recordkeeping requirements in this regulation. OASAS acknowledges that this would increase staff time for recordkeeping and will withdraw this amendment to this section.

8. Comment – The amendment to Section 822.3(a)(2) might be interpreted to allow discrimination against individual’s with HIV/AIDS because of the elimination of the term “transmitted through ordinary contact”.

Response – Change made. This term will remain in the regulation.

9. Comment – Section 822.3(f) does not require a program to admit a methadone patient.

Response – OASAS believes that the regulation clearly prohibits discrimination against admission of a methadone patient.

10. Comment – Section 822.6(c) should provide that the minimum standard for utilization review be stated in units of service rather than days to meet the excessive services standard in Section 822.11(k).

Response – This is incorrect, the standard in section 822.11(k) refers to an overall program average number of units of service and not the number of units of service provided to an individual patient.

11. Comment – Section 822.7(c)(1) does not define “as appropriate” in regard to staff training.

Response – This section has been changed as suggested.

12. Comment – Does section 822.7(f) provide an exception to the experience requirements for a clinical director?

Response – No, this amendment allows the commissioner to approve a clinical director who has equivalent experience but may not meet the three year experience requirement.

13. Comment – Section 822.11(k) should provide “measures” of indicators of excessive services.

Response – OASAS believes that the indicators provide notice to a provider regarding what considerations OASAS may make in making a determination of excess services. It believes that providing prescriptive measures, direction and rules for providers would not further quality services. The multidisciplinary team should make the decision, using clinical criteria, regarding a patient’s continued need for outpatient services. The indicators are the factors that OASAS may use to determine that the multidisciplinary treatment team is not using clinical judgment in providing services to patients.

14. Comment – OASAS should provide measurements of abstinence.

Response – OASAS believes this is the role of the multidisciplinary team and OASAS should not be prescribing arbitrary measures.

15. Comment – Section 822.11(k) excessive services should be renamed to “services provided outside the scope of clinical necessity”.

Response - The term “excessive services” is used under both federal and state Medicaid law and regulations.

16. Comment – Section 822.11(k) should be amended to require a finding of 3 or more indicators violated before the program is determined to have provided excessive services.

Response – OASAS believes that there should not be any specific formula in finding a program has provided excessive services. Each program should be reviewed on an individual basis.

17. Comment – Section 822.11(k) establishes utilization thresholds which are not authorized under state law.

Response – This section does not establish a utilization threshold which is defined as annual service limitations which can only be exceeded by prior approval of the state. This provision does not establish a cap or other limitation on the services a patient may received based upon their clinical needs as established by the multidisciplinary team. The average

units of service standard established in the regulation is intended to be a point where OASAS may survey a program to ensure that excessive services are not being provided. Excessive services are specifically prohibited under 18 CFR 505.2(b)(11). OASAS has removed references to the annual units of services from the regulation and instead provides a list of indicators of excessive services.

18. Comment – Costs relating to the one individual counseling session for every ten counseling sessions are not adequately addressed in the regulatory impact statement.

Response – Section 822.2 (c) has been modified to permit a program to provide a lesser frequency of individual counseling when the multidisciplinary team determines that there is a clinical justification for a different frequency of individual to group counseling. Therefore costs relating to counseling should not change for a program has been use the multidisciplinary team to determine frequency of individual counseling based upon clinical needs.

19. Comment – The Regulatory Impact Statement does not address the costs of establishing a program for compulsive gamblers who have a chemical dependence diagnosis.

Response – The decision to operate a compulsive gambling program is wholly voluntary for the provider. The costs of the program will reimbursed like every other service now provided by the provider. The provider may bill this service as it does any outpatient service.

20. Comment – Section 822.2(d)(8) would extend the federal block grant requirement to all providers, even providers who are not receiving block grant funding.

Response – This requirement has been changed to reflect that this section is only applicable to providers funded by OASAS.

21. Comment – Section 882.7 (c) should recognize the training and experience that clinicians receive outside of training provided by the agency.

Response – OASAS agrees and has modified this section to require the provider to ensure and document that training requirements have been met. This give the provider more flexibility in meeting this requirement.

Text of emergency rule: Section 400.5(a) of the Superintendent’s Regulations is hereby amended to read as follows:

§ 400.5 Depositing of checks, etc.

(1) Except as hereinafter stated all checks, drafts and money orders must be deposited in the licensee’s bank account in [the banking institution in this State] a branch or principal office of a bank, savings bank, savings and loan association, trust company, national bank, federal savings bank, or federal savings and loan association or any other duly chartered depository institution that is insured by the Federal Deposit Insurance Corporation, regardless of whether the branch and/or principal office of the foregoing banking institution is located within or without this State (collectively, “banking institution”), not later than the first business day following the day on which they were cashed. Such items must be deposited during the regular business hours of such [bank] banking institution so as to enable it to credit the deposits to the licensee’s account on that business day.

(2) Any account maintained by a licensee for the deposit of checks, drafts or money orders in a banking institution shall be subject to a written account agreement between the licensee and the banking institution that expressly provides for the personal and in rem jurisdiction over the parties and the account, respectively, of state and federal courts located in the State of New York and the agreement shall be governed by the laws of the State of New York, except that this requirement shall not apply (a) with respect to an account maintained in New York or in a State of New York-chartered bank prior to November 1, 2005, unless or until such existing account agreement is amended subsequent to November 1, 2005, or (b) if this requirement is waived in the Superintendent’s discretion. Every licensee or applicant for a license shall provide to the Superintendent a copy of any such account agreement within 15 days of establishing any such account or any amendment thereto relating to the items required by this subsection. Every licensee shall maintain a copy of such account agreement as part of its records available for examination by the Superintendent.

(3) Prior to depositing any checks, drafts or money orders in an account at a banking institution, the licensee shall cause such banking institution to give the Superintendent written authorization to conduct any such examination of all books, records, documents and materials, including those in electronic form, as they relate to such account and any checks, drafts, or money orders placed on deposit in such account, as the Superintendent in his/her discretion deems necessary, except that this written authorization requirement shall not apply (a) with respect to an account maintained in New York or in a State of New York-chartered bank prior to November 1, 2005, unless or until such existing account agreement is amended subsequent to November 1, 2005, or (b) if this requirement is waived in the Superintendent’s discretion. The licensee shall pay the cost of any such examination.

(4) [(2)] When the number of payroll checks cashed at a limited station amount to 50 or more, the licensee may present those checks to the drawee bank or the maker of the checks and receive in exchange a single draft, provided full details of the transaction are recorded in a manner satisfactory to the superintendent.

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 March 6, 2007.

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 371 of the Banking Law authorizes the Superintendent of Banks to adopt such rules and regulations as are necessary to ensure the proper conduct of the business of check cashing. Pursuant to section 400.5(a) of Title 3 NYCRR, the Superintendent requires licensed check cashers to deposit checks, drafts and money orders (hereafter “instruments”) in a banking institution in this state no later than the first business day after the date on which the instruments were cashed for the customers.

2. Legislative objectives. The Legislature, when enacting and periodically amending Article 9-A of the Banking Law, which requires regulatory supervision of the business of check cashing, has stated as matter of legislative intent that such businesses provide an important and vital service to New York citizens. The regulatory regime applicable to such industry is intended to ensure the consumer confidence in such business is maintained and the public interest is protected. The regulatory require-

Banking Department

EMERGENCY RULE MAKING

Licensed Check Cashers

I.D. No. BNK-52-06-00001-E
Filing No. 1481
Filing date: Dec. 7, 2006
Effective date: Dec. 11, 2006

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

Action taken: Amendment of section 400.5(a) of Title 3 NYCRR.

Statutory authority: Banking Law, section 371

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

Specific reasons underlying the finding of necessity: In order for licensed check cashers to conduct business, it is necessary that such licensees have and maintain a deposit account with a banking institution. Such an account enables licensees to deposit and clear the checks, drafts and money orders that have been cashed for customers, thus recouping for the licensees the funds paid out to customers. Absent this banking relationship, licensed check cashers would not be able to conduct business. Because of recent decisions by various banking institutions located within this State to end their deposit account relationships with licensed check cashers, it is necessary that the pool of banking institutions that licensees may use for such purposes be expanded.

Subject: Permissible banking institutions with which licensed check cashers may maintain deposit accounts.

Purpose: To permit licensed check cashers to maintain bank accounts with banking institutions or their branches located inside or outside this State.

ments addressed in this rule making are necessary to maintain the financial stability of the licensees, thus maintaining the public confidence in their operations.

3. Needs and benefits. Section 400.5(a) requires that a check casher licensee maintain a deposit account with a banking institution in this State. Licensees are required to deposit any checks, drafts and money orders received into the deposit account within the next business day. The deposit of such instruments in New York facilitates the timely clearing process of such instruments through the banking system. In addition, if a check casher experiences financial or other difficulty and there is a need for the Superintendent to examine or intervene, having the licensee's deposit account at a banking institution in New York State permits the Superintendent to more readily to examine the account and/or obtain control of the licensee's assets through the judicial process, if this proved necessary. However, due to the decision of various in-state banking institutions not to provide further deposit account services to check cashing businesses, it is necessary to expand the pool of potential banking institutions that may be willing to provide such services. Permitting check cashers to open and maintain deposit accounts with banks or branches located out of state should assist in addressing this problem. While doing business with banks or branches located out of state may present certain logistical problems for check cashers in meeting the one-business day deposit requirement, there are mechanisms available within the banking system which should make such arrangements workable.

The ancillary regulatory requirements of the proposed rule in connection with a check casher establishing a deposit account relationship with a bank will ensure the Superintendent's supervisory oversight of and jurisdiction over the casher's banking relationship remains the same, regardless of whether the account is in a banking institution within or outside of New York and whether the federal or a state government has chartered the institution. Such requirements necessitate that (i) the licensee's account agreement provide for the personal and *in rem* jurisdiction by federal and state courts located in New York over the parties and the account and that the agreement be governed by the laws of New York State; and (ii) prior to making any deposit in such account, the licensee obtain the written authorization by the bank enabling the Superintendent to examine any records and related documents and materials, in whatever form, pertaining to the deposits and the account. This is a timely revision of the rule, given the current rule was adopted prior to the advent of interstate branch banking and the Comptroller of the Currency's recent preemption ruling prohibiting any state bank regulator from exercising visitation authority over national banks.

4. Costs. The proposed rule imposes no additional costs or regulatory burden upon regulated parties, the Banking Department or other state agencies, or any other unit of government.

5. Local government mandates. The proposed rule imposes no mandates or costs upon any type of governmental unit. The regulatory provisions apply only to licensed entities, and such entities are private business enterprises.

6. Paperwork. The proposed rule imposes no paperwork requirements upon regulated parties or any unit of state government.

7. Duplication. None.

8. Alternatives. There are few alternatives to address the present situation other than to increase the pool of potential banks with which licensed check cashers may do business. One alternative is the creation of a bank, either under private or public auspices, that specializes in servicing money services businesses. However, this would be a long-term solution, and not an alternative that may be developed in the short-term given that in-state banks are currently terminating their deposit account relationships with these businesses.

9. Federal standards. There are no federal standards that apply to the daily operational aspects of the business of check cashing. The federal government does not license check cashers nor directly regulate the primary transaction activity of check cashers. When regulated, states are the sole supervisory regulators of the check cashing industry.

10. Compliance schedule. The new requirements applicable to any licensee's new deposit account, or modification of an existing account agreement, took effect on November 1, 2005.

Regulatory Flexibility Analysis

The emergency rule facilitates the conduct of business by and the financial stability of licensed check cashers, which are private businesses. Though the rule requires the licensee to obtain the agreement of the banking institution, when opening an account, to governance of the account relationship under New York law and courts located in New York, as well as to examination of its account-related records by the Superintendent, these are

necessary additional conditions in order for the Superintendent to properly supervise licensed check cashers that may choose to open accounts in banking institutions outside New York and also in national banks regardless of where located. The Department has determined that the emergency rule has no impact upon other private businesses, or any unit of local government.

Rural Area Flexibility Analysis

The Department has determined the emergency rule has virtually no impact upon private businesses or units of local government situated in rural areas. Licensed check cashers are predominantly located in metropolitan and urban areas of this state. To the extent there are licensed check cashers in any rural locations, the emergency rule will facilitate the conduct of business by and the financial stability of such businesses. The emergency rule will have the same effect upon regulated entities, regardless of where located.

Job Impact Statement

The emergency rule is intended to facilitate the conduct of business by and the financial stability of check cashing businesses. Without deposit account relationships with banking institutions, licensed check cashers could not function. Therefore, the Department has determined the emergency rule has no adverse impact upon employment in the check cashing industry.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Licensed Money Transmitters

I.D. No. BNK-52-06-00002-P

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

Proposed action: Amendment of Part 406 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 649 and 659

Subject: Regulation of licensed money transmitters.

Purpose: To eliminate regulatory references to subagents in Part 406 and expressly prohibit the use of subagents in the business of money transmission; increase the regulatory requirements pertaining to licensed money transmitter supervision of the designated agents; and generally conform Part 406 to chapters 625 and 677 of the Laws of 2004 and chapter 232 of the Laws of 2005.

Substance of proposed rule (Full text is posted at the following State website: www.banking.state.ny.us): Section 406.1 is amended to delete a reference to "subagents".

Section 406.2 is amended to update terminology relating to the term "traveler's" check and denominational requirements in order to conform to statutory provisions; to add a new standard for electronic traveler's checks; and to delete a reference to "subagent".

Section 406.3 is amended to make technical revisions and to add substantive due diligence requirements for licensees relating to supervision of their agents.

Section 406.4 is amended to make extensive technical revisions that include deleting various references to "subagent" and "subagents", correcting references to "traveler's" checks, deleting and revising various dated provisions and updating references for contacting the Department. A substantive requirement is added requiring agents to utilize receipts generated and approved by the licensee having unique identifying numbers.

Section 406.5 is amended to make technical revisions to terminology similar to those described for Section 406.4 above pertaining to the requirements for agency contracts. Substantive requirements are added relating to permissible agent actions when engaging in money transmission transactions. A subdivision specifying the time period within which existing agency contracts must be revised to be in compliance with current regulatory requirements is moved and revised as new section 406.17.

Sections 406.6, 406.9, 406.10 and 406.16 are amended to also make technical revisions to terminology similar to those described for Section 406.4 above and to conform to the other revisions described above.

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

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

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

Regulatory Impact Statement

1. Statutory authority. Sections 649 and 659 of the Banking Law authorizes the Superintendent to adopt such rules and regulations as he or she deems necessary or appropriate to enforce Articles 13-B and 13-C, which regulates the business of money transmission and requires licensing and supervision of money transmitters.

2. Legislative objectives. The Legislature sought when enacting chapters 625 and 677 of the laws of 2004 and chapter 232 of the laws of 2005 to update the statutory provisions of Articles 13-B and 13-C defining money transmission instruments, to define the relationship and manner by which licensed transmitters designate or appointed agents, to prohibit the use of subagents in the business of money transmission, and to generally update and conform technically the provisions of such Articles, both of which regulate the business of money transmission.

3. Needs and benefits. The Department first initiated a draft revision to Part 406 prior to September 11, 2001 for the purpose of increasing regulatory requirements pertaining to the designation of agent and subagents of licensed money transmitters and the subsequent due diligence exercised by licensed money transmitters of the activities of their designated agents and subagents. The policy objective was to lessen the opportunity for persons to use legitimate money transmission channels to engage in money laundering.

The regulatory initiative was accompanied by a legislative program proposal submitted to the Legislature to increase the statutory requirements for the same purposes and the same policy objective though it also addressed other issues. The regulatory initiative was not dependent on successful passage and approval of the legislative proposal. Chapters 625, 677 and 232 essentially comprise the original legislative proposal submitted to the Legislature many years previous, with one notable revision discussed below. However, the current proposed rule reflects changes to the original proposal necessitated by the enactment of the US Patriot Act subsequent to September 11, which caused many of the initial regulatory provisions to be superfluous. It also reflects the input of the regulated industry which reviewed various drafts and made numerous recommendations, many of which were incorporated in the final text of the proposed rule.

Thus, the proposed rule now includes amendments comprising the revised rule and also conforming the provisions of Part 406 to the statutory changes to Articles 13-B and 13-C adopted by Chapters 625, 677 and 232.

Sub-agents. The initial regulatory and legislative proposals sought in particular to appropriately define subagency relationships with licensed transmitters, thus expressly authorizing such relationships and requiring explicit designation of subagents by the licensee. Neither Part 406 nor Article 13-B of the Banking Law expressly authorized use of subagents.

Nonetheless, numerous references heretofore both in statute and regulation gave the appearance that sub-agency relationships were allowed. In addition, in previous years, expressions by members of the Legislature supported subagency relationships as a "fact" of the money transmission business. The Department historically expressed a preference that subagency relationships be prohibited, since the subagent has no direct contract with the licensee and therefore the subagent's background and activities are unknown to the licensee and not subject to its supervision.

Under subagency arrangements, agents enter into agreements with persons, not designated by or known to the licensee, to perform money transmission transactions for the licensee's customers. Subagents may be agents of another money transmitter or they may be persons not designated by any licensed transmitter as an agent. The use of subagents does not necessarily result in money laundering activities, but such arrangements, because they are not under the direct supervision of a licensee, may mean that federal Bank Secrecy Act and other anti-money laundering standards are not observed. Also, consumer protections, such as providing customer transaction receipts, may not be observed.

Industry trade groups representing licensed money transmitters, the National Money Transmitters Association and the Non-Bank Funds Transmitters Group, urged the Department to prohibit the use of subagents for the same reasons as the Department, as noted above. Consequently, in 2004 the Department reverted to its original position and recommended Articles 13-B and 13-C be amended to eliminate any references to subagents and to expressly disallow the use of subagents. The legislation which became Chapters 625 and 232 repealed any references to subagent or subagents and expressly disallowed the use of subagents. The amendments to Part 406 conform the regulations to these statutory changes.

Electronic Traveler's Checks and Check Denomination. A second basic objective of the legislative proposal, at the request of the industry, was to update the statutory definitions and requirements pertaining to a traveler's check instrument to reflect technological developments. Chapter 625

added a definition of an electronic traveler's check and also repealed provisions which require that checks be issued in denominations of \$10 if under \$100 and in \$100 denominations if in excess of \$100. With respect to an electronic traveler's check, which essentially operates as a "smart card" with stored value, a PIN number is assigned and used in place of drawer's signature and countersignature on a paper traveler's check. The proposed rule conforms Part 406 to the amendments to Articles 13-B and 13-C in this regard.

Licensee Due Diligence of Agents. A third basic objective of the proposed rule, which embodies the objective of the initial rule making activity by the Department, is to enhance the due diligence that licensees must exercise over their agents and increase regulatory control of agent activities. The provisions that achieve this objective include, but are not limited to:

- Requiring licensees to ensure compliance of their agents with the standards established by the federal Bank Secrecy Act (BSA), and related amendments, and the regulations of the federal Office of Foreign Asset Control (OFAC), thus, establishing a state requirement for such compliance;
- Requiring licensees to develop policies and procedures that will provide for general fitness, character and background checks on persons or entities before contracting with such to be agents, in order to insure the agents' businesses will be operated efficiently, honestly, equitably, etc. (The rule makes explicit the current standards that a licensee's failure to properly execute these requirements may subject such licensee to the enforcement proceedings, including a hearing and potential penalties.);
- Requiring agents to only use customer receipts that have been generated and approved by the licensee and which possess a unique identifying number; and
- Requiring agents to maintain a separate bank account or a sub-account of an account maintained by the licensee for deposit of funds related to activities on behalf of the licensee and not to commingle in such account funds derived from any other activities of the agents.

Consumer Complaint Number. Another objective of the regulatory proposal is to increase consumer protections. The proposed rule making requires that agents post in their places of business, in addition to the information presently required, a 1-800 number for the Banking Department that customers may use for unresolved consumer complaints. This requirement can be met by adding a sticker with the additional information to existing signs which meet the present informational requirements.

4. Costs. The proposed rule would cause an increase in costs for licensees to the extent they would need to increase or expand their due diligence standards to initially designate or appoint agents and continuously supervised their activities thereafter in conformance with applicable federal and state requirements. Many licensees' due diligence programs for such purposes may already be sufficient. No specific cost of compliance can be estimated. Licensees will need to issue new receipt books to their agents, if such books do not presently provide for numbered receipts. Similarly, agents will be required to modify their signage if such signs do not presently contain the hot-line telephone number of the Department. Additional costs, if any, to agents cannot be estimated.

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

6. Paperwork. The proposed rule imposes no additional paperwork or recordkeeping requirements upon businesses, other than licensed transmitters, or units of local government. It is presumed the proposed rule will cause additional paperwork or recordkeeping for some licensed entities. However, because of existing BSA, OFAC and Part 406 requirements pertaining to money transmission activities, licensed transmitters already are subject to extensive recordkeeping and reporting obligations.

Licensees will need to issue new receipt books to their agents, if such books do not presently provide for numbered receipts. Similarly, agents will be required to modify their signage if such signs do not presently contain the hot-line telephone number of the Department.

Licensees will be required to maintain documentation concerning their policies and procedures for exercising due diligence concerning contracting with agents, as well as documentation concerning the implementation of such policies, for a period of at least six years. An amendment to the regulation makes it clear that a licensee's books and records, including such documentation, may be maintained in electronic form.

7. Duplication. None.

8. Alternatives. There is one alternative to the additional regulatory requirements imposed upon licensed transmitters that may lessen but not

totally remove the proposed regulatory obligations. The State could directly regulate agents of money transmitters by licensing or registering such persons or entities, and this approach has been recommended from time to time especially by law enforcement authorities. However, the population of agents is estimated to range between twenty and thirty thousand in this state, and direct regulation of the agent universe would impose a significant administrative burden upon the Department. Further, licensed transmitters would remain subject to extensive supervision since licensees are the entities legally engaging in money transmission, are responsible for the acts of their designated agents, and are supervising the transaction activities of the their agents.

At the inception of this rule making, the Department proposed to fingerprint and run criminal background checks of licensees' agents and prospective agents as a condition of entering into and maintaining an agency relationship. This approach was viewed as an intermediate position between direct regulation of the agent universe by the State and insuring a certain level of State review of agent qualifications. Conviction of certain criminal activities would have been a basis for disqualification as an agent. The fingerprinting responsibility would have been the licensees', as the Department does not have the capability to directly provide this service. The industry did not support this aspect of the proposal due to the additional cost it would impose, but more importantly the practical realities implementation of the proposal would face. The agent universe predominantly comprises travel agencies, supermarkets, pharmacies and similar large retail chain stores. These entities legally are the contractual agent party and not the individuals that actually conduct the transmission transactions. Similar neither the corporate management nor the store management conduct such transactions. Multiple employees may be designated by the agent entities to conduct transactions in any store setting. In addition, these employees likely represent a fluid population compared to the management. In order for this proposal to be meaningful, the Department explored whether this population of agent employees should be subject to the criminal background check. However, both the numbers of such persons who would need to be fingerprinted and the occurrence of such fingerprinting could extend to thousands of persons, well beyond the estimated population of agents of twenty to forty thousand. The transmitters present evidence that they maintain extensive due diligence and training programs which such agents were required to follow to insure proper supervision of and performance by the employees who actually conduct the transmission transaction. Further, the licensees conduct real time supervision of transactions as they occur and any indication that inappropriate transactions are occurring in these settings will lead to intensive review and modification of the agent's due diligence program, training and procedures. Because of this reality, the Department withdrew its proposed requirement.

It is noted that supervision of non-bank money transmission activities by all states engaged in such regulation employs the same model of transmitter licensing, with supervision of the agent population the responsibility of the licensee as a condition of maintain licensing status.

9. Federal standards. There are no direct federal supervisory standards that pertain to money transmission that is performed by entities other than federal banking institutions. As noted above, money transmitters are subject to federal anti-money laundering standards pursuant to the federal Bank Secrecy Act (31 U.S.C. 5311, *et seq.*) and the implementing regulations (31 CFR Part 103.28) and the requirements of the Office of Foreign Asset Control Regulations (31 CFR Part 500). These standards and requirements impose at least certain reporting requirements upon licensed entities, and failure to comply intentionally or unintentionally may result in federal criminal or civil enforcement of those standards and requirements. If a licensee meets the Department's supervisory standards, such person or entity should not be in violation of any federal standards or requirements relating thereto.

As a result of the US Patriot Act, which amended the BSA, certain money services business that include money transmitters are required to be registered with the federal Financial Coordination Enforcement Network (FinCEN). However, FinCEN provides no direct supervisory oversight of registered MSBs and only engages in investigative and enforcement activities.

10. Compliance schedule. The proposed rule making will become effective 90 days after the date of final adoption.

A licensee whose agency contracts do not conform to the regulation will be required to amend such contracts prior to the effective date. Agency contracts which provide that, notwithstanding any other terms of the contract, agents shall comply with the Banking Law and the Department's regulations may not require amendment.

As a supervisory matter, however, the Department expects that all licensees will have effective procedures to ensure that agents receive timely notice of changes in the law and regulations that affect their activities, as well as effective procedures to ensure that the activities of such agents conform to such changes. A licensee need not, however, require that its agents provide it with a signed writing acknowledging each change.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed rule will apply to licensed money transmitters and agents of such transmitters, and any person or entity operating in a subagent capacity. There should be no effect upon consumers other than in situations where consumers have been transmitting funds using a person or entity that was operating as a subagent. It is almost a certainty an agent exists in the vicinity of such consumers to enable funds to be transmitted to a particular country.

2. Compliance requirements: Licensed money transmitters will need to review their due diligence programs to ensure they conduct sufficient background checks of their designate agents-to-be and also appropriately supervise their subsequent activities to determine if they are using sub-agents to conduct transmission business for the licensee. Additionally, licensees will need to issue new receipt books to their agents, if such books do not presently provide for numbered receipts. Similarly, agents will be required to modify their signage if such signs do not presently contain the hot line telephone number of the Department. This requirement can be met by adding a sticker with the additional information to existing signs which meet the present informational requirements.

Agents will be required to maintain funds received in separate bank account, if they are not doing so already and if the licensees do not provide sub-accounts of their accounts for this purpose. It is unlikely this will have a significant impact upon the agent universe as a whole due to the current supervisory policy that transmission funds not be co-mingled with the funds of other agent business activities. Further, many licensees have instituted a policy and procedures to daily "sweep" electronically the accounts of their agents to collect the funds received for transmission transactions and this would be a disincentive for an agent to use a "regular" business account for such purposes.

There are no compliance requirements applicable to businesses other than money transmitters and agents or to any unit of government.

3. Professional services: It may be necessary that licensed money transmitters expand either internally, or by contract with third-party vendors, professional services to conduct the character and financial background investigations of prospective agents to be in compliance with the proposed rule.

4. Compliance costs: Any additional compliance costs would be borne by the licensed money transmitters and to the extent such costs increase for any transmitter, it will be directly related to the need to expand or improve the due diligence program for recruiting agents and conducting on-going supervision of their transmission transactions.

5. Economic and technological feasibility: The proposed rule should impose no adverse economic or technological burden on licensed money transmitters. Licensees generally have sophisticated automated electronic computer operations to track agent transactions in real time. Additional capabilities may be required to conduct satisfactorily the necessary background and character investigations of prospective agents.

6. Minimizing adverse economic impact: As noted in the Regulatory Impact Statement, certain licensees may experience increased costs if they must modify and expand their supervisory due diligence programs applicable to their agents. However, failure to comply with BSA and OFAC standards and requirements may prove to be exceeding expensive for regulated entities, and such costs may far out weigh any additional costs associated with the proposed rule.

There are approximately 28,000 agents of licensed money transmitters. The rule making should have no or only minimal economic impact upon agents. Persons or entities operating in a subagency capacity will lose income to the extent they cannot perform money transmission activities in that capacity. However, agents and subagents almost without exception are engaging in money transmission activities only as one aspect or their business or economic activities. Agents of licensees that serve specific ethnic communities and transmit funds to specific geographical areas may use "sub-agents" who essentially are "runners" for an agent and engage in no other business activity. However, it is precisely this type of arrangement which causes violations of the Bank Secrecy Act and anti-money laundering statutes, and promotes criminal activity, because the true makers of the transactions are unknown to the agent and the licensees. On the whole, however, agents and subagents predominantly comprise travel agencies, groceries, convenience stores, supermarkets, pharmacies, and newsstands.

7. Small business participation and local government participation: The trade associations representing small and large money transmitters, respectively, the National Money Transmitters Association and the Non-Bank Funds Transmitters Group, met with Department staff on more than one occasion in the development of the regulations. These meetings included owner licensees and senior staff of the large transmitter licensees. The industry reviewed various drafts of the regulatory provisions that pertain to the due diligence standards applicable to agents and made numerous recommendations that were incorporated in the text. The provisions updating the definition of a traveler's check and the denomination of such checks were recommended by the industry trade organizations. The provisions relating to repeal of references to subagents and prohibiting the use of subagents were also included upon the recommendation of the industry. The final text of the proposed rule has not been reviewed by the industry.

Since the proposed rule has no effect upon local governments, no input or review was necessitated.

Rural Area Flexibility Analysis

The Department has determined this rule will have no appreciable effect upon the operations of licensed money transmitters or their agents located in rural areas. It is highly likely there are no licensed transmitters located in rural areas of the State. Transmitters which serve specific types of ethnic communities that transmit funds to particular foreign nations are located in metropolitan areas of the State as are their agents. Large corporate money transmitters may well be represented in rural areas through their agents. Such agents would be supermarkets, travel agents, convenience stores, pharmacies, etc. To the extent consumers engage in money transmission transactions in rural areas through such agents, this rule will have no effect upon such transactions.

Licensees, if any in rural areas, will need to issue new receipt books to their agents, if such books do not presently provide for numbered receipts. Similarly, agents will be required to modify their signage if such signs do not presently contain the hot-line telephone number of the Department. This requirement can be met by adding a sticker with the additional information to existing signs which meet the present informational requirements.

Job Impact Statement

There are 72 money transmitters licensed by the Banking Department. These businesses range in size from corporations having international operations to small domestic transmitters. The dollar volume of New York transactions per transmitter, as of December 31, 2005, ranges in excess of \$17 billion to less than \$274,000 per year. It is estimated the 20-30,000 agents serve these licensed transmitters. The agents can range from large corporations to small sole proprietorships. It is difficult to determine the precise number of agents because agents many times represent more than one transmitter. Similarly, the subagent population cannot be easily estimated. Licensed transmitters have stated to the Department that subagents are not used. This is difficult to corroborate with any certainty because it is difficult for a transmitter to determine if an agent is doing business through a subagent, since the transmitter neither appoints or designates a subagent and obviously cannot supervise the actions of the subagent. An agent actually executes the money transmission transaction that is undertaken by a subagent with the customer.

As indicated in the regulatory flexibility analysis, this rule will have an effect upon any person or entity operating in a subagency capacity to a licensed transmitter. It is not likely, however, that prohibiting the use of subagents will result in any loss of jobs, since anyone acting in an agency capacity performs money transmission activities only as one aspect of their business activities. Thus, the only effect may be loss of income, but this is likely to be negligible relative to the total business income of such persons or entities.

This proposal will have not have a job impact upon licensed transmitters and their designate or appointed agents.

Office of Children and Family Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical Examinations for Prospective Adoptive and Foster Families

I.D. No. CFS-52-06-00011-P

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

Proposed action: This is a consensus rule making to amend sections 421.16 and 443.2 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 372-b(3)

Subject: Medical examinations for prospective adoptive and foster families.

Purpose: To permit medical examinations to be conducted and medical reports required for certification or approval of a foster parent or adoptive parent to be prepared by Nurse Practitioners, Physician Assistants, and other qualified health care practitioners, in addition to a physician.

Text of proposed rule: Paragraph (2) of subdivision (c) of section 421.16 of Title 18 NYCRR is amended to read as follows:

(2) A report of a physical examination conducted not more than one year preceding the date of the adoption application and a written statement from a physician, *physician assistant, nurse practitioner or other licensed and qualified health care practitioner as appropriate*, regarding the family's general health, the absence of communicable disease, infection, or illness or any physical condition(s) which might affect the proper care of an adopted child, must be filed with the agency. This examination must include a [Mantoux skin test for tuberculosis] *tuberculosis screening and additional related tests as deemed necessary within the last 12 months*; an additional report of chest X-rays is required where a physician determines that such X-rays are necessary to rule out the presence of current diseases. If the adoptive applicant is or has been a foster parent, and the agency which certified, licensed or approved the foster parent has a completed medical report on the foster family in its records, the foster family medical report will satisfy this requirement, if the medical report was completed within the past year.

Subparagraph (i) of paragraph (16) of section 443.2(b) of Title 18 NYCRR is amended to read as follows:

(i) a written statement from a physician, *physician assistant, nurse practitioner or other licensed and qualified health care practitioner as appropriate*, regarding the foster family's general health, the absence of communicable disease, infection or illness or any physical conditions which might affect the proper care of a foster child; and

Subparagraph (ii) of paragraph (16) of section 443.2(b) is amended to read as follows:

(ii) the result of a [Mantoux skin test] *tuberculosis screening and additional related tests as deemed necessary within the last 12 months* and an additional report of chest X-rays where a physician, *physician assistant, nurse practitioner or other licensed and qualified health care practitioner as appropriate*, determines that such X-rays are necessary to rule out the presence of current diseases;

Subparagraph (ii) of paragraph (1) of section 443.2(c) of Title 18 NYCRR is amended to read as follows:

(ii) Health. Each member of the household of the foster family must be in good physical and mental health and free from communicable diseases. However, physical handicaps or illness of foster parents or members of their household must be a consideration only as they affect the ability to provide adequate care to foster children or may affect an individual child's adjustment to the foster family. Cases must be evaluated on an individual basis with assistance of a medical consultant when indicated. A written report from a physician, *physician assistant, nurse practitioner or other licensed and qualified health care practitioner as appropriate*, on the health of a family, including a complete physical examination of the applicant, must be filed with the agency initially and biennially thereafter. Additional medical reports must be furnished upon the request of either the

agency worker or the foster parent. Such reports must conform to the standards set forth in this Part.

Text of proposed 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

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

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

Consensus Rule Making Determination

The Office of Children and Family Services (OCFS) is filing the attached rule making proposal as a consensus rule. OCFS has considered the subject matter of the rule and its potential effect on regulated parties, and has concluded that the proposed amendment is non-controversial. This proposal would amend 18 NYCRR 421.16 and 443.2 to permit Nurse Practitioners and Physician Assistants, along with other qualified health care practitioners, to conduct physical examinations for prospective adoptive parents and foster families and prepare medical reports for inclusion as part of the home study for certification or approval of a foster parent or the adoption study for approval of an adoptive parent. Current OCFS regulations only authorize such examinations and reports from physicians. The existing regulations pre-date the widespread use of para-professionals for such duties in many, if not most, medical practices and clinics. As a result, OCFS reasonably believes that no party is likely to object to the adoption of the proposed rule as written.

Nurse Practitioners, Physician Assistants and other qualified health care practitioners practice under a licensed physician's supervision and oversight, and must practice only within the supervising physician's area(s) of practice or specialty. New York State Education Law (EDL) Title 8 (§§ 6500 *et seq.*), defines the scope of practice of any health care professional. EDL §§ 6902(3) and 6542 and permit Nurse Practitioners or Physician Assistants to perform "medical services" or "medical diagnoses", which include physical examinations, while limiting specialized matters to those others to whom such functions are "specifically delegated", such as optometrist and chiropractors. Under current law, Nurse Practitioners and Physician Assistants are authorized to conduct physical examinations of patients, order tests, prescribe drugs, and, when appropriate, refer patients to other health care providers. Amending the regulations to recognize the change of medical practice will benefit potential adoptive and foster parents because, in many practices and clinics, the required physical examinations are only performed by para-professionals. Due to these outdated OCFS regulatory requirements, medical reports submitted by potential foster and adoptive parents have been rejected and the foster and adoptive parent forced to undergo an additional examination by a physician, often at additional cost uncovered by insurance.

While the proposal does not attempt to define "other qualified health care practitioner", it is intended to describe an individual employed within a medical practice who, pursuant to New York State medical licensing standards and law, is permitted to perform medical examinations on patients and provide other medical services as is contemplated by these regulations.

It is common practice that Nurse Practitioners and Physician Assistants perform medical examinations necessary for a variety of purposes. These amendments conform outdated OCFS requirements to current statutory authority. OCFS anticipates that it is unlikely that any person or entity would object to this proposal to permit Nurse Practitioners, Physician Assistants, or other qualified practitioners to conduct medical examinations for purposes of approval or certification of foster or adoptive parents. Based on the foregoing, OCFS has concluded that the proposed rule should be published as consensus proposal, as no party is likely to object to the rule as proposed.

Job Impact Statement

The amendments being proposed modify the requirements regarding medical examinations and medical reports to allow physician assistants and registered nurses to perform physical examinations and issue necessary reports regarding prospective adoptive parents and foster parent for inclusion in a home study for certification or approval of a foster parent and an adoption study for approval as an adoptive parent. The rule will not affect the number of staff that social services districts or authorized agencies must maintain or staff employed by a medical practice or clinic. The rule does not create a new service or program. Based on the foregoing, the proposed regulations will have no impact on jobs or employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mother/Baby Facility

I.D. No. CFS-52-06-00012-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 442.25(a) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 462(1)

Subject: Regulatory standards for the operation of a mother/baby facility.

Purpose: To grant to the Office of Children and Family Services the authority to grant to authorized agencies an exception to the regulatory standards for the operation of mother/baby facilities in accordance with 18 NYCRR 442.17. In order for an authorized agency to receive an exception, the authorized agency must make a written request to the Office of Children and Family Services. The authorized agency must demonstrate that the residential program is in substantial compliance with the regulations of the Office of Children and Family Services in regard to the operation of a child care institution, with the exception of the standards that are the subject to the request for the exception. The authorized agency must also demonstrate that the granting of the exception will not create any hazardous conditions which could impact the health or safety of children in the residential program. The Office of Children and Family Services may impose on the requesting authorized agency alternative requirements the Office of Children and Family Services considers necessary for the protection of the health or safety of the children.

Text of proposed rule: Subdivision (a) of section 442.25 is amended to read as follows:

(a) The [department] *Office of Children and Family Services* may grant an exception to compliance with one or more of the provisions of section 442.4, 442.5, [or] 442.15 and 442.17 of this Part upon finding that compliance will result in undue hardship upon an institution. The authorized agency applying for the exception must demonstrate that, aside from the exception, the facility is in substantial compliance with the provisions of this Part and that granting the exception will not create any hazardous conditions which could impair the health or safety of the children. An institution must comply with any alternative requirements the [department] *Office of Children and Family Services* may consider necessary for the protection of the health or safety of the children. All exceptions must be requested by the authorized agency in writing and approved by the [department] *Office of Children and Family Services* in writing.

Text of proposed 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

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

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

Consensus Rule Making Determination

The Office of Children and Family Services (OCFS) is filing the attached rule making proposal as a consensus rule. OCFS has considered the subject matter of the rule and its potential effect on regulated parties, and has concluded that the proposed amendment is non-controversial. The proposed rule would authorize OCFS to grant exceptions to the regulatory standards for a mother/baby facility, contingent upon OCFS determining that the granting of an exception would not create any hazardous condition which could impact the health or safety of children in the residential program. The underlying regulatory standards are not changed. As a result, OCFS reasonably believes that no party is likely to object to the adoption of the proposed rule as written.

The proposal would amend 18 NYCRR 442.25(a) to permit OCFS to grant to authorized agencies an exception to the regulatory standards set forth in 18 NYCRR 442.17 for the operation of a mother/baby facility, contingent upon the facility being in substantial compliance with applicable regulatory provisions and provided that granting the exception will not create any hazardous conditions which could impair the health or safety of the children. The authorized agency requesting an exception must comply with any alternative requirements OCFS may consider necessary for the protection of the health or safety of the children in the residential program. The proposed regulation merely authorizes OCFS to grant exceptions specifically applicable to mother/baby facilities. The underlying regulatory

standards are not changed, nor are exceptions mandated. The addition of the exception authority to the regulatory standards for mother/baby facilities will permit greater flexibility to the opening and operation of such programs, while maintaining the health and safety of the residents. Based on the forgoing, OCFs has concluded that the proposed rule should be published as consensus proposal, as no party is likely to object to the rule as proposed.

Job Impact Statement

A full job statement has not been prepared for the regulation amending 18 NYCRR 442.25 to authorize the Office of Children and Family Services (OCFS) to grant an exception to the regulatory standards for the operation of a mother and baby facility. The regulation will not have a substantial adverse impact on jobs or employment opportunities and will not result in the loss of any jobs. The regulation will not impact any current programs. OCFS regulation 18 NYCRR 442.17 does not specify staffing/ resident ratios. In fact, where an exception to one of the other criteria for the operation of a mother and baby facility is requested, it is possible that OCFS may require enhanced staffing as a condition to approve the request for the exceptions.

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00010-A
Filing No. 1490
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Department of Labor.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00010-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00011-A
Filing No. 1497
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Transportation.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00011-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00012-A
Filing No. 1489
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00012-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00013-A
Filing No. 1491
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Labor.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00013-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00015-A
Filing No. 1496
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Family Assistance.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00015-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-41-06-00016-A**Filing No.** 1493**Filing date:** Dec. 11, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To classify positions in the non-competitive class in the Executive Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-41-06-00016-P, Issue of October 11, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-41-06-00017-A**Filing No.** 1492**Filing date:** Dec. 11, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To classify positions in the non-competitive class in the Department of Mental Hygiene.**Text was published in the notice of proposed rule making, I.D. No.** CVS-41-06-00017-P, Issue of October 11, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-41-06-00018-A**Filing No.** 1488**Filing date:** Dec. 11, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete a position from the non-competitive class in the Department of Health.**Text was published in the notice of proposed rule making, I.D. No.** CVS-41-06-00018-P, Issue of October 11, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-41-06-00019-A**Filing No.** 1498**Filing date:** Dec. 11, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete a position from the non-competitive class in Westchester County.**Text was published in the notice of proposed rule making, I.D. No.** CVS-41-06-00019-P, Issue of October 11, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-41-06-00020-A**Filing No.** 1486**Filing date:** Dec. 11, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete a position from and classify a position in the non-competitive class in the Department of Family Assistance.**Text was published in the notice of proposed rule making, I.D. No.** CVS-41-06-00020-P, Issue of October 11, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification**I.D. No.** CVS-41-06-00021-A**Filing No.** 1487**Filing date:** Dec. 11, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional classification.**Purpose:** To delete a position from and classify a position in the non-competitive class in the Department of Environmental Conservation.**Text was published in the notice of proposed rule making, I.D. No.** CVS-41-06-00021-P, Issue of October 11, 2006.**Final rule compared with proposed rule:** No changes.**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00022-A
Filing No. 1495
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify positions in the non-competitive class in the Department of Mental Hygiene and the State University of New York.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00022-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-41-06-00023-A
Filing No. 1494
Filing date: Dec. 11, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete positions from the exempt and non-competitive classes in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-41-06-00023-P, Issue of October 11, 2006.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

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

Specific reasons underlying the finding of necessity: Article 165 of the Education Law establishes three new licensed professions in New York State: clinical laboratory technologist, cytotechnologist, and clinical laboratory technician. This statute requires individuals who practice these professions to be licensed or under application for a license under the special "grandparenting" requirements in order to practice these professions in New York State on or after September 1, 2006.

Based on recent estimates, approximately 20,000 persons are employed in these three professional areas and, as of September 1, 2006, require licensure or submission of an application under the grandparenting provisions in order to continue to practice these professions. As of November 8, 2006, in excess of 15,000 applications have been received. The State Education Department expects that most current practitioners will be licensed under the grandparenting provisions. These clinical laboratory technology practitioners are employed in the State's clinical laboratories to perform tests and procedures needed for the diagnosis and treatment of illness and disease. They perform important functions that protect the general welfare, health, and safety of residents of New York State.

The proposed regulation implements the requirements of Article 165 of the Education Law by establishing education and examination standards for licensure or certification, special requirements for licensure or certification for applicants already practicing in these field or who have related education and/or experience (grandparenting applicants), and requirements for limited permits in the three professions. It also sets forth interim standards for meeting the educational requirement for licensure or certification in these fields, consistent with statutory requirements. These requirements must be in place in order for the State Education Department to license individuals to practice these new professions. The interim standards are expected to be in place for a transition period of five years while educational institutions make required changes in their educational programs.

The State Education Department originally planned to adopt these regulations in July 2006, but in response to public comment, the Department needed to make substantial changes to the regulations. These public comments resulted in the Board of Regents adopting a revised rule through emergency action, effective August 1, 2006, at its July 2006 meeting. Further public comment has led to continued discussions concerning the appropriate requirements for educational programs seeking registration by the Department as licensure qualifying programs, requiring further substantial revisions to the regulations. This resulted in the Board of Regents adopting a revised rule in a second emergency action, effective October 30, 2006, at its October 2006 Regents meeting. This emergency rule is effective for 60 days until December 25, 2006. The public comment period for this revised rule making ends on December 15, 2006, after the Regents meet in December. Therefore, the earliest Regents meeting at which the revised rule may be adopted as a permanent rule is the January meeting. A third emergency action is necessary to ensure that the rule does not expire before the January 2007 Regents meeting, when it is scheduled for adoption as a permanent rule.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare to ensure that the emergency rule remains continuously in effect until the rule may be adopted as a permanent rule and that procedures and standards are in place to continue to license clinical laboratory practitioners, thereby enabling such practitioners to meet the health care needs of residents of New York State.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its January 2007 meeting.

Subject: Licensure as a clinical laboratory technologist and as a cytotechnologist and certification as a clinical laboratory technician.

Purpose: To implement the provisions of art. 165 of the Education Law by establishing requirements for licensure as a clinical laboratory technologist for cytotechnologist and or certification as a clinical laboratory technician, requirements for limited permits in these fields, and standards for registered college preparation programs for these professions.

Substance of emergency rule: The Commissioner of Education proposes to promulgate regulations, relating to licensure as a clinical laboratory technologist and as a cytotechnologist and certification as a clinical laboratory technician. The following is a summary of the substance of the regulations.

Subpart 79-13 of the Regulations of the Commissioner of Education is added to establish requirements for licensure as clinical laboratory technol-

Education Department

**EMERGENCY
 RULE MAKING**

Licensure as a Clinical Laboratory Technologist

I.D. No. EDU-21-06-00009-E
Filing No. 1510
Filing date: Dec. 12, 2006
Effective date: Dec. 26, 2006

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

Action taken: Addition of Subparts 79-13, 79-14 and 79-15 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 212(3); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a), and (4)(a); 6508(1); 8605(1)(b) and (c), and (2)(b) and (c); 8606(2) and (3); 8607(1) and (2); and 8608 (not subdivided)

ogists. Section 79-13.1 establishes two alternative professional education requirements available to applicants who apply for licensure prior to September 1, 2011. The applicant must also certify to the department that he or she has reviewed the regulations of the New York State Department of Health and the U.S. Department of Health and Human Services, relating to practice, as directed by the department.

Section 79-13.2 establishes examination requirements for licensure as a clinical laboratory technologist.

Section 79-13.3 establishes requirements for limited permits to practice as a clinical laboratory technologist. The applicant must: (1) file an application for a limited permit with the department and pay the initial licensure and registration fee, and a limited permit fee of fifty dollars; (2) have met all requirements for licensure as a clinical laboratory technologist, except the examination requirement; (3) submit adequate documentation that the applicant will be under the general supervision of the director of a clinical laboratory, as prescribed. The limited permit has a one-year duration and may be renewed once for good cause.

Section 79-13.4 establishes special provisions that certain applicants may meet to be licensed as a clinical laboratory technologist. The applicant must apply for licensure under this section by September 1, 2007, and meet the alternative requirements for licensure under this section by September 1, 2008, unless the particular requirement prescribes an earlier date for completion, in which case the requirement must be completed by that earlier date. The applicant must: (1) file the application for licensure with the department and pay the prescribed fees, all by September 1, 2007; (2) be of good moral character as determined by the department; (3) be at least 18 years of age; and (4) meet one of six requirements.

The regulation also provides that, in accordance with subdivision (2) of section 8607 of the Education Law, an individual who on or before September 1, 2007 files with the department an application for licensure as a clinical laboratory technologist under this section and certifies to a good faith belief that he or she has or will have met the requirements for licensure under this section by the prescribed completion dates which shall in no case be later than September 1, 2008, shall be deemed qualified to practice as a clinical laboratory technologist from the date of filing the application with the department until such time as the department has acted upon such application.

Subpart 79-14.1 of the Regulations of the Commissioner of Education is added to establish requirements for licensure as cytotechnologists. Section 79-14.1 establishes two alternative professional education requirements for licensure available to applicants who apply for licensure prior to September 1, 2011. In addition, the applicant must certify to the department that he or she has reviewed the regulations of the New York State Department of Health and the U.S. Department of Health and Human Services, relating to practice as directed by the department.

Section 79-14.2 establishes examination requirements for licensure as a cytotechnologist.

Section 79-14.3 establishes requirements for limited permits to practice as a cytotechnologist. The applicant must: (1) file an application for a limited permit with the department and pay the initial licensure and registration fee, and a limited permit fee of fifty dollars; (2) have met all requirements for licensure as a cytotechnologist, except the examination requirement; and (3) submit adequate documentation that the applicant will be under the general supervision of the director of a clinical laboratory, as prescribed. The limited permit has a one-year duration and may be renewed once for good cause.

Section 79-14.4 establishes special provisions that certain applicants may meet to be licensed as a cytotechnologist. The applicant must apply for licensure under this section by September 1, 2007, and meet the alternative requirements for licensure under this section by September 1, 2008, unless the particular requirement prescribes an earlier date for completion, in which case the requirement must be completed by that earlier date. The applicant must: (1) file the application for licensure with the department and pay the prescribed fees, all by September 1, 2007; (2) be of good moral character as determined by the department; (3) be at least 18 years of age; and (4) meet one of two requirements.

The regulation also provides that, in accordance with subdivision (2) of section 8607 of the Education Law, an individual who on or before September 1, 2007 files with the department an application for licensure as a cytotechnologist under this section and certifies to a good faith belief that he or she has or will have met the requirements for licensure under this section by the prescribed completion dates which shall in no case be later than September 1, 2008, shall be deemed qualified to practice as a cytotechnologist from the date of filing the application with the department until such time as the department has acted upon such application.

Subpart 79-15 of the Regulations of the Commissioner of Education is added to establish requirements for certification as clinical laboratory technicians. Section 79-15.1 establishes the professional education requirements for certification for applicants who apply for certification prior to September 1, 2011. The applicant must also certify to the department that he or she has reviewed the regulations of the New York State Department of Health and the U.S. Department of Health and Human Services, relating to practice as directed by the department.

Section 79-15.2 establishes examination requirements for certification as a clinical laboratory technician.

Section 79-15.3 establishes requirements for limited permits to practice as a clinical laboratory technician. The applicant must: (1) file an application for a limited permit with the department and pay the initial certification and registration fee, and a limited permit fee of fifty dollars; (2) have met all requirements for certification as a clinical laboratory technician, except the examination requirement; (3) submit adequate documentation that the applicant will be under the general supervision of the director of a clinical laboratory, as prescribed. The limited permit has a one-year duration and may be renewed once for good cause.

Section 79-15.4 establishes special provisions that certain applicants may meet to be certified as a clinical laboratory technician. The applicant must apply for certification under this section by September 1, 2007, and meet the requirements for certification under this section by September 1, 2008, unless the particular requirement in this section prescribes an earlier date, in which case the requirement must be completed by that earlier date. The applicant must (1) file the application for certification with the department and pay the prescribed fees, all by September 1, 2007; (2) be of good moral character as determined by the department; (3) be at least 18 years of age; and (4) meet one of three requirements.

The regulation also provides that, in accordance with subdivision (2) of section 8607 of the Education Law, an individual who on or before September 1, 2007 files with the department an application for certification as a clinical laboratory technician under this section and certifies to a good faith belief that he or she has or will have met the requirements for certification under this section by the prescribed completion dates which shall in no case be later than September 1, 2008, shall be deemed qualified to practice as a clinical laboratory technician from the date of filing the application with the department until such time as the department has acted upon such application.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-21-06-00009-P, Issue of May 24, 2006. The emergency rule will expire February 9, 2007.

Revised rule making(s) were previously published in the State Register on August 16, 2006 and November 15, 2006.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department to determine and set fees for certification and permits, for which fees are not set or otherwise provided.

Section 6501 of the Education Law provides that, to qualify for admission to a profession, an applicant must meet requirements prescribed in the Article of the Education Law for the particular profession.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Paragraph (a) of subdivision (3) of section 6507 of the Education Law provides that the State Education Department shall establish standards for pre-professional and professional education, experience, and licensing examinations, as required to implement the Article for each profession.

Paragraph (a) of subdivision (4) of section 6507 of the Education Law authorizes the State Education Department to establish standards for and

register or approve educational programs designed for the purpose of providing educational preparation for licensure.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

Paragraphs (b) and (c) of subdivision (1) of section 8605 of the Education Law authorizes the State Education Department to establish implementing standards for the education and examination that must be successfully completed to qualify for a license as a clinical laboratory technologist.

Paragraphs (b) and (c) of subdivision (2) of section 8605 of the Education Law authorizes the State Education Department to establish implementing standards for the education and examination that must be successfully completed to qualify for a license as a cytotechnologist.

Subdivisions (2) and (3) of section 8606 of the Education Law authorizes the State Education Department to establish implementing standards for the education and examination that must be successfully completed to qualify for certification as a clinical laboratory technician.

Subdivision (1) of section 8607 of the Education Law establishes special provisions for licensure as a clinical laboratory technologist and cytotechnologist and certification as a clinical laboratory technician.

Subdivision (2) of section 8607 of the Education Law establishes a time-frame for applying special provisions for licensure and certification and a phase-in period for those applying under these provisions.

Section 8608 of the Education Law authorizes the State Education Department to establish regulations for the issuance of limited permits that allow an individual to practice as clinical laboratory technologists, cytotechnologists, and clinical laboratory technicians.

2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of the aforementioned statute in that it, as directed by statute, establishes standards implementing education and examination requirements and special provisions for licensure as a clinical laboratory technologist and as a cytotechnologist and certification as a clinical laboratory technician under Article 165 of the Education Law.

3. NEEDS AND BENEFITS:

The purpose of the proposed regulation is to implement the provisions of Article 165 of the Education Law by establishing requirements for licensure as a clinical laboratory technologist or cytotechnologist and for certification as a clinical laboratory technician, requirements for limited permits in these fields, and standards for registered college preparation programs for these professions.

Chapter 755 of the Laws of 2004 added a new Article 165 to the Education Law. Article 165 provides for the licensing of clinical laboratory technologists and cytotechnologists and the certification of clinical laboratory technicians, and establishes these three professions as practice and title protected, under a State Board for Clinical Laboratory Technology. The proposed regulation is needed to implement Article 165 of the Education Law by establishing specific education and examination requirements that an applicant for licensure or certification must meet.

In addition, in accordance with the requirements of Article 165 of the Education Law, the proposed regulation is needed to set forth standards for registered college programs that lead to licensure as a clinical laboratory technologist and cytotechnologist and certification as a clinical laboratory technician.

The regulation is needed to establish requirements for limited permits to practice each of the three professions in accordance with statute. It also establishes a definition for the general supervision of the limit permit holder by the director of the clinical laboratory, and a fee for the limited permit.

As authorized by statute, the proposed regulation is also needed to implement special licensure and certification requirements for applicants who are already practicing in these fields or have related education and/or experience (grandparenting applicants). This will ease the transition to licensure or certification for these individuals.

4. COSTS:

(a) Costs to State government: The proposed regulation will not impose any additional cost on State government, including the State Education Department, over and above the costs imposed by Article 165 of the Education Law for administering these new professions.

(b) Cost to local government: The proposed promulgation establishes requirements for licensure as a clinical laboratory technologist and cytotechnologist and certification as a clinical laboratory technician. The regulation will not impose additional costs on local government. The regulation will not impose additional costs on licensed clinical laboratories

that are operated by local governments. While the regulation does not directly regulate clinical laboratories, it requires the applicant for the limited permit to document that the level of supervision will meet the regulation's definition of "general supervision" by the clinical director before a limited permit will be issued by the State Education Department. The proposed regulation's standard for general supervision by the director of a licensed clinical laboratory of limited permit holders in the three professions was developed after consultation with Department of Health, and is consistent with the level of supervision that the director already is required to provide such employees by Department of Health regulations. Therefore, the regulation will not impose additional costs on the licensed clinical laboratories that are operated by local governments.

(c) Cost to private regulated parties: The proposed regulation requires an applicant for a limited permit to practice as a clinical laboratory technologist, cytotechnologist, or clinical laboratory technician to pay an application fee of \$50. The proposed regulation will not impose any other costs on regulated parties over and above those imposed by Article 165 of the Education Law. Article 165 establishes licensure and registration fees. Article 165 requires applicants for licensure as a clinical laboratory technologist or cytotechnologist to be educated at the baccalaureate degree level, and applicants for certification as a clinical laboratory technician to be educated at the associate degree level. The proposed regulation simply establishes the content of the coursework, and imposes no additional educational costs beyond those imposed by the statutory requirement. The proposed regulation's standard for general supervision by the director of a licensed clinical laboratory of limited permit holders in the three professions is consistent with the level of supervision that the director already is required to provide such employees by Department of Health regulations. Therefore, the regulation will not impose additional costs on the licensed clinical laboratories operated as private businesses.

(d) Cost to the regulatory agency: As stated above in Costs to State government, the proposed regulation does not impose costs on the State Education Department beyond those imposed by statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed regulation implements the requirements of Article 165 of the Education Law and concerns requirements that individuals must meet to be licensed as clinical laboratory technologists and as cytotechnologists and certified as clinical laboratory technicians. Therefore, the regulation does not regulate local governments, except for one provision. That provision concerns the definition for "general supervision" by the director of a clinical laboratory for holders of limited permits in these professions. Education Law section 8608 requires the Department to define this term. The clinical laboratory may be operated by a local government. While the regulation does not directly regulate the clinical laboratory, it requires the applicant for the limited permit to document that the level of supervision will meet the regulatory requirement before a limited permit will be issued by the State Education Department. The proposed regulation does not impose any other program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed regulation imposes no additional reporting or record-keeping requirements beyond those imposed by Article 165 of the Education Law. In accordance with Article 165, applicants for licensure will be required to submit to the State Education Department evidence of meeting licensure requirements. Colleges and universities seeking registration of preparation programs leading to licensure in the three new professions will be required to submit to the State Education Department evidence of meeting program registration requirements.

7. DUPLICATION:

The proposed regulation does not duplicate other existing State or Federal requirements. There are no State or Federal requirements for the licensure of clinical laboratory technologists, cytotechnologists or clinical laboratory technicians for employment in New York State. The State Education Department consulted with the State Department of Health during the development of this regulation to ensure that the proposed regulations coordinate with Health Department regulations for licensed clinical laboratories. The proposed requirements meet or exceed requirements for the qualifications of clinical laboratory technical personnel, for employment in licensed clinical laboratories, established in the regulations of the Department of Health. Accordingly, individuals licensed or certified under the proposed regulations will meet Health Department requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed regulation and none were considered. The proposed regulation implements statutory requirements.

9. FEDERAL STANDARDS:

There are no Federal standards for the licensure of clinical laboratory technologists, cytotechnologists or clinical laboratory technicians, the subject of the proposed regulation. The education requirements for the licensure or certification in these fields require applicants to certify that they have reviewed the rules and regulations of the U.S. Department of Health and Human Services, relating to practice in these fields, in accordance with written guidance by the State Education Department.

10. COMPLIANCE SCHEDULE:

Applicants for licensure or certification must comply with the regulation on the stated effective date. In accordance with section 8607(2) of the Education Law, the regulation permits a transition period for applicants who apply on or before September 1, 2007 under the special provisions available to individuals who are already practicing in these fields or have specified related education and/or experience (grandparenting applicants). Such applicants who certify to a good faith belief that they will have met the requirements for licensure or certification by the prescribed completion dates, which in no case will be later than September 1, 2008, will be deemed qualified to practice from the date of filing the application with the State Education Department until such time as the Department has acted upon the application.

Regulatory Flexibility Analysis**1. EFFECT OF RULE:**

This proposal implements the provisions of Article 165 of the Education Law by establishing requirements for the licensure of individuals as clinical laboratory technologist or cytotechnologist and certification of individuals as clinical laboratory technicians, and standards for registered college preparation programs leading to licensure in these fields. Such licensed and certified individuals are employed at clinical laboratories licensed and regulated by the New York State Department of Health. Of 3,800 licensed clinical laboratories located in New York State, 586 report that they are small businesses and 183 are operated by local governments, according to the New York State Department of Health.

2. COMPLIANCE REQUIREMENTS:

The regulation establishes education and examination requirements for individuals to be licensed as clinical laboratory technologists or cytotechnologists or certified as clinical laboratory technicians. Therefore, the regulation does not regulate small businesses or local governments, except for one provision. That provision concerns the definition for "general supervision" of limited permit holders in these professions by the director of a clinical laboratory. Education Law section 8608 requires the Department to define this term. While the regulation does not directly regulate the clinical facility, it requires the applicant for the limited permit to document that the level of supervision will meet the regulatory requirement before a limited permit will be issued by the State Education Department.

The regulation requires the director of the clinical laboratory to readily available for consultation with the permit holder, as needed, and to be responsible for the performance and findings of all tests carried out by the permit holder, either by directly overseeing such testing, or by delegating this responsibility to authorized supervisors who are on site within the laboratory, among other requirements.

3. PROFESSIONAL SERVICES:

The proposed regulation will not require licensed clinical laboratories that are classified as small businesses or operated by local governments to hire professional services to comply.

4. COMPLIANCE COSTS:

The regulation will not impose additional costs on licensed clinical laboratories that are small businesses or are operated by local governments. The standard for general supervision by the director of a licensed clinical laboratory of limited permit holders in the three professions was developed after consultation with Department of Health, and is consistent with the level of supervision that the director already is required to provide such employees by Department of Health regulations. Therefore, the regulation will not impose additional costs on the licensed clinical laboratories that are classified as small businesses or operated by local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The standard for general supervision by director's of clinical laboratory of limited permit holders in the three professions will allow licensed clinical laboratories, including those that are small businesses or operated

by local governments, a great deal of flexibility to determine how the limited permit holder will be supervised. The proposed regulatory standards for general supervision by directors of licensed clinical laboratories of limited permit holders in the three professions are consistent with the level of supervision that the director already is required to provide such employees by Department of Health regulations. Because of the flexibility of the proposed standards and the fact that they are consistent with Department of Health requirements, different standards for licensed clinical laboratories that are small businesses or operated by local governments are not appropriate or necessary.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The State Board for Clinical Laboratory Technology and its extended panel, include members who have experience working in clinical laboratories that are classified as small businesses or operated by local governments. Both the Board and its extended panel worked with staff of the State Education Department to develop the proposed regulation. In addition, the State Education Department communicated with directors and other supervisory staff of clinical laboratories, including those that are small businesses or operated by local governments, during the development of the proposed regulation. Staff of the Department met with large groups of individuals who are employed as clinical laboratory technologists, cytotechnologists, and clinical laboratory technicians at clinical laboratories that are small businesses and operated by local governments, among others, to obtain their input during the development of the regulation. The Department also sent the proposed regulation to licensed clinical laboratories across the State, including those that are small businesses and operated by local governments of the State.

Rural Area Flexibility Analysis**1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed regulation will apply statewide to all individuals who apply for licensure as clinical laboratory technologists and cytotechnologists and certification as clinical laboratory technicians (approximately 30,000 individuals), and colleges statewide that seek registration of programs leading to licensure and certification in these fields, including those located in the 44 rural counties of New York State with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

Chapter 755 of the Laws of 2004 added a new Article 165 to the Education Law. Article 165 provides for the licensing of clinical laboratory technologists and cytotechnologists and the certification of clinical laboratory technicians, and establishes these three professions as practice and title protected, under a State Board for Clinical Laboratory Technology. The proposed regulation implements the requirements of Article 165 of the Education Law by establishing specific education and examination standards that an applicant for licensure or certification must meet.

In addition, in accordance with the requirements of Article 165 of the Education Law, the proposed regulation set forth standards for registered college preparatory programs that lead to licensure or certification in these fields.

The proposed regulation establishes requirements for limited permits to practice each of the three professions in accordance with statute. It establishes a definition for general supervision by the director of a clinical laboratory of the limited permit holder, and a fee for the limited permit.

As authorized by statute, the proposed regulation also implements statutory provisions designed to permit applicants who are already practicing in these fields or have related education and/or experience to be licensed or certified under special provisions (grandparenting applicants).

The proposed regulation does not impose reporting requirements over and above that required by statute. In accordance with statutory requirements, applicants for licensure or certification in these three professions will have to submit to the State Education Department evidence of meeting licensure or certification requirements. Colleges and universities seeking registration of programs leading to licensure or certification in these fields will be required to submit to the State Education Department evidence of meeting program registration requirements.

The proposed regulation will not impose recordkeeping requirements on regulated parties, and will not require regulated parties to obtain professional services to comply beyond the educational services needed to meet the professional education requirements for licensure or certification.

3. COSTS:

The proposed regulation requires an applicant for a limited permit to practice as a clinical laboratory technologist, cytotechnologist, or clinical

laboratory technician to pay an application fee of \$50. The regulation will not impose any other additional costs on regulated parties over and above those imposed by Article 165 of the Education Law, which establishes licensure and registration fees. Article 165 requires applicants for licensure as a clinical laboratory technologist or cytotechnologist to be educated at the baccalaureate level, and applicants for certification as a clinical laboratory technician to be educated at the associate degree level. The proposed regulation simply establishes the content of the coursework for the college preparation program, and imposes no additional educational costs beyond those imposed by the statutory requirement. The proposed regulation's standard for general supervision by the director of a licensed clinical laboratory of limited permit holders in the three professions is consistent with the level of supervision that the director already is required to provide such employees by Department of Health regulations. Therefore, the regulation will not impose additional costs on clinical laboratories for supervision. The proposed regulation will not require regulated parties to incur capital costs.

4. MINIMIZING ADVERSE IMPACT:

The proposed regulation implements and clarifies education and examination standards required for licensure as a clinical laboratory technologist or cytotechnologist and certification as a clinical laboratory technician, as directed by Article 165 of the Education Law. It also establishes requirements for college programs registered as leading to licensure in these fields. The statute makes no exception for individuals or entities located in rural areas of the State. The State Education Department has determined that such requirements should apply to all individuals seeking licensure or certification no matter their geographic location to ensure an adequate standard of competency across the State. Likewise, the Department has determined that registered college programs that lead to licensure should be subject to the same requirements, regardless of their geographic location, to ensure that candidates for licensure are adequately prepared. Because of the nature of the proposed rule, alternative approaches for entities located in rural areas of the State were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed regulation were solicited from statewide organizations representing parties having an interest in the practice of the three professions. Included in this group was the State Board for Clinical Laboratory Technology, and professional associations and collective bargaining organizations representing individuals practicing these professions. These groups have members who live or work in rural areas. Staff of the State Education Department met with large groups of individuals who are employed in the three fields to obtain their input during the development of the regulation. These groups included individuals from rural areas of New York State. In addition, comments were solicited from colleges and universities in the State that offer programs that prepare clinical laboratory technologists, cytotechnologists, and clinical laboratory technicians, some of which are located in rural areas. The Department also sent the proposed regulation to licensed clinical laboratories across the State, including those that are located in rural areas of New York State.

Job Impact Statement

Article 165 of the Education Law establishes a requirement that clinical laboratory technologist and cytotechnologists be licensed to practice in New York State and that clinical laboratory technicians be certified to practice in this State. The proposed regulation implements the requirements of Article 165 of the Education Law by establishing education and examination standards for licensure or certification, special requirements for licensure or certification for applicants already practicing in these field or have related education and/or experience (grandparenting applicants), and requirements for limited permits in the three professions. It also sets forth standards for registered college preparation programs that lead to licensure or certification in these fields, in accordance with statutory requirements.

The proposed regulation implements statutory requirements and directives and will have no impact on jobs or employment opportunities, beyond the impact of Article 165 of the Education Law. Therefore, any impact on jobs and employment opportunity by establishing a licensure requirement for clinical laboratory technologists, cytotechnologists and clinical laboratory technicians is attributable to the statutory requirements, not the proposed rule, which simply establishes consistent implementing standards as directed by statute.

Because it is evident from the nature of the proposed regulation that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

EMERGENCY RULE MAKING

No Child Left Behind Act of 2001

I.D. No. EDU-40-06-00009-E

Filing No. 1511

Filing date: Dec. 12, 2006

Effective date: Dec. 12, 2006

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

Action taken: Amendment of section 100.2(p) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2) and (20), 309 (not subdivided) and 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to conform the Commissioner's Regulations to the provisions of the No Child Left Behind Act of 2001 (NCLB) relating to school and local educational agency accountability. The State and local educational agencies, including school districts, BOCES and charter schools, are required to comply with NCLB as a condition to their receipt of federal funding under Title I of the Education and Secondary Education Act (ESEA), as amended.

On July 27, 2006, Henry L. Johnson, the Assistant Secretary of the Office of Elementary and Secondary Education of the United States Department of Education (USDOE), informed Commissioner Mills that USDOE had approved New York's request to amend its State accountability plan under Title I of the ESEA, as amended by the NCLB. The proposed amendment will conform the Commissioner's Regulations with the approved NCLB accountability plan and implement New York's plan to address the findings of the USDOE peer review of New York's assessment program by: (1) modifying the School Performance Index to incorporate the results from New York's grade 3-8 assessment program in English language arts and mathematics; (2) revising the Annual Measurable Objectives in English language arts and mathematics to reflect the use of grade 3-8 test results; (3) combining the elementary and secondary science criteria into a single combined elementary-middle level science criterion; (4) revising the definition of the graduation cohort beginning with the 2003 graduation cohort to make schools accountable for students after they received five months of instruction in a school or district; (5) incorporating in the limited English proficient (LEP) subgroup students who had previously been considered LEP students during the prior one or two years in order to calculate Adequate Yearly Progress; (6) restricting the use of backmapping to schools serving exclusively students below grade three; (7) revising the timelines for schools and local educational agencies whose 2006-2007 accountability status is dependent on 2005-2006 grade 3-8 assessment results to take certain actions required of schools and local educational agencies identified as requiring academic progress or as in need of improvement; (8) indicating that the NYSESLAT will no longer be administered, in lieu of the required State assessment in English language arts, for accountability purposes beyond the 2005-2006 school year; and (9) restricting the use of the NYSESLAT, for participation rate purposes, to limited English proficient students who have attended school in the United States (not including Puerto Rico) for one year.

The proposed amendment was adopted at the September 11-12, 2006 Regents meeting as an emergency measure, effective September 19, 2006, in order to ensure that decisions regarding whether schools and districts make Adequate Yearly Progress are consistent with New York's approved NCLB accountability plan and are based upon the results of the English language arts and mathematics assessments first administered to students during the 2005-2006 school year; and to implement in part the provisions of New York's plan submitted to the United States Department of Education on August 2, 2006, which address the findings of the USDOE peer review of New York's assessment program. A Notice of Emergency Adoption and Proposed Rule Making was published in the *State Register* on October 4, 2006.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at their December 4-5, 2006 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative

Procedure Act. Pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the *State Register* on December 27, 2006. However, the September emergency adoption will expire on December 17, 2006, 90 days after its filing with the Department of State on September 19, 2006. A disruption in the rule's effectiveness would place New York at risk of USDOE corrective actions, which may include loss of State Title I administrative funds. A second emergency adoption is therefore necessary to ensure that the amendment remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: No Child Left Behind Act of 2001 (Pub. L. 107-110)—school/district accountability.

Purpose: To establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the Federal No Child Left Behind Act of 2001 relating to academic standards and school/district accountability.

Substance of emergency rule: The State Education Department proposes to amend subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, as an emergency action effective December 12, 2006. The following is a summary of the provisions of the emergency rule.

In general, subdivision (p) of section 100.2 is amended to conform the Commissioner's Regulations with New York State's approved accountability workbook pursuant to the No Child Left Behind Act of 2001 (NCLB), Public Law 107-110, particularly in terms of revising the school and school district accountability plan to incorporate the results from New York's new grades 3-8 testing program in English language arts and mathematics. The regulations have also been amended to incorporate select flexibility that has been made available by the United States Department of Education to New York in the most recently approved NCLB workbook. The substantive amendments to the regulations are as follows:

Section 100.2(p)(1) is amended to, beginning in 2005-2006, incorporate in the limited English proficient (LEP) subgroup students who had previously been considered LEP students during the prior one or two years in order to calculate Adequate Yearly Progress (AYP); and beginning with 2006-2007, to restrict the use of the New York State English as a Second Language Achievement Test (NYSESLAT), for participation rate purposes, to limited English proficient students who have attended school in the United States (not including Puerto Rico) for one year. Scores from the NYSESLAT beginning in 2006-2007 will no longer be equated to a level for use in the calculation of the elementary-middle level English language arts Performance Index.

Section 100.2(p)(3) is amended to add that if a school district closes a school building, its registration approved by the Board of Regents shall no longer be effective.

Section 100.2(p)(5) is amended to combine the elementary and middle level science indices into a single combined elementary-middle level science index; and to restrict the use of backmapping to schools serving exclusively students below grade three.

Section 100.2(p)(6) is amended to revise the timelines for local educational agencies whose 2006-2007 accountability status is dependent on 2005-2006 grades 3-8 assessment results to take certain actions required of local educational agencies identified as requiring academic progress or as in need of improvement. The section was further amended to indicate that a school that failed to make AYP at the elementary or middle level in a subject in 2004-2005 and fails to make AYP in 2005-2006 at the elementary-middle level in the same subject will be identified for improvement. A school in need of improvement at the grade 4 or 8 level in 2005-2006 will be in need of improvement in 2006-2007 at the elementary-middle level unless it made AYP in the subject and grade level for which it was identified in 2004-2005 and also makes AYP in that subject at the elementary-middle level in 2005-2006.

Section 100.2(p)(7) is amended to revise the timelines for local educational agencies whose 2006-2007 accountability status is dependent on 2005-2006 grades 3-8 assessment results to take certain actions required of local educational agencies identified as requiring academic progress or as in need of improvement; and to clarify which criteria set forth in paragraph 14 will be used to make accountability decisions for districts.

Section 100.2(p)(8) is amended to specify that a school or a district identified as rapidly improving will have improved its performance "by an amount determined by the commissioner."

Section 100.2(p)(14) is amended to revise the Annual Measurable Objectives in English language arts and mathematics to incorporate the use of grades 3-8 test results; and to indicate that the New York State English as a Second Language Achievement Test (NYSESLAT) will no longer be

administered, in lieu of the required State assessment in English language arts, for accountability purposes beyond the 2005-2006 school year.

Section 100.2(p)(15) is amended to combine the elementary and secondary science indices into a single combined elementary-middle level science index. The regulation is also amended to state that the graduation rate is the percentage of the annual graduation rate cohort that earns a local or Regents diploma by August 31st following the third school year (vs. the fourth calendar year) in which the cohort first entered grade 9, except that in a school in which the majority of students participate in a department-approved, five-year program that results in certification in a career or technology field in addition to a high school diploma, the graduation rate shall be the percentage of the annual graduation rate cohort that earns a local diploma by August 31st following the fourth school (vs. the fifth calendar year) after the school year in which the cohort first entered grade 9.

Section 100.2(p)(16) is amended, beginning in the 2005-2006 school year, to revise the definition of the annual high school cohort for purposes of determining adequate yearly progress to consist of those students who first enrolled in ninth grade three school years previously anywhere and who were enrolled in the school on the first Wednesday in October of the current (vs. previous) school year; and to specify that the year cited is the "school" year. Section 100.2(p)(16)(ii)(b)(1) and (2) is also amended to revise the definition of the graduation cohort commencing with the 2007-2008 school year, to consist of those students who first enrolled in grade 9 anywhere three school years previously or, if an ungraded student with a disability, first attained the age of 17 three years previously, and who have spent at least five consecutive months, not including July and August, in the school and/or district.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-40-06-00009-EP, Issue of October 4, 2006. The emergency rule will expire February 9, 2007.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the Chief Administrative Officer of the Department, which is charged with the general management and supervision of all public schools and the educational work of the State.

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

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

Education Law section 215 provides the Commissioner with the authority to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or any statute relating to education, and shall be responsible for executing all educational policies determined by the Regents. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

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

Education Law section 3713(1) and (2) authorizes the State and school districts to accept federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to establish criteria and procedures to

ensure State and local educational agency compliance with the provisions of the federal No Child Left Behind Act of 2001 (NCLB), Public Law section 107-110, relating to academic standards and school/district accountability.

NEEDS AND BENEFITS:

Commissioner's Regulations section 100.2(p) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the NCLB relating to academic standards and school and school district accountability. The State and local educational agencies (LEAs) are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State Plan, that the state has developed and is implementing a single, statewide accountability system to ensure that all LEAs, public elementary schools and public high schools make adequate yearly progress (AYP). Each state must implement a set of yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards.

On July 27, 2006, Henry L. Johnson, the Assistant Secretary of the Office of Elementary and Secondary Education of the United States Department of Education (USDOE), informed Commissioner Mills that USDOE had approved New York's request to amend its State accountability plan under Title I of the Elementary and Secondary Education Act of 1965 (ESEA) as amended by the NCLB. The proposed amendment will conform the Commissioner's Regulations with the approved NCLB accountability plan and implement New York's plan to address the findings of the USDOE peer review of New York's assessment program by: (1) modifying the School Performance Index to incorporate the results from New York's grade 3-8 assessment program in English language arts and mathematics; (2) revising the Annual Measurable Objectives in English language arts and mathematics to reflect the use of grade 3-8 test results; (3) combining the elementary and secondary science criteria into a single combined elementary-middle level science criterion; (4) revising the definition of the graduation cohort beginning with the 2003 graduation cohort to make schools accountable for students after they received five months of instruction in a school or district; (5) incorporating in the limited English proficient (LEP) subgroup students who had previously been considered LEP students during the prior one or two years in order to calculate Adequate Yearly Progress; (6) restricting the use of backmapping to schools serving exclusively students below grade three; (7) revising the timelines for schools and local educational agencies whose 2006-2007 accountability status is dependent on 2005-2006 grade 3-8 assessment results to take certain actions required of schools and local educational agencies identified as requiring academic progress or as in need of improvement; (8) indicating that the NYSESLAT will no longer be administered, in lieu of the required State assessment in English language arts, for accountability purposes beyond the 2005-2006 school year; and (9) restricting the use of the NYSESLAT, for participation rate purposes, to limited English proficient students who have attended school in the United States (not including Puerto Rico) for one year.

COSTS:

Cost to the State: None.

Costs to local government: None.

Cost to private regulated parties: None. The rule does not impose any additional costs on private parties.

Cost to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on the State, the Education Department or LEAs beyond those imposed by State and federal statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to establish criteria and procedures, relating to academic standards and school and school district accountability, to conform the Commissioner's Regulations to the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The proposed rule will not impose any

additional program, service, duty or responsibility beyond those imposed by State and federal statutes. The proposed amendment is in response to recent guidance provided by the U.S. Department of Education and is necessary to ensure consistency with NCLB accountability requirements.

A public school or charter school subject to the provisions of 100.2(p)(6)(vi)-(ix), for failure to make adequate yearly progress, which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular school attendance for the 2006-2007 school year shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to school choice and supplementary education services (SES) pursuant to the NCLB. The school district or charter school shall implement such school choice and, if required, SES immediately. Implementation of new/revise improvement/correction action/restructuring plan required under section 1116 of the NCLB must commence to the extent practicable within 90 days of notification of accountability status.

District improvement plans, for schools designated as a "district requiring academic progress" pursuant to section 100.2(p)(7), shall be implemented immediately, to the extent practicable, upon approval of the board, if such identification occurs after the first day of regular attendance.

A local educational agency (LEA) identified for improvement or correction action pursuant to 100.2(p)(7)(iii) and (iv), which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular attendance for the 2006-2007 school year, shall immediately commence implementation, to the extent practicable, of any plan required to be implemented pursuant to section 1116(c) of the NCLB.

PAPERWORK:

A public school or charter school subject to the provisions of 100.2(p)(6)(vi)-(ix), for failure to make adequate yearly progress, which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular school attendance for the 2006-2007 school year shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to school choice and supplementary education services (SES) pursuant to the NCLB.

DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and federal rules or requirements, and is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability.

ALTERNATIVES:

There were no significant alternatives to the proposed rule and none were considered. The proposed rule is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability. The proposed rule has been carefully drafted to meet these specific federal and State requirements.

FEDERAL STANDARDS:

The proposed rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability. The proposed amendment is in response to recent guidance provided by the U.S. Department of Education and is necessary to ensure consistency with NCLB accountability requirements.

COMPLIANCE SCHEDULE:

The proposed rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school and school district accountability. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended.

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State plan filed with the federal government, that the state has developed and is implementing a single, statewide accountability system to ensure that all local educational agencies (LEAs), public elementary schools and public high schools make AYP. Each state must implement a set of high-quality, yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards. Each state must establish a timeline for AYP to ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group described in NCLB section 1111(b)(2)(C)(v) will meet or

exceed the state's proficient level of academic achievement on such academic assessments.

It is anticipated that regulated parties may achieve compliance with the proposed rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The rule is necessary to conform the Commissioner's Regulations to the requirements of the No Child Left Behind Act of 2001 (NCLB), Public Law section 107-110, relating to academic standards and school and school district accountability. The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed rule generally applies to school districts, boards of cooperative educational services and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish criteria and procedures, relating to academic standards and school and school district accountability, to conform the Commissioner's Regulations to the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The proposed rule will not impose any additional compliance requirements beyond those imposed by State and federal statutes.

A public school or charter school subject to the provisions of 100.2(p)(6)(vi)-(ix), for failure to make adequate yearly progress, which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular school attendance for the 2006-2007 school year shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to school choice and supplementary education services (SES) pursuant to the NCLB. The school district or charter school shall implement such school choice and, if required, SES immediately. Implementation of new/revise improvement/correction action/restructuring plan required under section 1116 of the NCLB must commence to the extent practicable within 90 days of notification of accountability status.

District improvement plans, for schools designated as a "district requiring academic progress" pursuant to section 100.2(p)(7), shall be implemented immediately, to the extent practicable, upon approval of the board, if such identification occurs after the first day of regular attendance.

A local educational agency (LEA) identified for improvement or correction action pursuant to 100.2(p)(7)(iii) and (iv), which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular attendance for the 2006-2007 school year, shall immediately commence implementation, to the extent practicable, of any plan required to be implemented pursuant to section 1116(c) of the NCLB.

A public school or charter school subject to the provisions of 100.2(p)(6)(vi)-(ix), for failure to make adequate yearly progress, which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular school attendance for the 2006-2007 school year shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to school choice and supplementary education services (SES) pursuant to the NCLB.

PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

The rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school

and school district accountability. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any costs on LEAs beyond those imposed by State and federal statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations to the requirements of the NCLB relating to school and school district accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed rule has been carefully drafted to meet these specific federal and State requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed rule will be provided to each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed rule is necessary to establish criteria and procedures, relating to academic standards and school and school district accountability, to conform the Commissioner's Regulations to the federal No Child Left Behind Act of 2001 (NCLB), Public Law section 107-110. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The proposed rule will not impose any additional compliance requirements beyond those imposed by State and federal statutes.

A public school or charter school subject to the provisions of 100.2(p)(6)(vi)-(ix), for failure to make adequate yearly progress, which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular school attendance for the 2006-2007 school year shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to school choice and supplementary education services (SES) pursuant to the NCLB. The school district or charter school shall implement such school choice and, if required, SES immediately. Implementation of new/revise improvement/correction action/restructuring plan required under section 1116 of the NCLB must commence to the extent practicable within 90 days of notification of accountability status.

District improvement plans, for schools designated as a "district requiring academic progress" pursuant to section 100.2(p)(7), shall be implemented immediately, to the extent practicable, upon approval of the board, if such identification occurs after the first day of regular attendance.

A local educational agency (LEA) identified for improvement or correction action pursuant to 100.2(p)(7)(iii) and (iv), which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular attendance for the 2006-2007 school year, shall immediately commence implementation, to the extent practicable, of any plan required to be implemented pursuant to section 1116(c) of the NCLB.

A public school or charter school subject to the provisions of 100.2(p)(6)(vi)-(ix), for failure to make adequate yearly progress, which accountability status is dependent upon the 2005-2006 assessment results for grades 3-8 and which does not receive notice of such status until after the first day of regular school attendance for the 2006-2007 school year shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to school choice and supplementary education services (SES) pursuant to the NCLB.

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COSTS:

The rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school and school district accountability. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any costs on LEAs beyond those imposed by State and federal statutes.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations to the requirements of the NCLB relating to school and school district accountability and the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108-446). LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed rule has been carefully drafted to meet these specific federal and State requirements. Because these Federal and State requirements are uniformly applicable State-wide to school districts, BOCES and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the No Child Left Behind Act of 2001 (NCLB), relating to academic standards and school and school district accountability. The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

NOTICE OF ADOPTION

Proprietary College Degree-Conferring Authority

I.D. No. EDU-39-06-00026-A

Filing No. 1509

Filing date: Dec. 11, 2006

Effective date: Dec. 28, 2006

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

Action taken: Amendment of section 3.46 and addition of section 3.58 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 215 (not subdivided); 216 (not subdivided); 218(1) and (2); 224(1)(a) and (b); and L. 1995, ch. 82, section 137

Subject: Proprietary college degree-conferring authority.

Purpose: To set forth requirements that a for-profit institution must meet for Regents authorization to confer degrees and that a prospective owner of a proprietary college must meet to obtain Regents consent to the transfer of the degree-conferring authority of the institution, and establish requirements for the revocation and surrender of degree-conferring authority at proprietary colleges.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-39-06-00026-P, Issue of September 27, 2006.

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

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

Assessment of Public Comment

The proposed rule was published in the State Register on September 27, 2006. Below is a summary of written comments received by the State Education Department (SED) and SED's assessment of issues raised.

COMMENT: The regulation does not provide SED with sufficient tools to evaluate new proprietary colleges. The regulations should authorize SED to reject applications that have not demonstrated that the institution will improve outcomes in the State.

RESPONSE: The regulation has sufficient standards to enable the SED to evaluate a new proprietary college's capacity to operate as a degree-granting institution, including the requirements in Part 52 of the Commissioner's regulations, applicable to existing degree-granting institutions, among others.

COMMENT: There are only three reasons to approve new proprietary colleges: (1) the institutions brings something unique to the University of the State of New York; (2) the programs to be offered are so demonstrably excellent that they will improve the overall quality of the University; and (3) the programs to be offered are in areas where critical shortages have been identified. Meeting minimum criteria is insufficient for approval.

RESPONSE: The standards proposed in the comment are too restrictive. The regulation reasonably permits an institution to offer degree programs in New York State, if the institution demonstrates its capacity to operate as a degree-granting institution based upon specific enumerated standards and has documented a need for the programs. The Department does not believe it is appropriate to limit competition and student choice through the regulation.

COMMENT: The regulation should prohibit a new proprietary college from adding programs and expanding enrollment.

RESPONSE: The regulation provides the Regents with sufficient flexibility to limit enrollment or program growth on a case by case basis. The Department registers new programs and may deny registration based upon the failure to meet registration standards.

COMMENT: During the period of provisional authority to confer degrees, new programs should be considered for approval.

RESPONSE: The proposed rule does not prohibit the registration of additional programs at an institution with provisional authority to confer degrees. However, such programs would have to be approved by the Department through the registration review process.

COMMENT: The regulation should establish an extra step in the process for new degree-granting institutions. The first step would require the institution to submit pre-application review materials before being allowed to submit an application for provisional degree-conferring authority.

RESPONSE: The SED review for provisional degree-conferring authority is comprehensive, including evaluation of authority to operate; financial statements; information on the qualifications of administration,

faculty, and staff; educational programs; library; student services; facilities; and admissions requirements. In addition, SED will monitor the institution during this provisional period, and require the institution to undergo a review for permanent degree-conferring authority. SED does not believe that an additional step is warranted.

COMMENT: An institution under provisional authority to confer degrees that demonstrates its ability to meet requirements in less than five years should be granted permanent authority before five years.

RESPONSE: The regulation gives the Regents the flexibility to replace provisional degree-conferring authority with permanent authority before the end of the five-year period.

COMMENT: The regulation should permit a shorter period for provisional degree-conferring authority for a new college operated by an institution that already operates in the State.

RESPONSE: The proposed rule would not prevent the Regents from granting a shorter duration for the provisional degree-conferring, based upon a review of the institution.

COMMENT: The approval of new proprietary colleges should not be dependent on whether another institution in the area offers similar programs.

RESPONSE: Section 137 of Chapter 82 of the Laws of 1995 requires consideration of regional needs when a new institution seeks degree authority. The regulation requires an institution seeking provisional degree-conferring authority to substantiate the need for the degree programs it plans to offer based upon demand by students and/or employers and/or need of society for such programs. The fact that another institution in the region offers similar programs will not by itself preclude approval.

COMMENT: Although the regulation sets minimum standards for the sale of a degree-granting institution, they are not specific enough. It does not give SED authority to recommend that the sale not proceed where an institution with demonstrably weaker outcomes seeks to acquire an institution with stronger outcomes.

RESPONSE: The regulation establishes reasonable standards that prospective new owners must meet for Regents consent to the transfer of degree-conferring authority. It requires such individuals to meet standards addressing capacity to operate a college, including Part 52 of Commissioner's regulations applicable to all existing degree-granting institutions. SED will have the ability to keep out institutions with weak outcomes based upon these standards.

COMMENT: There should be explicit prohibitions on growth and new programs during the period immediately following the sale of a degree-granting proprietary college.

RESPONSE: The Board of Regents has the authority to limit enrollment and program growth through the terms of its vote, consenting to the transfer of degree-conferring authority. In addition, the Department registers any new programs and may deny registration based upon failure to meet registration standards.

COMMENT: The regulation should make Regents consent to the transfer of degree authority automatic when the transfer of ownership or control is within families and/or within non-family ownership groups where the owners are actively involved in the activities of the college. SED should follow the precedents established by federal regulations.

RESPONSE: Education Law, section 224(1)(b) states: "Notwithstanding any other provision of law to the contrary, no individual, association, partnership or corporation operating an institution on a for-profit basis and holding degree-conferring powers granted by the regents pursuant to this subdivision shall, through a change in ownership or control, convey, assign or transfer such degree-conferring authority without the consent of the regents." This statutory requirement makes no exception for changes in ownership or control within families or within groups of owners that are already participating in the activities of the college. Therefore, the regulation may not exempt such transactions. The federal exemption is authorized by federal statute and is for a different purpose (approval to participate in federal aid programs). The regulation reasonably permits the Department's review to be expedited for the transfer of degree-conferring authority where the transfer of ownership or control is between family members, upon a showing of good cause.

COMMENT: The regulation requires a proprietary college contemplating a change of ownership to obtain pre-approval of the transfer of degree-granting authority prior to the transaction. While there are benefits to a pre-transaction approval process, the new rules should not be implemented in a manner that disrupts current transactions. At minimum, those parties that have entered into agreements based on the timeframes and approval process of the current law should be able to proceed.

RESPONSE: The regulation establishes a process whereby the Regents must consent to the transfer of degree-conferring authority prior to the change of ownership or control of a proprietary college. However, the regulation permits a temporary transfer of degree-conferring authority after the change of ownership or control of the institution has been made, upon an adequate showing of good cause. Depending upon the circumstances and the nature of executed agreements, an applicant who has entered into an agreement prior to the effective date of the proposed regulation may be granted a temporary transfer of degree-conferring authority.

COMMENT: The time frames for the transfer of degree-conferring authority are too long. Under the proposed regulation, the parties would have to complete their negotiations and allow 150 days for the application process.

COMMENT: The time frames for the transfer of degree-conferring authority are not consistent with normal business practice and establish difficult, if not impossible, restrictions. The very long lead time will prevent prospective buyers and sellers from taking advantage of market forces and will discourage some prospective buyers from entering New York.

RESPONSE: In response to these two comments, the regulation requires the prospective owner to apply for the transfer of degree-conferring authority 150 days prior to the date for the change in ownership or control. The review has time limits. The Deputy Commissioner must make a recommendation to the Board of Regents within 60 days of a completed application. This regulation establishes reasonable but not excessive time periods for SED to review the prospective owner's capacity to operate a degree-granting institution, conduct a site visit, and permit the prospective owner adequate due process. A proprietary college is not a business; it is an educational institution under the Regents. The regulation does not concern a business asset that may be sold without Regents consent. SED needs adequate time to perform a full evaluation of the prospective owner's ability to operate a degree-granting institution.

COMMENT: The regulation should permit an expedited review for the transfer of degree-conferring authority when the incumbent owners will retain a significant ownership position or incumbent management retains a significant ownership position and will remain in place.

RESPONSE: The Department does not agree that an expedited review should be conducted in every case where the incumbent owner retains a significant ownership position or where management retains a significant ownership position. The review is triggered by a significant change in the ownership or control of the institution. Whether management will continue at the institution will be a factor to be considered during the review.

COMMENT: The regulation sets out an identical set of steps for institutions seeking provisional degree authority and those seeking a change of ownership. Established New York colleges that are already abiding by the regulations should not be subject to the same process as those entering the State for the first time.

RESPONSE: SED does not believe that there should be inconsistent procedures and quality standards for new institutions seeking provisional degree-conferring authority and for prospective owners of existing institutions. The regulation establishes consistent, though not identical, standards to ensure that in both cases the applicants have the capacity to operate a degree-granting institution.

COMMENT: The standards for review of new proprietary colleges and prospective owners seeking transfer of degree-conferring authority are not specific enough.

RESPONSE: The regulation provides sufficient standards to enable regulated parties to know what is required of them. They center on the capacity of the institution or prospective owner to operate a degree-granting institution and incorporate the standards of Part 52 of Commissioner's regulations, applicable to existing degree-granting institutions, among other requirements.

COMMENT: The regulation does not specify whether an institution that is surrendering degree powers may teach out its own students.

RESPONSE: In general, the Department does not recommend to the Regents the termination of degree powers until all enrolled students either have graduated or have transferred successfully to other institutions. The regulation does not prohibit an institution from teaching out its own students.

COMMENT: The procedures for the revocation of degree-conferring authority (section 3.58[f]) should apply to all degree-granting institutions, not just proprietary colleges.

RESPONSE: The independent (not-for-profit) degree-granting institutions are chartered by the Board of Regents. A mechanism for the Regents

to revoke or limit degree powers at these institutions already exists through the institution's charter, pursuant to section 219 of the Education Law. Section 3.58(f) is needed to provide an analogous procedure for revoking or limiting the degree-conferring powers of a for-profit proprietary college, incorporated under Business Corporation Law. This provision will provide a procedure to revoke the degree-conferring authority of a proprietary college once the Department has terminated registration of its programs, and includes significant due process procedures.

COMMENT: The regulation will advance SED's efforts to assure the quality of higher educational programs in New York State. The intent of the proposal is appropriate given the growth of proprietary schools in New York.

RESPONSE: No response to this comment is necessary.

NOTICE OF ADOPTION

No Child Left Behind Act of 2001

I.D. No. EDU-40-06-00009-A

Filing No. 1512

Filing date: Dec. 12, 2006

Effective date: Dec. 28, 2006

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

Action taken: Amendment of section 100.2(p) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2) and (20), 309 (not subdivided) and 3713(1) and (2)

Subject: No Child Left Behind Act of 2001 (Pub. L. 107-110)—school/district accountability.

Purpose: To establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the Federal No Child Left Behind Act of 2001 relating to academic standards and school/district accountability.

Substance of final rule: The State Education Department proposes to amend subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, effective December 28, 2006. The following is a summary of the provisions of the proposed rule.

In general, subdivision (p) of section 100.2 is amended to conform to the Commissioner's Regulations with New York State's approved accountability workbook pursuant to the No Child Left Behind Act of 2001 (NCLB), Public Law 107-110, particularly in terms of revising the school and school district accountability plan to incorporate the results from New York's new grades 3-8 testing program in English language arts and mathematics. The regulations have also been amended to incorporate select flexibility that has been made available by the United States Department of Education to New York in the most recently approved NCLB workbook. The substantive amendments to the regulations are as follows:

Section 100.2(p)(1) is amended to, beginning in 2005-2006, incorporate in the limited English proficient (LEP) subgroup students who had previously been considered LEP students during the prior one or two years in order to calculate Adequate Yearly Progress (AYP); and beginning with 2006-2007, to restrict the use of the New York State English as a Second Language Achievement Test (NYSESLAT), for participation rate purposes, to limited English proficient students who have attended school in the United States (not including Puerto Rico) for one year. Scores from the NYSESLAT beginning in 2006-2007 will no longer be equated to a level for use in the calculation of the elementary-middle level English language arts Performance Index.

Section 100.2(p)(3) is amended to add that if a school district closes a school building, its registration approved by the Board of Regents shall no longer be effective.

Section 100.2(p)(5) is amended to combine the elementary and middle level science indices into a single combined elementary-middle level science index; and to restrict the use of backmapping to schools serving exclusively students below grade three.

Section 100.2(p)(6) is amended to revise the timelines for local educational agencies whose 2006-2007 accountability status is dependent on 2005-2006 grades 3-8 assessment results to take certain actions required of local educational agencies identified as requiring academic progress or as in need of improvement. The section was further amended to indicate that a school that failed to make AYP at the elementary or middle level in a subject in 2004-2005 and fails to make AYP in 2005-2006 at the elementary-middle level in the same subject will be identified for improvement. A school in need of improvement at the grade 4 or 8 level in 2005-2006 will

be in need of improvement in 2006-2007 at the elementary-middle level unless it made AYP in the subject and grade level for which it was identified in 2004-2005 and also makes AYP in that subject at the elementary-middle level in 2005-2006.

Section 100.2(p)(7) is amended to revise the timelines for local educational agencies whose 2006-2007 accountability status is dependent on 2005-2006 grades 3-8 assessment results to take certain actions required of local educational agencies identified as requiring academic progress or as in need of improvement; and to clarify which criteria set forth in paragraph 14 will be used to make accountability decisions for districts.

Section 100.2(p)(8) is amended to specify that a school or a district identified as rapidly improving will have improved its performance "by an amount determined by the commissioner."

Section 100.2(p)(14) is amended to revise the Annual Measurable Objectives in English language arts and mathematics to incorporate the use of grades 3-8 test results; and to indicate that the New York State English as a Second Language Achievement Test (NYSESLAT) will no longer be administered, in lieu of the required State assessment in English language arts, for accountability purposes beyond the 2005-2006 school year.

Section 100.2(p)(15) is amended to combine the elementary and secondary science indices into a single combined elementary-middle level science index. The regulation is also amended to state that the graduation rate is the percentage of the annual graduation rate cohort that earns a local or Regents diploma by August 31st following the third school year (vs. the fourth calendar year) in which the cohort first entered grade 9, except that in a school in which the majority of students participate in a department-approved, five-year program that results in certification in a career or technology field in addition to a high school diploma, the graduation rate shall be the percentage of the annual graduation rate cohort that earns a local diploma by August 31st following the fourth school (vs. the fifth calendar year) after the school year in which the cohort first entered grade 9.

Section 100.2(p)(16) is amended, beginning in the 2005-2006 school year, to revise the definition of the annual high school cohort for purposes of determining adequate yearly progress to consist of those students who first enrolled in ninth grade three school years previously anywhere and who were enrolled in the school on the first Wednesday in October of the current (vs. previous) school year; and to specify that the year cited is the "school" year. Section 100.2(p)(16)(ii)(b)(1) and (2) is also amended to revise the definition of the graduation cohort commencing with the 2007-2008 school year, to consist of those students who first enrolled in grade 9 anywhere three school years previously or, if an ungraded student with a disability, first attained the age of 17 three years previously, and who have spent at least five consecutive months, not including July and August, in the school and/or district.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 100.2(p)(8)(ii)(a).

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

Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on October 4, 2006, a nonsubstantive revision was made to the proposed rule.

In section 100.2(p)(8)(ii)(a), a typographical error was corrected by changing the citation reference from "subparagraph (14)(xi)" to "subparagraph (14)(ix)."

The proposed rule, as so revised, does not require any changes to the Regulatory Impact Statement previously published herein.

Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on October 4, 2006, a nonsubstantive revision to the proposed rule was made as described in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, does not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on October 4, 2006, a nonsubstantive revision to the proposed rule was made as described in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, does not require any changes to the previously published Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on October 4, 2006, a nonsubstantive revision to the proposed rule was made as described in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, is necessary to conform the Commissioner's Regulations to the requirements of the No Child Left Behind Act of 2001 (NCLB), relating to academic standards and school and school district accountability. The proposed revised rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed revised rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

State Board of Elections

NOTICE OF ADOPTION**Administrative Complaint Procedure for Resolution of Violations of Title III Provisions of HAVA**

I.D. No. SBE-36-06-00009-A

Filing No. 1479

Filing date: Dec. 6, 2006

Effective date: Dec. 27, 2006

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

Action taken: Addition of Part 6216 to Title 9 NYCRR.

Statutory authority: Election Law, sections 3-102, 3-105; L. 2005, ch. 23

Subject: Administrative complaint procedure for resolution of violations of Title III provisions of the Help America Vote Act (HAVA).

Purpose: To provide a uniform, nondiscriminatory administrative complaint procedures for any person who believes that there is a violation of any provision of Title Three of the Federal Help America Vote Act of 2002 (HAVA).

Text or summary was published in the notice of proposed rule making, I.D. No. SBE-36-06-00009-P, Issue of September 6, 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 J. McCann, Jr., Board of Elections, 40 Steuben St., Albany, NY 12207-2109, (518) 473-2063, e-mail: wmccann@elections.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Office of General Services

NOTICE OF ADOPTION**Vendor Responsibility**

I.D. No. GNS-43-06-00017-A

Filing No. 1505

Filing date: Dec. 12, 2006

Effective date: Dec. 27, 2006

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

Action taken: Addition of section 250.21 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 200 and 202; State Finance Law, sections 163(3)(a)(iii) and (9)(f); and 48 CFR 9.104-1

Subject: Vendor responsibility.

Purpose: To provide State agencies with standards to consider for vendor responsibility determinations when contracting for goods, services or technology in accordance with article 11 of the New York State Finance Law.

Text of final rule: Part 250 is amended as follows:

250.21 Vendor Responsibility Standards and Determinations

(a) *Standards.* Prior to making an award of contract for commodities, services or technology in accordance with Section 163 of the New York State Finance Law, each State agency shall make a determination of responsibility of the proposed vendor. In deliberating upon the responsibility of a bidder or a subcontractor, all contracting State agencies shall, if relevant to the specific review, give due consideration to any credible evidence or reliable information related to the standards below. Credible evidence is that which is derived from a written determination or written statement issued by an authorized official of a body having statutory jurisdiction or administrative oversight relating to the conduct at issue. Reliable information should consist of facts that have demonstrable bearing, not rendered irrelevant by passage of time, on the vendor's historical, financial and legal ability to perform the terms and conditions of the contract under consideration in an ethical manner.

In the event that credible evidence or reliable information indicates a failure to comply with a statutory or governmental directive applicable to the vendor in question, with respect to which directive, the vendor has timely submitted an appropriate rebuttal or appeal of such and which rebuttal or appeal is pending, the state agency may consider the relevancy of the alleged failure to comply in its review. Standards to consider include:

(1) whether the vendor has the financial resources necessary to fulfill the requirements of the proposed contract or the ability to obtain them;

(2) whether the vendor is able to comply with the required or proposed delivery or performance schedule, taking into consideration all relevant existing commercial and governmental business commitments;

(3) whether the vendor has a satisfactory performance record under prior government procurement contracts;

(4) whether the vendor has a satisfactory record of integrity and business ethics;

(5) whether the vendor has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;

(6) whether the vendor is either authorized to do business in New York State, incorporated in New York State or can provide a current certificate of good standing from its state or applicable local jurisdiction;

(7) whether during the previous three (3) years, the vendor failed to file returns or pay any applicable federal, state or local government taxes;

(8) whether during the previous three (3) years, a vendor having New York State employees, failed to file returns or pay New York State unemployment insurance;

(9) whether bankruptcy proceedings have been initiated by or against the vendor within the past seven (7) years, whether closed or not;

(10) whether bankruptcy proceedings are pending by or against the vendor, regardless of the date of filing;

(11) whether the record of the vendor, principal, owner, officer, major stockholders (10% or more of the voting shares for publicly traded companies, 25% or more of the shares for all other companies), or any person involved in the bidding, contracting or leasing process, includes any of the following within the previous five (5) years:

(i) A criminal investigation, indictment, judgment, conviction or grant of immunity for any business related conduct, which if proven would constitute a crime under federal, state, or local government law including, but not limited to, fraud, extortion, bribery, racketeering, price-fixing or bid collusion.

(ii) An investigation for a civil or criminal violation for any business related conduct by any federal, state or local government agency.

(iii) An unsatisfied judgment, injunction or lien for any business related conduct obtained by any federal, state or local government agency including, but not limited to, judgments based on taxes owed and fines and penalties assessed by any federal, state or local government agency.

(iv) A federal, state or local government suspension or debarment from the contracting process.

(v) A federal, state or local government contract suspension or termination for cause prior to the completion of the term of a contract.

(vi) A federal, state or local government denial of a lease or contract award for non-responsibility.

(vii) An administrative proceeding or civil action seeking specific performance or restitution in connection with any federal, state or local contract or lease.

(viii) A federal, state or local determination of a willful violation of any public works or labor law or regulation.

(ix) A sanction imposed as a result of judicial or administrative proceedings relative to any business or professional license.

(x) A consent order, presently in effect, with the New York State Department of Environmental Conservation, or a federal, state or local government enforcement determination involving a violation of federal, state or local laws.

(xi) An Occupational Safety and Health Act citation and Notification of Penalty containing a violation of federal, state or local laws classified as serious or willful.

(xii) A rejection of a bid on a New York State contract or a lease with the State for failure to comply with the McBride Fair Employment principles.

(xiii) A citation, violation order, pending administrative hearing or proceeding or determination issued by a federal, state or local government for violations of health laws or regulations, unemployment insurance or workers' compensation coverage or claim requirements, Employee Retirement Income Security Act, humans rights laws, federal U.S. Citizenship and Immigration Services Laws, and the Sherman Act or other federal anti-trust laws.

(xiv) An agreement to a voluntary exclusion from contracting with a federal, state or local governmental entity.

(xv) A decertification, revocation or forfeiture of Women's Business Enterprise or Minority Business Enterprise status, pursuant to Article 15-A of the New York State Executive Law.

(xvi) A rejection of a low bid on a federal, state or local contract for failure to meet statutory affirmative action or Minority or Women's Business Enterprise or Disadvantaged Business Enterprise status requirements on a previously held contract.

(12) a finding of non-responsibility by an agency or authority pursuant to Section 139-j of the New York State Finance Law.

(13) whether the vendor is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(b) Determinations and documentation. (1) Determinations. The contracting officer's signing of a contract constitutes a determination that the prospective vendor is responsible with respect to that contract. When an offer upon which an award would otherwise be made is rejected because the prospective vendor is found to be non-responsible, the contracting officer shall make, sign, and place in the procurement record a determination of non-responsibility, which shall state the basis for the determination. Such determinations shall constitute final agency determinations of vendor responsibility. Any appeal from such determination shall be initiated in accordance with Article 78 of the Civil Practice Law and Rules.

(2) Support documentation. Documents and reports supporting a determination of responsibility or non-responsibility must be included in the procurement record.

Final rule as compared with last published rule: Non-substantive changes were made in section 250.21.

Text of rule and any required statements and analyses may be obtained from: Paula B. Hanlon, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: paula.hanlon@ogs.state.ny.us

Revised Regulatory Impact Statement

1. Statutory authority: New York State Executive Law § 200 creates OGS and grants the Commissioner of OGS ("the Commissioner") the authority to adopt, amend or rescind rules and regulations relating to the discharge of his functions, powers and duties and those of OGS as prescribed by law. New York State Executive Law § 202 provides that OGS will provide coordinated services in support of state departments and agencies that will serve to conserve state resources, benefit multiple agencies, and be consistent with the needs and interests of the agencies receiving those services. New York State Finance Law § 163(3)(a)(iii) provides that the Commissioner shall be responsible for the standardization and centralized purchase of commodities required by state agencies in a manner which maximizes the purchasing value of public funds. New York State Finance Law § 163(9)(f) provides that prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor. The Federal Acquisition Regulations set general standards for determining vendor responsibility on the Federal level (48 CFR 9.104-1).

2. Legislative objectives: By enacting New York State Finance Law § 163(9)(f), the Legislature sought to ensure that State agencies purchase commodities, services and technologies from vendors with the necessary financial capacity, legal authority, integrity and past performance history.

3. Needs and benefits: New York State Finance Law § 163(9)(f) requires that prior to making an award of contract, State agencies must determine the responsibility of a proposed contractor. This means that the State agency must determine if the vendor possesses the necessary financial capacity, legal authority, integrity and past performance history to award a contract. Currently, no uniform set of standards exists for State agencies to use when determining the responsibility of a vendor, and criteria can be found scattered throughout case law guidance and policy documents, such as Council of Contracting Agencies and the New York State Standard Vendor Responsibility Questionnaire. This can result in State agencies evaluating the same vendor, applying different standards and coming to different responsibility determinations. The inconsistency of application of standards often leads to a lengthy contract review process by the Office of the State Comptroller and has costly results. On many occasions, agencies have made a determination of responsibility only to have the Comptroller's Office question their determination based on different information and require that the agency conduct further research and assessment prior to the contract being awarded. The proposed regulations would also clarify that the State agency is the entity statutorily required to make the final agency determination of responsibility.

These proposed regulations do not prescribe a "bright line" test to determine responsibility. Rather, agencies will consider each of the standards and decide for themselves what level of noncompliance with the procurement standards triggers a finding of non-responsibility.

The draft proposed text was sent to NYS Department of Tax and Finance, the NYS Department of Transportation, the NYS Department of Environmental Conservation, the NYS Thruway Authority and NYS Department of Agriculture and Markets for outreach. OGS received minor non-substantive text change suggestions from DEC and one request for clarification of a standard from Tax and Finance. It is expected that State agencies will strongly support the efforts of OGS to create standards in regulation to assist them in responsibility determinations for prospective contractors. It will speed the contract approval process and ensure that all of the relevant factors have been considered prior to award. State Agencies are in need of a uniform set of standards, set in regulation, to use when determining the responsibility of a vendor.

Additionally, the Business Council of New York State, Inc. ("Business Council") was provided a copy of the proposed regulations for outreach purposes. On November 8, 2006, a meeting was held between the Business Council and OGS. The Business Council stated that they were supportive of OGS's efforts and suggested that the regulations be expanded to contracts in addition to those covered under Article 11 of the State Finance Law.

4. Costs: a. The subject regulations simply provide standards to assist State agencies in evaluating the responsibility of a vendor, as required by Section 163 of the State Finance Law. The proposed regulations do not impose any additional costs on State government. In fact, adoption of these proposed regulations may result in a savings to State agencies by ensuring that all criteria has been considered relative to a vendor's financial capacity, legal authority, integrity and past performance. Many of the standards listed in the proposed regulations are standards that State agencies currently use to determine the responsibility of a vendor.

b. Costs to local governments. The regulations do not apply to local government and do not impose any costs on local government.

c. Costs to private regulated parties. The regulations do not apply to private parties and do not impose any costs on private to private parties.

d. Costs to the regulatory agency. The subject regulations simply provide standards to assist State agencies in evaluating the responsibility of a vendor, as required by Section 163 of the State Finance Law. The proposed regulations do not require any additional costs to the Office of General Services in connection with its role as a regulatory agency.

5. Local government mandates: The subject regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: The subject regulations simply provide standards to use when evaluating the responsibility of a vendor as required by Section 163 of the State Finance Law. The proposed regulations do not require any additional paperwork requirements.

7. Duplication: The subject regulations do not duplicate other existing Federal or State requirements.

8. Alternatives: One alternative OGS considered was to seek statutory amendments to the Procurement Stewardship Act. However, this was not an acceptable alternative because the Procurement Stewardship Act is set to expire on June 30, 2007. Uniformity in state agency responsibility determinations will benefit both government and the contracting community at large. A second alternative that OGS considered was including different standards. However, the proposed standards were chosen because they are standards already familiar to and relied upon by State agencies and the vendor community. The proposed standards are taken from the Council of Contracting Agencies, Case Law, New York State Vendor Responsibility Questionnaire and the Federal Acquisition Regulations and are considered valuable in determining the financial capacity, legal authority, integrity and past performance of vendors. Another alternative was to continue the piecemeal, inconsistent responsibility reviews and determinations. This alternative was not acceptable because the result would be different vendor responsibility conclusions that would negatively impact the public procurement processes. Additionally, delays in finalizing contract awards for commodities, services and technology would continue.

9. Federal standards: General standards for determining vendor responsibility on the Federal level are found at 48 CFR 9.104-1. The proposed regulations are consistent with those Federal Acquisition Regulation ("FAR") standards and those FAR standards applicable to NYS contracting agencies are included in the proposed regulations. Additional standards are included to address the unique needs of NYS contracting agencies.

10. Compliance schedule: The regulations will be effective on the date they are adopted.

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

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

Assessment of Public Comment

During the comment period which commenced upon publication of the Notice of Proposed Rule Making in the *State Register* on October 25, 2006, comments were received from The Office of the State Comptroller ("OSC"), the Administrative Regulations Review Commission (Assembly Members Destito and Diaz) and Change to Win.

All comments received during the comment period were reviewed and assessed in accordance with the provisions of the State Administrative Procedure Act. The issues raised by these comments, significant alternatives suggested by them, statements of the reasons why alternatives suggested by such comments were not incorporated into the rule, and descriptions of the non-substantial changes made to the rule as a result of such comments are found below. Additionally, informal comments and suggestions from the business community, including representatives of the small business community were received and reviewed by the Office of General Services ("OGS") as well as from State agencies. A number of recommended non-substantive suggestions were incorporated in the amended text for clarification purposes.

COMMENTS BY NEW YORK STATE OFFICE OF THE STATE COMPTROLLER ("OSC")

COMMENT: OSC commented that OGS does not have the statutory authority to promulgate rules relating to vendor responsibility determinations for contracts other than OGS contracts, centralized purchasing contracts, and contracts that otherwise require prior OGS approval.

RESPONSE: OGS disagrees and no changes were made to the text regarding this issue. In addition to the Commissioner's statutory authority

to promulgate rules and regulations contained within the regulatory impact statement, 9 NYCRR 250.0(b) clearly sets forth that the purpose, intent and applicability of Part 250 is to set "forth requirements, procedures, and processes relative to purchasing and contracting for commodities, services, and technology by State agencies utilizing differing methods of procurement available to meet their needs. The consistent application of long standing effective purchasing and contracting practices serves the best interests of the State and its citizens." Part 250 is "applicable to State agency procurement practices, to the methodologies employed in public procurement and to the participation in State procurement contracts by other authorized purchases." The proposed regulations provide additional guidance in fulfilling the purposes of 9 NYCRR Part 250. Additionally, in May, 2000, OGS solicited an independent legal review of its authority to promulgate rules and regulations relating to procurement, which review confirms OGS' analysis of authority. The results of such review are on file in OGS.

COMMENT: OSC commented that OGS does not have the authority to promulgate rules that impinge or limit the Comptroller's authority under SFL § 112 to render independent vendor responsibility determinations.

RESPONSE: No changes were made to the text regarding this issue. The proposed regulations do not usurp the Comptroller's authority under SFL § 112 to approve or disapprove contracts. SFL § 163(9)(f) states that, "Prior to making an award of contract, each agency shall make a determination of responsibility of the proposed contractor" (emphasis added). The State Finance Law clearly states that it is the agency that shall determine a vendor's responsibility and the Comptroller's Office that will decide whether to approve or disapprove the contract, pursuant to the independent contract approval authority set forth in SFL § 112.

COMMENT: Regarding 9 NYCRR 250.21(b), OSC objects to the statement that, "Any appeal from such determination shall be initiated in accordance with Article 78 of the Civil Practice Law and Rules". OSC stated that the statement ignored a vendor's right to file an award protest among other things.

RESPONSE: An amendment is made to 9 NYCRR 250.21(b) to clarify that the reference to filing of an Article 78 only applies to vendor responsibility determinations made by State agencies in accordance with SFL § 163(9)(f).

COMMENTS BY THE ADMINISTRATIVE REGULATIONS REVIEW COMMISSION (Assembly Members Destito and Diaz)

COMMENT: Assembly Members Destito and Diaz suggested that the proposed regulations and responsibility determination of State Finance Law § 163(9)(f) can be read to undercut the responsibility determination required under State Finance Law § 139-j.

RESPONSE: Section 250.21(a) provides that its provisions apply to the responsibility determinations made in accordance with State Finance Law § 163(9)(f). Its terms do not apply to other responsibility determinations that may be required. State Finance Law §§ 139-j and 139-k set forth a separate responsibility determination that must be made under limited circumstances – namely when a procuring governmental entity has determined that there is sufficient cause to believe that an allegation of a violation of the permissible contacts requirements is true. State Finance Law §§ 139-j and 139-k set forth a definitive legal standard for this responsibility determination of knowing and willful, with separate consequences that attach only to the non-responsibility determination under this section – namely posting on the internet and potential debarment of an offerer. State Finance Law § 139-j(7) expressly recognizes the separate responsibility determination under State Finance Law § 163(9)(f). Further, State Finance Law § 139-k(2) obligates a governmental entity to obtain specific information regarding any prior non-responsibility due to a violation of State Finance Law § 139-j or the intentional provision of false or incomplete information to a governmental entity. Accordingly, the proposed regulations do not undercut the responsibility determination under State Finance Law § 163(9)(f), and support the separateness of the two responsibility determinations. Therefore, no changes were made to the text regarding this issue.

COMMENT: Assembly Members Destito and Diaz suggested that a conflict exists between the proposed 9 NYCRR 250.21(a)(11)(xvii) and SFL § 139-j regarding a lookback period.

RESPONSE: An amendment has been made to 9 NYCRR 250.21(a) to clarify and make the subsection consistent with the SFL § 139-j.

COMMENT: Assembly Members Destito and Diaz suggested that the proposed regulations may be an attempt by OGS to limit the authority of OSC under SFL § 112 to question agencies' determinations of responsibility and require further research and assessment before a contract can be awarded.

RESPONSE: No changes were made to the text regarding this issue. The proposed regulations do not usurp the Comptroller's authority under SFL § 112 to approve or disapprove contracts. SFL § 163(9)(f) states that, "Prior to making an award of contract, each agency shall make a determination of responsibility of the proposed contractor" (emphasis added). The State Finance Law clearly states that it is the agency that shall determine a vendor's responsibility and the Comptroller's Office that will decide whether to approve or disapprove the contract, pursuant to the independent contract approval authority set forth in SFL § 112.

COMMENT: Assembly Members Destito and Diaz suggested that OGS consult with the small business community during the creation of the proposed regulations.

RESPONSE: The Regulatory Impact Statement has been revised to reflect the outreach that OGS conducted with the Business Council of New York State, Inc. The Business Council was very supportive of OGS's efforts and made suggestions to OGS which were considered and many of them integrated into the revised text.

COMMENTS BY CHANGE TO WIN

COMMENT: Change to Win suggested amending 9 NYCRR 250.21(a) to broaden the definition of "credible evidence".

RESPONSE: No change is made. It is the opinion of OGS that "credible evidence" is defined appropriately.

COMMENT: Change to Win suggested amending 9 NYCRR Part 250 to mandate that prospective vendors (and their principals, officers, and shareholders) affirmatively disclose information related to various categories.

RESPONSE: No change is made. It is beyond OGS's statutory authority to regulate the vendor community.

COMMENT: Change to Win commented that 9 NYCRR 250.2(a)(11), requiring disclosure of certain information, is too narrow.

RESPONSE: An amendment is made to 9 NYCRR 250.21(a)(11) to clarify and correct a technical error by adding an "s" to "major stockholder" to make the term refer to any major stockholder.

COMMENT: Change to Win suggested that certain standards listed under 9 NYCRR 250.21(a)(11) are unnecessarily narrow.

RESPONSE: An amendment is made to 9 NYCRR 250.21(a)(11) to clarify that the proposed regulations are and remain consistent with the State Procurement Council's Standard Vendor Responsibility Questionnaire.

COMMENT: Change to Win suggested that specific additional categories of information should be included under 9 NYCRR 250.21(a)(11).

RESPONSE: No change is made. It is OGS's opinion that the additional categories suggested by Change to Win are already covered under 9 NYCRR 250.21(a)(11).

COMMENT: Change to Win suggested that 9 NYCRR 250.21 contain certain additional standards for agencies to consider.

RESPONSE: No change is made. It is OGS's opinion that the standards listed in the proposed regulations are appropriate.

COMMENT: Change to Win suggested that the proposed regulations be modified to explicitly provide that to the greatest extent possible, any information disclosed is promptly made available to the public, and that the public is given an opportunity to respond prior to any responsibility determination.

RESPONSE: No change is made. Any information regarding the responsibility determination of a vendor is appropriately requested through a Freedom of Information Law request.

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

Statutory authority: Public Health Law, section 2803

Subject: Nursing home pharmacy regulations.

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

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-50-05-00004-P, Issue of December 14, 2005.

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

Revised rule making(s) were previously published in the State Register on September 27, 2006.

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

Assessment of Public Comment

A Notice of proposed amendment of section 415.18 of Title 10 NYCRR subdivisions (g) and (i) titled "Pharmacy Services" was published in the September 27, 2006 issue of the *State Register*. In response to this publication, the NYSDOH received one written comment from the Medical Society of the State of New York (MSSNY). The following is a summary of the public comment:

Comment:

The comment stated that the term "legally designated alternate practitioner" in the proposal is too broad. They believe it would include practitioners who may not have appropriate legal authority to prescribe. MSSNY recommends that the sentence be revised to read "In the event a verbal order is not signed by the prescriber or a legally designated alternate practitioner, with appropriate legal authority to prescribe such medication, within 48 hours."

Response:

No changes were made. The Department determined that the term "legally designated alternate practitioner" does not allow practitioners to practice beyond the scope permitted by law. Nurse practitioners and physician's assistants may sign such verbal orders only where legally authorized. For example, nurse practitioners must practice within the collaborative arrangement with their physician and medical acts performed by physician's assistants must be assigned by the supervising physician.

NOTICE OF ADOPTION

Controlled Substances in Emergency Kits

I.D. No. HLT-50-05-00005-A

Filing No. 1484

Filing date: Dec. 8, 2006

Effective date: Dec. 27, 2006

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

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

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

Subject: Controlled substances in emergency kits.

Purpose: To allow class 3A facilities to obtain, possess and administer controlled substances in emergency kits.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-50-05-00005-P, Issue of December 14, 2005.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Health

NOTICE OF ADOPTION

Nursing Home Pharmacy Regulations

I.D. No. HLT-50-05-00004-A

Filing No. 1501

Filing date: Dec. 12, 2006

Effective date: Dec. 27, 2006

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

NOTICE OF ADOPTION

Non-Transplant Anatomic Banks**I.D. No.** HLT-20-06-00003-A**Filing No.** 1502**Filing date:** Dec. 12, 2006**Effective date:** Dec. 27, 2006

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

Action taken: Amendment of Part 52 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 4365(1)

Subject: Establishment of minimum technical requirements for non-transplant anatomic banks.

Purpose: To refine the definition of non-transplant anatomic banks and eliminate any regulatory confusion and establish certain technical requirements that reflect current standards of practice at non-transplant anatomic banking facilities.

Substance of final rule: This amendment to Part 52 changes existing definitions and adds new definitions to reflect currently accepted nomenclature, and provide needed clarification and consistency specific to the regulation of nontransplant anatomic banks. In addition, the new Subpart 52-11 enables the Department to establish needed technical standards for nontransplant anatomic banks.

The amendment fine tunes the definition of nontransplant anatomic bank to eliminate any regulatory confusion, decrease the likelihood of misinterpretation by regulated parties, and clarify licensure requirements for nontransplant anatomic banks located outside New York State. Exclusions from licensure as a nontransplant anatomic bank are clarified.

The amendment includes a new Subpart 52-11, which establishes minimum technical standards for nontransplant anatomic banks. The terms whole body, whole body acquisition service, whole body user, and body segment are defined.

The amendment specifies informed consent requirements for nontransplant anatomic banks that recover nontransplant anatomic parts (whole bodies, body segments, organs and/or tissues) for use in research and education. Consent must be documented, and any restrictions on the use of the gift, specified by the donor or donating next of kin, must be honored by the nontransplant anatomic bank. Requirements for documenting the consent, including those consents obtained by telephone, are specified.

The amendment requires the retrieval or acquisition of nontransplant anatomic parts to be performed on the premises of a general hospital, a nontransplant anatomic bank licensed in the category of whole body acquisition service, or, for nontransplant anatomic parts other than whole bodies and body segments, a licensed comprehensive tissue procurement service. Whole bodies, body segments, or other nontransplant anatomic parts are to be retrieved, acquired, distributed, transported, or used only for purposes authorized by Public Health Law Section 4302.

Minimum staffing requirements for whole body acquisition services and whole body users are set forth. Included is a provision that permits individuals who do not meet educational requirements, but who serve as director of a whole body acquisition service at the time of adoption of this amendment, to continue as director.

Facility requisites for whole body acquisition services and whole body users are specified. The amendment requires that whole body acquisition services and whole body users have dedicated, secure and restricted space, or approved off site locations for preparation of whole bodies and body segments for research and/or education purposes. Access to such space must be limited to individuals directly associated with receipt and preparation of whole bodies or body segments. Minimum requirements for preparation and storage space include: a working sink; adequate counter space; suitable space for storage of chemicals; counters, tables and cabinetry built of material that may be easily disinfected and cleaned; a dedicated, refrigerated room, walk-in cooler, or cadaver drawer cooler for the storage of whole bodies and body segments; U.S. Occupational and Health Administration (OSHA)-approved eye wash stations and devices for handling, lifting and internal transporting of whole bodies and body segments; and a morgue and/or crematory compliant with federal and state standards for embalming and cremation, if embalming and/or cremation services are performed.

Recordkeeping requirements, supplemental to those already detailed in Section 52-2.9(i), are specified.

The amendment includes provisions for the appropriate transfer of whole bodies, body segments, or other nontransplant anatomic parts in compliance with existing State standards for such transfer.

The amendment outlines requirements for the disposition of nontransplant anatomic parts, including whole bodies and body segments, once their use in education and research is concluded.

The amendment requires nontransplant anatomic banks to implement written safety and infection control policies and procedures to ensure protection of employees from unnecessary physical, chemical and biological hazards. Requisites are detailed for decontamination and disposal techniques for regulated medical waste as well as use of autoclave equipment. Restrictions on eating, drinking, smoking, and the application of cosmetics in work areas, and the use of gloves, laboratory coats, gowns or other protective clothing are imposed.

Finally, reporting requirements are set forth, consistent with those already in effect for licensed tissue banks. The amendment requires nontransplant anatomic bank directors to report to the Department certain information and data regarding the bank's activities.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 52-11.3(d) and 52-11.4(a).

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

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

Although the regulation has been changed since it was published in the *State Register* on May 17, 2006, the changes do not necessitate any changes to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

A notice of proposed amendment to Subpart 52-1 and addition of a new Subpart 52-11 to Part 52 of 10 NYCRR, entitled "Nontransplant Anatomic Banks," was published in the May 17, 2006 issue of the *State Register*. The Department of Health informed all licensed tissue banks and nontransplant anatomic banks of the publication. In response to the proposal, the Department received written comments from only one tissue bank. The comments were helpful in identifying provisions needing clarification to avoid misinterpretation and, as a result of considering these comments, two non-substantive changes have been made for clarification purposes and to preserve the Department's intent. In addition, the term "cadaveric" was changed to "deceased" in two instances, in order to be consistent with terminology throughout the express terms.

Comment:

The sole commentor expressed concern that the proposed requirement that retrieval of nontransplant anatomic parts take place on the premises of a hospital or whole body acquisition service would impede or even prevent recovery of tissues for research and education purposes by tissue banks licensed as comprehensive tissue procurement services, since such services would need to contract with an area hospital, imposing both time delays and costs.

Response:

Section 52-11.4 is primarily directed at acquisition of whole bodies and body segments. The Department notes that the proposed rule's restriction on the locations of body and body segment retrieval to hospitals and whole body acquisition services was not intended to hinder comprehensive tissue procurement services from acquiring tissues - typically those unsuitable for clinical use (*i.e.*, transplant) - for research and education purposes. Therefore, Section 52-11.4(a) has been revised to clarify that recovery of nontransplant anatomic parts other than whole bodies and body segments may take place on the premises of a comprehensive tissue procurement service.

Comment:

The commentor expressed concern that requiring telephone consent for donation to be followed by written consent documentation would severely limit the availability of fresh tissue for research, which, for many uses, must arrive at the research facility within 24 hours of recovery.

Response:

The Department agrees that the standard as written could be misinterpreted, and has revised Section 52-11.3(d) to underscore that the onus is on the bank or service to maintain a permanent written record of telephone consent. The Department believes the revised language now conveys that separate, written documentation of consent from the family is not required subsequent to telephone consent.

Comment:

The commentor expressed concern about the requirement for a facility or entity otherwise exempt from licensure as a nontransplant anatomic

bank to receive and maintain a copy of the donation consent document. The commentor suggested that provision of a redacted copy of the consent document, concealing the donor's name and other identifying information while retaining information to allow tracing back to the original consent document at the recovery agency, should be sufficient.

Response:

The Department will retain the requirement that researchers who use human nontransplant anatomic parts and/or their institutions maintain a copy of the consent document. The proposed requirement would not preclude a facility that provides nontransplant anatomic parts to researchers from redacting donor information on copies of consent forms provided to the researchers.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Recreational Aquatic Spray Grounds

I.D. No. HLT-52-06-00004-P

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

Proposed action: Addition of Subpart 6-3 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

Subject: Recreational aquatic spray grounds.

Purpose: To establish standards for safe and sanitary operation of recreational aquatic spray grounds that re-circulate water.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The proposed Subpart contains the following provisions:

Recreational aquatic spray grounds (spray ground) are defined and spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the spray ground is located.

Design standards for new and existing spray grounds are established. The standards including requirements for disinfection (chemical and ultraviolet) and filtration equipment, as well as, requirements for spray pad, spray pad treatment tank, decking and spray pad enclosure construction and design.

Existing spray ground operators must provide a report to the LHD which evaluates compliance with the design criteria contained in the regulation and needed improvements. The report must be prepared by a New York State licensed professional engineer and submitted to the LHD at least 90 days prior to operation.

LHDs must follow the recommendations of the State Health Department prior to accepting or denying alternative designs for new and existing spray grounds.

Operation and maintenance standards are established including daily start-up procedures, minimum disinfection levels, filtration rates, water quality standards and general safety provisions. The spray ground operator must maintain daily operation records.

On-site water supplies, toilet facilities, and sanitary wastewater treatment systems must comply with sanitary and operation standards.

Spray grounds must be supervised when open for use and must be maintained by a qualified swimming pool water treatment operator.

Spray ground operators must develop, update and implement a written safety plan consisting of procedures for patron supervision, injury prevention, reacting to emergencies, injuries and other incidents providing first aid and assistance.

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

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

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

Summary of Regulatory Impact Statement

Statutory Authority:

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL Sections 225(5)(a) and 201(1)(m) authorize SSC regulation of the sanitary aspects of businesses and activities affecting public health.

Needs and Benefits:

During the summer of 2005, approximately 3,000 patrons of the Seneca Lake State Park spray ground became ill with cryptosporidiosis as a result of exposure to the spray ground water. This type of aquatic facility poses a significant risk of illness to the patrons due to the design, which involves the collection and recirculation of sprayed water. To prevent future illness outbreaks involving this type of aquatic activity, spray ground design and operation regulations are necessary including design criteria for new and existing spray grounds for water recirculation, filtration and disinfection (chemical and ultraviolet), electrical safety and spray pad enclosure.

Additionally, the regulation contains requirements for obtaining an annual permit to operate from the state or local health department (LHD) having jurisdiction, as well as, other bathhouse, personnel, potable water supply, wastewater disposal and general safety requirements.

Regulated Parties:

Statewide in 2005, there were thirty-two seasonally operated spray grounds that use re-circulated water. Four additional spray grounds are under construction. Until the emergency regulations became effective on January 18, 2006, spray ground operations were not regulated by the SSC. Of the 36 existing and proposed spray grounds, 14 have submitted the required engineering report and plans for installation of ultraviolet disinfection systems and other necessary modifications, and 5 indicated they will not meet the spray ground definition because they plan to discharge feature water to waste, therefore regulatory compliance is not necessary. The proposed regulation clarifies of certain requirements but is consistent with the emergency regulation effective April 18, 2006.

Costs to Regulated Parties:

There may be significant cost to spray grounds operators for water recirculation, filtration and disinfection (chemical and ultraviolet) improvements and additions. Additionally there will be expenses associated with an engineering report, which addresses the design criteria, and other miscellaneous improvements.

Government:

The printing and distribution of the new Code and the corresponding revised inspection report will be a minimal State Health Department expense. There may be additional costs to some city and county health departments that enforce the proposed rule, because the proposed rule will increase the number of facilities regulated by some of these agencies. LHD's are expected to use existing staff to for the workload because of the low number of spray grounds in a jurisdiction.

The costs to municipally operated spray grounds are described above in Costs to Regulated Parties.

This regulation does not duplicate any existing federal, state or local regulations.

Alternatives Considered:

Several treatment options were considered for control of cryptosporidium including the use of ozone, membrane filtration, dilution and patron control. UV disinfection was selected as the code standard because of its effectiveness and appropriateness for the high flow rates of spray grounds. Other treatment options that can be documented to effectively remove cryptosporidium are acceptable in the proposed regulation.

Compliance Schedule:

The proposed regulation will be effective upon publication of a notice of adoption in the *State Register*.

Regulatory Flexibility Analysis

Effect on small business and local government:

There are thirty-two (32) recreational aquatic spray grounds (spray grounds) in New York State and four that are under construction. Eighteen (18) of the thirty-six (36) are or will be operated by local governments.

Compliance requirements:

Reporting and recordkeeping:

A spray ground operator must maintain daily operation records of the recreational aquatic spray ground including disinfection levels, bather usage and other maintenance. A copy of the records must be maintained at the facility for 12 months.

Facilities that are required to disinfect their potable water supply must maintain daily records of the potable water system disinfection. Forms will be provided by the permit-issuing official and require monthly submittal to the permit-issuing official.

Injury and illness that occur at a spray ground must be reported by the owner/operator to the permit-issuing official within 24 hours of its occurrence and recorded in a logbook.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first

aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Other affirmative acts:

Spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the facility is located.

Design criteria for new and existing spray grounds are established to assure safe and sanitary spray ground operation.

1. Water recirculation, filtration and disinfection (chemical and ultraviolet) standards are established to assure all water that is sprayed onto patrons is free of pathogens. Filtration is essential for effective disinfection. Both ultraviolet (UV) and chemical disinfection are required because UV is necessary to destroy cryptosporidium and chemical disinfection is effective for many other pathogens normally associated with swimming pools.

2. Spray pad and spray pad treatment tank construction standards ensure that there is no standing water on the spray pad, the spray pad is slip resistant, and the spray pad and spray pad treatment tank do not promote bacterial growth or harbor pathogens.

3. Electrical standards protect patrons from electrocution.

4. Spray pad enclosure requirements prevent access to the pad by people and animals during non-supervised time periods. Preventing access will reduce contaminants that can enter the recirculation system.

To ensure compliance with the regulation, (spray grounds existing prior to January 18, 2006 effective date of initial emergency regulation) are required to submit an engineering report addressing the design criteria specified in the regulation. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies.

Personnel:

Spray grounds must provide at least one supervisory staff to provide periodic supervision of the spray pad. Supervisory staff is necessary to control patron activities and respond to events that can affect patron health and safety.

Spray feature water treatment systems must be maintained by a qualified swimming pool water treatment operator to assure continuous and proper operation of water treatment equipment.

Safety:

Signs, which contain seven rules and warning statements, must be posted at the spray pad or enclosure/entrance and bathhouse/toilet facilities. The statements inform the patrons that the water is recirculated (not potable) and highlights the practices to reduce the potential for the contamination of the spray ground water.

First aid equipment must be provided at the spray ground unless otherwise specified in the safety plan.

A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Potable water supply and waste water disposal:

Potable water supplies serving the spray ground must comply with Subpart 5-1 of the State Sanitary Code. On-site water supplies that do not meet the definition of a Public Water supply must comply with the requirements in Subpart 5-1 for non-community water supplies.

Sewage and other wastewater must be disposed of in acceptable sanitary facilities.

Bathhouse and foot shower:

Adequate sanitary facilities are required including toilets, lavatories, refuse disposal, diaper changing areas and foot showers. The presence and maintenance of conveniently located toilet facilities, diaper changing areas and foot shower will help eliminate diaper changing on or near the spray pad and reduce the potential for spray pad contamination.

Professional services:

Operators of existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies. Spray grounds that require modifications to the existing equipment and plumbing will require additional engineering services related to design modification(s).

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to become certified.

Compliance cost:

The proposed rule has cost impacts that affect thirty-two (32) existing seasonally operated spray grounds and four spray grounds that are under construction.

Existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Some facilities may have existing reports that can be submitted; however, those that do not have an adequate existing report will need to hire a licensed professional engineer to prepare one. Cost estimates for the report range between \$2,000 and \$20,000. The cost is expected to be at the lower end of the range because spray ground operators will most likely utilize engineering firms that are already familiar with the facility and therefore require less time to prepare the report.

Spray grounds that require modifications to the existing equipment and plumbing incur additional cost. The estimated cost for engineering services related to design modification(s) range from 6% to 15% of the project cost.

The estimated cost for other modifications are as follows:

Spray ground feature water treatment:

Ultraviolet (UV) disinfection equipment cost will vary based on the spray ground feature flow rate. Costs are based on estimates provided by two leading UV reactor manufacturers.

Flow rate (gpm)	UV reactor cost	Installation ¹	Lamp replacement ²
50	\$6,585-\$12,000	\$1,930-\$4,000	\$240-\$500
100	\$9,000-\$17,500	\$2,050-\$4,000	\$480-\$500
140-150	\$13,800-\$19,000	\$2,290-\$4,500	\$600-\$720
250	\$20,965-\$23,000	\$2,650-\$5,000	\$600-\$840
500	\$29,355-\$31,000	\$3,068-\$5,500	\$700-\$1,680
1,000-1,300	\$34,000-\$42,225	\$3,712-\$6,000	\$700-\$2,320
2,000-2,300	\$40,000-\$50,000	\$4,100-\$7,000	\$800-\$3,480

¹UV reactor installation includes necessary labor and supplies for plumbing and electrical connection.

²Lamp replacement is anticipated to be once every 4-5 years for seasonally operated facilities.

The cost to operate UV reactors ranges from \$30 to \$875 per season for electric and \$350 to \$450 for cleaning and other maintenance.

Spray grounds that do not have adequate treatment tank filtration will require an additional pump and filtration. The pump and filter costs are based on the volume of water to be filtered. Costs range between \$350 and \$620 for pumps and \$350 and \$850 for filters. The number of required filters varies for each facility and cannot be estimated.

The proposed regulation requires spray grounds to have an automatic chemical controller for monitoring and adjusting the disinfectant and pH levels in the treatment tank. The cost for a chemical controller is between \$1,800 and \$4,200 plus installation.

Each spray ground is required to have valves and piping in the spray pad drain system to allow for discharging water to waste prior entering the spray pad treatment tank. The cost of installing a water diversion valve will vary based on the accessibility of piping at the point where the valve must be installed. Cost estimates range between \$750 and \$6,400.

Bathhouse/foot shower:

Some spray grounds may need to replace or add bathhouse facilities and/or foot showers when insufficient facilities are provided. The need and cost for additional fixtures will vary greatly by facility and cannot be estimated.

Personnel:

Spray grounds must be provided with periodic supervision. Most spray grounds will have acceptable staff already on-site fulfilling this role and will incur no additional expense. Spray grounds that do not have staff to periodically supervise the facility will have a cost increase associated with hiring someone or reassigning staff to perform supervisory duties. Staff may perform other duties such as facility maintenance in addition to performing the supervisory responsibilities. The minimum wage is currently \$6.75 an hour.

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to a course to become certified. Courses to become certified as a qualified swimming pool water treatment operator cost approximately \$280. The cost of hiring a company to provide the service is \$6,000 a season.

Miscellaneous expenses:

Spray grounds must be enclosed to prevent access by people and animals during non-supervised time periods. The cost of enclosures varies depending on the style. Fencing cost range from \$9.00 a lineal foot to \$23.00 per foot which includes installation. Some fence installation types include the cost of a gate while others have an additional gate charge.

Facilities must post signs stating seven rules/warning statements. The cost of a 2 feet by 3 feet commercially prepared sign ranges from \$85 to \$400. Two signs are required at each facility.

Spray grounds are required to have a 24-unit first aid kit or adequate first aid supplies. The cost of a 24-unit first aid kit is between \$25 and \$75. Purchasing first aid supplies to satisfy the requirement will cost less.

Economic and technological feasibility:

The proposal is technologically feasible because it requires the use of existing technology. The overall economic feasibility cannot be predicted at this time because the economic feasibility for each regulated spray ground is dependent upon the financial condition of that spray ground and the extent to which that spray ground must undertake additional actions to comply with the requirements of this regulation.

Minimizing adverse economic impact:

The proposed rule establishes standards for recreational aquatic spray grounds to minimize risk to the public health. Should this rule have a substantial adverse impact on a particular facility, a waiver of one or more requirements other than spray ground feature water disinfection (chemical and ultraviolet or accepted equivalent) and filtration, will be considered, so long as alternative arrangements protect public health and safety. Alternatively, a variance, allowing additional time to comply with one or more requirements, can be granted if the health and safety of the public is not prejudiced by the variance.

Small business participation:

During the development of the emergency regulation, the Department met with design professionals and industry representatives on one occasion and had numerous telephone conversations to develop a better understanding of spray ground operation, particularly concerning spray ground feature water recirculation and treatment, and incorporated the information into the proposed regulation.

Rural Area Flexibility Analysis

Types and estimated number of rural areas:

There are thirty-six (36) recreational aquatic spray grounds (spray grounds) in New York State grounds including four that are under construction. Approximately half are located in rural areas.

Reporting and recordkeeping and other compliance requirements:

A spray ground operator must maintain daily operation records of the recreational aquatic spray ground including disinfection levels, bather usage and other maintenance. A copy of the records must be maintained at the facility for 12 months.

Facilities that are required to disinfect their potable water supply must maintain daily records of the potable water system disinfection. Forms will be provided by the permit-issuing official and require monthly submittal to the permit-issuing official.

Injury and illness that occur at a spray ground must be reported by the owner/operator to the permit-issuing official within 24 hours of its occurrence and recorded in a logbook.

Spray ground owners are required to obtain an annual permit to operate from the local health department (LHD) having jurisdiction in the county that the facility is located.

Design criteria for new and existing spray grounds is established to assure safe and sanitary spray ground operation.

(1) Water recirculation, filtration and disinfection (chemical and ultraviolet) standards are established to assure all water that is sprayed onto patrons is free of pathogens. Filtration is essential for effective disinfection. Both ultraviolet (UV) or other acceptable equivalent, and chemical disinfection are required because UV is necessary to destroy cryptosporidium and chemical disinfection is effective for many other pathogens normally associated with swimming pools.

(2) Spray pad and spray pad treatment tank construction standards ensure that there is no standing water on the spray pad, the spray pad is slip resistant, and the spray pad and spray pad treatment tank do not promote bacterial growth or harbor pathogens.

(3) Electrical standards protect patrons from electrocution.

(4) Spray pad enclosure requirements prevent access to the pad by people and animals during non-supervised time periods. Preventing access will reduce contaminants that can enter the recirculation system.

To ensure compliance with the regulation, existing spray grounds are required to submit an engineering report addressing the design criteria specified in the regulation. Reports must be prepared by a professional

engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies.

Personnel:

Spray grounds must provide at least one supervisory staff to provide periodic supervision of the spray pad. Supervisory staff is necessary to control patron activities and respond to events that can affect patron health and safety.

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A written safety plan must be developed and implemented. The safety plan must contain procedures for daily patron supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first aid and summoning help. The safety plan must be approved by the permit-issuing official and maintained at the spray ground.

Potable water supply and waste water disposal:

Potable water supplies serving the spray ground must comply with Subpart 5-1 of the State Sanitary Code. On-site water supplies that do not meet the definition of a Public Water supply must comply with the requirements in Subpart 5-1 for non-community water supplies.

Sewage and other wastewater must be disposed of in acceptable sanitary facilities.

Bathhouse and foot shower:

Adequate sanitary facilities are required including toilets, lavatories, refuse disposal, diaper changing areas and foot showers. The presence and maintenance of conveniently located toilet facilities, diaper changing areas and foot showers will help eliminate diaper changing on or near the spray pad and reduce the potential for spray pad contamination.

Professional services:

Operators of spray grounds existing prior to January 18, 2006 (effective date of the initial emergency regulation) must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Reports must be prepared by a professional engineer and identify areas of non-compliance with the regulation and include recommendations for correcting the identified deficiencies. Spray grounds that require modifications to the existing equipment and plumbing will require additional engineering services related to design modification(s).

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to become certified.

Cost:

The proposed rule has cost impacts that affect thirty-two (32) existing seasonally operated spray grounds and four spray grounds that are under construction.

Existing spray grounds must submit an engineering report that addresses the design criteria contained in the proposed Subpart. Some facilities may have existing reports that can be submitted; however, those that do not have an adequate existing report will need to hire a licensed professional engineer to prepare one. Cost estimates for the report range between \$2,000 and \$20,000. The cost is expected to be at the lower end of the range because spray ground operators will most likely utilize engineering firms that are already familiar with the facility and therefore require less time to prepare the report.

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¹UV reactor installation includes necessary labor and supplies for plumbing and electrical connection.

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The cost to operate UV reactors ranges from \$30 to \$875 per season for electric and \$350 to \$450 for cleaning and other maintenance.

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The proposed regulation requires spray grounds to have an automatic chemical controller for monitoring and adjusting the disinfectant and pH levels in the treatment tank. The cost for a chemical controller is between \$1,800 and \$4,200 plus installation.

Each spray ground is required to have valves and piping in the spray pad drain system to allow for discharging water to waste prior entering the spray pad treatment tank. The cost of installing a water diversion valve will vary based on the accessibility of piping at the point where the valve must be installed. Cost estimates range between \$750 and \$6,400.

Bathroom/foot shower:

Some spray grounds may need to replace or add bathroom facilities and/or foot showers when insufficient facilities are provided. The need and cost for additional fixtures will vary greatly by facility and cannot be estimated.

Personnel:

Spray grounds must be provided with periodic supervision. Most spray grounds will have acceptable staff already on-site fulfilling this role and will incur no additional expense. Spray grounds that do not have staff to periodically supervise the facility will have a cost increase associated with hiring someone or reassigning staff to perform supervisory duties. Staff may perform other duties such as facility maintenance in addition to performing the supervisory responsibilities. The minimum wage is currently \$6.75 an hour.

A qualified swimming pool water treatment operator must maintain the spray pad water treatment system. Facilities that do not currently employ such personnel may hire a company to provide the service or send a current employee to a course to become certified. Courses to become certified as a qualified swimming pool water treatment operator cost approximately \$280. The cost of hiring a company to provide the service is \$6,000 a season.

Miscellaneous expenses:

Spray grounds must be enclosed to prevent access by people and animals during non-supervised time periods. The cost of enclosures varies depending on the style. Fencing cost range from \$9.00 a lineal foot to \$23.00 per foot which includes installation. Some fence installation types include the cost of a gate while others have an additional gate charge.

Facilities must post signs stating seven rules/warning statements. The cost of a 2 feet by 3 feet commercially prepared sign ranges from \$85 to \$400. Two signs are required at each facility.

Spray grounds are required to have a 24-unit first aid kit or adequate first aid supplies. The cost of a 24-unit first aid kit is between \$25 and \$75. Purchasing first aid supplies to satisfy the requirement will cost less.

Minimizing adverse economic impact on rural areas:

The proposed rule establishes standards for recreational aquatic spray grounds to minimize risk to the public health. Should this rule have a substantial adverse impact on a particular facility, a waiver of one or more requirements other than spray ground feature water disinfection (chemical and ultraviolet or accepted equivalent) and filtration, will be considered, so long as alternative arrangements protect public health and safety. Alternatively, a variance, allowing additional time to comply with one or more requirements, can be granted if the health and safety of the public is not prejudiced by the variance.

Rural area participation:

During the development of the emergency regulation, the Department met with design professionals and industry representatives on one occasion

and had numerous telephone conversations to developed a better understanding of spray ground operation, particularly concerning spray ground feature water recirculation and treatment, and incorporated the information into the proposed regulation.

Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

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

Hospice Residence Dually Certified Beds

I.D. No. HLT-52-06-00005-P

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

Proposed action: Amendment of Parts 700, 717, 790, 791 and 794 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 4002(2-b)

Subject: Hospice residence dually certified beds.

Purpose: To establish standards and procedures for hospice residence beds dually certified for residence care and inpatient care and update general standards for hospice residence.

Text of proposed rule: Subdivision (d) of section 790.2 of Part 790 is amended as follows:

Whenever any applicant proposes to lease premises in which a *hospice residence* or the inpatient component of a hospice is to be provided, the lease agreement shall include the following language:

“The landlord acknowledges that its rights of reentry into the premises set forth in this lease do not confer on it the authority to operate a hospital or hospice as defined in articles 28 and 40, respectively, of the Public Health Law on the premises and agrees to provide the New York State Department of Health, Mayor Erastus Corning 2nd Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, N.Y. 12237, with notification by certified mail of its intent to reenter the premises or to initiate dispossession proceedings or that the lease is due to expire, at least 30 days prior to the date on which the landlord intends to exercise a right of reentry or to initiate such proceeding or at least 60 days before expiration of the lease.”

Subdivision (e) of section 790.2 of Part 790 is amended as follows:

No lease covering the hospice office site or the premises in which a *hospice residence* or the inpatient component of a hospice as defined in article 40 of the Public Health Law is to be conducted, and no lease covering any equipment used in the operation of a hospice, may contain any provision whereby rent, or any increase therein is based upon the Consumer Price Index or any other cost of living index. In the event the lease covering such hospice premises or equipment contains provisions whereby it is the lessor’s responsibility to pay necessary expenses associated with such premises or equipment, such as real estate taxes, utilities, heat, insurance, maintenance and operating supplies, such lease may contain provisions which allow adjustments to the rent only to the extent necessary to compensate the lessor for changes in such expenses.

Paragraph (5) of subdivision (c) of section 790.16 of Part 790 is amended as follows:

(5) The estimated need for hospice inpatient beds or *dually certified hospice residence beds* shall be equal to a number no greater than 20 percent of the expected average daily hospice caseload capacity divided by 0.85 to reflect an expected occupancy rate for hospice beds.

A new paragraph (28) of subdivision (a) of section 700.2 of Part 700 is added as follows:

(28) *Dually certified hospice residence bed shall mean a bed located in a hospice residence that has been approved by the Department to be used alternately for residential hospice care and inpatient hospice care.*

Subdivision (c) of section 717.2 of Part 717 is amended as follows:

(c) A free-standing hospice residence shall have a minimum capacity of three (3) residents and a maximum capacity of eight (8) residents. For the purposes of local laws and ordinances governing fire safety and building construction standards, any such residence shall be deemed either a one- or two-family dwelling. All free-standing hospice residences that do not operate beds dually certified for inpatient care shall comply, at a minimum, with the requirements for small residential board and care facilities as contained in chapter 21, section 21-2 of the 1985 National Fire Protection Association (NFPA) 101 Life Safety Code, applicable to small facili-

ties with an evacuation capability classification of Impractical. These codes and standards were published by the National Fire Protection Association, Batterymarch Park, Quincy, MA 02269, and are available for public inspection and copying at the Office of Regulatory Reform, New York State Department of Health, Corning Tower Building, Empire State Plaza, Albany, New York 12237. *Hospice residences that operate beds dually certified for inpatient care shall comply with the pertinent provisions for either residential occupancies or institutional occupancies as required by NFPA 101 in accordance with subdivision (b) of this section.*

Subdivision (a) of section 717.4 of Part 717 is amended as follows:

(a) A hospice residence shall be residential in character and physical structure[.], and shall not be located in a facility licensed under Article 28 of the Public Health Law. The physical layout shall be designed to accommodate the functional and operational program for the facility. All residents shall be provided opportunities for individual privacy, and all resident areas shall be designed to accommodate the physically disabled.

New paragraphs (6) and (7) of subdivision (b) of section 717.4 of Part 717 are added as follows:

(6) *A hospice residence may be approved to operate a maximum of two dually certified beds at any given time, which beds may be used alternately for the provision of residential hospice care and inpatient hospice care, provided there is existing hospice inpatient bed need in the county where the residence shall be located. Inpatient care shall be provided, as needed, to patients residing in the residence to ensure continuity of care and avoid transfer to an inpatient facility or unit. Patients shall be admitted directly from the community into a dually certified bed for inpatient care only when such patients shall continue to reside in the residence to receive routine home care following cessation of inpatient care. First priority for inpatient care in a dually certified bed shall be given to patients already residing in the residence. Should a dually certified bed be unavailable to an existing resident due to a community admission, the community admission shall be transferred to another inpatient facility.*

(7) *A hospice residence shall not be combined with a hospice inpatient unit. The hospice residence shall be separate and distinct from an inpatient unit, and physically separated by walls, doors or other physical structures. The inpatient unit and the hospice residence, when adjacent to each other, shall have separate entrances onto each unit, but may share a common exterior main entrance and common areas for meals, family interactions, and spiritual and recreational activities.*

Paragraphs (6) and (7) of subdivision (b) of section 791.2 of Part 791 are amended as follows:

(6) the repair, maintenance or alteration of a facility or unit used for hospice inpatient or hospice residence care and services when the total project cost exceeds \$250,000, except that proposals for the alteration of systems for facility water supply, fixed dietary, solid waste disposal or fire protection, and structural, mechanical and electrical changes affecting safety and/or sanitary conditions shall require approval regardless of project cost; [or]

(7) the acquisition, erection or building of a facility or portion thereof for hospice inpatient or hospice residence care and services, regardless of cost[.]; or

A new paragraph (8) of subdivision (b) of section 791.2 of Part 791 is added as follows:

(8) *the approval of any dually certified hospice residence beds, regardless of cost.*

Paragraph (6) of subdivision (d) of section 791.2 of Part 791 is amended as follows:

(6) the acquisition, erection or building of a facility or portion thereof used for hospice inpatient or hospice residence care and services, when total project cost exceeds \$250,000[.]; or

A new paragraph (7) of subdivision (d) of section 791.2 of Part 791 is added as follows:

(7) *the approval of any dually certified hospice residence beds, regardless of cost.*

Paragraph (8) of subdivision (f) of section 794.4 of Part 794 is amended as follows:

(8) routine and emergency drugs and biologicals, provided either directly to residents, or obtained under contract as described in section 793.2 of this Part, in accordance with Article 33 of the Public Health Law and Part 80 of this Title[.];

New paragraphs (9), (10) and (11) of subdivision (f) of section 794.4 of Part 794 are added as follows:

(9) *accommodations for recreational and religious activities;*

(10) *adequate space for private family and small group interactions;*

(11) *accommodations to enable families to store and prepare food brought in by the family.*

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

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

Statutory Authority

The State Hospital Review and Planning Council, subject to the approval of the Commissioner of Health, has authority under Public Health Law (PHL) section 4010(4) to promulgate the regulations to effectuate the provisions and purposes of Article 40 (Hospice) of the PHL relating to operational and construction standards. The Public Health Council has the authority under PHL section 4004(4) to promulgate regulations to implement the establishment requirements and provisions of Article 40. Article 40 of the PHL provides the Department of Health (Department) with responsibility for the development and administration of programs, standards and methods of operation and all other matters of State policy with respect to hospices and authority to determine the standards and procedures relating to certificates of approval for hospices, including authority to promulgate regulations to implement statutory provisions regarding hospice residences.

Legislative Objectives

It was the intent of the Legislature in enacting Article 40 of the PHL that the Department establish rules, regulations and policies governing hospices. Article 40 defines hospice as a coordinated program of home and inpatient care which treats the terminally ill patient and family as a unit, employing an interdisciplinary team acting under the direction of an autonomous hospice administration. Hospice provides palliative and supportive care to meet the special needs arising out of physical, psychological, spiritual, social and economic stresses which are experienced during the final stages of illness, and during dying and bereavement. In enacting the hospice residence legislation, it was the Legislature's intent to authorize the operation of hospice residences in order to provide hospice access for individuals lacking a suitable home, or available family or other informal caregivers, which are elements ordinarily necessary for hospice care in the patient's home. The dual certification of hospice residence beds for inpatient care will allow up to two patients residing in the residence at any given time to receive a higher level of care, as necessitated by changes in their condition, and avoid the need for transfer to another inpatient setting.

Needs and Benefits

The proposed regulations would amend Parts 700, 717, 790, 791 and 794 of Chapter V of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York to authorize the dual certification of up to two beds in a hospice residence. Currently, patients residing in a hospice residence must transfer out of the residence to an inpatient facility when a higher level of care is needed for pain and symptom management. The dual certification of hospice residence beds for inpatient care will avoid the need to transfer patients to another setting, thus enhancing continuity of care.

In amending the regulations for dually certified hospice residence beds, the Department is also proposing amendments to several other sections of the code to update and clarify certain standards contained in the hospice residence regulations.

The proposed amendment to section 700 adds a definition for dually certified hospice residence beds.

The proposed amendments to section 717 provide standards for construction of a hospice residence that will house dually certified beds and limits the number of dually certified beds to two. The amendments to this section also provide clarification of required standards regarding the location of hospice residences in Article 28 medical facilities and the operation of hospice residences when located adjacent to a hospice inpatient unit.

The proposed amendments to section 790 address lease arrangements for a hospice residence and the requirement that there be sufficient hospice inpatient bed need in the county where the dually certified beds are to be located.

The proposed amendments to section 791 address the application procedure for dually certified hospice residence beds.

The proposed amendments to section 794 address additional accommodations and space to be provided by a hospice residence.

Costs

Costs to State Government and the Department of Health

There will be no significant cost to State Government and no increased costs resulting from the provision of inpatient care in the hospice residence. The hospice bills the Medicaid or Medicare hospice inpatient rate, as appropriate, when an inpatient level of care is necessitated by the patient's symptoms. The room and board component of inpatient care is included in the inpatient rate regardless of whether the care is provided in a hospice residence or another inpatient setting.

Existing Department staff will review and handle the processing of dual certification applications so there will be no additional administrative costs to the Department.

Costs to Local Governments

These regulations impose no direct cost on local governments. Local governments will be responsible for the county share of Medicaid costs incurred for hospice inpatient room and board, but such costs are incurred regardless of whether the inpatient care is provided in a hospice residence or another inpatient setting.

Costs to Regulated Parties

There may be an increased cost to hospices due to the requirement that the entire hospice residence be constructed to inpatient standards, and meet the federal and state requirements for inpatient care, when it houses dually certified beds. Hospice residences providing only residential care are required to comply with the requirements for small residential board and care facilities, while those with dually certified beds will be required to comply with the pertinent provisions for either residential occupancies or institutional occupancies. Federal standards for hospice inpatient units also require the presence of a registered nurse on the unit on a 24-hour basis to oversee the provision of inpatient care. Hospice residences that provide only residential care are not required to be staffed with registered nurses, so this may be an increased cost to hospices that operate dually certified beds.

Local Government Mandates

The proposed regulations do not impose mandates upon any county, city, town, village, school district, fire district or other special district, except as described in Costs to Local Governments.

Paperwork

Hospice providers wishing to dually certify beds for inpatient care will be required to submit an application for hospice residence construction for approval by the Department of Health. Otherwise, there will be no impact on the paperwork currently required for hospices.

Duplication

The proposed regulations do not duplicate any federal or state requirements.

Alternatives

Consistent with the hospice mission to make the dying process as comfortable as possible, the option to provide inpatient care in the hospice residence will avoid the need to disrupt care and transfer the patient to an alternate setting. It is with this intent that the hospice community and the Hospice and Palliative Care Association of New York State (Hospice Association) approached the Department of Health with the proposal to dually certify beds in the hospice residence for both residence and inpatient care. Since the passage of the legislation, two issues of concern have been raised.

The first issue involves the requirement that such beds be subject to the same need criteria applied to beds used solely for hospice inpatient care. While the Department and the Hospice Association originally agreed that dually certified beds would be subject to the hospice inpatient bed need criteria, the Association has since modified its position. The Hospice Association now states that the purpose of having dual beds is to be responsive to the patients' needs by allowing them to remain in the residence for all levels of hospice care and that application of the hospice inpatient bed need methodology may defeat that purpose. The Hospice Association contends that under current regulations, Article 28 hospice "swing" beds that are used for inpatient care are not factored into the hospice inpatient bed need formula and to be consistent, hospice residence dually certified beds should also not be factored into the hospice inpatient bed need formula. However, unlike Article 28 hospice "swing" beds, dually certified beds are operated by the hospice; staffed with personnel employed by the hospice; appear on the hospice's operating certificate and used strictly for hospice care. This is consistent with Article 40 autonomous or freestanding inpatient beds, which are subject to the hospice inpatient bed need criteria. Although the Department carefully considered the current position of the Hospice Association on this issue, the Department continues to believe that application of the hospice inpatient bed need criteria to dually certified beds is appropriate.

The Association also states that hospice residence patients in New York City are precluded from the option of utilizing dually certified beds because there is no remaining need for additional hospice inpatient beds in the five boroughs. In response to this, the lack of hospice inpatient bed need applies only to New York County and not all five boroughs. There is currently remaining need for 180 hospice inpatient beds in Bronx, Kings, Queens and Richmond Counties combined. One hospice in New York County was granted approval for a significant number of inpatient beds in 1996, thus meeting the inpatient bed need in that county. The Department has recommended that the other New York County hospice providers discuss with this hospice the possibility of relinquishing some of these beds to make them available for dual certification.

The second issue concerns the admission of hospice patients from the community directly to a dually certified bed in the hospice residence for inpatient care. It is the Hospice Association's intent that the dually certified beds be used for any hospice patient requiring inpatient care, regardless of whether care is needed at the beginning of a hospice residence stay, or in the middle or end of their stay in the residence. The Hospice Association states that patients admitted from the community directly to a dually certified bed for inpatient care would be admitted with the understanding that following their brief inpatient stay, they would move to the routine home care level of care within the residence. In most instances, these would be patients whose caregivers are too frail and elderly to properly care for them at home, thus making them eligible for hospice residence or nursing home care. It is the Department's position that by allowing admission of patients directly from the community, the availability of an inpatient bed for existing residence patients is compromised. Therefore, while the Department will permit the admission of a patient from the community into a dually certified bed for inpatient care, the proposed regulations include a provision that patients residing in the residence be given first priority for these beds. Should the dually certified beds be unavailable due to the admission of a patient from the community, the community admission will be required to transfer to another inpatient unit, giving access to the dually certified bed to the patient residing in the residence.

Federal Standards

Hospice residences that propose to operate dually certified beds will be required to meet federal standards for hospice inpatient care as outlined in 42 CFR 418.98 and 418.100, regarding the provision of short-term inpatient care and the direct provision of inpatient care by a hospice, respectively. By requiring the residence to be constructed to inpatient standards and requiring 24-hour care by a registered nurse, the rule is consistent with pertinent Federal standards.

Compliance Schedule

The regulations will become effective upon publication of a Notice of Adoption in the *State Register*. Dually certified beds are not mandatory and applicants will determine if, and when, they will submit an application to operate such beds under the new regulations.

Regulatory Flexibility Analysis

Effect on Small Business and Governments

The proposed regulations could potentially affect 51 hospice operators, including 5 hospices operated by county governments. Hospices that do not establish a hospice residence or who do not wish to operate dually certified beds in a hospice residence will not be affected by the regulatory revisions.

Compliance Requirements

Hospice providers wishing to operate dually certified hospice residence beds will be required to submit an application on forms and in a manner prescribed by the Department for approval by the Commissioner. Such providers must meet character and competence, financial feasibility, and architectural standards. Hospice residences that will house dually certified beds must comply with the pertinent provisions for either residential occupancies or institutional occupancies as required by NFPA 101 and contained in subdivision (b) of Section 717.2. Hospice residences will be surveyed to ensure compliance with programmatic standards.

Professional Services

The proposed regulations will require hospices to employ a registered nurse on a 24-hour a day basis whenever a dually certified bed is occupied by a patient requiring an inpatient level of care. Volunteer staff may also be utilized.

Compliance Costs

Additional costs may be incurred by more restrictive construction standards and increased staffing needs to ensure the safety and well-being of hospice residents while receiving an inpatient level of care in the hospice residence. Local governments will be responsible for the county share of Medicaid costs incurred for hospice inpatient care; however, the

inpatient rate is the same regardless of whether such care is provided in the hospice residence or another inpatient setting.

Economic and Technological Feasibility

Hospice residences that do not house dually certified beds are required to comply with chapter 21, section 21-2 of the 1985 edition of the NFPA 101 Life Safety Code, which applies to small residential room and board facilities. Hospice residences that do house dually certified beds will be required to comply with the pertinent provisions for either residential occupancies or institutional occupancies as required by NFPA 101. While these requirements impose more restrictive standards, it has been found that they do not compromise the home-like environment of the hospice residence. No significant technological requirements are proposed.

Minimizing Adverse Impact

The proposed amendments will not have an adverse impact on small businesses or local governments.

Small Business and Local Government Participation

The concept of the proposed regulations has been discussed with some hospice providers and with the Hospice and Palliative Care Association of New York State, which represents the needs and concerns of hospice providers, including smaller hospices and those operated by county governments. The recommendations made by these parties have been considered in developing this proposal.

Rural Area Flexibility Analysis

Effect on Rural Areas

Thirty-three hospices are located in rural areas or in counties that contain 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, include towns with population densities of 150 persons or less per square mile. The following 44 counties each have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

The following 31 hospices are either located in rural areas or have included in their service area counties or towns designated as rural areas.

- Catskill Area Hospice & Palliative Care
- The Community Hospice, Inc.
- High Peaks Hospice, Inc.
- Hospice of the North Country, Inc.
- Hospice & Palliative Care, Inc.
- Mountain Valley Hospice
- Home Care and Hospice
- Hospice Buffalo, Inc.
- Hospice Chautauqua County, Inc.
- Lifetime Care/Hospice of Rochester
- Hospice of Orleans, Inc.
- Niagara Hospice, Inc.
- Hospice Care in Westchester and Putnam

- Hospice of Dutchess/Ulster
- Hospice of Orange & Sullivan Counties, Inc.
- United Hospice of Rockland
- Livingston County Hospice
- Ontario Yates Hospice
- Southern Tier Hospice & Palliative Care
- Visiting Nurse Hospice & Palliative Care
- Caring Community Hospice of Cortland
- Hospicare & Palliative Care Svcs. Tompkins Co.
- Oswego County Hospice
- The Hospice at Lourdes
- Washington Co. Hospice & Palliative Care
- Hospice of Central New York
- Hospice of Chenango County
- Hospice of Jefferson County
- Hospice of St. Lawrence Valley
- Hospice of the Finger Lakes
- Lewis County Hospice

Reporting, Recordkeeping and Other Compliance Requirements; Professional Services

Hospices located in rural areas will be affected similarly to other hospices. Paperwork for providers wishing to operate dually certified beds will be increased due to the application process. The proposed regulations may necessitate that hospices employ additional staff, such as registered nurses, to ensure the safety and well-being of residents on a 24-hour a day basis while they receive an inpatient level of care.

Costs

The costs for rural hospices will be similar to those for other hospices. Additional costs may be incurred due to higher bed construction standards and increased staffing needs to ensure the safety and well-being of hospice patients while they receive inpatient care in the hospice residence.

Minimizing Adverse Impact

The approaches suggested in State Administrative Procedure Act section 202-bb were rejected as inconsistent with the purpose of the proposed regulations. The proposed regulations will be applied uniformly to all regions of the State, and will not have an adverse impact on hospices located in rural areas.

Rural Area Participation

The concept of the proposed regulations has been discussed with some hospice providers and with the Hospice and Palliative Care Association of New York State, which represents the needs and concerns of hospice providers, including rural hospices. The recommendations made by these parties have been considered in developing this proposal.

Job Impact Statement

Nature of Impact on Jobs and Employment Opportunities

The proposed regulations may necessitate that hospices choosing to operate dually certified beds employ additional staff or arrange for volunteers to reside and work in the residence to ensure the safety and well-being of residents on a 24-hour a day basis while they receive inpatient care.

Categories and Numbers of Jobs or Employment Opportunities Affected

Hospices that choose to operate dually certified beds in a hospice residence will be required to employ at least one registered nurse per shift to respond to patients' needs. The number of employment opportunities will depend on the number of hospice residences that operate dually certified beds, the availability of existing personnel to staff the residence, and whether increased staffing needs can be met by volunteers.

Regions of Adverse Impact

There are no regions in the state where the proposed rules will have a disproportionate adverse impact on jobs or employment opportunities.

Minimizing Adverse Impact

There will be no adverse impact on existing jobs. Job opportunities may be enhanced due to the requirement that the hospice employ registered nurses for the hospice residence while patients are receiving an inpatient level of care.

Insurance Department

EMERGENCY RULE MAKING

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-43-06-00002-E

Filing No. 1499

Filing date: Dec. 11, 2006

Effective date: Dec. 11, 2006

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

Action taken: Amendment of Part 83 (Regulation 172) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, sections 4403, 4403-a, 4403-c and 4408-a; and L. 2002, ch. 599

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

Specific reasons underlying the finding of necessity: Certain provisions of the Insurance Law require that insurers file financial statements annually and quarterly with the Superintendent. These insurers are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as Annual and Quarterly Statement Blanks on forms prescribed by the Superintendent. The Superintendent has prescribed forms and Annual and Quarterly Statement Instructions that are adopted from time to time by the National Association of Insurance Commissioners ("NAIC"), as supplemented by additional New York forms and instructions. To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy procedure and instruction manuals. The latest edition of one of the manuals, Accounting Practices and Procedures Manual As Of March 2005 ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). The Accounting Manual, which is incorporated by reference into this regulation, was adopted by the NAIC in March 2005.

The Accounting Manual represents a codification of statutory accounting principles. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. This amendment will take effect upon filing with the Secretary of State so that the accounting principles of this part will be in place for use in the preparation of Quarterly Statements and the Annual Statement for 2005. This amendment adopts the latest version of the Accounting Manual and also updates the list of SSAPs or sections thereof that are either not adopted, or are modified with additional guidance provided.

This regulation, as amended, will enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by entities subject to the regulation, by clearly setting forth the accounting practices and procedures to be followed in completing quarterly and annual statements required by law. In the preparation of this amendment, it was necessary for the Insurance Department to take into account determinations made by the NAIC at its meeting in 2005.

Absent the amendment being effective immediately, many of New York's accounting practices and procedures would not be consistent with the practices and procedures followed in most other states.

For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the general welfare.

Subject: Financial statement filings and accounting practices and procedures.

Purpose: To update references in the regulatory text to documents incorporated by reference that have been revised and republished and make minor modifications regarding accounting treatment of certain insurer assets.

Text of emergency rule: Subdivision (c) of Section 83.2 of Part 83 is amended to read as follows:

(c) To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy, procedures and

instruction manuals. The latest of these manuals, the Accounting Practices and Procedures Manual as of March [2004*] 2005* ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs").

The footnote to subdivision (c) of Section 83.2 is amended to read as follows:

*ACCOUNTING PRACTICES AND PROCEDURES MANUAL AS OF MARCH [2004] 2005. Copyright 1999, 2000, 2001, 2002, 2003, 2004, 2005 by National Association of Insurance Commissioners, in Kansas City, Missouri.

Subdivision (m) of Section 83.4 is amended to read as follows:

(m)(1) For life insurers, Paragraph 8 of SSAP No. 40 Real Estate Investments is not adopted. Depreciation on real estate investments owned by life insurers shall be computed at a rate no greater than two and one-half percent per annum, in accordance with Section 1405(b)(1)(C) of the Insurance Law.

(2)(i) For Article 43 corporations and not-for-profit Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Services Plans and Comprehensive HIV Special Needs Plans authorized pursuant to Article 44 of the Public Health Law, SSAP No. 40 Real Estate Investments is adopted with the following addition:

In accordance with Section 4310(l) of the Insurance Law, in determining the financial condition of Article 43 corporations and not-for-profit Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Service Plans and Comprehensive HIV Special Needs Plans authorized pursuant to Article 44 of the Public Health Law, real estate, including buildings, property, capital improvements and appurtenances owned and held that are utilized in the ordinary course of the business of such entities, may be valued by the corporation at either its current amortized book value or at ninety percent of its current market value, less encumbrances. Market value shall be determined by an independent appraisal undertaken annually, no earlier than September 30 of each year, by a member of the Appraisal Institute, 55 West Van Buren Street, Suite 1000, Chicago IL 60607. (website address is <http://appraisalinstitute.org>.) This option is not applicable to for-profit corporations authorized pursuant to Article 44 of the Public Health Law.

(ii) Real estate "owned and held" and "utilized in the ordinary course of business" as set forth in subparagraph (m)(2)(i) of this subdivision shall have the same definition as "property occupied by the company" as set forth in Paragraph 5 of SSAP No. 40 Real Estate Investments.

(iii) The provisions of paragraph 11 of SSAP No. 40 shall govern the independent appraisal requirement set forth in subparagraph (m)(2)(i) of this subdivision.

(iv) The election to value real estate at either its current amortized book value or at ninety percent of its current market value, less encumbrances, shall be applied to the valuation of all property not held for sale. As of any determination date either all real estate shall be valued at current amortized book value or all real estate shall be valued at ninety percent of its current market value, less encumbrances. Changes in the statement value of real estate held under this election shall be accounted for as unrealized capital gains or losses.

(v) If an entity elects to value its real estate at ninety percent of its current market value, less encumbrances, in addition to the Schedule A filed as part of the NAIC Annual Statement Health Blank, a Supplemental Schedule A must be completed for what the current amortized book value would be if the entity had not made such an election as of the determination date. A Supplemental Schedule A is herein defined as a Schedule A submitted for informational purposes only, not intended to supersede the Schedule A filed as part of the NAIC Annual Statement Health Blank. The completed Supplemental Schedule A shall be submitted annually on or before the first day of March for Article 43 corporations or on or before the first day of April for not-for-profit Health Maintenance Organizations as a supplement to the NAIC Annual Statement Health Blank in support of the note requirement of subparagraph 83.4(m)(2)(vii) of this subdivision.

(vi) Notwithstanding the valuation methodology permitted in subparagraph (m)(2)(i) of this subdivision and the instructions of subparagraph (m)(2)(iv) of this subdivision, properties that the reporting entity has the intent to sell, or is required to sell, shall be classified as properties held for sale and carried at the lower of depreciated cost or current market value less encumbrances and estimated sales costs consistent with the requirements of paragraph 10 of SSAP No. 40.

(vii) An entity which elects to change its valuation of real estate pursuant to sub-paragraph (m)(2)(i) of this subdivision shall disclose all of the following in the notes to its annual and quarterly financial statements:

- a. The current amortized book value of each property.
 - b. The current market value and ninety percent of the current market value, less encumbrances, of each property.
 - c. The determination date of the annual appraisal.
 - d. The name and qualifications of the independent appraiser.
- (viii) Appraisals obtained in satisfaction of subparagraph (m)(2)(i) of this subdivision shall be maintained in good order and shall be readily available for examination.

Subdivision (n) of Section 83.4 is amended to read as follows:

(n)(1) Paragraph [5]6 of SSAP No. [46] 88 Investments in Subsidiary, Controlled, and Affiliated Entities, A Replacement of SSAP No. 46, is not adopted. Pursuant to Section 1501(c) of the Insurance Law, the superintendent may determine upon application that any person does not, or will not upon taking of some proposed action, control another person. 10 NYCRR 98-1.9(d) authorizes the Commissioner of Health to make a similar determination with respect to organizations with a certificate of authority pursuant to Public Health Law Article 44.

(2) Paragraph [7] 8 of SSAP No. [46] 88 is not adopted with respect to subsidiaries that are insurers. Pursuant to Section 1414(c)(2) of the Insurance Law, the shares of an insurer that is a subsidiary shall be valued at the lesser of its market value or book value as shown by its last annual statement or the last report on examination, whichever is more recent.

(3) Paragraph [7(b)(i)] 8(b)(i) of SSAP No. [46] 88 is not adopted with respect to Public Health Law Article 44 Health Maintenance Organizations which are subsidiaries and which record goodwill as an admitted asset pursuant to Section 83.4(t) of this Part. Investments in such entities shall be recorded based on the underlying statutory equity of the respective entity's financial statements, including an admitted asset for goodwill as provided for in Section 83.4(t) of this Part.

Subdivision (t) of Section 83.4 is amended to read as follows:

(t) Paragraph 7 of SSAP No. 68 Business Combinations and Goodwill is not adopted. Section 1302(a)(1) of the Insurance Law shall apply. Goodwill recorded as an admitted asset on the books of a Public Health Law Article 44 Health Maintenance Organization, Integrated Delivery System, Prepaid Health Services Plan or Comprehensive HIV Special Needs Plan as of December 31, 2000[, which is in compliance with Generally Accepted Accounting Principles,] shall continue to be treated as an admitted asset on Financial Statements filed with the superintendent or the Commissioner of Health. *Goodwill shall be written off over its useful life. The period of amortization shall not exceed 40 years.*

Subdivision (v) of Section 83.4 is amended to read as follows:

(v) Paragraph 9 of SSAP No. 73 Health Care Delivery Assets – Supplies, Pharmaceutical and Surgical Supplies, Durable Medical Equipment, Furniture, Medical Equipment and Fixtures, and Leasehold Improvements in Health Care Facilities is not adopted. Durable medical equipment, furniture, medical equipment and fixtures, and leasehold improvements shall be depreciated utilizing a depreciation schedule no less conservative than that set forth in the latest revision of Estimated Useful Lives of Depreciable Hospital Assets (Revised [1998] 2004 Edition)**. The document may also be viewed at the New York State Insurance Department's New York City office at 25 Beaver Street, New York, NY 10004. Lease improvements in health care facilities shall be amortized against net income over the shorter of their estimated useful life or the remaining life of the original lease excluding renewal or option periods, using methods detailed in SSAP No. 19.

The footnote to subdivision (v) of Section 83.4 is amended to read as follows:

**ESTIMATED USEFUL LIVES OF DEPRECIABLE HOSPITAL ASSETS/Revised [1998] 2004 Edition, Copyright [1998] 2004 by Health Forum, Inc. All rights reserved. Printed with the permission of Health Forum, Inc., in Chicago.

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. INS-43-06-00002-P, Issue of October 25, 2006. The emergency rule will expire February 8, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Insurance Law Section 107(a)(2) defines the term "accredited reinsurer" which is used in sections 83.2, 83.3, and 83.5 of Part 83.

Insurance Law Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the Insurance Law; effectuate any power

granted to the superintendent under the Insurance Law; prescribe forms; or otherwise make regulations.

Insurance Law Sections 307 and 308 require insurers to file annual and quarterly statement blanks on forms prescribed by the superintendent and in accordance with instructions prescribed by the superintendent. Section 307(a)(1) of the Insurance Law requires every insurer authorized in New York to file an annual statement showing its financial condition in such form as prescribed by the superintendent. Section 307(a)(2) permits the use of the annual statement form adopted from time to time by the NAIC. Provisions of Article 44 of the Public Health Law and Sections 98-1.16(a) and 98-1.16(b) of Title 10 of the New York Code of Rules and Regulations provide that Public Health Law Article 44 Health Maintenance Organizations and Integrated Delivery Systems shall file financial statements annually and quarterly with both the commissioner of health and the superintendent.

Insurance Law Section 1109(a) provides that an organization complying with the provisions of Article 44 of the Public Health Law is subject to various specified sections of the Insurance Law, including Section 308. Section 1109(e) provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Article 13 specifies the requirements regarding the treatment of assets and deposits in determining the financial condition of insurers for the purposes of the Insurance Law.

Insurance Law Article 14 contains provisions regarding the authorization of, and restrictions on, investments of insurers regulated by the Insurance Department and sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Article 15 contains provisions sets forth procedures for the establishment and operation of holding company systems including controlled insurers.

Insurance Law Section 3233 sets forth provisions concerning stabilization of health insurance markets and premium rates.

Insurance Law Section 4117 sets forth provisions concerning loss reserves and loss expense reserves of property/casualty insurance companies.

Insurance Law Section 4233 sets forth provisions concerning the annual statements of life insurance companies including a provision that in addition to any other matter which may be required to be stated therein, either by law or by the superintendent pursuant to law, every annual statement of every life insurer doing business in New York shall conform substantially to the form of statement adopted from time to time for such purpose by, or by the authority of, the National Association of Insurance Commissioners, together with such additions, omissions or modifications, similarly adopted from time to time, as may be approved by the superintendent.

Insurance Law Section 4239 sets forth provisions concerning allocation and reporting of income and expenses of life insurers.

Insurance Law Article 43 establishes organizational requirements, investment and reserve requirements for non-profit medical and dental indemnity, or health and hospital service corporations organized in this state. The article also establishes "stop loss" funds, from which health maintenance organizations, corporations or insurers may receive reimbursement, to the extent of funds available therefor, for claims paid by such entities for members covered under certain contracts.

Insurance Law Section 6404 sets forth provisions concerning the assets, title plant, and valuation and allowance of admitted assets of title insurance corporations.

Pursuant to the above provisions, the superintendent is authorized to implement the National Association of Insurance Commissioners *Accounting Practices and Procedures Manual As Of March 2005* ("Accounting Manual"), subject to any provisions in New York statute which conflict with particular points in those rules. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). The Accounting Manual represents a codification of Statutory Accounting Principles.

Additionally, in regard to Public Health Law Article 44 Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Services Plans and Comprehensive HIV Special Needs Plans, Insurance Law Sections 1109(e) and 4301(e)(5) respectively provide that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law and authorize the superintendent to modify any regulatory requirement in order to encourage the development of Health Maintenance Organizations in this state. Article 43 of the Public Health Law provides for the issuance of

certificates of authority to health maintenance organizations, the granting by the Commissioner of Health of a special purpose certificate of authority, provided the applicant complies with certain requirements, authorizes the superintendent to establish standards governing the fiscal solvency of Integrated Delivery Systems, and requires the filing of financial reports by Prepaid Health Service Plans and Comprehensive HIV Special Needs Plans. In accordance with these sections, the regulation sets forth certain accounting rules applicable to Public Health Law Article 44 Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Services Plans and Comprehensive HIV Special Needs Plans. This Part does not apply to managed long term programs licensed pursuant to Section 4403-f of the Public Health Law.

2. Legislative objectives: Certain provisions of the Insurance Law provide that authorized insurers, accredited reinsurers, authorized fraternal benefit societies, and Public Health Law Article 44 Health Maintenance Organizations and Integrated Delivery Systems shall file financial statements annually and quarterly with the superintendent. These entities are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as Annual and Quarterly Statement Blanks on forms prescribed by the superintendent. Except in regard to filings made by Underwriters at Lloyd's, London, the superintendent has prescribed forms and Annual and Quarterly Statement Instructions that are adopted from time to time by the National Association of Insurance Commissioners, as supplemented by additional New York forms and instructions. To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy, procedure and instruction manuals. One of these manuals, the *Accounting Practices and Procedures Manual As Of March 2005* ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles. The Accounting Manual is incorporated by reference into this regulation. The preamble to the Accounting Manual states that "...this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations. . . ." (Accounting Manual at Pg. P-1).

3. Needs and benefits: The purpose of this Part is to enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by entities subject hereto, by clearly setting forth the accounting practices and procedures to be followed in completing annual and quarterly financial statements required by law.

The National Association of Insurance Commissioners has most recently adopted a new Accounting Manual as of March 2005. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of Statement of Statutory Accounting Principles ("SSAP's"). The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. Statutory Accounting Principles ("SAP") prior to codification did not always provide a consistent and complete basis of accounting and reporting. The prescribed statutory accounting model resulted in practices that varied from state to state. The codification project results in more comparable financial statements and in more complete disclosures, which will make regulators' analysis techniques more meaningful and effective. Codification will provide examiners and analysts with uniform accounting rules against which insurers' financial statements can be evaluated. Also, calculations under Risk Based Capital will be reported more consistently under codification.

The NAIC's instructions to insurers and Public Health Law Article 44 HMOs for completing their 2005 annual statement forms include the following: "The annual statement is to be completed in accordance with the NAIC Annual Statement Instructions and Accounting Practices and Procedures Manual - version as of March 2005 except to the extent that state law, rules or regulations are in conflict with these publication." In some instances, a New York statute or regulation may preclude implementation of particular codification rules. In a few instances, for various reasons, the Department has not implemented the codification rule.

Chapter 462 of the Laws of 2004 added a subsection (l) to Insurance Law Section 4310. The new subsection requires that in determining the financial condition of corporations subject to the provisions of Article 43 and not-for-profit corporations authorized pursuant to Article 44 of the Public Health Law, the Insurance Department shall include real estate, including buildings, property, capital improvements and appurtenances owned and held that are utilized in the ordinary course of the business of such entities, provided that such real estate may be valued by the corporation at either its current amortized book value or at ninety percent of its current market value, as determined by an independent appraisal under-

taken annually and in accordance with regulations promulgated by the Superintendent of Insurance. This required modification of SSAP No. 40 regarding permissible valuation methods.

The deviation from SSAP No. 88 is a continuation of the deviation to old SSAP No. 46, which it replaced in the 2005 Manual. The paragraphs of SSAP No. 88 that were not adopted were contrary to provisions of the Insurance Law regarding certain holding companies and subsidiaries.

The deviation from SSAP No.68 is continued since Section 1302(a)(1) of the Insurance Law dictates that goodwill shall not be treated as an admitted asset by insurers. In the case of certain HMOs however, goodwill can be treated as an admitted asset to be depreciated over a period not to exceed 40 years. The amendment was necessary to preserve the permissibility of this practice. The existing regulatory language was based upon Generally Accepted Accounting Principles ("GAAP") practices in place at the time the regulation was originally promulgated. GAAP accounting principles have since been modified with regard to the treatment of goodwill. This amendment eliminates the reference to existing GAAP principles and allows certain HMO's to continue accounting for goodwill as an admitted asset subject to the aforementioned 40 year depreciation limitation.

The amendment of the provision regarding SSAP No. 73 was necessitated by the issuance of a revised edition of ESTIMATED USEFUL LIVES OF DEPRECIABLE HOSPITAL ASSETS, which is incorporated by reference in regulation.

4. Costs: Cost to regulated entities as a result of implementing Part 83 are the acquisition of the Accounting Manual from the National Association of Insurance Commissioners and the acquisition of *Estimated Useful Lives of Depreciable Hospital Assets* (Revised 2004 Edition) from the American Hospital Association. The Accounting Manual costs \$425.00 per copy plus shipping charges. It is estimated that an insurer with 2,000 employees would require between 15 and 20 copies for a total cost of between \$6,375 and \$8,500 exclusive of shipping charges. *Estimated Useful Lives of Depreciable Hospital Assets* is only needed by Insurance Law Article 43 Corporations and Public Health Law Article 44 Health Maintenance Organizations with medical facilities. Currently, there are only three plans that have medical facilities. For these Plans, it is estimated that between 7 and 15 copies would be needed. *Estimated Useful Lives of Depreciable Hospital Assets* (Revised 2004 Edition) costs \$45.00 per copy with a 15% discount if between 11 to 50 copies are ordered. Total costs would be between \$315.00 for 7 copies and \$573.75 for 15 copies, exclusive of shipping charges.

There is no cost to the Insurance Department for the Accounting Manual since it is obtainable free of charge from the National Association of Insurance Commissioners. The Department will need to acquire 35 copies of Estimated Useful Lives of Depreciable Hospital Assets (Revised 2004 Edition) at a total cost of \$1,338.75, exclusive of shipping charges.

5. Paperwork: To the very minor extent to which the regulation makes changes in accounting principles, staffs of insurers will need to familiarize themselves with this regulation. To the extent that the regulation conforms New York filings, for the most part, to other states' requirements, the need for separate New York filings is reduced.

6. Local government mandate: This regulation does not impose any obligations on local governments.

7. Duplication: This regulation will not duplicate any existing state or federal rule.

8. Viable alternatives: None. The regulation ensures conformance with New York statutes and regulations that preclude implementation of particular rules found in the Accounting Manual.

9. Federal standards: There are no minimum standards of the Federal government in the same or similar areas.

10. Compliance schedule: The regulated parties should already be in compliance with the provisions of the Accounting Manual instructions unless and until the Insurance Department promulgates a regulation delineating exceptions.

Regulatory Flexibility Analysis

The Insurance Department finds that this regulation will have no adverse economic impact on local governments, and will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis of this finding is that this regulation is directed to insurers as defined under this regulation, none of which are local governments.

The Insurance Department finds that this regulation will have no adverse impact on small businesses, and will not impose reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this regulation is directed to insurers. The Insurance Department has reviewed filed Reports on Examination and Annual State-

ments of authorized insurers and determined that none of them would come within the definition of small businesses, within the meaning of the State Administrative Procedure Act, because none are both independently owned and have fewer than one hundred employees.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: This regulation applies to insurers which do business or are resident in every county in the state, including those that are, or contain, rural areas, as defined under section 102(13) of the State Administrative Procedure Act. Some of the home offices of these insurers lie within rural areas.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment does not impose new reporting or recordkeeping requirements. To the extent that the regulation conforms New York filings, for the most part, to other States' requirements, the need for separate New York filings is reduced. To the very minor extent to which the regulation makes changes in accounting principles, staffs of insurers will need to familiarize themselves with the provisions of this regulation.

3. Costs: Insurers as defined under this regulation are the regulated persons. Since the regulation is for the most part merely declaratory of existing accounting practices and procedures, there is no negative cost impact on regulated persons, and possibly a beneficial one, because the regulation is intended to enhance consistency of accounting treatment of assets, liabilities, reserves, income and expenses. Accounting is facilitated because the practices and procedures are organized and consolidated pursuant to one regulation.

4. Minimizing adverse impact: This regulation applies to any insurers that do business in New York State. The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: The amendment would not have a negative impact on rural areas. Insurers that have home offices that lie within rural areas were represented in industry organizations that were consulted in every stage of the development of this regulation.

Job Impact Statement

The proposed rule changes should have no adverse impact on jobs and employment opportunities in New York State. The regulation codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner. The current amendment, in addition to changing the publication date references to publications incorporated by reference in the regulation, makes some minor changes to current accounting practices but should have no adverse impact on jobs or employment opportunities.

EMERGENCY RULE MAKING

Healthy New York Program

I.D. No. INS-52-06-00003-E

Filing No. 1482

Filing date: Dec. 8, 2006

Effective date: Dec. 8, 2006

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

Action taken: Amendment of section 362-2.7 and addition of section 362-2.8 to Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The federal Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, added a new Section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. In his 2006 State of the Union Address, President Bush emphasized the importance of high deductible health plans and HSAs in expanding health care options and reducing the number of the uninsured. Chapter 1 of the Laws of 1999 enacted the Healthy New York Program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage uninsured individual proprietors and working uninsured individuals to purchase insurance coverage.

At this time, Healthy New York participants seeking comprehensive health insurance coverage cannot access high deductible health plans and

establish health savings accounts in accordance with the federal standards. These employers and individuals are not currently eligible for the tax deductions they would otherwise enjoy for funds deposited into health savings accounts and used for qualified medical expenses. The funds deposited into the health savings accounts may accrue tax-deferred until the account owner seeks reimbursement for medical expenses or reaches Medicare eligibility.

Health insurance costs have escalated dramatically in recent years, with some health plans implementing increases in the range of 25-30%. The increased cost of insurance has, in turn, contributed to a decline in the number of employers who offer insurance to their employees. Recent data indicates that approximately 15% of New York's population is uninsured. A large portion of New York State's uninsured population are individuals who are self-employed or who work for small employers.

This amendment to Part 362 of 11 NYCRR will require health maintenance organizations and insurers to offer high deductible health plans, as defined by the federal Medicare legislation, using the Healthy New York program for qualifying small employers and individuals. The high deductible health plans will have lower premiums than the current Healthy New York benefit package. The reduction in cost should encourage more small businesses and individuals to purchase comprehensive health insurance coverage and should therefore result in a decrease in the number of uninsured. In addition, the high deductible health plans purchased with the health savings accounts will give New Yorkers access to another health insurance alternative that complies with federal standards. The new option will also provide New Yorkers with access to a tax-advantaged method of purchasing health insurance that is currently not available.

Employers generally renew existing insurance arrangements or enroll in new insurance policies during the fall. These new policies become effective in January of the following year. In order for these high deductible health plans to be sold with a January 1, 2007 effective date, the health plans must be able to market them to employers along with other new product offerings in the fall. Therefore, this regulation must be adopted as an emergency to allow the Insurance Department to review and approve health insurance policies for sale and marketing during the fall.

This amendment also adds the following new benefits to the Healthy New York program: diagnostic screening for prostate cancer, and a limited number of post-hospital or post-surgical home health care of physical therapy services. The addition of the prostate cancer screening benefit will facilitate prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. Currently, the Healthy New York program covers surgery and hospitalizations but does not cover home health care and physical therapy care. Consequently, Healthy New York beneficiaries may extend hospitalizations to receive therapy. The addition of post-hospitalization and post surgical home health and physical therapy services should result in lower hospital costs, which should in turn reduce costs to the state.

The Department has received extensive comments and suggestions from the health insurance industry in preparing these regulations. The Department has met several times with representatives from groups that represent the health maintenance organization and not-for-profit health insurance industry and has held numerous phone conferences. Some of these conversations have been with experts in high deductible health plans and HSAs. These industry representatives have provided the Department with comments and suggestions on how the drafting of this regulation.

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

Subject: Minimum standards for the form and content of policies and contracts subject to the provisions of section 4326 of the Insurance Law.

Purpose: To create additional health insurance options for qualifying small employers and individuals by requiring health maintenance organizations and participating insurers to offer high deductible health plans in conjunction with the Healthy New York Program.

Text of emergency rule: New subdivisions (d), (e) and (f) are added to section 362-2.7 to read as follows:

§ 362-2.7 Healthy New York benefit adjustments.

(d) Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to forty post-hospital or post-surgical home health care visits per calendar year.

(e) Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to thirty post-hospital or post-surgical physical therapy visits per calendar year.

(f) Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for diagnostic screening for prostatic cancer consistent with the benefit set forth in section 4303(z-1) of the Insurance Law.

A new section 362-2.8 is added to read as follows:

§ 362-2.8 High Deductible Health Plan Under the Healthy New York Program.

(a) For purposes of this section:

(1) "High deductible health plan" shall mean a qualifying health insurance contract with a plan year deductible of at least \$1,150 for individual coverage and \$2,300 for family coverage. Out-of-pocket expenses, including the deductible and copayments, shall be capped at \$5,250 for individual coverage and \$10,500 for family coverage for the plan year.

(2) "Family coverage" means any coverage that is not self-only.

(b) Effective January 1, 2007, every health maintenance organization and insurer participating in the Healthy New York program shall offer a high deductible health plan with a plan year deductible of \$1,150 for individual coverage and \$2,300 for family coverage to qualifying small employers and qualifying individuals under the Healthy New York program in connection with a Health Savings Account (hereinafter "HSA") authorized by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Pub. L. No. 108-173). The health maintenance organization or insurer must provide qualifying small employers and qualifying individuals that select a high deductible health plan with a disclosure statement which prominently discloses the existence of the deductible.

(c) Health maintenance organizations and participating insurers may also offer additional high deductible health plans with deductibles exceeding the minimum amounts set forth in subdivision (a) of this section in connection with qualifying health insurance contracts. Any such additional options must contain the cap on out-of-pocket expenses set forth in subdivision (a) of this section.

(d) The superintendent may annually adjust the dollar amounts referred to in subdivision (a) of this section to meet the federal minimums for a high deductible health plan, taking into consideration applicable provisions of state and federal law including any cost-of-living adjustment required by federal law.

(e) The plan year deductible shall not apply to those services described in section 4326(d)(7) and (8) of the Insurance Law, prostatic cancer screenings, or routine prenatal care. Health maintenance organizations and participating insurers may also exempt from the deductible such other preventive services which would not jeopardize the eligibility of the high deductible health plan to be used in conjunction with an HSA.

(f) The calendar year prescription drug deductible set forth in section 4326(e)(5) of the Insurance Law shall not be applied in addition to the overall plan year deductible for the high deductible health plan.

(g) At the time of application, the health maintenance organization or participating insurer shall obtain a certification that the applicant or their employees, as appropriate, intend to establish an HSA, or if applicable, HSAs. At the time of annual recertification, the qualifying employer or individual shall submit a recertification confirming the status of the HSA or HSAs.

(h) A small employer or individual may choose between a high deductible health plan or a qualifying health insurance contract at the time of enrollment. Once enrolled, any change from one type of plan to another may occur only at the time of the annual recertification.

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 March 7, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The superintendent's authority for the adoption of the third amendment to 11 NYCRR 362 is derived from sections 201, 301, 1109, 3201, 3217, 3221, 4235, 4303, 4304, 4305 and 4326 of the Insurance Law. Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization (HMO) and its subscribers. Section 3201 authorizes the superintendent to approve accident and health insurance policy

forms for delivery or issuance for delivery in this state. Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies. Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers. Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued. Section 4303 governs the accident and health insurance contracts written by non-for-profit corporations and sets forth the benefits that must be covered under such contracts. Section 4304 includes requirements for individual health insurance contracts written by not-for-profit corporations. Section 4305 includes requirements for group health insurance contracts written by not-for-profit corporations. Section 4326 authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the superintendent to modify the copayment and deductible amounts for qualifying health insurance contracts. Section 4326(g) authorizes the superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002.

2. Legislative objectives: The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. Chapter 1 of the Laws of 1999 enacted the Healthy New York Program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage individual proprietors and working uninsured individuals to purchase insurance coverage.

3. Needs and benefits: Currently, small employer and individual participants in the Healthy New York program seeking comprehensive health insurance coverage cannot purchase high deductible health plans and establish health savings accounts in accordance with federal standards. These participants in the Healthy New York Program are not currently eligible for the tax deductions for funds deposited into health savings accounts and used for qualified medical expenses. This amendment will create products that are compatible with health savings accounts. Health savings accounts allow users to deposit pre-tax money into an account and withdraw the money tax-free for qualified medical expenses.

Due in part to the rising cost of health insurance coverage, many small employers are currently unable to provide health insurance coverage to their employees. The high cost of insurance prevents many individual proprietors and working individuals from purchasing their own coverage.

These amendments to Part 362 of 11 NYCRR will require HMOs and participating insurers to offer high deductible health plans using the Healthy New York small employer and individual programs. The high deductible health plans will have lower premiums than current Healthy New York benefit packages. The reduction in premium will encourage more small businesses and individuals to purchase comprehensive health insurance coverage. In addition, the high deductible health plans purchased for use with the health savings accounts will give New Yorkers access to another health insurance alternative that complies with recently-enacted federal standards. This new option will also provide New Yorkers with access to a tax-advantaged method of purchasing health insurance.

The amendment will also provide for prostatic cancer screening and a limited home health care and physical therapy benefit. The addition of the prostate cancer screening benefit will facilitate prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. The addition of post-hospitalization and post-surgical home health and physical therapy services will result in insureds being discharged from the hospital sooner now that they can obtain these services in an outpatient setting. Shorter hospital stays will reduce costs. The addition of the new benefits will in turn reduce costs to the state, because the state reimburses the health plans for certain claims.

4. Costs. This amendment imposes no compliance costs upon state or local governments. HMOs and participating insurers will incur some minor costs in drafting the contract riders that will create the high deductible health plans and add the new benefits. The Department has provided HMOs and participating insurers with model language and forms to use in implementing the amendment. The Health Care Reform Act allocated a fixed amount to the Healthy New York Program to encourage uninsured businesses and individuals to purchase health insurance. This amendment will not alter the amounts dedicated to the program. However, this amendment may decrease the per head cost to the State to be distributed from the

overall allocation for the program for workers enrolled in Healthy New York because the addition of the home health care and physical therapy benefits will reduce hospitalization costs by allowing insureds to receive services in less costly settings. In addition, the prostatic screening benefit may reduce costs to the state by resulting in some instances of cancer being detected earlier, with fewer medical costs. The amendment creates a less expensive option under Healthy NY, which should attract additional people to the program and increase enrollment. The overall costs of the program are capped at the appropriated funding amounts.

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

6. Paperwork: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department. This amendment will not impose any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option.

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

8. Alternatives: The adoption of this amendment will require high deductible health plans to be issued under the Healthy New York Program for qualifying individuals and small employers. One alternative would be to not offer the high deductible health plan option. The Department has determined that this is not an attractive alternative, because without a high deductible health plan, these small businesses, individuals, and sole proprietors could not open health savings accounts. The amendment will also add prostatic cancer screening and a limited post-hospital and post-surgical physical therapy and home health care benefit to the Healthy New York program. Currently, the program does not cover these benefits. The Department has received extensive comments and suggestions from the health insurance industry in preparing these regulations. The Department has met several times with representatives from groups that represent the health maintenance organization and not-for-profit health insurance industry and has held numerous phone conferences. Some of these conversations have been with experts in high deductible health plans and HSAs. These industry representatives have provided the Department with comments and suggestions on the drafting of this regulation, including technical advice and cost analysis of the deductibles and benefits.

9. Federal standards: The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish tax-deductible health savings accounts to pay for certain medical expenses.

10. Compliance schedule: HMOs and participating insurers will be required to comply by January 1, 2007.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses since the provisions of this Part apply only to health maintenance organizations (HMOs) and participating insurers. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of HMOs and participating insurers and none of them comes within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there is none which is both independently owned and has fewer than 100 employees.

This rule will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at participating insurance companies and HMOs, none of which is a local government.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Health maintenance organizations (HMOs) and participating insurers to which this regulation is applicable do business in every county of the state, including rural areas as defined under section 102(13) of the State Administrative Procedure Act. Small employers and individuals in need of health insurance coverage are located in every county of the state including rural areas as defined under section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year,

enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department. This revision will not add any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option. Nothing in this revision distinguishes between rural and non rural areas. No special type of professional services will be needed in a rural area to comply with this requirement.

3. Costs: HMOs and participating insurers may incur some modest costs in drafting the contract riders that will create the high deductible plans and include the additional benefits. There are no costs to local governments. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will have the same impact on all affected entities.

5. Rural area participation: None.

Job Impact Statement

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to comprehensive health insurance for small employers and working individuals. This amendment provides qualifying small employers and individuals with the ability to obtain a federal tax deduction through the purchase of a high deductible health plan. It also reduces the cost of Healthy New York health insurance by adding a deductible and benefits that will reduce costs to the program, which will in turn improve access to health insurance by lowering health insurance premiums.

Assessment of Public Comment

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Claim Submission Guidelines

I.D. No. INS-41-06-00006-A
Filing No. 1480
Filing date: Dec. 6, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Part 217 (Regulation 178) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 2403, 3224 and 3224-a

Subject: Claim submission guidelines for medical service provider and hospital claims submitted in paper form.

Purpose: To update the claim payment guidelines on what is needed in order to determine when a health care insurance claim is considered complete and ready for payment.

Text of final rule: Section 217.2 is amended to read as follows:

Section 217.2 Health Insurance claim submission guidelines.

(a) A claim for payment of medical or hospital services submitted on paper shall be deemed complete if it contains the minimum data elements set forth in this Part. If the minimum data elements set forth are not present or accurate, the payer may, but need not, adjudicate the claim if the payer can determine, based on the information submitted, whether such claim should be paid or denied. Even if the claim is deemed complete, a payer may, pursuant to the provision of Section 3224-a(b) of the New York Insurance Law, request specific additional information, distinct from information on the claim form, necessary to make a determination as to its obligation to pay such claim.

(b)(1) In the case of a medical claim submitted on the national standard form known as a CMS 1500 (previously known as HCFA 1500 (New York State)) and its successors, attached as an appendix (Appendix 26), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

- 1a. Insured's ID Number
2. Patient's Name
3. Patient's Date of Birth and Gender
4. Insured's Name (Last Name, First Name)
5. Patient's Address
9. Other Insured's Name (if appropriate)
- 9a. Other Insured's Policy or Group Number (if appropriate)

- 9b. Other Insured's Date of Birth and Gender (if appropriate)
- 9c. Employer's Name or School Name (if appropriate)
- 9d. Insurance Plan Name or Program Name (if appropriate)
- 10a. Is Patient's Condition Related to Employment?
- 10b. Is Patient's Condition Related to Auto Accident?
- 10c. Is Patient's Condition Related to Other Accident?
- 11. Insured's Policy, Group or FECA Number (if provided on ID Card)
- 11d. Is There Another Health Benefit Plan?
- 12. Patient's or Authorized Person's Signature (Can be completed by writing "signature on file" where appropriate)
- 13. Insured's or Authorized Person's Signature (if appropriate)
- 17. Name of Referring Physician or Other Source (if appropriate)
- 17a. ID. Number of Referring Physician (if appropriate)
- 18. Hospitalization Dates Related to Current Services (if appropriate)
- 21. Diagnosis or Nature of Illness or Injury
- 23. *Prior Authorization Number (to report ZIP code for ambulance pick-up) (if appropriate)*
- 24A. Dates of Service
- 24B. Place of Service
- 24D. Procedures, Services, or Supplies
- 24E. Diagnosis Code (refer to item 21)
- 24F. \$ Charges
- 24G. Days or Units (if appropriate)
- 25. Federal Tax ID. Number
- 28. Total Charge
- 29. Amount Paid (if appropriate)
- 30. Balance Due
- 31. Signature of Physician or Supplier Including Degrees or Credentials (if not already on file, except as required by applicable Federal and State laws)
- 33. Personal Identifying Number of the particular practitioner rendering the care plus, if practicing in a group, the Identifying Number of the group as well

(2) For items listed in paragraph (1) of this subdivision with the notation (if appropriate), the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(c)(1) In the case of a hospital claim submitted on the national standard form HCFA 1450 (also known as UB-92) and its successors, attached as an appendix (Appendix 27), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

- 1. Provider Name and Address
- 3. Patient Control Number
- 4. Type of Bill
- 5. Federal Tax Number
- 6. Statement Covers Period
- 7. Covered Days (if appropriate) (interim bill, etc)
- 8. Non-Covered Days (if appropriate)
- 9. Coinsurance Days (if appropriate)
- 10. Lifetime Reserve Days (if appropriate)
- 11. Newborn Birthweight (if appropriate)
- 12. Patient Name
- 13. Patient Address
- 14. Patient Birthdate
- 15. Patient Sex
- 17. Admission Date
- 18. Admission Hour
- 19. Type of Admission
- 22. Discharge Status Code
- 42. Revenue Codes
- 43. Revenue Description
- 44. HCPCS/CPT4 Codes
- 45. Service Date
- 46. Service Units
- 47. Total Charges (by revenue code)
- 48. Non-Covered Charges
- 50. Payer Name
- 51. Provider ID
- 54. Other Insurance Payment (if appropriate)
- 55. Estimated Amount Due (if appropriate)

- 58. Insured's Name
- 59. Patient Relationship
- 60. Patient's Cert. SSN - HIC - ID No.
- 62. Insurance Group Number (if on card) (where appropriate)
- 67. Principal Diagnosis Code
- 68. Code
- 69. Code
- 70. Code
- 71. Code
- 72. Code
- 73. Code
- 74. Code
- 75. Code
- 76. Admitting Diagnosis Code
- 77. E-Code
- 78. DRG#
- 79. P.C.
- 80. Principal Procedure Code and Date
- 81. Other Procedures Code and Date
- 82. Attending Physician's ID Number
- 84. *Remarks (to report ZIP code for ambulance pick-up) (if appropriate)*

(2) For items listed in paragraph (1) of this subdivision with the notation (if appropriate), the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(d) Nothing in this Part shall prohibit a payer from electing to accept some or all claims with less information than that specified in the lists set forth in subdivisions (b) and (c) of this section.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 217.2(b)(1) and (c)(1).

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Job Impact Statement

Although nonsubstantive changes were made to the text of the rule it did not necessitate revision to the previously published Job Impact Statement.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Personal Injury Protection Benefits

I.D. No. INS-52-06-00006-P

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

Proposed action: Amendment of Subpart 65-3 (Regulation 68-C) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601, 5106, and 5221; and Vehicle and Traffic Law, section 2407

Subject: Claims for personal injury protection benefits.

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

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

(b) If a dispute regarding priority of payment arises among insurers who otherwise are liable for the payment of first-party benefits, then the first insurer to whom notice of claim is given pursuant to section 65-3.3 or 65-3.4(a) of this Subpart, by or on behalf of an eligible injured person, shall be responsible for payment to such person. Any such dispute shall be resolved in accordance with the arbitration procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part. *Each insurer that concludes that it was not the first insurer contacted to provide first party benefits shall issue a denial of claim form (NF-10) that includes the following statement in box 33:*

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

(c) If the source of first-party benefits is at issue because the status of the injured person as a pedestrian or an occupant of a motor vehicle is in dispute, the insurer to whom notice of claim was given or if such notice was given to more than one insurer, the first insurer to whom notice was given shall, within 15 calendar days after receipt of notice, obtain an agreement with the other insurer or insurers as to which insurer will furnish no-fault benefits. If such an agreement is not reached within the aforementioned 15 days, then the insurer to whom such notice was first given shall process the claim and pay first-party benefits and resolve the dispute in accordance with the arbitration procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part. *Each insurer that concludes that it was not the first insurer contacted to provide first party benefits shall issue a denial of claim form (NF-10) that includes the following statement in box 33:*

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

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

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

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

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

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

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

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

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@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.

Consolidated Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 2601, 5221 and 5106 of the Insurance Law and Section 2407 of the Vehicle and Traffic Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2601 prohibits insurers from engaging in unfair claim settlement practices and requires insurers to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. Section 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation (MVAIC) in the payment of no-fault benefits to qualified persons. Section 5106 of the Insurance Law sets forth an expedited eligibility hearing option and authorizes the superintendent to promulgate procedures to resolve disputes among eligible insurers using the expedited arbitration process that will designate the insurer responsible for the payment of first party benefits.

2. Legislative objectives: Regulation 68 contains provisions implementing Article 51 of the Insurance Law, known as the Comprehensive Motor Vehicles Insurance Reparations Act, popularly referred to as the No-Fault Law. No-fault insurance was introduced to rectify many problems that were inherent in the existing tort system utilized to settle claims, and to provide for prompt payment of health care and loss of earnings benefits. Chapter 452 of the Laws of 2005 which amends Section 5106 of the Insurance Law codifies the rules contained within Insurance Department Regulation No. 68 that are applicable when multiple insurers may be responsible to the claimant for the processing of the claim for first party benefits. It also enhances the current arbitration procedures to include an expedited eligibility hearing option, when required, to designate the insurer for first party benefits.

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

The rules also provide the procedures for administration of the special expedited arbitration for disputes regarding the designation of the insurer for first party benefits. By providing notification of, and procedures for, administration of the special expedited arbitration, an applicant can utilize the special expedited arbitration to expeditiously resolve all disputes regarding which insurer should be liable for the payment of the claim for first party benefits.

4. Costs: The arbitration alternative is mandated by Chapter 452 of the Laws of 2005, but it is anticipated that the increase in cases utilizing the special expedited arbitration to resolve priority of payments disputes will be minimal, because insurers and self-insurers already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a), which provide for the resolution of "priority of payment" disputes. [Circular Letter No. 16 (2005) was issued to remind insurers that they should be in compliance with the aforementioned subdivisions and paragraphs].

Any additional costs associated with these rules for insurers or self-insurers would be the result of claims for which insurers or self-insurers do not comply with the procedures outlined in subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a) thus causing the applicant to go to arbitration to resolve the "priority of payment" dispute. The additional costs would include: the costs of defending cases, the reimbursement of the filing fee by the insurer determined to be responsible for processing the claim and paying applicants' attorney fees. These additional cases will increase the insurers' and self-insurers' share of costs from the American Arbitration Association. However, all these costs should be offset by savings as the use of the special expedited arbitration will be in lieu of regular arbitration or a court of competent jurisdiction.

A cost associated with the rules for the applicant is the \$40 filing fee. However, this fee will be reimbursed by the insurer determined to be responsible for processing the claim.

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

5. Local government mandates: Some local governments are self-insured for no-fault benefits and those entities will have to comply with the requirements of these rules. The Department has not been able to determine the number of local governments that are self-insured. However, we did outreach by contacting a large local government that is self-insured to determine the impact this change would have on them. It was determined that there would be a very minimal impact since almost all injuries are work related and therefore covered by workers compensation rather than no-fault law.

6. Paperwork: To the extent that additional applicants have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on insurers and self-insurers associated with defending cases in special expedited arbitration and submitting legal briefs and documentary evidence. However, under most circumstances, the submission of the paperwork will eliminate the requirement of the attendance of the applicant (unless the arbitrator determines that a hearing is necessary) thus saving the applicant the time and expense of attending the special expedited arbitration. Since the special expedited arbitration option

is being utilized to resolve "priority of payment" disputes, the applicant does not have to submit bills for this arbitration and the specific notification language for the special expedited arbitration required by this rule has been amended to specifically inform the applicant that bills do not have to be submitted. Insurers and self-insurers will have additional paperwork related to typing or printing the language onto the NF-10 form since it is not preprinted on the form. There will also be paperwork associated with reimbursing filing fees and paying applicants their attorney fees.

The insurers and self-insurers will also incur additional paperwork to comply with record retention requirements. However, it is anticipated that there will be few requests for the special expedited arbitration because insurers and self-insurers already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a), which provide for the resolution of "priority of payment" disputes and therefore paperwork should be minimal.

7. Duplication: None.

8. Alternatives: The Department considered changing the NF-10 form to include the specific notification language for the special expedited arbitration pre-printed on it. However, because insurers and self-insurers already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a), which provide for the resolution of "priority of payment" disputes, it is anticipated that there will be few requests for the special expedited arbitration and the specific notification language would be rarely used. Therefore, the Department decided against changing the form since the costs involved, i.e., insurers and self-insurers would have to discard the current forms in use and print new forms, far outweigh the benefits of having pre-printed language. It was deemed preferable, for those rare instances where the language is needed, to have the affected entities write the prescribed language in space provided on the current form.

The Department considered using a shorter specific notification language for the special expedited arbitration. However, after receiving comments, and based on the Department's evaluation of these comments including assessment of the needs and benefits as well as any potential negative consequences that would result from making the change, it was determined that it would be appropriate to expand the specific notification language to provide further clarification.

It was also suggested that any filing fee be initially financed by the Department. The Department does not have the legislative authorization to fund an arbitration between private parties; therefore, the filing fee cannot be waived. However, in accordance with the regulation's existing provision that the filing fee will be refunded to the applicant by the insurer determined to be responsible for processing the claim, the Department has revised the required specific notification language to advise applicants of this provision.

9. Federal standards: None.

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

Consolidated Regulatory Flexibility Analysis

1. Effect of the rule: The Insurance Department finds that these rules will generally not impose reporting, recordkeeping or other requirements on small businesses or local governments except as noted below. The basis for this finding is that these rules are primarily directed to property/casualty insurance companies authorized to do business in New York State and self-insurers, none of which fall within the definition of "small business". The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized property/casualty insurers and determined that none of them would fall within the definition of "small business", because there are none which are both independently owned and have less than one hundred employees. Self-insurers are typically large enough to have the financial ability to self-insure losses and the Department has no information to indicate that any self-insurers are small businesses.

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

Some local governments are self-insured for no-fault benefits. The Department has not been able to determine the number of local governments that are self-insured. However, we did outreach by contacting a large local government that is self-insured to determine the impact this change would have on them. It was determined that there would be a very

minimal impact since almost all injuries are work related and therefore covered by workers compensation rather than no-fault law.

2. Compliance requirements: To the extent that additional applicants have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on health care providers in filing for special expedited arbitration and providing documentary evidence. There will be additional paperwork requirements imposed on local governments that are self-insured for no-fault benefits associated with defending cases in special expedited arbitration and submitting legal briefs and documentary evidence. There will also be paperwork associated with the reimbursement of the filing fee by the insurer determined to be responsible for processing the claim and paying applicants their attorney fees. The local governments will have additional paperwork related to typing or printing the language onto the NF-10 form since it is not preprinted on the form.

The local governments will also incur additional paperwork to comply with record retention requirements. However, the arbitration alternative is mandated by Chapter 452 of the Laws of 2005. It is anticipated that there will be few requests for the special expedited arbitration because insurers and self-insurers already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a), which provide for the resolution of "priority of payment" disputes [Circular Letter No. 16 (2005) was issued to remind insurers that they should be in compliance with the aforementioned subdivisions and paragraphs] and therefore paperwork should be minimal and the procedures established by this regulation should minimize adverse impact on the parties.

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

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

A cost associated with the rules for the applicant is the \$40 filing fee. However, this fee will be reimbursed by the insurer determined to be responsible for processing the claim.

Additional arbitration requests may be filed against local governments who are self insured for no-fault benefits because applicants can seek the resolution of priority of payments disputes in special expedited arbitration. Such disputes will require the self-insurers to incur the costs of defending cases, the reimbursement of the filing fee by the insurer determined to be responsible for processing the claim and paying applicants their attorney fees. The additional cases will increase the self insured local government's costs from the American Arbitration Association. However, all these costs should be offset by savings as the use of the special expedited arbitration will be in lieu of regular arbitration or a court of competent jurisdiction. The arbitration alternative is mandated by Chapter 452 but it is anticipated that the increase in cases utilizing the special expedited arbitration to resolve priority of payments disputes will be minimal, because self-insurers are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a). As such, it is also anticipated that the additional aforementioned costs to self-insurers should be minimal.

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

6. Minimizing adverse impact: This rule applies uniformly to regulated parties and is mandated by statute. This rule does not impose any additional burden on small businesses and local governments. It is anticipated that there will be few requests for the special expedited arbitration because insurers and self-insurers already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4)

of section 65-3.13(a), which provide for the resolution of "priority of payment" disputes and therefore paperwork should be minimal and the procedures established by this regulation should minimize adverse impact on the parties.

7. Small business and local government participation: This agency action appeared as a proposal in the Insurance Department's current Regulatory Agenda.

Consolidated Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers and self-insurers covered by this regulation do business in every county in this state, including rural areas as defined under Section 102 (10) of the State Administrative Procedure Act. Some of the home offices of these insurers and self-insurers lie within rural areas. Some government entities that are self-insurers for no-fault benefits may be located in rural areas.

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

2. Reporting, recordkeeping and other compliance requirements: To the extent that additional applicants (injured party or health care provider per assignment of benefits from the injured party) have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on insurers and self-insurers (including local governments self-insured for no-fault benefits) associated with defending cases in special expedited arbitration and submitting legal briefs and documentary evidence. There will also be paperwork associated with the reimbursement of the filing fee by the insurer determined to be responsible for processing the claim and paying applicants their attorney fees. The insurers and self-insurers will also incur additional paperwork to comply with record retention requirements. Insurers and self-insurers will have additional paperwork related to typing or printing the language onto the form since the NF-10 form does not have the required language preprinted on the form.

To the extent that additional applicants will also have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on health care providers in filing for special expedited arbitration and providing documentary evidence. However, under most circumstances, the submission of the paperwork will negate the requirement of the attendance of the applicant (unless the arbitrator determines that a hearing is necessary). Since the special expedited arbitration option is being utilized to resolve "priority of payment" disputes, the applicant does not have to submit bills for this arbitration and the specific notification language for the special expedited arbitration required by this rule has been amended to specifically inform the applicant that bills do not have to be submitted. In addition, the arbitration alternative is mandated by Chapter 452 of the Laws of 2005. It is anticipated that there will be few requests for the special expedited arbitration and therefore paperwork should be minimal and the procedures established by this regulation should minimize adverse impact on the parties because insurers and self-insurers are already required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a), which provide for the resolution of "priority of payment" disputes. [Circular Letter No. 16 (2005) was issued to remind insurers that they should be in compliance with the aforementioned subdivisions and paragraphs].

3. Costs: The arbitration alternative is mandated by Chapter 452 of the Laws of 2005 but it is anticipated that the increase in cases utilizing the special expedited arbitration to resolve priority of payments disputes will be minimal, because insurers and self-insurers (including local governments self insured for no-fault benefits) already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a), which provide for the resolution of most "priority of payment" disputes. Any additional costs associated with these rules would be the result of claims for which insurers or self-insurers do not comply with the procedures outlined in subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a) thus causing the applicant to go to arbitration to resolve the "priority of payment" dispute. The additional costs would include: the costs of defending cases, the reimbursement of the filing fee by the insurer determined to be responsible for processing the claim and paying applicants' attorney fees. These additional cases will increase the insurers' and self-insurers' share of costs from the American Arbitration Association. However, all these costs should be offset by savings as the use of the special

expedited arbitration will be in lieu of regular arbitration or a court of competent jurisdiction.

A cost associated with the rules for the applicant is the \$40 filing fee. However, this fee will be reimbursed by the insurer determined to be responsible for processing the claim.

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

4. Minimizing adverse impact: This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State and is mandated by statute. The Insurance Department does not believe that it will have an adverse impact on rural areas. Any additional costs associated with these rule would be the result of claims for which insurers or self-insurers do not comply with the procedures outlined in subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13(a) thus causing the applicant to go to arbitration to resolve the "priority of payment" dispute.

5. Rural area participation: This agency action appeared as a proposal in the Insurance Department's current Regulatory Agenda.

Job Impact Statement

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Arbitration

I.D. No. INS-52-06-00007-P

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

Proposed action: Amendment of Subpart 65-4 (Regulation 68-D) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601, 5106, and 5221; and Vehicle and Traffic Law, section 2407

Subject: Arbitration.

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

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

(b) Special expedited arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@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.

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. INS-52-06-00006-P, Issue of December 27, 2006.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. INS-52-06-00006-P, Issue of December 27, 2006.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. INS-52-06-00006-P, Issue of December 27, 2006.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. INS-52-06-00006-P, Issue of December 27, 2006.

Division of the Lottery

EMERGENCY RULE MAKING

Video Lottery Gaming

I.D. No. LTR-50-06-00004-E

Filing No. 1485

Filing date: Dec. 8, 2006

Effective date: Dec. 8, 2006

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

Action taken: Addition of Part 2836 to Title 21 NYCRR.

Statutory authority: Tax Law, section 1617-a

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

Specific reasons underlying the finding of necessity: (1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. It is projected that the operation of video lottery gaming in New York State may generate over \$1 billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately \$1 to \$4 million weekly in aid to education that are needed to offset anticipated shortfalls.

Since passage of the legislation in October 2001 which authorized the division to license the operation of video lottery gaming at racetracks in New York State, the division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. Five facilities are now in operation. The Legislature enacted changes to the legislation in April 2005. In enacting chapter 61 of the Laws of 2005, the Legislature found that the revenue generated from video lottery gaming to that date had not met predictions. Overall, the Legislature found that lottery revenue would be maximized by making available to the video lottery gaming facilities an increased vendor's fee and a vendor's marketing allowance. The legislation was designed to provide the necessary resources and incentives to the video lottery gaming facilities to undertake the capital, marketing and other expenditures necessary to create and sustain video lottery gaming and maximize lottery revenue to support education. These regulations are a result of that legislation and were initially issued in September 2005, almost six (6) months after passage of chapter 61. These emergency regulations permit the vendor's to receive the benefits of the increased vendors fee and the vendor's marketing allowance, pending formal adoption of these regulations by the division. The division met with each of the current and pending vendors and operators of the video gaming facilities during the months of October and November 2005 to solicit comments on the emergency regulations. While the facilities agreed to submit written comments, the regulations expired requiring a new emergency filing on December 20, 2005. The video lottery gaming facilities submitted comments in late December 2005. Since that date, the Division has been meeting with the facility owners and operators and determining the best approach on implementing proposed and acceptable changes. Accordingly, although timing requires issuance of these emergency regulations for a third time, it is expected that final regulations will be published for public comment within sixty (60) days.

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rule making is that the stated legislative goal of chapter 61 of the Laws of 2005 will be implemented and lottery revenue to support education will be maximized. The division intends to file shortly a notice of proposed rule making pursuant to the State Administrative Procedure Act, section 202(4-a) to continue the normal rule making procedures relative to these regulations within sixty (60) days.

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation and deprive the state of needed revenue to education.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment at

this time since there is insufficient time to commence a formal rule making process and permit such public comment period. The division expects to commence the formal rule making process within sixty (60) days. Such delay would thereby result in a loss of needed aid to education. This is the earliest the regulations could have been finalized in light of the new legislation, leaving inadequate time to comply with the normal rule making procedure set forth in the State Administrative Procedure Act, section 202(1). Delaying the implementation of the increased vendor's fee and the providing of the marketing allowance would mean a loss in lottery revenue to aid education and frustrate the legislative intent of chapter 61 of the Laws of 2005.

Subject: Video lottery gaming.

Purpose: To allow for the licensed operation of video lottery gaming.

Substance of emergency rule: Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the Laws of 2002, as amended further by Chapters 62 and 63 of the Laws of 2003, and as amended further by Chapter 61 of the Laws of 2005, codified as §§ 1612 and 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks in New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

In April, 2005, Chapter 61 of the Laws of 2005 amended § 1612 of the Tax Law to provide an increase to the vendor fee to be paid to each video lottery terminal operator and also permits a marketing allowance for each such facility. These changes have necessitated a revision to the Emergency Regulations. Regulations were initially adopted on an Emergency basis in 2003. Since that date, the regulations have been renewed every 90 days. The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principals and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. Annually, the agents will be required to submit a marketing plan for approval by the Division. The marketing plan will identify those marketing or promotion costs which may be reimbursed from the marketing allowance permitted by § 1612 of the Tax Law. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations. Since issuing the Emergency Regulations in September, 2005, the Division has met and discussed the marketing procedures with each of the existing and pending vendors and operators. Formal comments have been submitted by those facilities. The Division is in the process of responding to these comments and expects to commence the formal rule making within sixty (60) days.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility.

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. LTR-50-06-00004-P, Issue of December 13, 2006. The emergency rule will expire March 7, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Acting General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: jrbarker@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, codified as §§ 1612 and 1617-a of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of

video lottery gaming at racetrack locations around the state. Chapter 383 of the Laws of 2001 has been amended by Chapter 85 of the laws of 2002, as amended further by Chapters 62 and 63 of the Laws of 2003, and amended further by Chapter 61 of the Laws of 2005. The legislation directs the Division to promulgate regulations allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. Legislative Objectives: These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming and, as required by Chapter 61 of the Laws of 2005, permitted vendors to receive an increased vendor fee and a vendor marketing allowance.

3. Needs and Benefits: The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, certain requirements for the physical layout of the gaming facilities, and how the marketing allowance will be disbursed. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While video lottery gaming has been held to be similar to other lottery games that the Division has successfully conducted for over thirty years, some components set it apart from those more traditional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming requires the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key and other employees.

A Notice of Proposed Rule Making was first published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Based on comments received during the public comment period, it was necessary to revise the proposed regulations. Emergency regulations have been promulgated since early 2004. Subsequently, the Legislature made certain additional changes to the statute authorizing video lottery gaming. By way of example, Chapter 61 of the Laws of 2005 increases the vendors fee originally promulgated and adds a new marketing allowance subject to the supervision of the Lottery.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York. Since issuing the Emergency Regulations in September, 2005, the Division has met and discussed the marketing procedures with each of the existing and pending vendors and operators. Formal comments have been submitted by those facilities. The Division is in the process of responding to these comments and expects to commence the formal rule making within sixty (60) days.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$550 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from \$4 million to \$250 million. The regulations require video lottery gaming agents to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. Such gaming facilities throughout the state are expected to employ more than 4,000 people. Individual video lottery gaming agents will be employing approximately 110 to 1,200 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries ranging from \$22,000 to \$250,000. Total annual payroll for each racetrack could range from \$1.8 million to over \$10.8 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately \$100,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

Portions of these rules and regulations identify the guidelines and requirements in relation to marketing expenses and the utilization of the legislatively provided funds. It is anticipated that the licensed video gaming facilities will take full advantage of the allowable uses of the funds which when fully implemented will create over \$70 million annually in available resources for increasing the amount of aid to education from the video gaming program. The use of the marketing allowance funds is voluntary for video gaming facilities as is participation in the video gaming program in general.

The Lottery expects to annually expend over \$110 million in gaming vendor fees in generating over \$800 million in aid to education annually from the video gaming program when fully implemented. Video gaming facilities which are not yet open, but have construction intentions, will likely expend approximately \$300 million in renovations and new construction for video gaming.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. Any registered vendor may be required to be licensed as determined by the Division and if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

(a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds \$150,000.00 in any twelve (12) month period;

(b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed \$500,000.00 in any twelve (12) month period;

Video lottery gaming agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures, marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

Finally, video lottery gaming agents are required to submit an annual marketing plan to the Division which describes the proposed use of the marketing allowance permitted by Chapter 61 of the Laws of 2005.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the New York State Racing and Wagering Board must license the operation of pari-mutuel wagering at the racetracks as well as licensing racetrack employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Division may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Division and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: The Division has conducted outreach sessions with each of the operating video lottery gaming facilities and believes that these regulations fulfill its statutory mandate while addressing those comments. While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. All comments received are available for public review by contacting Julie B. Silverstein Barker, Acting General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to jbarker@lottery.state.ny.us.

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-going throughout the operation of the games.

Regulatory Flexibility Analysis

1. Effect of Rule: The Division of the Lottery finds that the rule will not adversely affect local government. The rule will impact a number of different types of businesses:

(a) Licensed racetracks: It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses" as that term is defined in New York State Administrative Procedure Act '102;

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central computer system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain lenders. It is anticipated that, these companies will recoup any costs associated with licensing and start-up from operations;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process only. However, if their contract exceeds a certain value, or if the Division otherwise determines, such vendors will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, should not exceed \$100 per application for the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. Certain small vendors may not even be required to register.

3. Professional Services: It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming operation. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$550 million if all eligible remaining venues participate. Each facility's proposed project differs. The cost for each facility ranges is from \$4 million to over \$250 million dollars. The regulations require video lottery gaming agents equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional \$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each racetrack's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ more than 4,000 people. Individual gaming agents will be employing between approximately 110 to 1,200 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual hourly salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racetrack facilities. The majority of these controls are put in place through adequate experienced personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately \$100,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. These emergency regulations include revisions made to the regulations as a result of such comments.

Rural Area Flexibility Analysis

Many of the racetracks eligible for video lottery gaming licenses are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Division believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

Job Impact Statement

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ more than 4,000 people. Individual gaming agents will be employing between approximately 110 to 1,200 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs. It is expected that, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Reimbursement Methodologies for Health Care Enhancement Funding Initiative

I.D. No. MRD-42-06-00008-A

Filing No. 1506

Filing date: Dec. 12, 2006

Effective date: Jan. 1, 2007

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

Action taken: Amendment of sections 635-10.5, 671.7, 679.6, 680.12, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

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

Subject: Revision of the reimbursement methodologies for various facilities and services provided under the auspices of OMRDD to include a health care enhancement (HCE II) funding initiative.

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

Text or summary was published in the notice of proposed rule making, I.D. No. MRD-42-06-00008-P, Issue of October 18, 2006.

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

Text of 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.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Reimbursement Methodologies in Individualized Residential Alternative Facilities

I.D. No. MRD-42-06-00009-A

Filing No. 1507

Filing date: Dec. 12, 2006

Effective date: Jan. 1, 2007

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

Action taken: Amendment of sections 635-10.5(b) of Title 14 NYCRR.

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

Subject: Revision of the reimbursement methodologies for residential habilitation services provided under the auspices of OMRDD in supervised and supportive Individualized Residential Alternative (IRA) facilities.

Purpose: To simplify price setting and billing procedures for IRAs.

Text or summary was published in the notice of proposed rule making, I.D. No. MRD-42-06-00009-P, Issue of October 18, 2006.

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

Text of 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.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Criminal History Record Checks

I.D. No. MRD-52-06-00010-P

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

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

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 16.33; and Executive Law, section 845-b

Subject: Requirements related to criminal history record checks.

Purpose: To promulgate regulations necessary to implement chapter 575 of the Laws of 2004 and chapter 673 of the Laws of 2006, concerning criminal history record checks. The regulation requires that agencies, sponsoring agencies and providers of services request criminal history record checks for specified employees, volunteers, family care providers and parties who are to reside in a family care home.

Substance of proposed rule (Full text is posted at the following State website: www.omr.state.ny.us): • Similar emergency regulations have been in effect since April 1, 2005.

- Applies to all providers, including residences (ICFs, IRAs, and CRs), family care homes, day programs (day treatment, day habilitation, day training, sheltered workshops, prevocational services), HCBS waiver services, Article 16 clinics, family support services, and individualized support services.
- Applies to some entities that have a contract with OMRDD.
- Establishes a requirement that providers of services apply to become "registered providers" if they contract with a voluntary agency, entity on behalf of the voluntary agency or DDSO and provide transportation services or staff.
- Requires agencies to appoint an "authorized party" to request criminal history record checks and receive the results.

- Requires that prospective employees, volunteers, and operators that have “regular and substantial unsupervised or unrestricted physical contact” with people receiving services consent to a criminal history record check, which includes a FBI check.
 - Requires that agencies ask applicants about pending criminal charges, in addition to convictions.
 - Defines employees of the provider that are subject to a criminal history record check to include people that are directly employed by the provider and other people providing similar services for the provider who are employed by other entities, such as temporary employment agencies or contractors.
 - Includes a list of jobs that are presumed to include this type of contact.
 - Provides that while the results of criminal history record checks are pending, employees and volunteers may not have unsupervised physical contact with people receiving services. Regulations specify restrictions placed on “temporarily approved provisional” employees and volunteers.
 - Provides that oversight of temporarily approved provisional employees and volunteers can be provided by an employee who has completed required training in incidents and abuse, and who was not subject to a criminal history record check or whose criminal history record check has been completed.
 - Provides that temporarily approved provisional employees and volunteers may not be assigned personal care activities which require privacy unless the employee providing oversight is in the same room.
 - Provides that temporarily approved provisional employees and volunteers may not work the night shift in a residence.
 - Requires that requests for criminal history record checks be made through OMRDD. If a subject party is also subject to another criminal history record check from the New York State Office of Mental Health (OMH) at the same time because of other responsibilities of the potential employment with the same agency or provider of services the individual need only to be fingerprinted through one of the agencies; however OMH and OMRDD will make separate determinations.
 - Provides that OMRDD will make a determination in each case either to issue a denial (or direct the provider to issue a denial) or not to issue a denial (or not direct the provider to issue a denial). The determination process is put on hold for pending felony charges and may be put on hold for misdemeanor charges.
 - Establishes standards for OMRDD determinations that replicate the standards in the statute, with certain specified crimes that are presumptive disqualifying crimes. A new section 633.98 lists these crimes.
 - Provides that OMRDD will send a summary of the criminal history record information to agencies, to the extent permitted by law and regulation, which can assist in further decision-making by the agency (such as evaluating whether the applicant provided false information about convictions or pending charges). Registered providers will not receive the summary unless OMRDD is issuing a denial.
 - Provides that once a person has had a criminal history record check, OMRDD will let the provider know about future arrests. When they are notified, providers must take appropriate steps to protect people receiving services.
 - Requires that providers notify OMRDD when employees and volunteers separate from service, so that OMRDD can remove the name from its database.
 - Includes a requirement that agencies and providers of services submit an annual criminal history record check statement to OMRDD.
 - Identifies actions that OMRDD may take for non-compliance.
 - Makes minor changes in current requirements to assess applicant backgrounds.
- Family care homes.
- Includes family care respite providers, and adults living in homes where respite is provided.
 - Requires prospective family care providers and people who are to reside in a family care home and who are age 18 years and older to consent to a criminal history record check (except for individuals receiving family care services).
 - Requires current family care providers and residents of a family care home to consent to a criminal history record check, at the time of recertification.

- Establishes that checks related to family care homes are requested by the sponsoring agency (DDSOs for most family care homes) and information is received by the sponsoring agency.
- Requires criminal history record checks for current residents at the time of their 18th birthday.
- Requires that a criminal history record check be conducted prior to or shortly after a new adult moves into the family care home. Additional processes are specified to safeguard people receiving services before the results of the criminal history record check are received.
- Requires notifications to OMRDD about residency and provider status so that names can be removed from the OMRDD database.
- Requires additional notifications by family care providers about changes in residents of the family care home and arrests of household members.

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

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

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

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

d. OMRDD’s responsibility, pursuant to section 845-b of the Executive Law, as amended by Chapter 673 of the Laws of 2006, to promulgate regulations concerning criminal history record checks.

2. Legislative objectives: These amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 16.33 of the Mental Hygiene Law and section 845-b of the Executive Law, as amended by Chapter 673 of the Laws of 2006. The promulgation of these amendments will enhance the safety of people with developmental disabilities who receive services certified, authorized, approved or funded by OMRDD. Providers of services, with some exceptions, are required to comply, including certified residences and day programs, HCBS waiver services, Medicaid Service Coordination, family support services, and individual support services.

3. Needs and benefits: The new law and these implementing regulations require fingerprinting and criminal history record checks, which include information from the New York State Division of Criminal Justice Services (DCJS) and the Federal Bureau of Investigation (FBI) for prospective employees and volunteers, family care providers and adults who are to reside in a family care home.

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

The regulations also include measures that can be used at the discretion of the provider (except for “registered providers”) to temporarily approve new applicants while the results of the criminal history record check are pending. During this time, the activities of these employees and volunteers

must be monitored. In this manner, new employees can be hired while people receiving services are safeguarded.

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

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

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

4. Costs:

a. Costs to the Agency and to the State and its local governments: OMRDD estimates that the new requirements will result in approximately 50,000 requests for a criminal history record check on an annual basis. The total annual cost is estimated to be approximately \$7,585,000. This cost includes the costs of the processing fee charged by the Division of Criminal Justice Services and the Federal Bureau of Investigation, which is \$99 per check, and the related costs, including administrative costs, which are incurred by OMRDD.

OMRDD estimates that approximately 79 percent of the annual aggregate cost will be eligible for Medicaid funding. Therefore, approximately \$5,992,150 of the total costs will be subject to a 50 percent Federal share, and approximately \$1,592,850 will be borne entirely by the State. The new requirements will therefore result in the expenditure of approximately \$2,996,075 in Federal funds, and approximately \$4,588,925 in costs to the State.

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

b. Costs to private regulated parties: There are no initial capital investment costs or initial non-capital expenses. The new requirements will not generally result in any costs to private regulated parties.

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

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

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

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

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

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

7. Duplication: The regulatory amendment does not duplicate existing State or federal requirements.

It should be noted that the Office of Mental Health (OMH) has a similar statutory requirement and is promulgating its own regulations on this subject, as required via Chapter 575. Staff from OMRDD and OMH have met to explore opportunities to share fingerprint technology across both Agencies. In terms of technology, OMH and OMRDD hope to integrate systems at a later date to arrive at a single technology solution. In anticipation of that effort, OMRDD and OMH selected the same vendor, which was already under contract to provide a LiveScan solution for a joint

project between other state agencies. To facilitate future integration, a common, consistent hardware and software platform was purchased by OMH and OMRDD. In addition, OMRDD has begun efforts with the Fingerprint technology vendor to electronically share between OMRDD and OMH. This would facilitate staff from OMRDD providers being printed at OMH locations, as well as staff from OMH providers being printed at OMRDD locations. OMRDD has had preliminary discussions with the vendor as to the architecture, software and connectivity required to accomplish this goal.

With the release of enhanced LiveScan stations and software, the capability exists to share fingerprints electronically through the NyeNet. As all NYS Agencies utilize the NyeNet, this capability provides for future expansion beyond OMH for State Agencies who also utilize this technology. In addition, this will also allow voluntary agencies that serve both OMH and OMRDD consumers to forward prints to the appropriate State Agency for processing.

OMRDD has also expanded the number of sites available for electronic fingerprinting by implementing fingerprint technology at a limited number of voluntary agencies. The technology utilized is equivalent to that being used at OMRDD DDSOs and increases the number of locations to serve large population centers, as well as more remote locations where there are no DDSO Livescan stations. Support is being provided by OMRDD to ensure the success of these new sites. Additional expansion in the future is anticipated in response to the numerous requests from voluntary agencies for this capability.

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

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

10. Compliance schedule: OMRDD filed a similar emergency regulation on April 1, 2005 to implement Chapter 575 of the Laws of 2004, which became effective on April 1, 2005. Subsequent emergency regulations were filed June 30, 2005, September 28, 2005, December 27, 2005, March 27, 2006, June 23, 2006 and September 21, 2006.

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

Regulatory Flexibility Analysis

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

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

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

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

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

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

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

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

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

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

6. Minimizing adverse economic impact: These amendments impose no adverse economic impact on local governments. As mentioned in the Regulatory Impact Statement, OMRDD had considered requiring that oversight could only be provided by supervisors or employees with at least one year of experience. OMRDD determined that this requirement might be difficult for some providers to implement and would not enhance consumer safety, and has minimized any related adverse economic impact on providers of services by not incorporating these qualifications for the employees providing oversight.

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

OMRDD distributed similar emergency regulations in April, June, September and December of 2005, March, June and September of 2006. OMRDD also posted the regulations on the Agency website. No comments were received regarding the emergency regulations.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Division of Probation and Correctional Alternatives

NOTICE OF ADOPTION

Case Record Management and Supervision

I.D. No. PRO-41-06-00007-A
Filing No. 1500
Filing date: Dec. 12, 2006
Effective date: Dec. 27, 2006

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

Action taken: Amendment of Parts 348 and 351 of Title 9 NYCRR.
Statutory authority: Executive Law, sections 243(1) and 257(4) and (5)
Subject: Case record management and supervision of those under probation supervision.

Purpose: To promote public/victim safety, increase offender accountability, facilitate appropriate communication and/or sharing by probation of certain case record information where deemed necessary and recognize instructions and/or supervisory directives pertaining to orders and conditions of probation.

Text or summary was published in the notice of proposed rule making, I.D. No. PRO-41-06-00007-P, Issue of October 11, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Linda J. Valenti, Counsel, Division of Probation and Correctional Alternatives, 80 Wolf Rd., Suite 501, Albany, NY 12205, (518) 485-2394

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Retail Access Plan by Orange and Rockland Utilities, Inc.

I.D. No. PSC-08-05-00008-A
Filing date: Dec. 6, 2006
Effective date: Dec. 6, 2006

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

Action taken: The commission, on Oct. 18, 2006, adopted an order approving Orange and Rockland Utilities, Inc.'s retail access plan with modifications.

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

Subject: Retail access plan filed by Orange and Rockland Utilities, Inc.

Purpose: To adopt the retail access plan filed by Orange and Rockland Utilities, Inc.

Substance of final rule: The Commission adopted an order approving, with modifications, Orange and Rockland Utilities, Inc.'s Retail Access Plan, subject to the terms and conditions of the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(00-M-0504SA14)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Property Tax Refunds by Orange and Rockland Utilities, Inc.

I.D. No. PSC-52-06-00014-P

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

Proposed action: The Public Service Commission is considering both a petition filed by Orange and Rockland Utilities, Inc. pursuant to Public Service Law, section 113(2) and a joint proposal filed by the company and Department of Public Service staff regarding a proposed allocation of the cash refund and prospective relief associated with tax certiorari proceedings commenced by the company against the Town of Clarkstown. The commission may accept, reject, or modify, in whole or in part, the parties' recommendations and it may consider other related matters.

Statutory authority: Public Service Law, sections 2, 5, 65, 113(2)

Subject: Disposition of property tax refunds and the benefits of prospective assessment reductions, and other related matters.

Purpose: To determine the manner in which property tax refunds and benefits from tax assessment reductions should be passed on to customers and shared with the company, and consider other related matters.

Public hearing(s) will be held at: 10:00 a.m., January 20, 2007* at Department of Public Service, Three Empire State Plaza, 3rd Fl., Albany, NY; *There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Web Site (www.dps.state.ny.us) under Case No. 06-E-0379.

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

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

Substance of proposed rule: Orange and Rockland Utilities, Inc. filed a petition pursuant to Public Service Law § 113(2) that notified the Public Service Commission (Commission) that it had settled a series of tax certiorari proceedings it commenced against the Town of Clarkstown and proposed a sharing of the total benefits between ratepayers and shareholders. Under the terms of the settlement with the Town, the company received a combination of cash refunds and prospective assessment reductions. Subsequently, the company and Department of Public Service Staff entered into a Joint Proposal in which the parties jointly agreed to recommend to the Commission an alternate disposition of the total benefits.

Under the Joint Proposal, the company would retain 10% of the cash refund plus 10% of the net benefits of the prospective relief that accrue during the term of the company's electric rate plan. Of the estimated cumulative benefits of \$1.24 million, the company's ratepayers would receive approximately \$1.15 million and the shareholders would receive about \$92,000. The ratepayers' share of the benefits will be deferred until its next rate case. The Commission may grant, deny, or modify, in whole or part, the parties' recommendations, and if may consider other related matters.

Text of proposed rule may be obtained from: Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

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

Public comment will be received until: 5 days after the last scheduled public hearing.

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

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

(06-E-0379SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Frontier Communications of AuSable Valley, Inc., et al.

I.D. No. PSC-52-06-00013-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of Seneca-Gorham, Inc., Ogden Telephone Co. and T-Mobile USA, Inc.

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

Subject: Interconnection of the networks between Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of Seneca-Gorham, Inc., Ogden Telephone Co. and T-Mobile USA, Inc.

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

Substance of proposed rule: Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of Seneca-Gorham, Inc., Ogden Telephone Co. and T-Mobile USA, Inc. have reached a negotiated agreement whereby Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of Seneca-Gorham, Inc., Ogden Telephone Co. and T-Mobile USA will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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

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

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

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

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

(06-C-1462SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

License Agreement of Real Property by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York, et al.

I.D. No. PSC-52-06-00015-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KeySpan) and Luba Mishiev d/b/a M&M Parking System (M&M) for (1) approval under section 70 of the Public Service Law for a license agreement of a part of KeySpan's Coney Island Service Station property to M&M; (2) approval of the proposed accounting and rate treatment for the transaction; and (3) related relief. The commission has previously approved the licensing of the site by KeySpan to M&M for this purpose in Case 04-G-1029 issued and effective Dec. 17, 2004.

Statutory authority: Public Service Law, sections 5(b), (c), 65(1), 66(1), (2), (5), (8), (9), (10), (11), (12) and 70

Subject: License agreement of real property, the accounting and rate treatment for the transaction and related matters.

Purpose: To consider the license agreement of a part of property, the proposed accounting and rate treatment (associated with the transaction), and related matters.

Substance of proposed rule: The Public Service Commission is considering whether to approve to reject, in whole or in part, the License Agreement of a part of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's (KeySpan) Coney Island Service Station property, located 817 Neptune Avenue, Brooklyn, New York to Luba Mishiev d/b/a M&M Parking System (M&M). Under this License Agreement, M&M proposes to use this property for the purpose of daily and month parking of vehicles. By this petition, the parties seek approval of this License Agreement. The Commission is also considering KeySpan's proposed accounting and rate treatment for this transaction, including its proposal to use the revenues generated for this transaction to defray operation and maintenance expenses, and other related issues. The Commission has previously approved the licensing of the site by KeySpan to M&M for this purpose in Case 04-G-1029 issued and effective December 17, 2004.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-G-1439SA1)

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

Security Requirements for Large Volume Transportation Customers by Niagara Mohawk Power Corporation d/b/a National Grid

I.D. No. PSC-52-06-00016-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Niagara Mohawk Power Corporation, d/b/a National Grid, requesting a limited waiver of the requirements of the Uniform Business Practices (UBP) as set forth in its schedule for gas service—P.S.C. No. 219 to become effective March 1, 2007.

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

Subject: Security requirements for large volume transportation customers served under Service Classification No. 11—Load Aggregation Service.

Purpose: To revise the company's S.C. No. 11 security requirements applicable to direct customers participating in the company's daily balancing program by increasing the number of days included in the balancing risk calculation from 10 to 30 days for those customers with annual usage greater than 5,000 Dth, who have been dropped by their marketer either through a voluntary or involuntary action, and that are not able to demonstrate the ability to deliver gas.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify the petition of Niagara Mohawk Corporation, d/b/a National Grid, for a limited waiver of the Uniform Business Practices (UBP) rules as contained in its tariff P.S.C. No. 219 as UBP Addendum No. 4, Section 3 (D) (2) (a), at page 16. The current rules state that a distribution utility may require that larger volume transportation (direct) customers meet a credit requirement because of gas supply imbalance risk these large volume customers may impose on National Grid, equal to no greater than the customer's projected maximum daily volume multiplied by the peak forecasted NYMEX price for the next 12 months, including upstream capacity to the citygate, times 10 days. The company is requesting a limited waiver of this rule in order to allow an increase in that security requirement from 10 to 30 days only for direct customers who have an annual usage greater than 5,000 Dth, participate in daily balancing, have been dropped by their marketer either through a voluntary or involuntary action, and cannot demonstrate the ability to deliver gas to the utility. Direct customers who are able to demonstrate that they will be delivering

sufficient quantities of gas to balance their own consumption will remain subject to the current credit requirements in effect under the UBP.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-G-1478SA1)

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

Lightened Regulation as a Gas Corporation by Nornew Energy Supply, Inc.

I.D. No. PSC-52-06-00017-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject (in whole or in part) or modify a request by Nornew Energy Supply, Inc. (Nornew) for an order providing for lightened regulation with respect to matters other than its rates, services and facilities.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Request by Nornew for lightened regulation as a gas corporation.

Purpose: To consider Nornew's request in connection with its provision of competitive retail gas service.

Substance of proposed rule: By petition filed December 7, 2006 Nornew Energy Supply, Inc. (Nornew) seeks an Order from the Commission providing for lightened regulation of it as a gas corporation providing competitive retail gas service in Chautauque County.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-G-1484SA1)

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

Retail Access Program by Central Hudson Gas & Electric Corporation

I.D. No. PSC-52-06-00018-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Central Hudson Gas & Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12 to become effective April 1, 2007.

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

Subject: General Information Section No. 41 - Retail Access Program - Capacity Release.

Purpose: To revise the manner in which upstream pipeline capacity is released to retail suppliers who elect to take assignment of the company's primary delivery point capacity under the company's Retail Access Program.

Substance of proposed rule: The Commission is considering Central Hudson Gas & Electric Corporation's (the company) request to revise the manner in which upstream pipeline capacity is released to retail suppliers who elect to take assignment of the company's primary delivery point capacity under the company's Retail Access Program.

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

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

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

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

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

(06-G-1487SA1)

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

Commission Pole Attachment Policies by Omnipoint Communications, Inc. d/b/a T-Mobile USA

I.D. No. PSC-52-06-00019-P

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

Proposed action: The Commission is considering whether to approve or reject, in whole or in part, a petition filed by Omnipoint Communications, Inc. d/b/a T-Mobile USA (T-Mobile) on Nov. 20, 2006 regarding wireless attachment issues.

Statutory authority: Public Service Law, sections 94(2) and 119-a

Subject: Application of commission pole attachment policies to wireless attachments.

Purpose: To consider application of commission pole attachment policies to wireless attachment to utility distribution poles.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, a petition filed by Omnipoint Communications, Inc. d/b/a T-Mobile USA (T-Mobile) on November 30, 2006 regarding wireless attachment issues.

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

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

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

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

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

(03-M-0432SA5)

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

Transfer of Water Supply Assets between Helen J. Binder Water System and the Town of Binghamton

I.D. No. PSC-52-06-00020-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a joint petition filed by Doreen Layton as Executrix of the Estate of Helen J. Binder and the Town of Binghamton for approval to transfer the Helen J. Binder water distribution system to the Town of Binghamton.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and 89-h

Subject: Transfer of water supply assets.

Purpose: To transfer the water supply assets of Helen J. Binder to the Town of Binghamton.

Substance of proposed rule: On December 1, 2006, Helen J. Binder (Binder) water system and the Town of Binghamton (Town) filed a joint petition requesting approval to transfer the water supply assets of Binder to the Town. Binder currently provides water service to 26 residential customers located on Powers Road and Lillian Drive, Town of Binghamton, Broome County. The Commission may approve or reject, in whole or in part, or modify the petition.

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

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

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

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

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

(06-W-1466SA1)

**Department of Taxation and
Finance**

NOTICE OF ADOPTION

New York Reportable Transactions

I.D. No. TAF-43-06-00006-A

Filing No. 1503

Filing date: Dec. 12, 2006

Effective date: Dec. 27, 2006

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

Action taken: Addition of Part 2500 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 25(a)(3); 171; subdivision First; 697(a); and 1096(a)

Subject: New York reportable transactions.

Purpose: To provide a definition of a New York reportable transaction and the disclosure requirements for participation in a New York reportable transaction.

Substance of final rule: The proposal creates Part 2500 "New York Reportable Transactions" in the Procedural Regulations as published in Chapter IX of Title 20 NYCRR. The rule provides a definition of a New York reportable transaction and the disclosure requirements for participa-

tion in a New York reportable transaction. A New York reportable transaction is a transaction that has the potential to be a tax avoidance transaction under articles 9, 9-A, 22, 32, or 33 of the Tax Law.

A summary of the sections of Part 2500 as contained in the proposal follows:

Section 2500.1 provides the statutory authority for the amendments, a brief description of a New York reportable transaction and the purpose of the Part.

Section 2500.2 requires a taxpayer to disclose its participation in a New York reportable transaction with its tax return for the taxable year it has participated in such New York reportable transaction. The section also conveys that a transaction's designation as a New York reportable transaction shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper.

Section 2500.3 defines a New York reportable transaction and includes a description of the three categories of New York reportable transactions: New York listed transactions, New York confidential transactions, and New York transactions with contractual protection. A brief description of each category follows.

A New York listed transaction is a transaction that is the same or substantially similar to a transaction that the commissioner has determined to be a tax avoidance transaction and identified by notice or form of published guidance as a New York listed transaction. When determining whether a transaction is a tax avoidance transaction, the commissioner is required to find that one of the following conditions exists:

- (1) The transaction is not done for a valid business purpose;
- (2) The transaction does not have economic substance apart from its tax benefits; or
- (3) The tax treatment of the transaction is based upon an elevation of form over substance.

A New York confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor fee.

A New York transaction with contractual protection is a transaction where the taxpayer or related party has a right to a full or partial refund of fees if the tax treatment is not sustained or where the fee is contingent on the taxpayer's realization of tax benefits from the transaction.

Section 2500.4 provides the definitions for Part 2500. The definition of "taxpayer" describes persons who may be subject to the reporting requirement if they participate in New York reportable transactions, and is structured to include persons required to file a return or report or are subject to tax under the specific articles of the Tax Law: 9, 9-A, 22, 32, and 33.

The definition of "participation" describes when a taxpayer has participated in New York reportable transactions and therefore, is subject to the disclosure requirements. Generally, a taxpayer is considered to have participated in a transaction if its return reflects a tax benefit from the transaction. Thus, for instance, a member of a combined group that is subject to New York tax has participated in a transaction where the combined report reflects a tax benefit from a transaction engaged in by another member of the group, even if the other member is not subject to New York tax. Other terms defined are: substantially similar, tax, tax benefit, tax return, tax treatment, and tax structure.

Section 2500.5 provides taxpayer is required to report such disclosure on the forms and in the manner prescribed by the commissioner. Guidance of the specific filing and disclosure requirements will be provided in applicable forms, instructions, and other appropriate publications.

The section provides the requirement for a timely disclosure of participation in a New York listed transaction where the designation of the transaction as a listed transaction occurs after a taxpayer has filed the tax return that encompasses the date the New York listed transaction occurred. The taxpayer must disclose its participation with the next tax return filed after the date the transaction is listed.

The section also provides that these disclosure requirements are intended to supplement any existing provisions of the Tax Law.

Section 2500.6 allows a taxpayer to request a review of a transaction to determine whether or not a transaction is subject to the New York reportable transaction disclosure requirements prior to the date that disclosure would normally be required. A protective disclosure procedure is also provided for a transaction where a taxpayer is uncertain whether a transaction is subject to the disclosure requirements.

Section 2500.7 provides the document retention requirements based upon Tax Law sections 25(d) and (e). The section also provides that these retention requirements are intended to supplement any existing provisions of the Tax Law.

The rule is effective upon publication of the Notice of Adoption in the *State Register* and shall apply to taxable years beginning on or after January 1, 2006.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2500.4(b)(4).

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

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Statement in lieu of a Job Impact Statement are not required to be submitted because the nonsubstantive change made to the proposed rule does not affect any of the statements made in these documents.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

New York Source Income of Nonresidents and Part-Year Residents from Stock Options

I.D. No. TAF-43-06-00007-A

Filing No. 1504

Filing date: Dec. 12, 2006

Effective date: Dec. 27, 2006

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

Action taken: Amendment of Parts 132 and 154 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 631(g); 638(c); 697(a); and L. 2006, ch. 62, part N, section 3

Subject: New York source income of nonresidents and part-year residents from stock options, stock appreciation rights and restricted stock.

Purpose: To comply with a statutory directive to propose regulations within 180 days of enactment to provide allocation rules for certain nonresidents and part-year residents who were granted stock options, stock appreciation rights or restricted stock.

Text of final rule: Section 1. The heading note for Part 132 of such regulations is amended to read as follows:

"Note:" Except for [section] sections 132.19 and 132.24, this Part does not reflect amendments to the Tax Law made by the Tax Reform and Reduction Act of 1987 (Chapter 28 of the Laws of 1987) and certain other amendments.

Section 2. Sections 132.24 and 132.25 of such regulations are renumbered to be sections 132.25 and 132.26, respectively, and a new section 132.24 is added to read as follows:

Section 132.24 Stock options, stock appreciation rights and restricted stock (Tax Law, section 631(g))

(a) "General." A nonresident individual has New York source income from compensation received from stock options, stock appreciation rights or restricted stock if at any time during the allocation period the nonresident individual performed services in New York State for the corporation granting such options, rights or stock ("grantor"). A nonresident individual's New York source income from compensation received from stock options, stock appreciation rights or restricted stock is realized when the income is realized for federal income tax purposes and is reportable to New York State in the taxable year that the income is included in the individual's federal adjusted gross income.

(b) "Computation of New York source income." New York source income from stock options, stock appreciation rights or restricted stock is the amount determined by multiplying the compensation by the New York workday fraction for the applicable allocation period.

(c) "Definitions." For purposes of this section:

(1) "Compensation" means the amount of compensation income attributable to stock options, stock appreciation rights or restricted stock that is required to be included in federal gross income for the taxable year. In the case of statutory stock options (Internal Revenue Code, sections 422 and 423), the amount of income recognized for federal income tax purposes may be reported as a capital gain, and in such case, the amount of the capital gain that is compensation is limited to the amount that is the lesser of:

(i) the difference between the option price and the fair market value of the stock at the time the option is exercised; or

(ii) the gain (but not the loss) actually recognized for federal income tax purposes at the time the stock is sold.

(2) "New York workday fraction" is a fraction the numerator of which is the number of days worked within New York State for the grantor during the allocation period and the denominator of which is the number of days worked both within and without New York State for the grantor during the allocation period. See section 132.18 of this Part for more information about what constitutes a working day within New York.

(3) "Allocation period" is:

(i) in the case of statutory stock options (Internal Revenue Code, sections 422 and 423), nonstatutory stock options that do not have a readily ascertainable fair market value at the time of grant, and stock appreciation rights,

"(a)" the period of time from the date of grant to the date on which all service-related conditions for exercise of the option or right have been satisfied (the date that the option or right is vested) or, if the option or right is vested at the time of grant, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year of the grant, or

"(b)" for a taxable year beginning in 2006, if elected by the individual, the period of time from the date of grant to the earliest of the date that the option or right is exercised, the date that the individual's services terminate, or the date that the compensation is recognized for federal income tax purposes;

(ii) in the case of nonstatutory stock options that have a readily ascertainable fair market value at the time of grant (Internal Revenue Code, section 83(a)) and restricted stock where an election under section 83(b) of the Internal Revenue Code is made, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year the option was granted or the restricted stock was received; or

(iii) in the case of restricted stock where an election under section 83(b) of the Internal Revenue Code is not made, the period of time from the date that the stock was received to the earliest of the date that the stock is substantially vested (transferable or not subject to substantial risk of forfeiture), the date that the individual's services terminate, or the date that the stock is sold, except that, with respect to the portion of the compensation related to the stock that is attributable to dividends paid on the stock, the same period of time that applies to regular, non-stock-based remuneration from the grantor during the taxable year that such dividends were received.

In all cases, the allocation period may span multiple years and may include New York State resident periods.

(d) "Examples."

"Example 1:" On April 1, 2007, Company B compensates employee S with a grant of nonstatutory stock options that do not have a readily ascertainable fair market value when granted. The stock options permit S to purchase 10,000 shares of Company B stock for \$5 per share. The stock options do not become exercisable unless and until S performs services for Company B (or a related company) for the next 5 years. S continues to work for Company B for the next 15 years. From April 1, 2007 through March 31, 2011, S is a New York State nonresident who works within and without New York State. S's workdays within New York State during this time period total 720 days, and S's workdays both within and without New York State for this time period total 960 days. From April 1, 2011 to August 15, 2013, S continues to be a nonresident of New York State, but during this time period, only performs services for Company B outside New York State. From April 1, 2011 to March 31, 2012 (the date that the options become exercisable), S has a total of 240 working days, all of which were services performed outside New York State. On August 15, 2013, S exercises the options when the stock is worth \$12 per share. S recognizes \$70,000 in compensation for federal income tax purposes $((\$12-\$5) \times 10,000)$ in 2013. S's allocation period for computing New York source income is the 5-year period between the date of grant (April 1, 2007) and the date that the stock options become exercisable (March 31, 2012) because, as of that date, S has performed all services necessary for exercise of the options. The services performed after the date that the stock options became exercisable are not taken into account in allocating the compensation from the stock options. Therefore, S's New York workday fraction for the 5-year allocation period is 720/1200, and \$42,000 of the \$70,000 compensation recognized in 2013 is New York source income in 2013 $(720/1200 \times \$70,000 = \$42,000)$.

"Example 2:" Same facts as in "Example 1" except that the options granted were statutory stock options and the stock is sold on September 17, 2014, for \$11 per share. From August 16, 2013 to September 17, 2014, S

continues to be a New York State nonresident who performs no services in New York State. In this situation, S recognizes a capital gain for federal income tax purposes of \$60,000 $((\$11-\$5) \times 10,000)$ when the stock is sold in 2014. S's compensation is limited to \$60,000 since the \$60,000 gain is less than the \$70,000 difference between the option price and the fair market value at the time of exercise $((\$12-\$5) \times 10,000)$. S's allocation period for computing New York source income is the 5-year period between the date of grant (April 1, 2007) and the date that the stock options became exercisable (March 31, 2012) because, as of that date, S has performed all services necessary for exercise of the options. Therefore, S's New York workday fraction is 720/1200, and \$36,000 of the \$60,000 compensation recognized in 2014 is New York source income in 2014 $(720/1200 \times \$60,000 = \$36,000)$.

"Example 3:" Same facts as in "Example 2" except that the stock sells for \$14 per share. In this situation, S recognizes a capital gain for federal income tax purposes of \$90,000 $((\$14-\$5) \times 10,000)$ when the stock is sold in 2014. S's compensation is limited to \$70,000, the difference between the option price and the fair market value at the time of exercise $((\$12-\$5) \times 10,000)$, and \$42,000 of the \$70,000 compensation recognized in 2014 is New York source income in 2014 $(720/1200 \times \$70,000 = \$42,000)$. The \$20,000 increase in the value of stock after the exercise date is considered investment income, and is not New York source income for S.

Section 3. Section 132.25 of such regulations is amended to read as follows:

Section 132.25 Other methods of allocation.

Sections 132.15 through [132.23] 132.24 of this Part are designed to apportion and allocate to New York State, in a fair and equitable manner, a nonresident's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. Where the methods provided under those sections do not so allocate and apportion those items, the [department] Department may require a taxpayer to apportion and allocate those items under such method as it prescribes, as long as the prescribed method results in a fair and equitable apportionment and allocation. A nonresident individual may submit an alternative method of apportionment and allocation with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. The proposed method must be fully explained in the taxpayer's New York State nonresident personal income tax return. If the method proposed by the taxpayer is approved by the [department] Department, it may be used in lieu of the applicable method under sections 132.15 through [132.22] 132.24 of this Part.

Section 4. A new section 154.6 of such regulations is added to read as follows:

Section 154.6 Stock options, stock appreciation rights and restricted stock (Tax Law, section 638(c))

(a) Where an individual changes resident status during the taxable year, the amount of New York source income from compensation (see section 132.24(c)(1)) received from stock options, stock appreciation rights or restricted stock, in the taxable year that such income is included in the individual's federal adjusted gross income (as either ordinary income or capital gain income), is dependent on the individual's resident status at the time that the compensation is recognized for federal income tax purposes.

(b) If the compensation is recognized during the resident period, the entire amount of compensation recognized for federal income tax purposes is includable in New York source income. In the case of statutory stock options (Internal Revenue Code, sections 422 and 423), the entire amount of gain or loss recognized for federal income tax purposes (both the compensation element and any appreciation in the value of the stock after the exercise date) is includable in New York source income.

(c) If the compensation is recognized during the nonresident period, the amount includable in New York source income is determined using the allocation methods described in section 132.24 of this Title.

Section 5. These amendments shall apply to taxable years beginning on or after January 1, 2006.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 132.24(c)(2).

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

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Statement in lieu of a Job Impact Statement are not required to be submitted because the nonsubstantive changes made to the proposed rule do not affect any of the statements made in these documents.

Assessment of Public Comment

Written comments were received from the public regarding proposal TAF-43-06-0007 from Charles Nanavaty, CPA, of Nanavaty, Nanavaty and Davenport, LLP, Richard S. Schwarz, Tax Counsel and Director of Government & Fiscal Affairs for The Business Council of New York State, Inc. ("Business Council") and Eric Taussig, Esq. of Moultonborough, New Hampshire.

Mr. Nanavaty agreed that the grant-to-vest allocation method in the proposed regulations (for statutory stock options, nonstatutory stock options without a readily ascertainable fair market value at the time of grant and stock appreciation rights) was reasonable, but also wanted compensation from options or rights to be realized at vesting. He thought that after an option becomes vested, it changed from compensation to investment and in deciding to hold, sell or convert the option, the grantee was acting more as an investor than as an employee.

Section 631 of the Tax Law provides that New York source income of a nonresident individual is the sum of the net amount of items of income, gain, loss and deduction entering into federal adjusted gross income which are derived from or connected with New York sources plus certain modifications. New York State conforms to federal treatment of items of income. As the proposed regulations note, in section 132.24(a), income from stock options, stock appreciation rights, and restricted stock is realized when the income is realized for federal income tax purposes and is reportable to New York State in the taxable year that the income is included in the individual's federal adjusted gross income. The compensation income from statutory stock options, nonstatutory stock options without a readily ascertainable fair market value at the time of grant and stock appreciation rights that is being allocated is realized at the date of exercise, not at vesting (see, *Matter of Michaelson v. New York State Tax Commission*, 67 N.Y.2d 579).

No changes were made to the proposal as a result of Mr. Nanavaty's comments.

Mr. Schwarz submitted comments on behalf of the Business Council. He stated that the comments reflected both current law and the opinion of the Council's Committee on Taxation members. The Business Council advocates for allocation based on the year of exercise, resulting from the recent Tax Appeals Tribunal decision in the *Matter of Stuckless*, as opposed to the grant-to-vest methodology in the regulation, citing the following reasons for its position:

1. The year-of-exercise rule in *Stuckless* is a valid, reasonable, and appropriate measure for sourcing stock option income.

2. Stock option income is earned in the year that the employee decides to exercise the options, which is commonly based solely on the market increase in the stock value.

3. The year-of-exercise method would impose less recordkeeping requirements for both employees and employers than either the grant-to-vest or grant-to-exercise methods.

4. Although the Internal Revenue Code has a grant-to-vest provision for U.S./foreign sourcing of income, it does not have such provisions for taxpayers with only U.S. source income from stock options. If federal conformity is the main goal of the Department, then employers should be permitted to use any reasonable method including looking at only the year of exercise for administering their stock option programs, provided they do so on a consistent basis.

5. The standard most contemporary in transpiration of time (that is, the year of exercise) with realization of income would enhance compliance, accuracy, efficiency, and auditability.

6. To prevent confusion, the proposed regulation should contain expanded definitions of the types of deferred compensation covered by the sourcing rule. Companies have many different types of deferred compensation programs which are similar to stock options and stock appreciation rights, such as restricted stock units and phantom stock, which should be covered by these rules.

The Department gives the following responses to the Business Council comments:

1. The Department views the grant-to-vest method as a more appropriate method for allocating compensation income than the year of exercise, since the work days in the year of exercise do not necessarily correlate to the individual's performance of services with respect to the option or right. The time of exercise, once vested, is at the individual's discretion; and as

pointed out in the comments, it is usually market driven. The time period from grant to vest is service-related, as at the time of vesting the individual has performed all service-related conditions required by the grantor to exercise the option or right. It should be noted that, in the process of developing the regulation, we received input from taxpayer representatives who recommended the grant-to-vest method.

2. Although income is realized when the option or right is exercised, an individual has performed all service-related conditions for the right to exercise an option or right at the time of vesting. It is appropriate to look at the period ending with vesting to determine the allocation of the compensation for the services.

3. The year of exercise may be a simpler method of allocation, by virtue of it being a single-year allocation, but as stated above, it is not tied to the time period in which an individual performs the services required by the grantor before the option or right can be exercised. The Department does not view recordkeeping for the time from grant to vest as a hardship. The allocation method in the rule contains a workday fraction obtained by including days worked in New York State and days worked within and without the state. This is not a new reporting or paperwork requirement, as to compute wage income derived from New York State sources, nonresident employees and officers are already required to keep track of their working days both within and without New York State (20 NYCRR 132.18). Additionally, the time period necessary to keep workday records for calculation of New York source income from compensation income attributable to stock options, restricted stock and stock appreciation rights is less than under the method outlined in a 1995 technical memorandum issued by the Department (TSB-M-95(3)I). The effect on employers is limited to a possible change in methodology for calculating withholding amounts for some employees and officers to meet the requirement that the amount withheld is substantially equivalent to the amount of tax due.

4. The Internal Revenue Code sourcing rule for nonresident aliens was viewed by the Department as a reasonable and fair apportionment for stock option income, but federal conformity was not the Department's main goal. The proposed regulation does not entirely duplicate the IRS sourcing rule, which provides a great deal of flexibility dependent upon an individual's facts and circumstances. The proposed regulation provides a specific rule which applies to everyone. In situations where the proposed rule may produce an unfair result, the Department's regulations already provide individuals with an option to use an alternate allocation that would more fairly apportion their New York source income (section 132.25).

5. In deciding to use a grant-to-vest allocation for statutory stock options, nonstatutory stock options without a readily ascertainable fair market value at the time of grant and stock appreciation rights, the Department's main consideration was fair allocation. We do not believe that compliance, accuracy, efficiency, or auditability are compromised by this rule.

6. The regulation was written to comply with a statutory directive which called for a regulation specifically for stock options, stock appreciation rights and restrictive stock. The Department would welcome input as to whether additional guidance should be given on the other types of deferred compensation plans.

For the reasons stated above, no changes were made to the rule based on the Business Council comments.

Like the Business Council, Mr. Taussig thinks that the year-of exercise method in *Stuckless* is the proper rule. He states that the proposed regulation conflicts with *Michaelson* and *Stuckless* and the Department went beyond the legislative authorization in section 631(g) of the Tax Law and created an unconstitutional taxing scheme. He also contends that the Department's policy is to tax an employee who at one time was a New York employee even though there is no connection between the employee/option holder's income and New York after the employee leaves New York employment.

In response to the comments that the year-of-exercise rule in *Stuckless* is the proper rule, we refer back to responses 1, 2 and 3 above, which demonstrate why the grant-to-vest method is a more appropriate method for allocation. Also, in a situation where an employee leaves New York employment but performed services in New York for the grantor during the grant-to-vest period, there is a connection between the compensation and New York. It is during this period that the individual performs all the services required by the grantor to exercise the option or right. The *Stuckless* decision dealt with the previous regulations of the Department; this proposal is new and there is specific legislative authority for the regulations in Chapter 62 of the Laws of 2006.

Regarding Mr. Taussig's claim that the Department is going beyond section 631(g), it is important to note the legislation itself. This section

(along with section 638(c)) was added by such chapter and provides that the allocation of compensation income from stock options, stock appreciation rights and restricted stock should be prescribed by regulations of the Commissioner. Paragraph 3 of section N of such chapter provides that the regulations may apply to taxable years beginning on or after January 1, 2006 and may be controlling notwithstanding any Tax Appeals Tribunal decision to the contrary. The proposed regulation does not go beyond the legislation because it is a reasonable method for allocation, one that was recommended by taxpayer representatives and is similar to the Internal Revenue Code sourcing rule for nonresident aliens.

For the reasons stated above, no changes were made to the rule based on Mr. Taussig's comments.

We also received an informal phone comment from a taxpayer which indicated that it was not clear that the New York workday fraction pertained only to services performed for the grantor. Although this comment was not a written comment that is required to be addressed under SAPA section 202.5, it is noted that we revised the definition for the New York workday fraction in section 132.24(c)(2) to clarify that the workday fraction is based solely on the individual's services performed for the grantor of the stock option, stock appreciation right or restricted stock.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Security Training Tax Credit

I.D. No. TAF-52-06-00008-P

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

Proposed action: Addition of Subparts 5-4 and 20-7 and section 106.3 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 26(a); 171, subdivision First; 697(a); and 1096(a)

Subject: Security training tax credit.

Purpose: To provide a credit proration rule where a qualified security officer is not employed for a full year.

Text of proposed rule: Section 1. A new Subpart 5-4 is added to such regulations to read as follows:

SUBPART 5-4 SECURITY TRAINING TAX CREDIT (Statutory authority: Tax Law, §§ 26, 210(37))

Section 5-4.1 General.

A taxpayer that is a qualified building owner, as defined under section 26(b)(1) of the Tax Law, and that has been issued a certificate of tax credit by the State Office of Homeland Security is allowed to claim a credit against the tax imposed by article 9-A of the Tax Law. The amount of the credit allowed is three thousand dollars for each qualified security officer, as defined under section 26(b)(4) of the Tax Law, who is directly or indirectly employed to provide protection to the taxpayer's building or buildings for a full year. However, the amount of the credit may be reduced due to the limitation placed on the total amount of all tax credits issued by the State Office of Homeland Security in any calendar year (See L 2005, Ch 537, '9). In the case of a qualified security officer who is employed for less than a full year, the amount of the credit is prorated to reflect the length of such employment pursuant to sections 5-4.2 and 5-4.3 of this Subpart. Sections 5-4.2 and 5-4.3 prescribe the method of proration, which applies for purposes of the security training tax credit against the tax imposed by Article 9-A as well as the taxes imposed by Articles 9, 22, 32 and 33.

Section 5-4.2 Definitions for purposes of the security training tax credit.

(a) "Full year" means 1,750 qualified hours worked during the calendar year.

(b) "Qualified hours" means hours worked, directly or indirectly, as a qualified security officer for the qualified building owner.

Section 5-4.3 Prorating the security training tax credit for security officers employed for less than a full year.

(a) In the case of a qualified security officer who is employed for less than a full year, as such term is defined in subdivision (a) of section 5-4.2 of this Subpart, the amount of the security training tax credit is prorated.

(b) The prorated amount of the credit for a qualified security officer employed for less than a full year is computed as follows:

- ascertain the number of qualified hours worked by the qualified security officer during the calendar year (limited to 1,750 hours);
- divide the number of hours by 1,750; and

3. multiply the result by three thousand dollars.

Section 2. A new Subpart 20-7 is added to such regulations to read as follows:

SUBPART 20-7 SECURITY TRAINING TAX CREDIT (Statutory authority: Tax Law, §§ 26, 1456(t))

Section 20-7.1 General.

A taxpayer that is a qualified building owner, as defined under section 26(b)(1) of the Tax Law, and that has been issued a certificate of tax credit by the State Office of Homeland Security is allowed to claim a security training tax credit against the tax imposed by article 32 of the Tax Law. The provisions of Subpart 5-4 of this Title addressing the security training tax credit against the tax imposed by article 9-A are applicable to the security training tax credit allowed by section 1456(t) of the Tax Law.

Section 3. A new section 106.3 is added to such regulations to read as follows:

Section 106.3 Security Training Tax Credit. (Tax Law, Sec. 26 and 606(ii))

A taxpayer that is a qualified building owner, as defined under section 26(b)(1) of the Tax Law, and that has been issued a certificate of tax credit by the State Office of Homeland Security is allowed to claim a security training tax credit against the tax imposed by article 22 of the Tax Law. The provisions of Subpart 5-4 of this Title addressing the security training tax credit against the tax imposed by article 9-A are applicable to the security training tax credit allowed by section 606(ii) of the Tax Law.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 26(a); section 171, Subdivision First; sections 697(a) and 1096(a). Section 26(a) of the Tax Law, which was added by Chapter 537 of the Laws of 2005, provides that, for workers not employed as qualified security officers for a full year, the security tax training credit shall be prorated under regulations of the Commissioner of Taxation and Finance. Section 171, Subdivision First, provides for the Commissioner to make reasonable rules and regulations, which are consistent with law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. Sections 697(a) and 1096(a) provide the authority for the Commissioner to make such rules and regulations as are necessary to enforce the personal income tax and the franchise taxes.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives that the Commissioner equitably administer the provisions of the Tax Law. Additionally, Section 26(a) of the Tax Law requires the Commissioner to promulgate a rule as to the proration of the security training tax credit where a qualified security officer is not employed for a full year.

3. Needs and benefits: Section 26(a) of the Tax Law provides that the Commissioner shall promulgate regulations regarding the security training tax credit which provides a credit proration rule applicable where a qualified security officer is not employed for a full year. This regulation will satisfy that requirement. Also, the rule will benefit taxpayers by providing guidance to the State Office of Homeland Security when it administers and issues certificates of tax credit to eligible taxpayers.

An eligible taxpayer that is a qualified building owner and that has been issued a certificate of tax credit is allowed to claim a credit against tax imposed by Article 9, 9-A, 22, 32 or 33 of the Tax Law. The amount of the credit allowed is \$3,000 for each qualified security officer who is so employed by the taxpayer for a full year. In the case of a qualified security officer employed for less than a full year, the amount of the credit is being prorated by the number of hours worked during the calendar year.

4. Costs: (a) Costs to regulated persons: It is estimated that there would be no costs to regulated parties associated with implementation of this rule.

(b) Costs to the agency and to the State and local governments for the implementation and continuation of this rule: It is estimated that the implementation and continued administration of this rule will not impose any costs upon this agency, New York State, or its local governments.

(c) Information and methodology: These conclusions are based upon an analysis of the rule, which merely provides a method of prorating the security training tax credit as directed by statute, by the Department's Office of Tax Policy Analysis, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau. The amount of credit per qualified security officer and in total is set by statute.

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

6. Paperwork: The rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties beyond those required by existing law and regulations. As required by Tax Law Section 26(d), taxpayers seeking to take the credit will need to apply to the State Office of Homeland Security to obtain a credit certification. The taxpayers will need to provide the information necessary to prorate the credit for security officers employed for less than a full year.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: The credit could have been prorated using a different method, such as by months or weeks. However, it was thought that prorating the limited credit by hours was more precise and thus more fair. When a qualified security officer is employed for less than a "full year", the amount of the credit is being prorated by the number of hours worked during the "full year". The rule defines "full year" as 1,750 qualified hours worked during the calendar year. The 1,750 hours is based upon the computation of a 35 hour work week multiplied by 50 weeks. The 35 hour work week comes from the existing interpretations of "full time employment" used in the Empire Zone Wage Tax credit and the QETC Employment Tax credit. In addition, the proration rule was developed in consultation with the State Office of Homeland Security, which is responsible for issuing the credit certifications.

9. Federal standards: The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

10. Compliance schedule: The amendment will take effect when the Notice of Adoption is published in the State Register. No additional time is needed in order for regulated parties to comply with this rule.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because it will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The rule does not distinguish between different types and sizes of regulated parties. The rule does not distinguish between regulated parties located in different geographical areas. The purpose of these amendments is to provide a credit proration rule where a qualified security officer is not employed for a full year.

The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Small Business Council of the New York State Business Council, the Division for Small Business of Empire State Development, the National Federation of Independent Businesses, the Retail Council of New York State, the New York State Association of Counties, the Association of Towns of New York State, the New York Conference of Mayors, and the Office of Local Government and Community Services of the New York State Department of State. In addition, drafts of this rule were sent to the following: Service Employees International Union, Business Council of New York State, the New York Bar Association, the Association of the Bar of the City of New York, New York State Society of CPAs, the National Tax Committee for the National Conference of CPA Practitioners and the City of New York Department of Finance. We received no substantive comments from any of these groups.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule does not distinguish between regulated parties located in different geographical areas. The amendments merely provide a credit proration rule where a qualified security officer is not employed for a full year.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it will have no adverse impact on jobs and employment opportunities. The amendments merely

provide a credit proration rule where a qualified security officer is not employed for a full year.

Department of Transportation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Nondivisible Loan Permit Insurance Compliance Requirements

I.D. No. TRN-52-06-00009-P

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

Proposed action: This is a consensus rule making to amend sections 154-1.1, 154-1.2, 154-1.5, 154-1.6, 154-1.11 and 154-1.18 of Title 17 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 385.15(a)

Subject: Nondivisible load permit insurance compliance requirements.

Purpose: To set forth motor vehicle insurance requirements for issuance of nondivisible loan permits and eliminate requirements for separate protective liability insurance coverage.

Text of proposed rule: Section 1. Subdivision c of Section 154-1.1 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(c) A permit fee will be charged for each special hauling permit issued in accordance with the fee schedule as shown in Section 154-1.20 of this Subpart. [Permit and insurance fees shall be paid when application is made for a permit. Fees] *Such fee* shall be paid by a money order, a certified check, a bank check, a check drawn on a New York State bank, or a negotiable instrument acceptable to the New York State Department of Transportation, made payable to the New York State Department of Transportation, *and such fee shall be paid when application is made for a permit.* Permit fees are nonrefundable.

§ 2. Paragraphs 8 and 11 of subdivision (b) of Section 154-1.2 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York are amended to read as follows:

(8) An overweight-radioactive material permit is a permit that authorizes the movement of an overweight vehicle or combination of vehicles transporting low level radioactive material from one specific location to other specific locations by approved routes for a period not to exceed eight continuous days of travel at the discretion of the permit engineer[, except that the permit may not extend beyond the day before the expiration date of the permittee's current protective liability insurance policy].

(11) Emergency blanket permit is a permit available to transporters of equipment required to meet emergency conditions. It authorizes all emergency movements, at any time, of specified vehicles or loads, limited to 116,000 pounds gross weight for a five axle vehicle with a minimum wheel base of 36 feet; a maximum gross weight of 112,000 pounds for a four axle vehicle which consists of two steering axles with a minimum wheel base of 28 feet; a maximum gross weight of 80,000 pounds for a four axle vehicle which consists of a steering axle with a minimum wheel base of 22 feet; a maximum gross weight of 73,280 pounds for a three axle vehicle with a minimum wheel base of 17 feet, with any tandem axle grouping limited to 56,000 pounds and any triaxle grouping limited to 60,000 pounds. The maximum dimensions shall not exceed 72 feet in length and 13 feet in width and of legal height, for a period not to exceed 12 calendar months, on State highways 20 feet or more in minimum pavement width. [The duration of the emergency blanket permit shall extend to the day before the expiration date of the permittee's current liability insurance policy, which is kept on file with the Department, if this period is less than 12 calendar months.]

§ 3. Subdivision (r) of Section 154-1.2 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby repealed.

§ 4. Section 154-1.5 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby repealed and a new Section 154-1.5 is added to read as follows:

§ 154-1.5 Financial responsibility.

In order to protect the State of New York, the various political subdivisions thereof, and the public, every holder of a non-divisible load permit shall meet the insurance requirements described in this section.

(a) **Liability Insurance Coverage.** Every holder of a non-divisible load permit shall procure and maintain a policy of liability insurance coverage from a company duly authorized to transact business in this state. Such insurance policy shall provide for liability arising from the ownership, operation, maintenance, or use of each vehicle for which a non-divisible load permit is granted and shall provide for at least the following liability coverage:

(1) for bodily injury to or death of one or more persons in any one accident, \$750,000 and for injury to or destruction of property in any one accident, \$250,000; or

(2) a combined single limit for any one accident, \$1,000,000.

(b) **Certification.** Each applicant for a non-divisible load permit shall certify to the Department the following:

(1) that the applicant has obtained insurance coverage with the minimum coverage specified in this section;

(2) that the applicant will not operate or allow to be operated any permitted vehicle unless the required insurance covering such vehicle is in effect;

(3) that the operation of a vehicle without the insurance required by this section being in effect constitutes grounds for the revocation of the permit as well as other applicable civil and criminal penalties; and

(4) that upon request such applicant will provide evidence issued by or on behalf of an insurance company duly authorized to transact business in this state that an insurance policy meeting the requirements of this subpart is or has been in effect for all such time as the permit has been granted.

The Department shall not issue, amend or renew a non-divisible load permit to any applicant who has not provided this certification to the Department.

(c) **Proof of Insurance.** The commissioner may require from each applicant, prior to issuing a non-divisible load permit, a certificate of insurance, as that term is defined in Section 311 of the Vehicle and Traffic Law, showing that there is a liability insurance policy in effect meeting the minimum requirements specified in this section.

(d) **Operation without Required Insurance.** No vehicle for which a non-divisible load permit has been granted shall be operated during the period of permit issuance without the insurance coverage required by this section being in effect. Such operation shall invalidate the permit.

(e) **Audit.** The commissioner may investigate or audit any holder of a non-divisible load permit with respect to compliance with the provisions of this section. Failure of a permit holder to cooperate in any such audit or investigation or failure to provide within a reasonable time such records as the commissioner may reasonably require to audit or investigate the permit holder's compliance with the provisions of this section shall constitute grounds for the suspension or revocation of the non-divisible load permit.

(f) **Municipalities.** A self-insured municipality may furnish, in lieu of the insurance certificate, a self-insurance indemnification agreement in a form prescribed by the Department of Transportation.

(g) **Modification.** The commissioner may increase any of the insurance requirements contained in this section when special conditions warrant, including, but not limited to superloads or vehicles transporting hazardous or radioactive materials.

§ 5. Section 154-1.6 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby repealed.

§ 6. Paragraph 10 of Subdivision (b) of Section 154-1.11 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby repealed.

§ 7. Section 154-1.18 of Subpart 154-1 of Part 154 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

§ 154-1.18 Overwidth omnibus movements

A blanket permit may be issued, pursuant to subdivision 15 and paragraph (b) of subdivision 1 of section 385 of the Vehicle and Traffic Law, to authorize the movement of omnibuses which exceed the limitations of paragraph (a) of subdivision 1 of said section. [The duration of such blanket permit shall extend to the day before the expiration date of the permittee's current liability insurance policy if the period is less than 12 calendar months.] The permit may authorize one or more omnibuses owned or leased by the permittee to operate in accordance with the condi-

tions and on the routes prescribed in the permit. If more than one omnibus is listed on a permit, each omnibus must be specified and clearly identified and each omnibus must carry a copy of the permit which shall be produced upon demand by proper authority. The total fee will be charged at the rate of \$30 per month per omnibus not to exceed \$200 per omnibus per year.

Text of proposed rule and any required statements and analyses may be obtained from: David Rudinger, Department of Transportation, Registration and Permitting Bureau, 50 Wolf Rd., POD 53, Albany, NY 12232, (518) 485-2448, e-mail: drudinger@dot.state.ny.us

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

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

Consensus Rule Making Determination

The Department of Transportation annually issues over 85,000 nondivisible load permits and serves approximately 5000. Since April, 2006, the Department has been meeting with its customers and with associations that represent the trucking industry as well as holding a number of Listening Forums in an attempt to identify problems with the existing permitting process for special hauling permits.

One problem that has been identified through this outreach effort concerns the Department's requirement that, in addition to basic motor vehicle insurance coverage, each permit holder must also provide "protective liability insurance coverage" for New York State, all its political subdivisions, and their officials and employees. Current Department regulations allow most permit holders to satisfy this insurance requirement in one of two ways. Either they can pay a per-trip fee, which is intended to cover the current cost of purchasing protective liability insurance coverage or they can have their insurance company file with the Department a Perm 17—a form unique to New York State—certifying that the permit holder has purchased protective liability insurance coverage. (Note: Certain types of nondivisible load permits—such as permits for mobile homes and annual permits—require Perm 17 filings and for those permits, the permit holders may not satisfy the protective liability insurance requirement through payment of a per-trip fee.) Approximately 96% of nondivisible load permit holders satisfy the Department's protective liability insurance requirement by paying a per-trip fee to the Department, and the remaining 4% satisfy this requirement through a Perm 17 filing.

Through ongoing outreach efforts with the industry and by analyzing the recent history of claims, the Department has concluded that:

- Almost all permit holders have motor vehicle insurance coverage with liability limits in excess of the Department's current requirements for protective liability insurance coverage.
- Adequate motor vehicle liability insurance coverage obviates the need for separate protective liability insurance coverage and the expense incurred for such additional insurance.
- Over the past 10 years, the Department has not incurred any demonstrable savings in litigation or claims costs attributable to the additional protective liability insurance requirement.
- The existing regulation is confusing and could mislead some permit holders into concluding that the per-trip fee provides additional insurance coverage to the permit holder when in fact such fee only reimburses New York State's costs of purchasing insurance.
- For the approximately four percent of permit holders that satisfy the protective liability insurance requirement through the Perm 17 filing, the fact that the Perm 17 form cannot be submitted directly by the applicant contributes to unnecessary delays and rejections of permit applications.

The Department has concluded that the existing protective liability insurance requirement applicable to nondivisible load permits should be eliminated.

This rule making is intended to accomplish the following:

- 1) Set forth by regulation motor vehicle insurance requirements:
 - a. a motor vehicle insurance policy that, at a minimum, provides liability coverage of \$750,000 for bodily injury to or death of one or more persons in one accident and \$250,000 for injury to or destruction of property in any one accident; or,
 - b. a motor vehicle insurance policy that provides a combined single limit of at least \$1,000,000 liability coverage for any one accident.
 These requirements would apply to all special hauling permits.

2) Eliminate current requirements that the State of New York and all its municipal subdivisions and their officials, officers, and employees be named as additional insured parties. Correspondingly, eliminate the ability to satisfy Department insurance requirements by purchasing a separate "protective liability insurance" policy or, as is currently permitted for holders of individual trip permits, by paying a per-trip fee to New York

State. The only type of insurance required for a special hauling permit would be a motor vehicle insurance policy.

3) Enable each applicant for a nondivisible load permit to sign a certification stating that the applicant has obtained the required insurance and will not operate a vehicle with a permitted load unless such insurance is in effect. Prior to issuing any permit, the Department may also require a certificate of insurance which under the proposed new regulation could be submitted directly by the applicant together with the permit application.

4) Eliminate discrepancies in existing Department regulations with respect to references made to insurance requirements. Existing regulations refer to "liability insurance", "permit liability insurance", "public liability insurance", and "protective liability" insurance coverage. These terms are not all well defined. Eliminating these references will reduce confusion as what type of insurance is required and foster compliance.

5) Make it possible for permit holders who have already purchased adequate motor vehicle insurance to secure nondivisible load permits without paying an additional fee, or purchasing or demonstrating additional protective liability insurance coverage.

6) Improve the efficiency of the Department's permitting process.

The Department has shared these proposed regulatory changes with the industry through recent meetings with industry groups, a direct mailing of the proposal to 4000 nondivisible load permit customers, publication on the Department of Transportation's Permit Office web site, which can be found at: <http://www.dot.state.ny.us/nypermits/perm-news.shtml>

The actual text of the mailing and regulation can be retrieved directly from the following web address: <http://www.dot.state.ny.us/nypermits/files/proposedinsuranceregspar154-2.pdf>

Based on comments that the Department has received so far, it appears that most, if not all, nondivisible load permit holders already meet the insurance requirements that this regulation would set forth. The Department anticipates that the industry will support this proposal and that we will receive no substantive comments in opposition. Accordingly, the Department is treating this proposed change as a consensus rule making.

Job Impact Statement

A job impact statement is not submitted because the proposed revisions to 17 NYCRR Subpart 154-1 eliminate a current requirement that nondivisible load permit holders purchase or obtain separate protective liability insurance coverage beyond the liability insurance coverage they have already purchased through their motor vehicle insurance policies. In turn, these revisions are expected to facilitate the Department's processing of nondivisible load permit applications. These revisions impose no additional burdens on the industries that require nondivisible load permits, and no impacts on jobs and employment opportunities are anticipated.