

# RULE MAKING ACTIVITIES

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

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

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

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## Affordable Housing Corporation

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### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Affordable Housing Corporation publishes a new notice of proposed rule making in the *NYS Register*.

#### Public Access to Information

I.D. No.	Proposed	Expiration Date
AHC-52-05-00025-P	December 28, 2005	June 26, 2006

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Captive Cervids

**I.D. No.** AAM-28-06-00022-E  
**Filing No.** 793  
**Filing date:** June 27, 2006  
**Effective date:** June 27, 2006

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

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

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

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

**Specific reasons underlying the finding of necessity:** The proposed repeal of section 62.8 of 1 NYCRR and the adoption of 1 NYCRR Part 68 will help to prevent further introduction of chronic wasting disease (CWD) into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State. CWD is an infectious and communicable disease of deer belonging to the Genus *Cervus* (including elk, red deer and sika deer) and the Genus *Odocoileus* (including white tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico, Illinois and Utah. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and New York and the Canadian provinces of Saskatchewan and Alberta.

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

New York State has 433 entities engaged in raising approximately 9,600 deer and elk in captivity with a value of several million dollars, and many of these entities have imported captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. The rule repeals

a prohibition on the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless a permit authorizing such movement has been obtained from the Department prior to such importation or movement. Except for cervids moving directly to slaughter, permits shall be issued only for captive cervids that meet the health requirements established by the rule.

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

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

**Subject:** Captive cervids.

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

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

Section 68.1 of 1 NYCRR sets forth definitions for "CWD susceptible cervid," "CWD exposed cervid," "CWD positive cervid," "CWD negative cervid," "CWD suspect cervid," "CWD infected zone," "captive," "CWD Certified Herd Program," "Cervid," "Chronic Wasting Disease," "Commingling," "Department," "Enrollment Date," "Herd," "Herd Inventory," "CWD Herd Plan," "CWD Herd Status," "CWD positive herd," "CWD Suspect herd," "Special purpose herd," "CWD Exposed herd," "CWD certified herd," "Official identification," "CWD Monitored herd," "Owner," "Premises," "CWD Premises plan," "Quarantine," "State animal health official," "Status date," "Official test," "USDA/APHIS", and "Certificate of Veterinary Inspection (CVI)".

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 24, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

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

##### 2. Legislative Objectives:

The statutory provisions pursuant to which these regulations are proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State to control, suppress and eradicate such diseases and prevent the spread of infection and contagion. The Department's proposed repeal of 1 NYCRR section 62.8 and adoption of 1 NYCRR Part 68 will further this goal by preventing the importation of deer which may be infected with chronic wasting disease (CWD), and permitting CWD to be detected and controlled within the captive cervid population of the State.

##### 3. Needs and Benefits:

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

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

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

##### 4. Costs:

## (a) Costs to regulated parties:

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

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

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

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

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

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

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

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

## (c) Source:

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

## 5. Local Government Mandates:

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

## 6. Paperwork:

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a movement permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of

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

## 7. Duplication:

None.

## 8. Alternatives:

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

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

## 9. Federal Standards:

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

## 10. Compliance Schedule:

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

**Regulatory Flexibility Analysis**

## 1. Effect of Rule:

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

## 2. Compliance Requirements:

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

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

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

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

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

Regulated parties must keep accurate records documenting purchases, sales, interstate shipments, escaped cervids and deaths, including har-

vested cervids, and maintain them for at least sixty months for all captive CWD susceptible cervid operations. The owners of all CWD susceptible cervid herds enrolled in the CWD Certified Herd Program shall establish and maintain accurate records that document the results of the annual herd inventory.

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

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

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

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

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

The rule would have no impact on local governments.

### 3. Professional Services:

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

### 4. Compliance Costs:

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

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

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have whitetailed deer. Assuming that half of these farms do not have

adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as a CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7' plastic mesh and \$2.00 per foot for posts (\$20 post every 10 feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

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

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

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

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

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

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

#### (c) Source:

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

### 5. Economic and Technological Feasibility:

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

### 6. Minimizing Adverse Impact:

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

The rule would have no impact on local governments.

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

In developing this rule, the Department has consulted with representatives of the approximately 433 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of

the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

**Rural Area Flexibility Analysis**

1. Types and Estimated Numbers of Rural Areas:

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

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

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a movement permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least seventy-two months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be followed for positive or trace herds that would be implemented within sixty days of a diagnosis of CWD. All captive cervid locations shall be identified by a federal premises identification number issued by the Department and APHIS. The owner of the cervids must provide an adequate geographic location description and contact information in order to receive a federal premises identification number. It is not anticipated that regulated parties in rural areas will have to secure any professional services in order to comply with the rule.

3. Costs:

(a) Costs to regulated parties:

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

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

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

farms will only have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

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

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

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

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

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

(c) Source:

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

4. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certification Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

5. Rural Area Participation:

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

**Job Impact Statement**

1. Nature of Impact:

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

2. Categories and Numbers Affected:

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

3. Regions of Adverse Impact:

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

4. Minimizing Adverse Impact:

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

**NOTICE OF ADOPTION**

**Halal Foods Protection Act of 2005**

**I.D. No.** AAM-18-06-00009-A

**Filing No.** 788

**Filing date:** June 27, 2006

**Effective date:** July 12, 2006

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

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

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

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

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. AAM-18-06-00009-P, Issue of May 3, 2006.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## Banking Department

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Banking Department publishes a new notice of proposed rule making in the *NYS Register*.

**Reporting of Suspicious Transactions**

I.D. No.	Proposed	Expiration Date
BNK-52-05-00015-P	December 28, 2005	June 26, 2006

## Office of Children and Family Services

### EMERGENCY RULE MAKING

**Permanency, Safety and Well-Being of Children in Foster Care**

**I.D. No.** CFS-28-06-00018-E

**Filing No.** 789

**Filing date:** June 27, 2006

**Effective date:** June 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 426.10, amendment of sections 421.4, 421.6, 421.17, 423.2, 426.4, 428.1, 428.2, 428.3, 428.4, 428.5, 428.6, 428.7, 428.8, 428.9, 428.10, 430.8, 430.9, 430.11, 430.12, 431.9, 432.2, 441.21, 441.22, 443.2, 476.2, 507.2 and repeal of sections 430.1-430.7, 441.20 and 430.13 of Title 18 NYCRR.

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

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

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

suitable person. Therefore, it is necessary to adopt these regulations on an emergency basis.

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

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

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

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

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

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

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

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

Part 428 (Standards for Uniform Case Records)

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 24, 2006.

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

**Regulatory Impact Statement**

1. Statutory authority:

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

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

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

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

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

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

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

#### 2. Legislative objectives:

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

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

#### 3. Needs and benefits:

The regulations implementing Chapter 3 of the Laws of 2005 provide for a more frequent series of administrative reviews and service plan development activities involving all parties with a stake in the outcome. The regulations support permanency planning through enhancing the service plan review process and the collection of comprehensive and timely information for the development of the permanency hearing report. The regulations also set out the critical areas of review necessary to advance the child's permanency plan. In accordance with the legislation, these regulations provide a specific means for meeting documentation requirements with regard to a child's out-of-home placement or for any child considered for foster care. The regulations implement the change of the permanency goal from "independent living" to "discharge to another planned living arrangement with a permanency resource". The regulations support the need to locate an absent parent and other relatives of a child in out-of-home placement, in order to consider each of those persons as a resource for the child. The regulations also provide that any person designated by the child's birth parent to be the child's adoptive parent in a conditional surrender to be a certified or approved foster parent or an approved adoptive parent, in support of a child's need for a safe, permanent home.

#### 4. Costs:

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

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

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

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

#### 5. Local government mandates:

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

#### 6. Paperwork:

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

first reassessment being due one month later than had previously been required.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

**Regulatory Flexibility Analysis**

1. Effect of Rule:

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

2. Compliance Requirements:

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

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

3. Professional Requirements:

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

4. Compliance Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency

for children in care and the associated savings attached to a shorter length of stay.

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

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

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impact:

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

nency hearing is held and completed within six months of the previous service plan review.

7. Small Business and Local Government Participation:

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

**Rural Area Flexibility Analysis**

1. Effect on Rural Areas:

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

2. Compliance Requirements:

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

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

3. Professional Services:

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

4. Compliance Costs:

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

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

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

be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

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

5. Minimizing Adverse Impact:

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

6. Small Business Participation:

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

**Job Impact Statement**

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

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## Department of Correctional Services

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

**Inmate Correspondence Program**

**I.D. No.** COR-28-06-00006-P

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

**Proposed action:** Amendment of sections 720.3 and 720.4(b) of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Inmate Correspondence Program.

**Purpose:** To require inmates to pay for certified or registered mail services and allow inmates to receive canceled, copied or voided checks or money orders.

**Text of proposed rule:** A new subdivision (o) is added to section 720.3, 7 NYCRR, as follows, and subdivisions (o) and (p) are re-lettered (p) and (q), respectively:

(o) *An inmate must request and pay for certified or registered mail service in order to have a valued personal document mailed out from personal property secured by the facility inmate records coordinator. Whenever such mail is prepared and sent by the I.R.C., a copy of the disbursement form and postal documentation showing the item has been sent will be filed in that inmate's personal property folder. If a "return receipt" has been requested as part of the postal service, it shall go directly to the inmate.*

Section 720.4 (b) of 7 NYCRR is amended as follows:

(b) *Monies received. When, in the course of inspection, cash, checks, or money orders from a clearly identifiable source are found, they shall be removed and credited to the inmate's account as appropriate. A copy of a check or money order made out to an inmate may be given to that inmate if the word "CANCELED," "COPY" or "VOID" is stamped or written across its face. If this has not been done, the copy will be returned to the sender. All anonymously received monies will be considered contraband and handled accordingly.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.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

Section 112 of Correctional Law assigns to the commissioner of correction the powers and duties of management and control of correctional facilities and inmates, and the responsibilities to make rules and regulations for the government and discipline of correctional facilities.

##### Legislative Objective

By vesting the commissioner with this rule making authority, the legislature intended the commissioner to establish and publish rules and procedures to document the mailings of inmates' valued personal documents and to allow inmates to receive copies of checks or money orders within their correspondence under certain circumstances.

##### Needs and Benefits

Addition of new 720.3(o): Inmates are not permitted to possess certain personal documents such as a driver's licenses, passports, credit cards, savings passbooks, etc. because these may be used in escape attempts or other activities that could compromise safety and security and good order, and because inmates have no capability to secure and safeguard them on their own. Such documents are sometimes found in an inmate's possession upon entry into Department custody and may be received subsequently from outside sources. Department practice has been to provide the inmate owner with a receipt for a document of this type and to keep it under lock at the correctional facility housing the inmate. Occasionally an inmate may seek to have such a document mailed out of the correctional facility. While accommodating the inmate's request, the Department has an interest in ensuring that the document is not lost or mishandled in the mailing process and that the Department is not liable for loss or damage after it is mailed.

The addition of a new subdivision (o) to section 720.3 requires inmates to use certified or registered mail service when mailing out valued personal documents which have been held in safekeeping at the correctional facility. By requiring an inmate to request and pay for certified or registered mail service, postal documentation is created showing the item has been mailed as requested and affording the inmate a method of tracking and pursuing a claim against the requested mail service if it is lost.

Amendment of 720.4(b): The Department recognizes that an inmate may have a legitimate need for a copy of a check or money order to provide a record that a financial transaction has occurred. At the same time, the Department must ensure for valid security reasons that an inmate does not come into possession of a check or money order that is negotiable or that may be perceived as negotiable. The amendment to section 720.4(b) addresses both concerns by permitting an inmate to receive a copy of a check or money order made to the respective inmate if the word "canceled," "copy" or "void" is stamped or written across its face.

#### Costs

a. To regulated parties: There is a nominal increase in cost to inmates who request certified or registered mail service instead of regular mail service. Some of this cost may be offset by an inmate's privileged correspondence weekly allowance (see 7 NYCRR 721.3(a)(3)) if the mailing meets the standard of privileged correspondence. The extra cost, however, affords the inmate a method of tracking and pursuing a claim against the requested mail service if a document is lost.

b. To agency, the state and local governments: None.

c. Source of information: Departmental Budget staff.

#### Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

#### Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

#### Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

#### Alternatives

No alternatives are considered feasible. The addition of 720.3(o) is regarded as the only reasonable way ensure that an inmate's valued personal document will be mailed in a manner that allows for its tracking and provides documentation if a claim is to be made. The amendment at 720.4(b) is regarded as the only reasonable way to allow an inmate to receive copies of checks or money orders.

#### Federal Standards

There are no minimum standards of the Federal government for this or a similar subject area.

#### Compliance Schedule

The Department of Correctional Services will achieve compliance with the proposed rules immediately.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. These proposals merely ensures that an inmate's valued personal documents will be mailed in a manner that allows tracking and documentation and allows an inmate to receive copies of checks or money orders.

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

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. These proposals merely ensure that an inmate's valued personal documents will be mailed in a manner that allows tracking and documentation and allows an inmate to receive copies of checks or money orders.

#### **Job Impact Statement**

A job impact statement is not submitted because these proposed rules will have no adverse impact on jobs or employment opportunities. These proposals merely ensure that an inmate's valued personal documents will be mailed in a manner that allows tracking and documentation and allows an inmate to receive copies of checks or money orders.

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## Education Department

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### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### **Behavioral Interventions**

**I.D. No.** EDU-28-06-00005-EP

**Filing No.** 782

**Filing date:** June 23, 2006

**Effective date:** June 23, 2006

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

**Action taken:** Amendment of sections 19.5, 200.1, 200.4 and 200.7 and addition of section 200.22 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 210 (not subdivided), 305(1), (2) and (20), 4401(2), 4402(1), 4403(3) and 4410(13)

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

**Specific reasons underlying the finding of necessity:** The purpose of the proposed rule is to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions; to provide for a child-specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions.

Currently, neither New York State Education Law nor the Regulations of the Commissioner prohibit the use of aversive behavioral interventions in school programs serving New York State students. Aversive behavioral interventions have the potential to affect the health and safety of children, yet there is currently a lack of a clear policy and no standards on their use in school programs. Through site visits, reports and complaints filed by parents, school districts and others, the Department identified concerns with preschool programs serving children with disabilities that use aversive behavioral interventions such as sprays to the face and noxious tastes placed on the child's lips, and an out-of-state residential school serving more than 145 New York State students with disabilities that is using contingent food programs, mechanical restraints and electric shock interventions to modify students' behaviors. A recent site review of the out-of-state residential school identified significant concerns for the potential impact on the health and safety of New York's students placed at this school. Regulations are needed to limit the aversive behavioral interventions that inflict pain and discomfort to children and have the potential to result in physical injury and/or emotional harm. In those exceptional instances when a child displays such extreme self-injurious or aggressive behaviors as to warrant a form of punishment to intervene with the behavior, regulations are necessary to ensure that such interventions are used in accordance with the highest standards of oversight and monitoring and in accordance with research-based practices.

Emergency action to adopt the proposed rule is necessary for the preservation of the public health and safety in order to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive behavioral interventions that inflict pain or discomfort, by immediately establishing standards for the use of such interventions that will ensure they are used only when absolutely necessary and under conditions of minimal intensity and duration to accomplish their purpose.

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

**Subject:** Behavioral interventions, including aversive behavioral interventions.

**Purpose:** To establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions; to provide for a child-specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive behavioral interventions.

**Public hearing(s) will be held at:** 3:00-7:00 p.m., Aug. 8, 2006 at Albany, NY\*; 2:00-7:00 p.m., Aug. 10, 2006 at New York City, NY\*; 3:00-7:00 p.m., Aug. 15, 2006 at Syracuse, NY\*

\*For the specific locations and details regarding these public hearings, see announcements at: <http://www.vesid.nysed.gov/specialed/timely.htm>  
NB: Individuals planning to attend the public hearings should check this website for updated announcements prior to the hearing.

**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 emergency/proposed rule (Full text is posted at the following State website: <http://www.nysed.nysed.gov/specialed/timely.htm>):** The Commissioner of Education proposes to amend section 19.5 of the Rules of the Board of Regents and sections 200.1, 200.4 and 200.7 of the Regulations of the Commissioner of Education, and to add a new section 200.22 of the Commissioner's Regulations, effective June 23, 2006, relating to standards for behavioral interventions, including aversive behavioral interventions. The following is a summary of the substance of the proposed amendments.

Section 19.5(a)(1) of the Rules of the Board of Regents, as amended, provides that no teacher, administrator, officer, employee or agent of a school district in New York State, a board of cooperative educational services (BOCES), a charter school, a State-operated and State-supported school, an approved preschool program, an approved private school, an approved out-of-State day or residential school, or a registered nonpublic nursery, kindergarten, elementary or secondary school in this State, shall use corporal punishment against a pupil.

Section 19.5(b) of the Rules of the Board of Regents, as amended, establishes a prohibition on the use of aversive behavioral interventions, except as provided by a child-specific exception pursuant to proposed section 200.22(e) of the Commissioner's Regulations, and defines the term 'aversive behavioral intervention.'

Sections 200.1(III) and (mmm) of the Commissioner's Regulations, as added, provide, respectively, definitions of the terms 'aversive behavioral intervention' and 'behavioral intervention plan.'

Section 200.4(d)(3)(i) of the Commissioner's Regulations, as amended, provides that the CSE or CPSE shall, in developing a student's IEP, consider supports and strategies to address student behaviors that are consistent with the requirements in section 200.22.

Section 200.7(a)(2)(i)(f) of the Commissioner's Regulations, as added, provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

Section 200.7(a)(3)(iv) of the Commissioner's Regulations, as amended, provides that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22 or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) of the Commissioner's Regulations, as added, provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

Section 200.7(c)(6) of the Commissioner's Regulations, as added, requires a private school that proposes to use or continue to use aversive behavioral interventions in its program shall submit, not later than August 15, 2006, its written policies and procedures on behavioral interventions to the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f); provides that any school that fails to meet this requirement shall be immediately closed to new admissions of New York Students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program; and provides that failure to comply with this requirement may result in termination of private school approval pursuant to section 200.7(a)(3).

Section 200.22 of the Commissioner's Regulations, as added, establishes program standards for behavioral interventions. This section further provides that for an education program operated pursuant to section 112 of the Education Law and Part 116 of the Regulations of the Commissioner of Education, if a provision of section 200.22 relating to use of time out rooms, emergency use of physical restraints, or aversive behavioral interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of section 200.22 shall not apply.

Section 200.22(a) establishes requirements for the conduct of a functional behavioral assessment to assess student behaviors.

Section 200.22(b) establishes requirements for behavioral intervention plans.

Section 200.22(c) establishes requirements regarding the use of time out rooms.

Section 200.22(d) establishes requirements for the emergency use of physical restraints.

Section 200.22(e) establishes the process for a child-specific exception to the Regents prohibition on the use of aversive behavioral interventions, including timelines and procedures for an independent panel of experts appointed by the commissioner or commissioner's designee to make a

recommendation to the CSE or CPSE and to the Commissioner as to whether a child-specific exception is warranted.

Section 200.22(f)(1) sets forth applicability provisions for the requirements set forth in the subdivision.

Section 200.22(f)(2) establishes general requirements for programs that employ the use of aversive behavioral interventions.

Section 200.22(f)(3) requires each school that uses aversive behavioral interventions to establish a Human Rights Committee to monitor the school's behavior intervention program to ensure the protection of legal and human rights of individuals.

Section 200.22(f)(4) establishes supervision and training requirements for persons who use aversive behavioral interventions.

Section 200.22(f)(5) states that aversive behavioral interventions shall be provided only with the informed written consent of the parent and no parent shall be required by the program to remove the student from the program if he or she refuses consent for an aversive behavioral intervention.

Section 200.22(f)(6) requires that the program's use of aversive behavioral interventions, including a review of all incident reports relating to such interventions, shall be subject to quality assurance reviews.

Section 200.22(f)(7) provides for ongoing monitoring of student progress in programs using aversive behavioral interventions; and requires a school district that places a student in such a program to oversee the student's education and behavior program, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the student's parent; and requires the CSE or CPSE to convene a meeting at least every six months to review the student's educational program and placement.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 20, 2006.

**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

**Data, views or arguments may be submitted to:** Rebecca H. Cort, Deputy Commissioner, VESID, Education Department, One Commerce Plaza, Rm. 1606, Albany, NY 12234, (518) 473-2714, e-mail: rcort@mail.nysed.gov

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

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

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

Section 210 authorizes the Regents to register institutions in terms of New York standards.

Section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties charged by the Regents.

Section 4401 authorizes the Commissioner to approve private day and residential programs to serve students with disabilities.

Section 4402 establishes school district duties for education of students with disabilities.

Section 4403 outlines Department and school district responsibilities concerning education programs and services to students with disabilities.

Section 4403(3) authorizes the Department to adopt rules and regulations as the Commissioner deems in their best interests.

Section 4410 outlines education services and programs for preschool children with disabilities. Section 4410(13) authorizes the Commissioner to adopt regulations.

##### **LEGISLATIVE OBJECTIVES:**

The rule carries out the above objectives to ensure that students with disabilities are provided a free appropriate public education, including behavioral assessments and interventions consistent with federal law.

##### **NEEDS AND BENEFITS:**

The rule is necessary to establish standards for behavioral interventions, including a prohibition on use of aversive behavioral interventions (ABIs); to provide for a child specific exception; and to establish standards for programs using ABIs. The rule ensures that ABIs are used only when

necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring.

The rule is, in part, based on the following studies.

"On the Status of Knowledge for Using Punishment: Implications for Treating Behavior Disorders," Dorothea C. Lerman and Christina M. Vorndran, Louisiana State University and the Louisiana Center for Excellence in Autism (Journal of Applied Behavior Analysis, 2002, 35, 431-464). This report, highlighting research findings relating to use of punishment to treat problem behaviors, was considered in developing standards for ABIs, including that ABIs be combined with reinforcement procedures; include procedures for generalization and maintenance of behaviors and for fading ABI use; be limited to behaviors of greatest concern; apply the lowest intensity and duration; employ strategies that increase the effectiveness of mild levels of ABIs; and use alternative procedures other than increasing an ABI's magnitude when an aversive fails to suppress a behavior over time. The report discussed ethical and practical issues surrounding use of punishers to change behaviors and side effects of punishment including collateral effects as emotional reactions, and increases in aggressive and/or escape behaviors. The criteria to be used by the independent panel is based, in part, upon information in this study that ABIs may be indicated when the variables maintaining a problem behavior cannot be identified; when problem behavior must be suppressed rapidly to prevent serious physical harm; or when other interventions have not reduced self-injurious behavior to clinically acceptable levels without use of punishment-based interventions.

"Establishing and Maintaining Treatment Effects with Less Intrusive Consequences Via a Paring Procedure", Christina M. Vorndran and Dorothea C. Lerman, Louisiana State University (Journal of Applied Behavior Analysis, 2006, 39, 35-48) discussed the need to design interventions using punishment to be the least intrusive possible and to include strategies to improve an ABI's effectiveness and acceptability. This study was considered in proposing standards that ABIs be implemented consistent with peer-reviewed research based practices; include individualized procedures for the generalization and maintenance of behaviors and for the fading of ABI use; and employ strategies to increase the effectiveness of mild levels of ABIs.

"Contingent Electric Shock (SIBIS) and a Conditioned Punisher Eliminate Severe Head Banging in a Preschool Child", Sarah-Jeanne Salvy, James A. Mulick, Eric Butter, Rita Kahng Bartlett and Thomas R. Linscheid, (Behavioral Interventions, 2004, 19:59-72), published online in Wiley InterScience (www.interscience.wiley.com), which discussed strategies that increase the effectiveness of mild levels of ABIs, was considered in establishing standards for ABI use.

"School-wide Positive Behavior Support Implementer's Blueprint and Self-Assessment" (Center on Positive Behavioral Interventions and Supports, University of Oregon, 2004), which discussed research findings relating to negative side effects associated with the exclusive use of punishing environments and consequences, and "Why Must Behavior Intervention Plans Be Based on Functional Assessments?", G. Roy Mayer, California State University, Los Angeles, 1997 (published online at www.calstatela.edu/academic/adm\_coun/docs/501/funcart.html) were considered in proposing standards for assessing and addressing collateral effects of the use of punishment. These studies identified that punishment-based interventions can lead to students engaging in aggressive and/or escape behaviors and foster development of negative attitudes toward self and school programs. Mayer's article also identified that when reinforcement approaches are used to reduce behavior that match the function or reasons for the behavior, they are "just as effective as punishment approaches when used on self-injurious behavior of individuals with disabilities." Mayer's finding was considered in proposing the requirement that ABIs be combined with reinforcement procedures, as individually determined based on an assessment of the student's reinforcement preferences.

"Physical Restraint in School", Joseph B. Ryan and Reece L. Peterson, University of Nebraska-Lincoln, 2005, which discusses research, court and Office of Civil Rights rulings on individual rights of students, restraint procedures and professional training for emergency interventions, including the use of physical restraint in educational settings, was considered in proposing policy and standards for emergency physical restraint interventions.

"Functional Behavioral Assessment: Policy Development in Light of Emerging Research and Practice", W. David Tilly, Joseph Kovaleski, Glen Dunlap, Timothy Knostr, Linda Bambara, Donald Kincaid, (March 24, 1998), developed at request of National Association of State Directors of Special Education (NASDSE) and "A Practical Guide to Functional Be-

havioral Assessment” Margaret E. Shippen, Robert G. Simpson and Steven A. Crites, (Teaching Exceptional Children, Vol. 35, No. 5, pp. 36-44, 2003, Council for Exceptional Children) were considered in the development of standards for functional behavioral assessments (FBAs) and behavioral intervention plans (BIPs).

#### COSTS:

a. Costs to State government: See costs to the Education Department.  
 b. Costs to local governments: None.  
 c. Costs to regulated parties: School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using ABIs and most of these have only one student where such a recommendation currently appears on the student’s individualized education program (IEP). Schools using ABIs may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

d. Costs to the Education Department of implementation and continuing compliance: The cost of funding a three-member independent panel of experts to provide a recommendation regarding the need for a child-specific exception is estimated at approximately \$360,000 for the first year. This calculation was based on approximately 100 requests for child-specific exceptions, at an estimated cost of \$3,600 for each student. Additional costs for State administration and oversight of the child-specific exception, including duplication of materials for the panel are estimated at \$10,000 annually. The annual costs of the review panel are expected to be less in subsequent years. These costs may be offset if the CSE/CPSE determines that a student no longer requires ABIs since the cost for one student currently placed in an out-of-state residential school for ABIs ranges from \$281,180 to \$329,970 per year.

#### LOCAL GOVERNMENT MANDATES:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of ABIs except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.4(d)(3)(i) requires a CSE/CPSE, in developing a student’s IEP, to consider supports and strategies to address student behaviors that are consistent with program standards in section 200.22 relating to a student’s FBA, BIP, use of time out rooms, emergency interventions and ABIs.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency use of physical restraints.

Section 200.22(e) provides, effective on or after October 1, 2006, whenever a CSE/CPSE is considering whether a child-specific exception to the prohibition of the use of ABIs is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE/CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student’s IEP shall include a child-specific exception allowing the use of ABIs. The school district shall notify the Commissioner when such exemption has been included in the student’s IEP. An IEP providing such exemption shall identify the specific targeted behaviors, ABIs to be used, and aversive conditioning devices where the ABIs include use of such devices.

Public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of ABIs. Each school using ABIs shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using ABIs shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), ABIs shall be provided only with the parent’s informed written consent and no parent shall be required by the program to remove

the student from the program if the parent refuses consent. Use of ABIs is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student’s IEP and BIP are being implemented. The CSE/CPSE shall convene at least every six months to review the student’s educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use ABIs pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

#### PAPERWORK:

CSEs/CPSEs must compile and submit student record information and school districts must submit an application for a child-specific exception to the prohibition on the use of ABIs. Currently there are approximately 23 school districts that have students recommended for ABIs.

#### DUPLICATION:

The rule will not duplicate, overlap or conflict with any other State or federal statute or regulation.

#### ALTERNATIVES:

The Department considered other states’ experiences with statutes and/or regulations prohibiting ABIs in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of ABIs, but determined there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which ABIs may be warranted.

#### FEDERAL STANDARDS:

The rule does not exceed any minimum federal standards.

#### COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance with the rule by its effective date.

#### Regulatory Flexibility Analysis

##### Small Businesses:

The proposed rule is necessary to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions for students with disabilities; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions and do 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 rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

##### Local Governments:

The proposed rule applies to all public school districts, boards of cooperative educational services (BOCES) and charter schools in this State. Currently, there are approximately 23 school districts that have students recommended for aversive behavioral interventions.

#### COMPLIANCE REQUIREMENTS:

Section 19.5(a) of the Regents Rules prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of ABIs except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.4(d)(3)(i) of the Commissioner’s Regulations requires a CSE/CPSE, in developing a student’s IEP, to consider supports and strategies to address student behaviors that are consistent with program standards in section 200.22 relating to a student’s FBA, BIP, use of time out rooms, emergency interventions and ABIs.

Section 200.7(a)(2)(i)(f) provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school’s procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

Section 200.7(a)(3)(iv) that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of

students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22 or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

Section 200.7(c)(6) requires a private school that proposed to use or continue to use aversive behavioral interventions in its program shall submit, not later than August 15, 2006, its written policies and procedures on behavioral interventions to the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f); provides that any school that fails to meet this requirement shall be immediately closed to new admissions of New York Students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program; and provides that failure to comply with this requirement may result in termination of private school approval pursuant to section 200.7(a)(3).

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school that uses a time out room as part of its behavior management approach is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency use of physical restraints.

Section 200.22(e) provides, effective on or after October 1, 2006, whenever a CSE/CPSE is considering whether a child-specific exception to the prohibition of the use of ABIs is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE/CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception allowing the use of ABIs. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, ABIs to be used, and aversive conditioning devices where the ABIs include use of such devices.

Public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of ABIs. Each school using ABIs shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using ABIs shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), ABIs shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of ABIs is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE/CPSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use ABIs pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

#### PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional service requirements on school districts, BOCES or charter schools.

#### COMPLIANCE COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using ABIs and most of these have only one student where such a

recommendation currently appears on the student's individualized education program (IEP). Schools using ABIs may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Regents policy to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. In developing the proposed amendment, the Department considered other states' experiences with statutes and/or regulations prohibiting aversive behavioral interventions in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought the professional expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of aversive behavioral interventions, but determined that there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which aversive behavioral interventions may be warranted. The proposed rule will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices and the highest standards of oversight and monitoring; under conditions of minimal intensity and duration to accomplish their purpose; and consistent with the requirements of the Individuals with Disabilities Education Act (IDEA).

#### LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule will be provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. In addition, the State Education Department will schedule public hearings on the proposed amendments.

#### Rural Area Flexibility Analysis

##### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The rule will apply to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, approved preschool programs, approved private schools, approved out-of-state day or residential schools, and registered nonpublic nursery, kindergarten, elementary or secondary schools in this State, including those in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

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

Section 19.5(a) of the Regents Rules prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of ABIs except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.4(d)(3)(i) of the Commissioner's Regulations requires a CSE/CPSE, in developing a student's IEP, to consider supports and strategies to address student behaviors that are consistent with program standards in section 200.22 relating to a student's FBA, BIP, use of time out rooms, emergency interventions and ABIs.

Section 200.7(a)(2)(i)(f) provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

Section 200.7(a)(3)(iv) that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to

section 200.22 or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

Section 200.7(c)(6) requires a private school that proposed to use or continue to use aversive behavioral interventions in its program shall submit, not later than August 15, 2006, its written policies and procedures on behavioral interventions to the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f); provides that any school that fails to meet this requirement shall be immediately closed to new admissions of New York Students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program; and provides that failure to comply with this requirement may result in termination of private school approval pursuant to section 200.7(a)(3).

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school that uses a time out room as part of its behavior management approach is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency use of physical restraints.

Section 200.22(e) provides, effective on or after October 1, 2006, whenever a CSE/CPSE is considering whether a child-specific exception to the prohibition of the use of ABIs is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE/CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception allowing the use of ABIs. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, ABIs to be used, and aversive conditioning devices where the ABIs include use of such devices.

Public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of ABIs. Each school using ABIs shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using ABIs shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), ABIs shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of ABIs is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE/CPSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use ABIs pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

The proposed amendment will not impose any additional professional service requirements on school districts.

#### COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using ABIs and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using ABIs may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least

quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Regents policy to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. In developing the proposed amendment, the Department considered other states' experiences with statutes and/or regulations prohibiting aversive behavioral interventions in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought the professional expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of aversive behavioral interventions, but determined that there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which aversive behavioral interventions may be warranted. The proposed rule will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices and the highest standards of oversight and monitoring; under conditions of minimal intensity and duration to accomplish their purpose; and consistent with the requirements of the Individuals with Disabilities Education Act (IDEA). The proposed amendments are necessary to ensure the health and safety of students. Since these requirements apply to all school districts, BOCES, charter schools, and other affected entities in the State, it is not possible to adopt different standards for entities located in rural areas.

#### RURAL AREA PARTICIPATION:

The proposed rule will be submitted for discussion and comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas. In addition, the State Education Department will schedule public hearings on the proposed amendments.

#### Job Impact Statement

The proposed rule is necessary in order to establish standards for behavioral interventions for students with disabilities, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. These amendments will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring. The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

## NOTICE OF ADOPTION

### Uniform Violent and Disruptive Incident Reporting System

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

**Filing No.** 785

**Filing date:** June 23, 2006

**Effective date:** July 13, 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(gg) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 2801(1) and 2802(2), (3), (4) and (6) and L. 2005, ch. 402

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

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-45-05-00008-P, Issue of November 9, 2005.

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

**Revised rule making(s) were previously published in the State Register on February 8, 2006.**

**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**

Since publication of a Notice of Revised Rule Making in the *State Register* on February 8, 2006 the State Education Department (SED) received the following comments:

##### **COMMENT:**

With respect to paragraph (2)(ii) of section 100.2(gg), the regulations exclude reporting criteria for certain incidents (a) through (h) and (q), (r) and (s). The following language should be added to make it clear that these offenses must be reported whether or not the perpetrator is identified:

“The offenses described in clauses (a) through (h) of subparagraph (vi) of paragraph (1) of this subdivision should be reported whether or not the perpetrators are identified.”

“The offenses described in clauses (q), (r), and (s) of subparagraph (vi) of paragraph (1) of this subdivision involving the illegal possession or use of the specified items shall be reported whether or not the perpetrators are identified.”

“The offenses described in clauses (r) and (s) of subparagraph (vi) of paragraph (1) of this subdivision involving the sale of the specified items shall be reported whether or not the perpetrators are identified.”

Not including the language above might lead to an unintended legal interpretation at some point in the future. Given that the proposed regulations specify reporting criteria for only certain offenses, it could be argued that its exclusion from other clauses was purposeful and the legislative intent was to limit the extent of reporting with respect to these other offenses.

In addition, concern was expressed with the clarity of the information that would be provided via guidance. Because the goal is the accurate reporting of crimes whether or not a perpetrator is identified, the language must be clarified.

##### **DEPARTMENT RESPONSE:**

With respect to the request for additional language on each crime, while we agree that crimes need to be reported regardless of whether an offender is identified, we do not believe that it is necessary to add language to the regulations and think that the suggested language would make the regulatory language more confusing.

It is the Department's position that this issue can be effectively dealt with in guidance, and the Department has posted on its website a Questions and Answers (Q&A) section addressing this issue, among others. The Q&A section is intended to supplement the Directions for Completing the Summary of Violent and Disruptive Incidents form and the Glossary of Terms in Reporting Violent and Disruptive Incidents. The website address is: <http://www.emsc.nysed.gov/sss/SDFSCA/UniformViolentIncidentReportingSystemQ&A2-27-20005.htm>

## **NOTICE OF ADOPTION**

### **Requirements for Certification in the Educational Leadership Service**

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

**Filing No.** 781

**Filing date:** June 23, 2006

**Effective date:** July 13, 2006

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

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

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

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

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-16-06-00017-P, Issue of April 19, 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 April 19, 2006. Below is a summary of written comments received by the State Education Department concerning the proposed rule and the Department's assessment of issues raised by the comments.

**COMMENT:** In general, it appears that the proposed revisions are sound. School leadership will benefit from strengthening the certification requirements. School boards rely on superintendents, building principals, and business officials to effectively manage schools under the guidance of policies established by the board. Raising certification standards will benefit school boards that are making key hiring decisions, enhance the possibilities for successful administrators to achieve recognition and advancement, and improve school performance.

**RESPONSE:** No response to this positive comment is necessary.

**COMMENT:** There is one element that we would strongly encourage for inclusion in the certification and on-going professional development regimen: training regarding the proper roles, responsibilities and relationships pertaining to the board of education and a well-functioning management team. School boards and these key administrators need to support one another as a team, and school leaders need to develop skills for working with school boards.

**RESPONSE:** The content requirements for the college preparation programs leading to certification as a school district leader already require the candidate to develop knowledge and skill necessary “to interact and communicate effectively with school board members in developing and implementing district policies, managing change, and managing district affairs . . .” The Department plans to amend section 100.2(dd) of Commissioner's regulations relating to professional development plans that must be adopted by school district and boards of cooperative educational services (BOCES). At that time, the Department will consider specifying the suggested subject as an appropriate subject for coursework that the school district or BOCES may approve for school leaders through its professional development plan.

**COMMENT:** We support the establishment of professional development requirements for school leaders. However, the proposed regulation requires professional development to be approved by an employing school district or BOCES pursuant to a professional development plan, as prescribed in section 100.2(dd) of Commissioner's Regulations. That plan is developed through a committee, which is comprised of a majority of teachers, pursuant to section 100.2(dd). Section 100.2(dd) should be amended to provided for a separate committee controlled by school leaders to develop professional development for school leaders.

**RESPONSE:** The proposed rule making did not make any changes to requirements set forth in section 100.2(dd) of the Commissioner's Regulations for the development of professional development plans by school districts and BOCES. The Department plans to review these requirements in the near future and to establish separate procedural requirements for the development of professional development plans for school leaders.

**COMMENT:** We continue to question the value of requiring school leaders to pass an examination for certification. Strong training, accompanied by practical experience ensures winning school leaders. Mentoring and intense professional development breeds success. An examination is little more than a barrier to entering the profession, offering little to ensure the quality of the candidate for certification.

**RESPONSE:** The proposed certification examinations are being designed to measure the knowledge and skills needed by the candidate to function as school leaders. They are based upon job analyses and knowledge and skills gained in college preparatory programs leading to certification in the educational leadership service. The examinations are testing for knowledge and skills that were to be learned and developed in the school leadership educational programs. These examinations will also serve as a measure of the effectiveness of the educational programs. This is similar to the classroom teaching examinations that are used as one factor in evaluating the teacher education programs.

The Department is still developing the examinations, and the proposed regulation provides that the candidate must pass an examination, provided that the examination is available. The examinations will not be made available until the Department has completed needed consultations and made any appropriate adjustments in the content or format of the examinations. The goal of the consultations will be to ensure the examinations are

appropriate to produce qualified school leaders to fill those positions in New York State's public schools.

**COMMENT:** Well prepared school leaders are essential to raising student achievement. Those trained in quality higher education programs linked directly to schools and children and who continue professional development throughout their careers are most ready to tackle the myriad of challenges facing our diverse education system. The proposed regulation in large measure achieves these goals.

**RESPONSE:** No response to this positive comment is necessary.

**COMMENT:** We support the provision that allows the endorsement of the certificates of experienced school district leaders and school district business leaders in other states.

**RESPONSE:** The proposed amendment permits the endorsement of certificates of another state or territory of the United States or the District of Columbia for service as a school district leader and school business district leader, provided that the candidate meets prescribed education and experience requirements.

**COMMENT:** We support the regulation permitting professional associations representing school leaders to provide professional development to school leaders.

**RESPONSE:** The regulation establishes requirements for professional development for holders of the professional certificate in the educational leadership service. It permits such certificate holders who are not regularly employed by a school district or BOCES to obtain the professional development from a variety of sources, including professional associations representing administrators, teachers, and pupil personnel professionals.

## NOTICE OF ADOPTION

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

**I.D. No.** EDU-16-06-00018-A

**Filing No.** 783

**Filing date:** June 23, 2006

**Effective date:** July 13, 2006

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

**Action taken:** Amendment of section 29.10(a), (d), (e), (f) and (g) of Title 8 NYCRR.

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

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

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

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

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

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

(ii) the licensee expresses an opinion on financial statements or financial data presented in conformity with generally accepted accounting principles. The State Board for Public Accountancy may consider those

principles promulgated by [an organization whose principles are generally accepted by other licensing jurisdictions] *a recognized national accountancy organization whose standards are generally accepted by other regulatory authorities* in the United States, including but not limited to: [the American Institute of Certified Public Accountants and] the Financial Accounting Standards Board, *the Government Accounting Standards Board, and the International Accounting Standards Board*, to be generally accepted accounting principles. If financial statements or data contain departures from generally accepted accounting principles but the licensee can demonstrate that the financial statements or data would have been misleading had generally accepted accounting principles been followed, the licensee's opinion should describe the departure, its approximate effect if practicable, and the reasons why compliance with generally accepted accounting principles would have otherwise been misleading;

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

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

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

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

(e) *Reportable events.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) for a court decision or arbitration award as prescribed in subparagraph (ii) of paragraph (2) of this subdivision, the report shall consist of a copy of the court decision or arbitration award and any findings of facts or special verdict form;

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

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

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

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

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

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

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

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

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

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

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

(2) having voluntarily consented to a revocation or temporary or permanent suspension of the authority to appear or practice as an accountant before the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board, or having voluntarily surrendered such authority; or having voluntarily consented to a revocation or temporary or permanent suspension from further association with any public accounting firm registered pursuant to Chapter 98 of Title 15 of the United States Code, or having voluntarily surrendered such authority; or having voluntarily consented to a revocation or temporary or permanent suspension of registration under Chapter 98 of Title 15 of the United States Code, or a voluntary surrender of such registration; all after a disciplinary action was commenced by the United States Securities and

Exchange Commission or the Public Company Accounting Oversight Board where any conduct charged resulting in the consent to such revocation or temporary or permanent suspension or surrender would, if committed in New York State, constitute professional misconduct under the laws of New York State; and where the date of such consent or surrender is on or after January 1, 2007. In any adversary proceeding conducted pursuant to subdivision (3) of section 6510 of the Education Law, the individual licensee or public accountancy firm shall have the rights set forth in that subdivision.

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

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

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 29.10(e)(4).

**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 in the *State Register* of the Notice of Proposed Rule Making on April 19, 2006, the proposed rule has been non-substantially revised as follows: in section 29.10(e)(4), third sentence, after the phrase "relating to," the word "he" is replaced with the word "the." This revision to the rule does not necessitate any changes to the Regulatory Impact Statement.

#### **Regulatory Flexibility Analysis**

Since publication in the *State Register* of the Notice of Proposed Rule Making on April 19, 2006, the proposed rule has been non-substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement, submitted herewith. This revision to the rule does not necessitate any changes to the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

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

Since publication in the *State Register* of the Notice of Proposed Rule Making on April 19, 2006, the proposed rule has been non-substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement, submitted herewith. This revision to the rule does not necessitate any changes to the Rural Area Flexibility Analysis.

#### **Job Impact Statement**

Since publication in the *State Register* of the Notice of Proposed Rule Making on April 19, 2006, the proposed rule has been non-substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

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

The proposed amendment, as revised, establishes standards of practice for New York State licensed public accountants and public accountancy firms. It sets forth standards that licensees and firms must already meet pursuant to Federal law, and establishes violations of such standards as definitions of unprofessional conduct that could subject licensees and firms to professional discipline. In addition, the amendment, as revised, establishes a reporting requirement for events that relate to possible instances of professional misconduct. This amendment will not affect the number of jobs or employment opportunities in public accountancy or in

any other field. Because evident from the nature of the proposed amendment, as revised, that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

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

The proposed regulation was published in the *State Register* on April 19, 2006. Below is a summary of comments received by the State Education Department and the Department's response.

**COMMENT:** The reporting of a court decision, arbitration award, and notice of discipline should only be required after exhaustion of all appeals and expunged upon exoneration.

**RESPONSE:** The regulation requires licensees or firms to report to the Department prescribed events within 45 days, and failure to report constitutes unprofessional conduct. A licensee or firm must report the receipt of a court decision or an award in an arbitration proceeding in which the licensee, registered partnership, or public accountancy firm is found liable for negligence or wrongdoing relating to the practice of public accountancy in New York State, and must report the notice of the imposition of a disciplinary penalty upon the licensee, registered partnership, or public accountancy firm relating to the practice of public accountancy.

Convictions, court decisions, or determinations imposing disciplinary penalties are public information when rendered. Reporting them immediately will give the Department an opportunity to determine whether further investigation is appropriate, avoiding delay until appeals are over. If the court decision is ultimately upheld, the Department will be able to protect the public immediately from similar wrongdoing. As to expungement, the reports are maintained as investigatory documents, subject to the confidentiality provisions of Education Law section 6510(8). If disciplinary charges are not initiated, these reports will be destroyed in accordance with retention schedules for investigatory materials.

**COMMENT:** The monetary threshold, over \$25,000, for the triggering of the reporting of court decisions or arbitration awards is too low. We recommend that this threshold be increased to over \$150,000.

**RESPONSE:** The Department disagrees that the monetary threshold, over \$25,000, is too low. The regulation requires the licensee or firm to report a court decision or arbitration award in which the licensee or firm is found liable for over \$25,000 for negligence or wrongdoing relating to the practice of public accountancy in New York State. The monetary threshold protects the public. It ensures that reported cases are not trivial, but the threshold is not so high as to exclude significant cases.

**COMMENT:** The reporting of court decisions should be limited to decisions issued by courts in the United States or its territories. The reporting of disciplinary penalties should be limited to specifically named countries whose standards of due process and practice of accountancy are substantially equivalent to New York's.

**RESPONSE:** This is only a reporting requirement. It is unnecessary to limit the jurisdictions whose court decisions or findings of unprofessional conduct should be reported. A finding of unprofessional conduct relating to the practice of public accountancy by a foreign jurisdiction could provide valuable guidance to the Department in investigating possible instances of unprofessional conduct by a firm or licensee in New York.

**COMMENT:** The reports of administrative disciplinary actions (section 29.10[e][2][ii]) should relate to practice in New York State. Failure to include this geographic nexus raises constitutional concerns because the due process clause and the dormant commerce clause limit States' powers to regulate beyond their borders.

**RESPONSE:** This reportable event is reasonable. It requires the reporting of administrative disciplinary penalties relating to the practice of public accountancy. The Department will use this information to determine if in fact there is a nexus to New York and whether any further investigation is necessary.

**COMMENT:** Requiring the reporting of a conviction of a felony or misdemeanor is too broad without relating to the practice of public accountancy in New York State.

**RESPONSE:** Education Law section 6509(d) defines unprofessional conduct as being convicted of a crime under New York law, Federal law, or the law of another jurisdiction. Such crime need not relate to professional practice. The reporting requirement is reasonable because the conviction of a felony or misdemeanor may be professional misconduct regardless of the jurisdiction.

**COMMENT:** The proposed regulation would allow partners in registered partnerships to designate an individual to report reportable events but unreasonably holds each partner responsible for ensuring that events are reported.

**RESPONSE:** Partnerships registered pursuant to Education Law section 7408 must report the events. The licensees who are partners may designate an individual to report the events, but each licensed partner is responsible to ensure the reporting. The licensee will be permitted to discharge this responsibility by ensuring that an individual is assigned to making the reports and that reasonable monitoring and reporting procedures are in place. The Department will issue written guidance.

**COMMENT:** The Regents should revise the exception to the reporting requirement for court decisions or arbitration awards that are confidential. The requirements place an undue burden on the licensee or firm, may be unenforceable and invite unnecessary litigation.

**RESPONSE:** The regulation contains an exemption to the reporting requirement when a court or arbitrator has included language in a decision that specifically provides that the decision shall not be reported to the Department, and another exemption, which would require the licensee or firm to inform the court or arbitrator, prior to the execution of the confidentiality provision, of the duty to report the decision to the Department. Failure to notify the Department would not constitute unprofessional conduct if following notification, the court or arbitrator does not provide for disclosure to the Department. These requirements do not place an undue burden on the licensee or firm. They ensure that a court or arbitrator is aware of the reporting requirement before issuing the order. It is within the control of the licensee or firm to provide notice to the court, and therefore, there should be little or no conflict between the reporting requirement and a court order.

**COMMENT:** The confidentiality exemption to the reporting requirement requires the licensee to inform a court or arbitrator about a specific provision in the Regents Rules. Inadvertent errors may occur. It is unreasonable to expect judges or arbitrators throughout the country to include in their decisions explicit reference to the Department. An exemption without limitation should apply when a court or arbitrator makes its determination confidential.

**RESPONSE:** The regulation establishes reasonable conditions for a court or arbitration decision to be exempt from the reporting requirement, based upon confidentiality order or provision, as stated above. In the event of error, the licensee or firm may apply to the Department for an exemption for good cause (section 29.10[e][2]). These court decisions and arbitration awards have monetary judgments, making it unlikely that they will be subject to confidentiality orders because they have to be collected.

**COMMENT:** The confidentiality exception to reporting fails to include administrative determinations.

**RESPONSE:** The regulation requires the reporting of a disciplinary penalty relating to the practice of public accountancy issued by government administrative agencies. Normally, these determinations are public. In the unlikely event that the determination is confidential, the licensee or firm may apply to the Department for an exception for good cause.

**COMMENT:** The proposed regulation alters the presumption of innocence, and permits the finding of professional misconduct when the licensee or firm voluntarily consents, with no admission of guilt, to a revocation or suspension of authority to practice before the U.S. Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB), where any conduct charged resulting in the consent would, if committed in New York State, constitute professional misconduct under the laws of New York State. The Department should not consider a voluntary settlement with no admissions or findings of guilt to constitute improper professional conduct, and any such conclusion may raise serious constitutional due process issues.

**RESPONSE:** The regulation defines as unprofessional conduct, having voluntarily consented to a revocation or suspension of the authority to practice before the SEC or PCAOB, after disciplinary action was commenced by one of these agencies and the underlying conduct charged resulting in the consent would if committed in New York State constitute professional misconduct under the laws of New York State. The regulation would apply to consents entered into on or after January 1, 2007. The licensees or firms will be on notice that they may be subject to State professional discipline based upon a voluntary consent to revocation or suspension of its authority to practice before the SEC or PCAOB.

Education Law section 6509(9) delegates to the Regents the authority to define professional misconduct in the practice of a licensed profession. The regulation defines unprofessional conduct in the practice of public accountancy in accordance with this statutory authority. In addition, the licensee or public accounting firm has all of the due process rights available under Education Law section 6510, including the right to explain its conduct for purposes of imposition of an appropriate penalty.

The proposed regulation was modeled after a provision defining professional misconduct in medicine (Education Law section 6530[9][d]). This provision like the proposed regulation defines professional misconduct as, *inter alia*, having a medical license revoked, suspended or having other disciplinary action taken by another State, or the licensee having surrendered his or her license after a disciplinary action was instituted by another State, but does not require a finding of guilt of the underlying charges. The Court of Appeals upheld this provision as providing sufficient due process, and rejected the contention that application of section 6530(9)(d) required proof of guilt of the out-of-state charges (*Matter of D'Ambrosio*, 4 NY3d 133 [2005]).

**COMMENT:** The provision that defines unprofessional conduct as a voluntary consent to a revocation or suspension of a licensee's or public accountancy firm's authority to practice before the SEC or PCAOB, based upon conduct charged resulting in the revocation or temporary or permanent suspension or surrender does not provide an appropriate measure of misconduct, unlike findings or admissions of misconduct. Disciplinary authorities may bring multiple charges in order to procure a settlement on a subset of charges.

**RESPONSE:** The regulation refers to "any conduct charged resulting in the consent to such revocation or temporary or permanent suspension or surrender" of authority to practice before the SEC or PCAOB. (Emphasis added.) Therefore, not all charges will be pertinent. The charges must result in the consent to the practice limitation. If the settlement document states that charges were dropped or not considered, they will not be pertinent in the misconduct proceeding.

**COMMENT:** The proposal would discourage settlement in SEC and PCAOB disciplinary proceedings. A New York licensee would be less likely to settle with the SEC or PCAOB, knowing that the Department could impose its own discipline based upon the original charges.

**RESPONSE:** As stated above, only the charges that result in the consent to the suspension or revocation of the authority to practice will be pertinent. These settlement cases will involve charges of a substantive nature in which the licensee or firm has agreed to relinquish authorization to practice. It is unlikely that a possible State disciplinary proceeding will have chilling effect on whether the licensee or firm agrees to settle these serious Federal cases.

**COMMENT:** The Department is incorrect in stating in the Regulatory Impact Statement that the regulation will not impose costs on licensees or firms, except for reporting costs. Monitoring for reportable events will impose significant costs. Legal costs can also be expected to increase as the regulations give rise to questions of application and make SEC and PCAOB settlements more complicated.

**RESPONSE:** The Department adequately estimated costs of the rule making in the Regulatory Impact Statement. This statement accurately reported that the only costs concern the reporting requirement and prorated costs per reportable event. It considered both costs for monitoring for reportable events and submitting the reports to the Department. The comment that the regulation will impose additional legal costs because it will give rise to questions of application and more complicated SEC and PCAOB settlements is speculative.

## NOTICE OF ADOPTION

### Accreditation of Teacher Education Programs

**I.D. No.** EDU-16-06-00019-A

**Filing No.** 784

**Filing date:** June 23, 2006

**Effective date:** July 13, 2006

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

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

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

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

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-16-06-00019-P, Issue of April 19, 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 April 19, 2006. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of issues raised by the comments.

**COMMENT:** Institutions that delayed accreditation visits or that have deficiencies will have a number of years to become accredited for the first time, while in that same time those that worked to meet the original deadline may go through the accreditation process twice (initial accreditation and then re-accreditation). This does not hold all programs to high standards and sets a precedent that undermines Regents rulings.

**RESPONSE:** The amendment gives the Department regulatory flexibility for a one-time accommodation of programs that demonstrate to the Department's satisfaction the ability to earn accreditation in the short term. Programs that have been denied accreditation during a limited time period may obtain a deferral of the date by which they must be accredited, provided that the programs submit a corrective action plan that is acceptable to the Department. The Department will determine the date by which the program must be accredited, which may not exceed three additional years. This upholds high standards by building the quality of those programs without jeopardizing the Department's ability to terminate the registration of programs with fundamental, pervasive problems. By providing this deferral of the accreditation deadline, the amendment allows programs to address deficiencies, thereby limiting disruptions to students while helping to ensure improvements in program quality.

**COMMENT:** The amendment recognizes that institutions seeking accreditation for the first time are evaluating their procedures and resources, and it helps those institutions to make adjustments to achieve the desired results. An affirmative vote will benefit students by assisting institutions in providing the best teacher education programs, statewide.

**RESPONSE:** The amendment is designed to provide flexibility and a one-time means to support the progress of sound programs as they develop the structures and resources to meet accreditation standards. These programs and the students they serve will benefit, without compromising Regents initiatives to foster quality teaching.

**COMMENT:** New York State had never before required accreditation of teacher education programs, and it has taken most schools a tremendous amount of time and energy to develop the mechanisms necessary for a first-time accreditation process. Likewise, the accrediting organizations were pressed to schedule visits, formulate reports, and reach accreditation decisions within a restricted time period. It is a one-time only change that wisely and proactively addresses the challenges that have become evident.

**RESPONSE:** The initial round of accreditation has both challenged and benefited teacher education programs, the institutions housing those programs, accrediting entities, and the Department. The flexibility provided by the amendment provides a one-time means to address those challenges while ultimately supporting the goals of accreditation and the Regents policy.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### Big Game Hunting Regulations

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

**Filing No.** 790

**Filing date:** June 27, 2006

**Effective date:** July 12, 2006

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

**Action taken:** Amendment of sections 1.20, 1.27 and 1.31 of Title 6 NYCRR.

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

**Subject:** Big game hunting regulations.

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. ENV-16-06-00022-P, Issue of April 19, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Jeremy Hurst, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8867, e-mail: jehurst@gw.dec.state.ny.us

**Additional matter required by statute:** This action is covered by a programmatic environmental impact statement on file with the Department of Environmental Conservation.

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

The Department received comments on the proposed rule making. A summary of these comments and the Department's response follow:

**Comment:** Comments were received in support of the proposed expansion of black bear hunting areas, noting that bears have become a nuisance in these areas and have begun displaying bold behavior. Comments in support also noted that expanding the bear hunting area will provide new hunting opportunity, and will also decrease the negative impacts of bears by lowering the bear population.

**Response:** The Department agrees. Bear hunting remains the only viable and cost effective tool for controlling bear numbers on a landscape scale. Opening of the three wildlife management units (WMUs) to bear harvest could result in a significant change in negative bear-human interactions, and reduce levels of bear nuisance activity and property damage in this portion of the Catskill bear range. These regulations will provide opportunities to increase bear harvest and also establish a high quality opportunity for hunters.

A key component of the black bear management planning process is the creation and use of Stakeholder Input Groups (SIGs) that are tasked to identify and prioritize bear impacts and to help Department staff articulate black bear management objectives for a specific geographic area. One of several recommendations of the Northern Catskill SIG, held in the fall and winter of 2003-04, was to expand bear hunting opportunities in the northwestern portion of the Catskills in order to lessen the impacts of agricultural damage, primarily to corn and bee/honey crops. In response to this recommendation, the Department proposed the addition of WMUs 4O and 4P to the areas open to bear hunting for the 2004-2005 season and WMUs 4F, 4G and 4H were recommended for future evaluation and consideration. Data gathered since 2004 indicates that damage complaint levels in WMUs 4F, 4G and 4H are similar to adjacent units where bear hunting is allowed. Accordingly, inclusion of these units in the area open to Catskill bear hunting will allow consistent use of the black bear throughout the Catskill bear range.

**Comment:** Several comments were received opposing the proposed expansion of black bear hunting areas because of concern that the bears are not numerous enough to support a hunting season.

**Response:** In recent years, black bears have extended their range into WMUs 4F, 4G and 4H, and their populations have grown. This is demonstrated by an increasing trend in the number and frequency of bear sightings and bear nuisance problems. Bear activity and complaint levels have risen by over 100 percent since 1999. Currently, 17% of the nuisance bear complaints in Region 4 occur in these three WMUs. The continued expansion of the bear hunting area in WMUs 4F, 4G and 4H is aimed at the stabilization or reduction in the number of bears in these areas or both, and the reduction of negative interactions between bears and people.

**Comment:** Some comments indicated that the negative impacts associated with bears are primarily a human behavior problem, not a bear problem, and that damage caused by bears should be addressed on a case by case basis.

**Response:** The Department has long-standing and ongoing programs to educate the public and prevent bear damage. The Department recognizes that effective bear management involves education, non-lethal intervention, and population management. Information concerning these three categories may be found on the Department's website ([www.dec.state.ny.us](http://www.dec.state.ny.us)). The Department recently started new and expanded educational programs in the Catskills and Adirondacks.

The Department firmly believes that hunting is an important component of a comprehensive management program, which includes efforts to mitigate the negative black bear impacts over large areas. The additional harvest anticipated in the areas proposed, in combination with education

and preventative measures, is expected to bring the number and magnitude of negative impacts in better balance with human interests.

**Comment:** Comments were received opposing the proposed expansion of black bear hunting areas because of concern that the majority of New York's citizens are non-hunters and their voice of opposition is not adequately heard, and that only hunters are in favor of the proposed expansion.

**Response:** All citizens of the State have the opportunity to comment on the Department's regulatory proposals. Recognizing the high public interest in black bear management, the Department held two public meetings to seek input on the proposals (Cobleskill, NY on May 17, 2006; Liberty, NY on May 31, 2006). These meetings were open to the public without restriction, and written comments from all interested persons or groups were accepted via mail and electronic mail. The Department received comments from both hunters and non-hunters, and all comments were given equal consideration.

**Comment:** Comments were received opposing the proposed expansion of black bear hunting areas because of concern of increased trespass.

**Response:** Black bear seasons in the Catskill Bear Range overlap with deer hunting seasons, and the Department believes that the majority of black bears harvested in the proposed areas will be taken by deer hunters. The expansion of bear hunting areas will not likely alter hunter behavior to increase levels of trespass in these areas. The Department encourages hunters to always seek landowner permission before going on private lands for any purpose.

**Comment:** Comments were received in support of the proposed expansion of the Antler Restriction Pilot Program. Those commenting cited a number of reasons for their support, such as promoting higher quality deer hunting, increasing the antler size of bucks, equalizing the sex ratio of deer and improving breeding ecology, increasing hunter safety, and improving hunter satisfaction and participation levels.

**Response:** The Department believes that a pilot antler restriction program is a reasonable and responsive action in recognition of the growing support and interest in alternative deer harvest strategies among New York sportsmen and women. The current deer hunting buck harvest standards in New York rest on traditions that are almost 100 years old. This pilot program will provide a unique learning opportunity for both deer hunters and the Department.

Harvest data from the current antler restriction pilot areas, WMUs 3C and 3J, indicate that hunters are complying with the regulation and that the proportion of yearling (1½ year old) deer in the buck harvest has dropped dramatically. The Department expects the antler restriction program to result in a greater diversity of age classes present in the buck harvest, which should increase hunter satisfaction, and may have a positive impact on deer breeding ecology.

**Comment:** Many comments received also suggested that antler restrictions be implemented statewide or in various other locations throughout New York.

**Response:** Currently, the Department has implemented antler restrictions as a pilot program in WMUs 3C and 3J, with the intent that the pilot program be evaluated for three years, at which point a decision will be made to continue or discontinue the program. WMUs 3H and 3K will be included in this original pilot program and will undergo a similar three year evaluation period. This pilot program will provide a unique learning opportunity for both deer hunters and the Department. The Department also plans to survey hunters throughout New York to assess levels of interest in alternative buck harvest strategies.

**Comment:** Many comments stated opposition to the proposed expansion of the Antler Restriction Pilot Program. Reasons for opposition included: counting antler points is not practical during typical hunting conditions; the program will reduce the opportunity to harvest a buck and will focus harvest on antlerless deer, further reducing the total population; inferior deer will not be removed from the herd; and the program will result in increased illegal kills. Several people also suggested that the current pilot program has not been fully evaluated and that similar programs in nearby states have not demonstrated success.

**Response:** Antler restriction programs have worked successfully in several southern states and in Pennsylvania to reduce the harvest of yearling bucks and to allow bucks to survive to older age classes. Most of these programs have been based on a minimum number of antler points, and hunters have successfully adapted their hunting techniques to comply with the regulations. Preliminary data from New York's current pilot area (WMUs 3C and 3J) indicate similar success.

Several western states have experimented with antler restriction programs and subsequently discontinued the programs after experiencing a high degree of illegal kills. However, biologists in Pennsylvania estimate

the illegal kills associated with their antler restrictions at less than 5% of total harvest. Similarly, the Department has no reason to believe that illegal kills have increased in the current pilot antler restriction area. Antler restrictions do reduce buck harvest during the first year of the program, but buck take is expected to rise toward typical levels in succeeding years. Antlerless harvest in New York is controlled by the availability of Deer Management Permits (DMPs). Hunter success rates using DMPs did not increase in 2005, during the first year of the current antler restriction program in WMUs 3C and 3J.

**Comment:** Many comments were received by sportsmen opposed to the proposed expansion of the Antler Restriction Pilot Program, stating that antler restriction programs promote hunting for "trophy" animals rather than for a source of meat. Several comments also noted that the notion of "trophy" hunting is often used by anti-hunting groups as an argument to denounce hunting.

**Response:** The proposed antler restriction is designed to minimize harvest of yearling bucks and is expected to shift the focus of harvest to 2½ year old deer with a slight increase in harvest of 3½ year old and older deer. Deer in the 2½ year age class in the proposed WMUs average about 6 antler points, compared to yearling bucks that average only about 3 antler points. The definition of "trophy" varies among sportsmen, but the term is commonly used to describe deer that are 4½ years or older and have significantly larger antlers than a 2½ year old buck would attain.

**Comment:** One comment questioned the proposed regulations noting that yearling bucks may serve as a key vector in the spread of Chronic Wasting Disease (CWD) and that preserving this age class of animals through antler restrictions may not be prudent.

**Response:** While the dispersion of yearling bucks could potentially be a pathway for the spread of CWD, the methods of CWD transmission are not well understood. Since the initial detection of CWD in New York, the Department has tested over 8,000 wild deer statewide, including deer from WMUs 3H and 3K, with no additional cases of CWD. Given the extreme low prevalence and geographic isolation of CWD, the Department does not anticipate a threat of CWD spread throughout the state resulting from the antler restriction program in WMUs 3H and 3K.

**Comment:** Several comments were received regarding the exemption from the antler restriction for hunters under 17 years of age, suggesting that a one year exemption for young hunters is not sufficient to captivate the interest of young people and increase hunter numbers. Several people also suggested that the exemption should apply for senior hunters over 65 years of age.

**Response:** Hunter numbers are declining in New York State and the Department is actively pursuing actions that may increase participation of young hunters. The exemption from the proposed antler restriction for hunters under the age of 17 is intended to maximize the opportunity for hunting success among young hunters and increase their interest level in hunting. Currently, young hunters aged 14 to 15 years may purchase a Junior Archery license and are exempt from the antler restriction while hunting in the pilot area. The Department has also supported proposed legislation that would reduce the legal age for deer hunting with a firearm from 16 to 14 and reduce the age requirement for a Junior Archery license from 14 to 12 - actions that would increase the amount of time young hunters would be exempt from the antler restriction.

Senior hunters make up a increasingly larger segment of our hunting populace. Exempting this group of hunters from the antler restriction could compromise the success of the program.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Remediation Stipulation Program

**I.D. No.** ENV-28-06-00023-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 375-5 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101 and 3-0301

**Subject:** Remediation Stipulation Program.

**Purpose:** To create a regulatory program, modeled after the administrative Voluntary Cleanup Program, to encourage and enhance private-sector remediation of brownfields.

**Public hearing(s) will be held at:** 2:00 p.m., Aug. 31, 2006 at Department of Environmental Conservation, 625 Broadway, Rm. 129, Albany, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: <http://www.dec.state.ny.us/website/der/>):** This rule making is proposed by the New York State Department of Environmental Conservation (Department) to amend 6 NYCRR 375, the statewide regulation that implements the State Superfund Program, Article 27, Title 13 of the Environmental Conservation Law (ECL), and the Environmental Restoration Program, Article 56, Title 5 of the ECL, by the addition of a new Subpart, 375-5, the Remediation Stipulation Program. This program, modeled after the administrative Voluntary Cleanup Program, enhances private-sector remediation of brownfields and reduces development pressure on "greenfields." This program encourages a cooperative approach amongst the Department, current property owners, lenders, developers and prospective purchasers to investigate and/or remediate contaminated sites and return these sites to productive use.

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of brownfield sites. These programs ensure the continued protection of public health and the environment and assure the most efficient utilization of public and private funding sources for the investigation and remediation of sites under such remedial programs. The Department's current programs provide various mechanisms to address contaminated sites. However, the Department has determined, and public comment during recent public information meetings on the draft Part 375 rule making has confirmed, the need to have an additional brownfield program. This program would address sites not eligible for the Brownfield Cleanup Program, or sites where a less structured program is sought.

Chapter 1 of the Laws of 2003 added a new ECL Article 27 Title 14 (the Brownfield Cleanup Program "BCP"); made extensive amendments to existing ECL Article 27 Title 13 (the State Superfund Program "SSF") and to existing ECL Article 56 Title 5 (the Environmental Restoration Program "ERP"); and made other related amendments. As a result of these statutory changes, the Department has proposed rule making ENV-46-05-00010-C, which is ongoing, to conform to Chapter 1. It is necessary and desirable to further revise the Department's regulation, by the addition of a new brownfield program, in the interest of administrative efficiency. The Remediation Stipulation Program rule making is proposed as it complements the ongoing rule making by providing for another remedial program, which will ensure the continued protection of public health and the environment. It will also ensure remediation efforts are completed as quickly as possible, while furthering the goal of reducing contamination in the environment.

The Department's current regulation governing the SSF and ERP is contained in 6 NYCRR Part 375. In November 2005 a rule making was proposed to revise, reorganize, and restructure existing Part 375, and include a regulation for the BCP to cover the requirements provided by, and to provide for the implementation of, 2003 and 2004 statutory changes. Under that proposed rule making, Subpart 375-1 addresses general remedial program requirements; Subpart 375-2 addresses the Inactive Hazardous Waste Disposal Site Remedial Program; Subpart 375-3 addresses the Brownfield Cleanup Program; and Subpart 375-4 addresses the Environmental Restoration Program. This proposed rule, the Remediation Stipulation Program, is an additional Subpart to Part 375, and it has been organized in a consistent format. The following outline highlights the organization of this Subpart 375-5.

Subpart 375-5.1 Purpose; applicability; construction

Subpart 375-5.2 Definitions

Subpart 375-5.3 Eligibility

Subpart 375-5.4 Applications

Subpart 375-5.5 Remediation stipulation agreement

Subpart 375-5.6 Work plans and reports

Subpart 375-5.7 Significant threat and Registry determinations

Subpart 375-5.8 Remedial program

Subpart 375-5.9 Certificate of Completion

Subpart 375-5.10 Citizen Participation

Subpart 375-5.11 Miscellaneous

## Subpart 375-5.12 Permits

In summary, the Remediation Stipulation Program regulation is needed to provide for the orderly and efficient administration of this new brown-field program, including the oversight and implementation of the remedial program; granting of liability protections; and the certificates of completion. This proposed rule making provides for an alternative remedial program, application to which is voluntary, which will facilitate the clean up and reuse of contaminated sites, thus stimulating economic revitalization, while ensuring the continued protection of public health and the environment.

**Text of proposed rule and any required statements and analyses may be obtained from:** Robert W. Schick, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7014, (518) 402-9662, e-mail: rxschick@gw.dec.state.ny.us

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

**Public comment will be received until:** September 5, 2006.

**Additional matter required by statute:** SEQR per ECL Title 8; Env. Review Board per ECL Title 5.

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

**Regulatory Impact Statement**

## 1. Statutory Authority:

The statutory authority for this proposed rule is Sections 1-0101 and 3-0301 of the Environmental Conservation Law (ECL).

Section 1-0101 subdivision (1) outlines the policy declaration for the New York State Department of Environmental Conservation (Department) regarding the protection of New York State's environment and natural resources "in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being." Section 1-0101 subdivision (3) also states:

"It shall . . . be the policy of the state to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations."

Section 3-0301 subdivision (1) paragraph (a) gives the Commissioner broad authority to "coordinate and develop policies, planning and programs related to the environment of the state and regions thereof." Pursuant to subdivision (1) paragraph (b) the Commissioner is charged with promoting and protecting the water, land, fish and wildlife of New York. The Commissioner has the authority to consider development, which provides the best usage of land areas, maximizes environmental benefits and minimizes the effects of less desirable environmental conditions pursuant to subdivision (1) paragraph (g). Moreover, subdivision (1) paragraph (i) provides the Commissioner with the authority to prevent and abate of all water, land and air pollution including, but not limited to, that related to hazardous substances. Subdivision (1) paragraph (n) provides authority to promote restoration and reclamation of degraded or despoiled areas and natural resources. Subdivision (2) paragraph (a) permits the Commissioner to adopt rules and regulations to carry out the purposes and provisions of the ECL (see also subdivision (2) paragraph (m)). Subdivision (2) paragraph (g) allows the Commissioner to enter and inspect sources of pollution and to verify compliance. Pursuant to subdivision (2) paragraph (b) the Commissioner is authorized to enter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the Department.

Moreover, the recent enactment of ECL Article 27, Title 14, does not diminish the foregoing generic authority. First: there is no indication of an explicit intent to limit that generic authority, and indeed, in the subsequent specific authority, namely, at ECL 27-1403, it is recited that the legislative intent in enacting same was that the statute "... shall not be construed as limiting or otherwise affecting any authority conferred upon the department by any other provision of law". Second: an implicit intent to limit the generic authority may not be inferred, inasmuch as the applicable rule of construction is that the subsequent enactment of specific authority does not limit any preexisting generic authority unless the two are in irreconcilable conflict. See *Consolidated Edison Co. of New York Inc. vs. New York State Department of Environmental Conservation*, 71 N.Y.2d 186, 519 N.E.2d 320, 524 N.Y.S.2d 409 (1988). Therefore, since the Department had the generic authority to create the administrative Voluntary Cleanup Program (VCP) in 1994, the Department continues to have that authority and thus has the generic authority to create the administrative Remediation Stipulation Program.

## 2. Legislative Objective:

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created

an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of brownfield sites. This rule making provides for another remedial program, which will ensure the continued protection of public health and the environment. It will also assure the most efficient utilization of public and private funding sources for the investigation and remediation of sites under such remedial programs and will ensure remediation efforts are completed as quickly as possible. This regulation will further the goals of reducing contamination in the environment.

This program, modeled after the VCP, enhances private-sector remediation of brownfields and reduces development pressure on "greenfields." This program encourages a cooperative approach amongst the Department, current property owners, lenders, developers and prospective purchasers to investigate and/or remediate contaminated sites and return these sites to productive use. The VCP addresses the environmental and legal liability barriers that often hinder the redevelopment and reuse of contaminated properties.

## 3. Needs and Benefits:

The Department's current programs provide various mechanisms to address contaminated sites. However, the Department has determined, and public comment during recent public information meetings on the draft Part 375 rule making has confirmed, the need to have an additional brown-field program to address sites not eligible under the Brownfield Cleanup Program (BCP) or sites where the project sponsored has determined that it is advantageous and timely to proceed through this new brownfield program. This regulation is needed to provide for the orderly and efficient administration of this new program, including the oversight and implementation of the remedial program, granting of liability protections, and the issuance of certificates of completion.

The major needs and benefits result from the ability to implement this remedial program timely and effectively.

## 4. Costs:

This rule making creates an optional program and should not result in additional costs to the regulated community or other branches of local or State government, unless they elect to proceed with a cleanup under this new program.

Costs to State government, local government, private regulated parties and the Department are discussed below.

## a. Costs to regulated community:

Promulgation of these regulations will have no fiscal effect on private regulated parties, unless they elect to participate in this program; in which event they will receive the benefits of technical oversight and liability protections. Further, participation in this program should reduce the cost and time of addressing these sites.

## b. Costs to the Department, State, and Local Government:

The costs associated with the administration of this program should not be substantial. The Department will need to oversee the implementation of this remedial program. However, it is anticipated that current staff will handle this workload.

Since this program is elective, promulgation of this regulation will have no fiscal effect on local government beyond what they already experience under existing law. For example, if they are the owner of contaminated property or are otherwise responsible for the contamination at the site.

## 5. Local Government Mandates:

No substantive recordkeeping, reporting, or other requirements will be imposed on local governments by this rule making except for those requirements stemming from a party's election to voluntarily participate.

## 6. Paperwork:

No substantive paperwork is proposed other than that which is required by voluntary participation. Further, any additional paper requirements are minimal in the scope of the overall remedial programs covered by the rule making. For instance, if a person wishes to apply for a cleanup project, an application must be completed and submitted with requested information/documentation. The regulation discusses the minimal amount of information needed to consider such an application. Reporting obligations are also included in the rule making, consistent with present practice in the State Superfund Program, the BCP and the Environmental Restoration Program (e.g., final engineering reports, feasibility studies or alternatives analyses, etc.).

## 7. Duplication:

The proposed new regulation will not result in a duplication of State regulations. While this is similar to the BCP, it is intended to provide a simpler alternative with no financial incentives.

#### 8. Alternatives:

The alternatives to creating this voluntary program are limited. The Department's brownfield programs have been in existence for years now and experience has shown that a certain segment of contaminated properties fall outside any of the currently available programs. It is possible to take "no action" on this issue, however, to do so would be unresponsive to the many requests received. Stakeholders have consistently requested the Department to consider a program similar to the BCP, but with simplified procedures and no tax credits. Other alternatives include the re-establishment of an administrative (*i.e.*, non-regulatory) program, or as another alternative, allowing for the Remediation Stipulation Program as an option under the BCP. Arguably, an administrative program would provide an opportunity to address these sites. However, in the interest of predictability and consistency (reporting requirements, deliverables, etc.) it makes sense that the Remediation Stipulation Program be addressed in a like manner, with a similar regulatory basis, as the Department's other brownfield programs. Stakeholders have often expressed a desire for consistency among programs and historically, requested that the VCP have a regulatory basis. The latter option, to modify the BCP to permit eligibility of two "tiers" of sites, traditional BCP vs. Remediation Stipulation Program, would lead to considerable confusion. The BCP already incorporates varying responsibility for "volunteers" vs. "participants;" multiple cleanup tracks; and specific incentives not applicable to other programs. Further, the BCP includes administration/process (in light of the tax credits and other program benefits) not envisioned by the Remediation Stipulation Program. Thus, to incorporate the Remediation Stipulation Program as a variant of the BCP is not advised.

#### 9. Federal Standards:

There are no federal standards applicable to this rule making.

#### 10. Compliance Schedule:

This regulatory proposal will take effect immediately.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The proposed rule making does not place any additional burdens on small business or local governments, create new mandatory regulatory programs, expand existing regulatory programs or increase the universe of regulatory requirements applicable to the regulated community. Additionally, this rule creates a brownfield program that is voluntary. Parties may elect to not participate, and thus they will not incur any obligations or responsibilities under this proposed rule.

Accordingly, the number of small businesses and local governments affected by the rule making will not increase, except to the extent that such entities elect to participate.

#### 2. Compliance Requirements:

There are no new substantive reporting or record keeping requirements for small businesses or local governments as a result of the proposed rule making. As noted above, this rule provides for a brownfield program that can be, but need not be, participated in. The reporting obligations contained in the regulations are included to provide consistency amongst the New York State Department of Environmental Conservation's (Department) remedial programs. These obligations are consistent with the legislative intent for the Department to oversee the implementation of remedial programs in New York State and will allow the Department to timely issue Certificates of Completion after the successful implementation of the remedial program.

#### 3. Professional Services:

The quantity and types of service needed will remain close to the present level. The proposed rule making involve the creation of a new program. The Department has, and will continue to, conduct a variety of education and outreach activities directed at a diverse audience, including small businesses. One such activity is making information available on the agency's web page to explain the obligations and benefits of the Department's remedial programs to answer questions about the programs and the proposed regulation.

#### 4. Compliance Costs:

Small businesses and local governments should only incur costs, either initial capital costs or annual compliance costs, to comply with the proposed rule making if they voluntarily elect to participate and take advantage of the benefits of this new remedial program.

#### 5. Economic and Technological Feasibility:

The proposed rule making provides for programmatic consistency with other Department remedial programs. The proposed rule making causes no

added economic burdens or requires any additional sophisticated environmental control technology. Accordingly, implementation of these rules will be economically and technologically feasible for small businesses and local governments.

#### 6. Minimizing Adverse Impact:

It is the Department's belief that the proposed regulations will not cause a significant economic burden to the small business community or local governments. To the contrary, there is a positive impact in that the proposed rule provides for a simplified program to address brownfields and the cleaned up areas will result in alternative uses. Further, there are liability protections and technical advice that afford all parties, including small businesses and local governments, incentives to participate in this program.

The proposed rule making is also intended to be less complex and easier to understand than existing regulations and programs.

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

The Department has an ongoing statewide outreach program to regulated communities and interested parties including small businesses and local governments. These outreach efforts have included mailings to environmental groups, citizen advisory committees, environmental management councils, statewide organizations, the regulated community and other interested parties, including small businesses and local governments.

### **Rural Area Flexibility Analysis**

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

This rule will apply Statewide, to all 44 rural counties and 71 additional rural towns. All entities subject to the regulations, including those in rural areas, will be affected.

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

No substantive reporting, recordkeeping, compliance requirements, or professional services will be imposed on local governments by this rule making. This program requires various reports, work plans and citizen participation activities to be conducted and documented. These requirements are generally consistent with or less than existing statutory, regulatory or programmatic requirements under the newly enacted Brownfield Cleanup Program.

#### 3. Costs:

No local mandates will be created by this rule, and no different or additional costs will be imposed because the businesses are in a rural area.

#### 4. Minimizing Adverse Impact:

It is the New York State Department of Environmental Conservation's (Department) belief that the proposed regulations will not cause a significant economic burden to the rural areas. The proposed rule making does not place any additional burdens on rural areas, create new mandatory programs, expand existing regulatory programs or increase the universe of regulatory requirements applicable to rural areas. The Department has determined that there is a positive impact in that cleaned up areas will result from this remedial program.

#### 5. Rural Area Participation:

The Department has an ongoing statewide outreach program to regulated communities and interested parties including public and private interests in rural areas. These outreach efforts have included mailings to environmental groups, citizen advisory committees, environmental management councils, statewide organizations, the regulated community and other interested parties, including small businesses and local governments.

### **Job Impact Statement**

In accordance with Section 201-a.2(a) of the State Administrative Procedure Act (SAPA), a Job Impact Statement has not been prepared for this rule as it is not expected to create a substantial adverse impact on jobs and employment opportunities in New York. To the contrary, it is expected to create, as set forth below, a positive impact on employment opportunities.

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of sites. This rule making creates a new program to further these goals.

The New York State Department of Environmental Conservation (Department) has determined that the nature and purpose of the proposed regulation will have a positive impact on jobs and employment opportunities throughout the State. Projects under this program have not started;

therefore exact data regarding job creation and industry growth are unavailable.

Subpart 375-5 applies to a "person" who voluntarily participates in the Remediation Stipulation Program. This voluntary program encourages private entity involvement in the investigation and remediation of contaminated properties, resulting in jobs and a subsequent positive impact on the availability of local employment opportunities.

This rule making will result in the creation of temporary, and possible long term, employment during the property's investigation and site remediation and redevelopment. Depending on the redevelopment plans of particular sites, an increase of permanent jobs and secondary business activities will occur.

Therefore, the Department concludes that adoption of this regulatory proposal should not have a substantial adverse impact on jobs within New York State.

## REVISED RULE MAKING HEARING(S) SCHEDULED

### Environmental Remediation Programs

**I.D. No.** ENV-46-05-00010-RP

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

**Revised action:** Repeal of Part 375 and addition of new Part 375 to Title 6 NYCRR.

**Statutory authority:** L. 2003, ch. 1 as amd. by L. 2004, ch. 577; and Environmental Conservation Law, art. 27, titles 13 and 14; art. 56, title 5; art. 71, title 36

**Subject:** Environmental remediation programs.

**Purpose:** To revise, reorganize and restructure existing Part 375 to cover the requirements provided by, and provide for the implementation of, the 2003 and 2004 Superfund/Brownfield Acts.

**Public hearing(s) will be held at:** 1:00 p.m., Aug. 15, 2006 at Department of Environmental Conservation, 625 Broadway, Rm. 129, Albany, NY.

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

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

**Substance of revised rule:** This rule making is proposed by the New York State Department of Environmental Conservation (Department) to amend 6 NYCRR 375, the statewide regulations that implement the State Superfund Program, Article 27, Title 13 of the Environmental Conservation Law (ECL), and the Environmental Restoration Program, Article 56, Title 5 of the ECL. The revisions are aimed at incorporating recent statutory changes, clarifying and streamlining the current regulations and addressing issues raised by state and local agencies, the public, and project sponsors since the last regulatory update of Part 375 in 1996.

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of brownfield sites. This rule making ensures the continued protection of public health and the environment. It will also assure the most efficient utilization of public and private funding sources for the investigation and remediation of sites under such remedial programs and will ensure remediation efforts are completed as quickly as possible.

Specific to this rule making, the State administers the State Superfund Program (SSF), created in 1979; the Brownfield Cleanup Program (BCP), created in 2003; and the Environmental Restoration Program (ERP), created in 1996.

Chapter 1 of the Laws of 2003 added a new ECL Article 27 Title 14 (the BCP); made extensive amendments to existing ECL Article 27 Title 13 (the SSF) and to existing ECL Article 56 Title 5 (the ERP); and made other related amendments. As a result of these statutory changes, it is necessary and desirable to revise the Department's regulations to conform to Chapter 1. Additionally, it is also necessary and desirable to revise the Department's regulations, both to conform to previous legislation and to

make adjustments to conform to experience acquired, and in the interest of administrative efficiency.

Accordingly, the Department is:

1. Incorporating requirements of New York State's Chapter 1, Laws of 2003;

2. Revising/enhancing the Inactive Hazardous Waste Disposal Site Remedial Program and Environmental Restoration Program regulations to address necessary legal, technical, and policy developments, as well as to reflect our extensive experience in remediating sites, that have occurred since the last major revisions to Part 375 in 1992 and 1996, respectively;

3. Establishing regulations for the Brownfield Cleanup Program.

The Department's current regulations governing the SSF and ERP are contained in 6 NYCRR Part 375. Revising, reorganizing, and restructuring existing Part 375, including the provision of regulations for the BCP is necessitated to cover the requirements provided by, and to provide for the implementation of, the 2003 and 2004 statutory changes. These laws were enacted subsequent to the previous Part 375 rule making. Further, they will incorporate statutory changes that occurred after the current Part 375 was finalized and will improve the readability of the regulations and decrease confusion.

This action is not intended to mandate any specific remedial technology or approach. However, it will define the remedial process; and for the BCP, it will define the use-based soil cleanup objectives. The following outline highlights the reorganization of this Part.

**Subpart 375-1: GENERAL REMEDIAL PROGRAM REQUIREMENTS**

This rule identifies those requirements that are common to each of the remedial programs. Further, it incorporates the statutory changes since the previous Part 375 rule making, and makes adjustments to conform to experience acquired, and in the interest of administrative efficiency.

**Subpart 375-2: INACTIVE HAZARDOUS WASTE DISPOSAL SITE REMEDIAL PROGRAM**

This rule maintains, but reorganizes and restructures, much of the existing Part 375. These rule changes primarily conform to the recent statutory changes and provide for greater consistency with the other remedial programs.

**Subpart 375-3: BROWNFIELD CLEANUP PROGRAM (BCP)**

This rule is new and implements recent changes to the law, which create the BCP. There are no substantive requirements that are not required by statute.

**Subpart 375-4: ENVIRONMENTAL RESTORATION PROGRAM (ERP)**

This rule conforms the existing subpart 375-4 to recent changes in the law and provides for some modest changes to increase consistency between the remedial programs. This rule maintains, but reorganizes and restructures, much of the existing subpart 375-4.

**Subpart 375-6: REMEDIAL PROGRAM SOIL CLEANUP OBJECTIVES**

Subpart 375-6 contains soil cleanup objectives applicable to the remedial programs set forth in subparts 375-2 through 375-4. Additionally, it sets forth the procedures for development of soil cleanup objectives for compounds not included in the soil cleanup objective tables.

In summary, this rule making is proposed to incorporate the statutory changes since the previous Part 375 rule making, and make adjustments to conform to experience acquired. The revisions are intended to clarify and streamline the current regulations and to address issues raised by program stakeholders. This proposed rule making will facilitate the clean up and reuse of contaminated sites, thus stimulate economic revitalization, while ensuring the continued protection of public health and the environment.

**Revised rule compared with proposed rule:** Substantial revisions were made in Subparts 375-1.1(a), (b)(4), (5), (d); 375-1.2(a), (x), (ac), (af), (ag), (ak), (am), (an), (aq), (at), (au), (aw); 375-1.5(a)(1), (2), (b)(1), (2)(i), (3)(v), (vi), (5); 375-1.6(a); 375-1.8(a), (d), (d)(1), (e)(2), (f)(9)(ii)(a), (g), (h)(3)(v); 375-1.9(a), (c)(5), (d), (g); 375-1.10(a), (c), (h); 375-1.11(c)(1), (2)(v), (7), (d)(3), (e), (f); 375-2.1(a); 375-2.2(d), (e), (h), (j); 375-2.3(b); 375-2.5(a)(1), (b)(2)(iv), (7); 375-2.7(a)(3), (b)(6)(ii), (d)(2), (e)(4), (5), (f)(5)(ii)(b); 375-2.8(b), (b)(1), (c), (c)(3); 375-2.9(b); 375-2.10(f); 375-2.11(a)(1); 375-3.1; 375-3.2(e), (f), (g), (j); 375-3.3(a); 375-3.4(b)(4), (5), (6), (c), (d); 375-3.5(c), (c)(2), (3), (e), (f); 375-3.6; 375-3.7(b)(2); 375-3.8(b)(2), (3), (4), (d), (e), (f), (g)(1), (2), (h), (i); 375-3.9(a); 375-4.1; 375-4.2(f); 375-4.3(a), (d)(1)(iv); 375-4.4(c)(3); 375-4.5(b)(1)(ii), (6); 375-4.8(b), (c), (d), (e); 375-4.9(a) and 375-6 (new Subpart added).

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Robert W. Schick, P.E., Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7014,

website: <http://www.dec.state.ny.us/website/der/>, (518) 402-9662, e-mail: [rxschick@gw.dec.state.ny.us](mailto:rxschick@gw.dec.state.ny.us)

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

**Public comment will be received until:** August 25, 2006.

**Additional matter required by statute:** SEQR per ECL Title 8; Env. Review Board per ECL Title 5.

### Revised Regulatory Impact Statement

#### 1. Statutory Authority

Chapter 1 of the Laws of 2003, as amended by Chapter 577 of the Laws of 2004, added a new ECL Article 27 Title 14 (the Brownfield Cleanup Program); a new ECL Article 71 Title 36 (Environmental Easements); made extensive amendments to existing ECL Article 27 Title 13 (the State Superfund Program) and to existing ECL Article 56 Title 5 (the Environmental Restoration Program); and made other related amendments.

The Department's general authority to adopt any necessary, convenient or desirable rules to carry out the environmental policy of the State is provided by ECL Article 3 Title 3 Section 1(2), (a), (m); additionally, the Department's specific authority to adopt rules of procedure for adjudicatory proceedings is provided by SAPA § 301(3).

#### 2. Legislative Objective

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of brownfield sites. This rule making ensures the continued protection of public health and the environment. It will also assure the most efficient utilization of public and private funding sources for the investigation and remediation of sites under such remedial programs and will ensure remediation efforts are completed as quickly as possible.

Specific to this rule making, the State administers the State Superfund Program (SSF), created in 1979; the Brownfield Cleanup Program (BCP), created in 2003; and the Environmental Restoration Program (ERP), created in 1996.

The SSF, created in response to the Love Canal environmental disaster, identifies and characterizes suspected inactive hazardous waste disposal sites. Once identified, the program provides for the investigation and remediation of those inactive hazardous waste disposal sites that have consequential amounts of hazardous waste, which pose a significant threat to public health or the environment. Current Department regulations, Part 375-1, 375-2 and 375-3 govern cleanups under this program.

The BCP, successor to the Voluntary Cleanup Program, enhances private-sector remediation of brownfields and reduces development pressure on "greenfields." This program encourages a cooperative approach among the Department, current property owners, lenders, developers and prospective purchasers to investigate and/or remediate contaminated sites and return these sites to productive use. The BCP addresses the environmental, legal liability and financial barriers that often hinder the redevelopment and reuse of contaminated properties. This program provides brownfield investment incentives, including business and personal tax credits for remediation and development, real property taxes and environmental insurance tax credit.

The ERP was created as one (1) of seventeen (17) programs under the 1996 Clean Water/Clear Air Bond Act. It was amended to provide increased financial assistance and incentives to municipalities for investigation and cleanup at eligible brownfield sites as well as more favorable terms of participation. Under the ERP, New York State provides grants to municipalities for reimbursement of a portion (up to 90 percent on-site and 100 percent off-site) of eligible costs for site investigation and remediation. A municipal cost share is required. Remediation may include cleanup of contamination in environmental media, such as soil and groundwater, and may also include building demolition and asbestos removal for which reimbursement up to 50 percent of eligible costs is available. In addition, the ERP provides liability protection, including an indemnification for any claims and defense by New York State for claims made against the funding recipient. Current Part 375-4 governs the investigation and cleanup of projects under this program.

In 2003, the Legislature passed and the Governor signed into law historic legislation, which created the BCP, enhanced the ERP and refinanced and reformed the SSF. Again, in 2004, the Legislature passed, and the Governor enacted, laws affecting these three remedial programs. The goal of the 2003 and 2004 statutory changes was to refinance the State Superfund Program, and to create new and enhance existing programs to encourage private sector cleanups of contaminated properties known as

brownfields and to reduce development pressure on greenfields. By cleaning up abandoned, idled or underutilized brownfield sites and restoring these properties to productive use in the community, local economies across the State can be revitalized.

#### 3. Needs and Benefits

The Department's current regulations governing the SSF and ERP are contained in 6 NYCRR Part 375. Revising, reorganizing, and restructuring existing Part 375, including the provision of regulations for the BCP, is necessitated to cover the requirements provided by, and to provide for the implementation of, the 2003 and 2004 Superfund/Brownfield Acts. These laws were enacted subsequent to the previous Part 375 rule making. Further, they will improve the readability of the regulations and decrease confusion. These regulations are needed to provide for the orderly and efficient administration of the SSF, BCP and ERP, including the oversight and implementation of remedial programs; provision of grants; granting of liability protections; and the certificates of completion.

Additionally, the regulations will facilitate disbursement of monies to municipalities and the providing of tax credits to private parties; all of which will enhance the environment and public health by ridding the environment of undesirable contaminants and promoting the use of previously contaminated properties.

The major needs and benefits result from the following:

a. Subpart 375-1 is the compilation of common information for subsequent subparts of 375 including a description of the general purpose, applicability, construction and abbreviations, and definitions, permit exemptions, institutional controls, environmental easements, annual certifications and citizen participation, to ensure orderly and efficient administration of ECL 27-13 (State Superfund Program), ECL 27-14 (Brownfield Cleanup Program), ECL 52-3 (Hazardous Waste Site Remediation Projects), ECL 56-5 (Environmental Restoration Program), and ECL 71-36 (Environmental Easements).

b. Subpart 375-2 reorganizes and restructures the existing Part 375 in order to enhance understanding and readability. Additionally, some provisions from other remedial programs (*e.g.*, certificate of completion, liability protections, etc.) have been added for consistency and to facilitate the reuse and redevelopment of remediated superfund sites.

c. Subpart 375-3 is a new regulation. This subpart implements the codified BCP. Some of the new provisions are specifically required to be included in this rule making (*e.g.*, cleanup tracks).

d. Subpart 375-4 reorganizes, restructures and revises the existing 375-4 to eliminate conflicts with the 2003 and 2004 laws (*e.g.*, the reimbursement amounts have been increased to 90 percent on-site and 100 percent off-site of eligible costs) as well as to increase consistency with the other remedial programs. This will enhance the understandability of the rule.

e. Subpart 375-6 contains soil cleanup objectives applicable to the remedial programs set forth in subparts 375-2 through 375-4. Additionally, it sets forth the procedures for development of soil cleanup objectives for compounds not included in the soil cleanup objective tables.

#### 4. Costs

This rule making implements the statutorily created remedial programs without substantive changes, and as such should not result in substantial additional costs to the regulated community or other branches of local or State government. Further, for purposes of the BCP and ERP, the programs are not regulatory programs, *i.e.*, participation in ECL Article 27 Title 14 and ECL Article 56 Title 5 is voluntary.

Costs to state government, local government, private regulated parties and the Department are discussed below.

##### a. Costs to regulated community

Promulgation of these regulations will have no fiscal effect on private regulated parties beyond what they already experience under existing law. Additionally, to the extent these parties elect to participate in the BCP, costs associated with the program are subject to various tax credits. These tax credits offset costs that the parties may otherwise be liable to incur to address the sites' contamination.

##### b. Costs to the department, State, and local government

The costs to the Department for implementing these proposed regulations should not be substantial. The proposed rule making requires no additional statutory authority, does not create new regulatory programs other than ones created by statute, does not expand existing regulatory programs and does not increase the universe of the regulated community beyond that which is already required by State statutes.

Further, promulgation of these regulations is required by statute and the proposal will allow the State to implement the program in a more efficient, more uniform manner. Also, there are no new costs for other State agencies.

Promulgation of these regulations will have no fiscal effect on local government beyond what they already experience under existing law. For example, if they are the owner of contaminated property or are otherwise responsible for the contamination at the site; or costs that may be related to the environmental easement provisions in the statute. Moreover, the cost to remediate municipally owned contaminated properties could be substantial. Under the ERP, the fiscal burden to municipalities associated with contaminated property investigation and remediation will be reduced by State assistance grants of up to 90 percent of the eligible on-site and 100 percent of the eligible off-site costs. The remaining portion can be covered through additional federal, State or non-responsible party private party monies.

#### 5. Local Government Mandates

No substantive recordkeeping, reporting, or other requirements will be imposed on local governments by this rule making, which are not otherwise created by statute. Also, participation in the BCP and ERP is voluntary, therefore, any obligations under the BCP or ERP are either required by statute or imposed as a result of a party's voluntary and considered action to apply for and participate in those programs.

#### 6. Paperwork

No substantive paperwork is proposed other than that which is either required by statute, or provided for consistency across the various remedial programs. Further, any additional paper requirements are minimal in the scope of the overall remedial programs covered by the rule making. For instance, application forms are required for the BCP and ERP, as required by statute. If a person wishes to apply for a brownfield cleanup project, an application must be completed and submitted with requested information/documentation. The regulations discuss the minimal amount of information needed to consider such an application. Reporting obligations are also included in the rule making, consistent with the BCP statutory requirements, as well as present practice in the SSF and the ERP (*e.g.*, final engineering reports, feasibility studies or alternatives analyses, etc.). These reporting obligations are consistent with the legislative intent for the Department to oversee remedial programs being implemented in New York State and do not cause any undue costs or burdens.

#### 7. Duplication

The proposed new regulations and amendments to existing regulations will not result in a duplication of State regulations.

#### 8. Alternatives

In order to implement the recent statutory changes, there are no other viable alternatives available other than to revise the existing Part 375.

Certain revisions included in this rule making action are mandatory. Specifically, i) ECL 27-1407(9)(f), as enacted by Laws of 2003 Chapter 1, Part A, Section 1, as amended by Laws of 2004 Chapter 577, Part A, Section 3 mandates a regulation defining the term "substantial interest" for purposes of the Department's discretionary authority to reject a request for participation in the Brownfield Cleanup Program if the person submitting is an individual or other person who had a "substantial interest" in an entity which engaged in conduct justifying denial of a permit; ii) ECL 27-1415(4), (6), as enacted by Laws of 2003 Chapter 1, Part A, Section 1, as amended by Laws of 2004 Chapter 577, Part A, Section 7, mandate a regulation, with input from the Department of Health, creating a multi-track approach to remediation, including tables of remedial action objectives for soil based on use; and iii) ECL 27-1323(4)(c)(2), as enacted by Laws of 2003 Chapter 1, Part E, Section 9, as amended by Laws of 2004 Chapter 577, Part E, Section 3, mandates a regulation establishing standards and practices for satisfying the inquiry requirement for purposes of the third-party affirmative defense.

Moreover, various regulatory provisions under Part 375 addressing the SSF or ERP are in conflict with current law, and need to be revised to reflect the 2003 and 2004 Acts.

Additionally, the centerpiece of Chapter 1 of the Laws of 2003 is the Brownfield Cleanup Program; the legislative purpose of the new ECL 27-1403 is to encourage voluntary remediation and redevelopment. It is to be anticipated that uncertainties inevitably associated with implementation of the statute alone would tend to be a disincentive to participation in the programs.

If the State were to follow the "no action" alternative, we would be disregarding a statutory mandate to develop regulations, would have outdated and inaccurate regulations, and would jeopardize the consistency and predictability that all stakeholders sought in advocating for the recent reforms; especially as it relates to soil cleanup numbers and cleanup tracks.

#### 9. Federal Standards

The proposed changes will make the State Superfund Program's remedy selection criteria consistent with federal standards, namely through the

inclusion of land use as a remedy selection criterion. Other than that aspect of this proposed rule making, there are no federal standards applicable to this rule making.

#### 10. Compliance Schedule

There is no need for a compliance schedule. The remedial programs covered by this rule making are currently being administered per existing regulations (SSF and ERP) or the statutory framework.

#### **Revised Regulatory Flexibility Analysis**

##### 1. Effect of Rule:

The proposed rule making does not place any additional burdens on small business or local governments, create new regulatory programs, expand existing regulatory programs or increase the universe of regulatory requirements applicable to the regulated community beyond that which is required by State statutes.

Accordingly, the number of small businesses and local governments affected by the rule making will not be more than those already affected by State statute or existing regulations.

Further, the BCP and ERP are voluntary programs, which means only those eligible entities that elect to participate will be affected. Under the ERP, grants are not available to any businesses or individuals. Therefore, the amended regulations to subpart 375-4, by definition, will have no direct impact on small businesses.

##### 2. Compliance Requirements:

There are no new substantive reporting or recordkeeping requirements for small businesses or local governments as a result of the proposed rule making. The proposed rule making either restructures existing regulations or implements recent statutory changes of the Environmental Conservation Law. The reporting obligations contained in the regulations are derived either from the Environmental Conservation Law, existing regulations or were included to provide consistency among the three remedial programs. These obligations are consistent with the legislative intent for the Department to oversee the implementation of remedial programs in New York State and will allow the Department to timely issue Certificates of Completion after the successful implementation of the remedial programs.

##### 3. Professional Services:

The quantity and types of service needed will remain close to the present level. The proposed rule making does not involve any major program changes, with regard to the scope of the program, which are not already mandated by State statute or existing regulation. The Department has, and will continue to, conduct a variety of education and outreach activities directed at a diverse audience, including small businesses. One such activity is making information available on the agency's web page to explain the recent changes in the law and to answer questions about the law, our remedial programs and the proposed regulations.

##### 4. Compliance Costs:

Small businesses and local governments should not incur any additional costs, neither initial capital costs nor annual compliance costs, to comply with the proposed rule making other than those incurred as a result of the statutory provisions. This is particularly true since the BCP and ERP are voluntary programs.

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

The proposed rule making, for the most part, clarifies existing requirements, makes revisions to existing regulations for programmatic consistency, or implements into regulation recent State statutory enactments and amendments. The proposed rule making causes no added economic burdens or requires any additional sophisticated environmental control technology, other than that which may be required by statute. Accordingly, implementation of these rules will be economically and technologically feasible for small businesses and local governments.

##### 6. Minimizing Adverse Impact:

It is the Department's belief that the proposed regulations will not cause a significant economic burden to the small business community or local governments. To the contrary, there is a positive impact in that the cleaned up areas will result in alternative uses. Further, there are financial incentives and liability protections that afford all parties, including small businesses and local governments, incentives to participate in the programs covered by the proposed rule making.

The proposed rule making is also intended to be less complex and easier to understand than existing regulations.

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

The Department has an ongoing statewide outreach program to regulated communities and interested parties including small businesses and local governments. This includes a Teleconference broadcast to 17 locations across the State, held in November and December 2003, public workshops which were held in different parts of the State in May and June

2004; over 25 seminars around the State; public meetings on the proposed rule making at 7 locations across the State in November and December 2005; public hearings on the proposed rule making at 3 locations across the State in March 2006; and opportunities through the Department's website to ask questions and/or obtain answers about the new regulations. These outreach efforts have included mailings to environmental groups, citizen advisory committees, environmental management councils, statewide organizations, regulated community and other interested parties, including small businesses and local governments.

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

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

This rule will apply Statewide, to all 44 rural counties and 71 additional rural towns. All entities subject to the regulations, including those in rural areas, will be affected.

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

No substantive reporting, recordkeeping, compliance requirements, or professional services, other than those imposed by State statute or existing regulations and programs, will be imposed on local governments by this rule making. Each program requires various reports, work plans and citizen participation activities to be conducted and documented. As noted, these requirements are derived from current requirements (statutory, regulatory or programmatic).

##### 3. Costs:

No local mandates will be created by this rule, and no different or additional costs will be imposed because the businesses are in a rural area. All mandates and costs are a result of statutory provisions and not this rule making. Additionally, costs associated with two of the remedial programs covered by this rule making, the BCP and ERP, are offset through tax credits (BCP) or substantial reimbursement through grants (ERP).

##### 4. Minimizing Adverse Impact:

It is the Department's belief that the proposed regulations will not cause a significant economic burden to the rural areas. The proposed rule making does not place any additional burdens on rural areas, create new regulatory programs, expand existing regulatory programs or increase the universe of regulatory requirements applicable to rural areas beyond that, which is required by State statutes. The Department has determined that there is a positive impact in that the cleaned up areas will result from these remedial programs.

##### 5. Rural Area Participation:

The Department has an ongoing statewide outreach program to regulated communities and interested parties including public and private interests in rural areas. This includes a Teleconference broadcast to 17 locations across the State, held in November and December 2003; public workshops which were held in different parts of the State in May and June 2004; over 25 seminars around the State; public meetings on the proposed rule making at 7 locations across the State in November and December 2005; public hearings on the proposed rule making at 3 locations across the State in March 2006; and opportunities through the Department's website to ask questions and/or obtain answers about the new regulations. These outreach efforts have included mailings to environmental groups, citizen advisory committees, environmental management councils, statewide organizations, regulated community and other interested parties, including those located in rural areas.

#### **Revised Job Impact Statement**

In accordance with Section 201-a(2)(a) of the State Administrative Procedures Act (SAPA), a Job Impact Statement has not been prepared for this rule as it is not expected to create a substantial adverse impact on jobs and employment opportunities in New York. To the contrary, it is expected to create, as set forth below, a positive impact on employment opportunities.

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. New York State offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of sites. Specific to this rule making, the State has the State Superfund Program (SSF), created in 1979; the Brownfield Cleanup Program (BCP), created in 2003; and the Environmental Restoration Program (ERP), created in 1996. This rule making consists of Part 375, which is subdivided into the following parts. The subparts of Part 375 are: subpart 375-1, containing general provisions relating to the implementation of the foregoing programs; subpart 375-2, addressing the SSF; subpart 375-3, addressing the BCP; subpart 375-4,

addressing the ERP, and subpart 375-6, containing the remedial program soil cleanup objectives.

The New York State Department of Environmental Conservation (Department) has determined that the nature and purpose of the proposed regulations will have a positive impact on jobs and employment opportunities throughout the State. Projects are in their initial stages, therefore exact data regarding job creation and industry growth are unavailable. However, presently over 200 applications have been submitted for the BCP and ERP, and new sites have been recognized as potential sites under the SSF.

Subpart 375-1 contains a description of the general purpose, applicability, construction, abbreviations and definitions discussed throughout 375. The purpose of this section is to ensure the orderly and efficient administration of ECL 27-1301 *et seq.* (SSF), ECL 27-1401 *et seq.* (BCP), ECL 52-0301 *et seq.* (Hazardous Waste Site Remediation Projects), ECL 56-0501 (ERP), and ECL 71-3601 *et seq.* (Environmental Easements). These general provisions have been determined to have no direct negative effect on the generation of employment opportunities.

Subpart 375-2 applies to the development and implementation of remedial programs aimed at the cleanup of inactive hazardous waste disposal sites and related matters through the SSF. The expansion of the statutory definition of hazardous waste to include hazardous substances has increased the number of eligible cleanup sites. This increase of recognized eligible sites translates to an increase of long term temporary employment due to remediation. Further, the increase in the universe of sites provides for additional business opportunities and redevelopment opportunities.

Moreover, this proposed regulation includes an explanation of the provisions for Technical Assistance Grants (TAGs), as provided in statute, which are available for eligible community based not-for-profit organizations. TAGs provide community based not-for-profit organizations, otherwise unable to participate in the remediation projects due to cost and lack of technical expertise in the investigation phase, funding to cover the technical aspects required during the investigation phase.

These increased employment, business, redevelopment and TAG opportunities have been determined to have a positive impact on job creation.

Subpart 375-3 applies to a "person" who voluntarily participates in the BCP. Currently, the Department has received almost 200 applications for the BCP. This voluntary program encourages private entity involvement in the investigation and remediation of contaminated properties, resulting in jobs and a subsequent positive impact on the availability of local employment opportunities.

The statute provides for tax credits for parties who perform remedial activities under the BCP. While this rule making does not deal with the tax provisions themselves (the Department of Taxation and Finance will address these issues), this rule making does provide for the programmatic requirements in order to obtain the certificate of completion, which is needed to avail oneself of tax credits. The tax credits will offset costs associated with real property taxes, site preparation, property improvements, on-site groundwater cleanup costs, and environmental insurance premiums. The tax credits will start to accrue upon signing of the Brownfield Cleanup Agreement and become effective in the tax year beginning April 1, 2005. The real property tax credit is based upon a jobs formula and requires a minimum of 25 full time employees. Tax credits for businesses not only attract new business but also retain existing business. Subpart 375-3 will positively impact jobs and employment opportunities.

Subpart 375-4 applies to municipalities that voluntarily participate in the ERP. Through this program, the State provides grants to municipalities to assist in investigating and remediating contaminated properties, which will result in increased employment. Potential redevelopment will also create additional employment. The ERP will have a positive impact on job creation, much like the BCP.

Subpart 375-6 contains soil cleanup objectives applicable to the remedial programs set forth in subparts 375-2 through 375-4, which, as stated above, will have a positive impact on employment and redevelopment opportunities. Additionally, subpart 375-6 sets forth the procedures for development of soil cleanup objectives for compounds not included in the soil cleanup objective tables.

Part 375 generally will result in the creation of temporary, possible long term, employment during the property's investigation, site remediation and redevelopment. Depending on the redevelopment plans of particular sites, an increase of permanent jobs and secondary business activities will occur.

Therefore, the Department concludes that adoption of these regulatory proposals should not have a substantial adverse impact on jobs within New York State.

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

New York State, in furtherance of its commitment to environmental protection and economic revitalization and growth in the State, has created an array of programs and resources to help clean up and reuse contaminated sites. The New York State Department of Environmental Conservation (Department) offers programs that provide for financial assistance, as well as technical assistance and liability protection, for the investigation, remediation and redevelopment of brownfield sites. Specific to this rule making, the State has the Inactive Hazardous Waste Disposal Site Remedial Program (commonly known as the State Superfund Program (SSF)), created in 1979; the Brownfield Cleanup Program (BCP), created in 2003; and the Environmental Restoration Program (ERP), created in 1996.

The Department issued a draft revised 6 NYCRR Part 375, the regulation that has implemented the SSF and the ERP. Revised Part 375 also will now include the regulation to implement the BCP. The draft regulation and supporting documentation was available for a public comment period of 120 days at repositories and on the Department website.

The Department drafted the regulation in response to historic legislation signed into law by Governor Pataki in October 2003, and amended in 2004. That law refinanced and reformed the SSF, enhanced the ERP, and created the BCP. The Department has been administering and implementing the new and amended programs since the legislation's passage. These remedial programs provide for the investigation and remediation of contaminated sites throughout New York State by volunteers, municipalities and the parties responsible for the contamination. The programs approach these cleanups in a common manner, with some unique aspects for each program.

That regulation is proposed to incorporate the statutory changes since the previous Part 375 rule making, and make adjustments to conform to experience acquired. The revisions are intended to clarify and streamline the current regulations and to address issues raised by program stakeholders. This proposed rule will facilitate the cleanup and reuse of contaminated sites which will stimulate economic revitalization, while ensuring the continued protection of public health and the environment.

The Department formally proposed 6 NYCRR Part 375 on November 16, 2005. The following public availability sessions were held on the proposed rule:

- November 29, 2005 - Radisson Hotel, 200 Genesee Street, Utica;
- November 30, 2005 - Syracuse Genesee Grande Hotel, 1060 East Genesee St., Syracuse;
- December 1, 2005 - Adams Mark Hotel, 120 Church Street, Buffalo;
- December 5, 2005 - U.S. Customs House, One Bowling Green, New York City;
- December 6, 2005 - SUNY Farmingdale, 2315 Route 110, Farmingdale;
- December 7, 2005 - Yonkers Public Library, 1 Larkin Center, Yonkers; and
- December 13, 2005 - NYSDEC, 625 Broadway, Albany.

Additionally, the Department conducted 3 hearings as follows:

- March 6, 2006 - CUNY Graduate Center, 365 5th Avenue, New York City;
- March 9, 2006 - Monroe Community College, 1000 E. Henrietta Road, Rochester; and
- March 15, 2006 - NYSDEC, 625 Broadway, Albany.

The Department received written comments through March 27, 2006. The comments and responses are presented by topic in six parts, which parallel the subparts generally:

- Part A – Comment on Part 375 Generally;
- Part B – Comments on Part 375-1 (provisions applicable to all subparts);
- Part C – Comments on Part 375-2 (State Superfund Program);
- Part D – Comments on Part 375-3 (Brownfield Cleanup Program);
- Part E – Comments on Part 375-4 (Environmental Restoration Program); and
- Part F – Comments on Matters Outside Part 375.

This summary highlights the central issues raised by commenters. For additional detail, the full text of the Response to Comments should be consulted.

#### PART A: COMMENTS ON PART 375 GENERALLY

COMMENT: What is the affect of this rule on the Petroleum Spill Program and the Voluntary Cleanup Program (VCP)?

RESPONSE: The proposed rule does not apply to the Spills program or the VCP, these sites are not affected by this rule. While the VCP program is no longer accepting new applications, sites currently in the VCP continue to implement their remedial programs under existing guidance. Cur-

rent regulations and/or guidance for these programs remain unchanged and will continue to be applicable.

COMMENT: Many comments were received calling for a program to replace the administrative voluntary cleanup program for sites not eligible for the BCP or which desired a less structured program.

RESPONSE: The Department agrees and has created the Remediation Stipulation Program patterned after the concept of stipulations currently in use in the petroleum spill program. The Remediation Stipulation Program, a new Subpart 5 to this rule, is the subject of a separate, ongoing rule making.

COMMENT: The applicability of the Soil Cleanup Objectives (SCOs) to the other remedial programs (SSF, ERP, VCP, petroleum spill program) and Solid Waste programs was questioned.

RESPONSE: The Department proposes to apply the SCOs to all programs covered by this rule; provided, however, that the manner in which the SCOs apply is different depending on the program. A new subpart (Subpart 375-6) has been incorporated into this rule making which includes the SCO Tables previously included in Subpart 3 and which provides detail on the application and use of the SCO tables.

PART B: COMMENTS ON SUBPART 375-1 (provisions applicable to all subparts)

COMMENT: Parties should not be obligated to address contamination coming on the site from off-site sources.

RESPONSE: The Department agrees and has revised the proposed rule relative to this requirement.

COMMENT: The remedial programs need to incorporate more citizen participation.

RESPONSE: The Department has incorporated additional language from the existing regulation and the statute and has clarified that the 1988 guidance document that was rescinded did not change our commitment to citizen participation – it was simply outdated.

COMMENT: The regulation needs to strengthen the institutional and engineering controls language.

RESPONSE: The Department has added additional language and detailed our commitment to viable and reliable institutional and engineering controls that endure the test of time.

PART C: COMMENTS ON SUBPART 375-2 (State Superfund Program)

COMMENT: The goal of the SSF program should not be pre-disposal.

RESPONSE: The proposed remedial goal is taken from the current goal, and the Department does not intend to change the revised rule.

COMMENT: Land use should not be considered in the SSF and ERP.

RESPONSE: The Department disagrees and has not changed the proposed rule. Land use is only considered when pre-disposal conditions are not achievable in the SSF. The ERP is consistent with the BCP in considering land use, and applies a similar approach.

COMMENT: The Department lacks the authority to require various remedial components from the BCP in the SSF; and, if included in the SSF, such remedial components should be limited to addressing significant threats.

RESPONSE: The Department's authority is clear and the Department does not intend to change this approach. These practices have been employed in remedial programs conducted pursuant to the SSF for the past quarter century. This rule merely memorializes long-standing requirements and practices.

PART D: COMMENTS ON SUBPART 375-3 (Brownfield Cleanup Program)

COMMENT: The statutory preference for permanence has been lost.

RESPONSE: The proposed rule does not weaken the preference for permanence set forth in ECL 27-1403. In fact, the rule reiterates the preference verbatim: "a remedial program that achieves a permanent cleanup of a contaminated site, including the restoration of groundwater to its classified use, is to be preferred over a remedial program that does not do so".

COMMENT: BCP eligibility issues were commented on extensively. Requests to incorporate the current guidance, not to incorporate the current guidance, and to incorporate new factors (socio-economic, affordable housing, urban centers) were received. Additionally, there were requests to omit the "on-site" source requirement and define or delete the historic fill reference.

RESPONSE: The Department reiterates that this rule provides a framework for the consideration of eligibility. Further, that the Department's Eligibility Guidance is appropriate and should be consulted.

COMMENT: That the 15' limitation for soil remediation in Track 2 is not permitted by statute.

RESPONSE: The Department disagrees. This provides a practical approach to soil remediation and is fully protective of public health and the environment. The response to comments details the rationale.

COMMENT: The Department has weakened Track 4 cleanups by allowing the consideration of site background in the evaluation.

RESPONSE: The Department intends to carry this approach forward considering site background is consistent with our remedial approaches over decades, not inconsistent with the statute, and consistent with both State and federal guidance and approaches.

COMMENT: Excluding farms and having a separate column for the protection of ecological resources in Track 1 (unrestricted) is inconsistent with the ECL.

RESPONSE: The Department has revised Track 1 SCOs to include the farm pathway in the development of the unrestricted use (Track 1) SCOs and has also modified the unrestricted use SCO Table to include only one column of SCOs, representing the lowest SCO for all calculated concerns [Protection of Public Health (PPH), Protection of Groundwater (PGW) or Protection of Ecological Resources (PER)]. The unrestricted Table will now have only one SCO column.

COMMENT: Providing SCOs for Restricted Residential in Track 2 is inconsistent with the ECL.

RESPONSE: The Department intends to carry the restricted residential scenario forward, and has modified the restricted use SCO Table to provide for a second residential scenario in Track 2 (representing the former Track 1 PPH SCOs). This new use of a site is identified as "residential use" and provides a category of use which will allow single family home development, with only limited restrictions, only allowing restrictions on the use of the property for farming and groundwater use. The Restricted use Table will now have six SCO columns.

COMMENT: The Department is not protecting groundwater according to its classification given the separate protection of groundwater (PGW) SCOs; and given the application of generic assumptions (*i.e.*, attenuation, depth of groundwater, type of soils). While other commenters argued that the obligations to address groundwater exceed current and statutory approaches/authorizations.

RESPONSE: The Department intends to carry the proposed approach forward. Subpart 6 has been added which includes a more detailed explanation of the use of the PGW SCO to better reflect the protective and practical nature of this approach.

COMMENT: The Department is not protecting ecological resources given the separate protection of ecological resources (PER) SCOs. Conversely, others argued that the PER SCOs as drafted, will be overly protective.

RESPONSE: The Department intends to carry this approach forward. Subpart 6 has been added which includes a more detailed explanation of when the PER SCOs will apply, as well as the use of the PER SCO to better reflect the protective and practical nature of this approach.

COMMENT: The Department has failed to adequately consider "indoor air," while other comments argued we inappropriately are considering "indoor air."

RESPONSE: The Department discussed indoor air in the Technical Support Document and concluded that the science and models are not sufficiently developed or predictive to justify incorporating this pathway directly into the SCOs. Rather, the Department will require an evaluation of soil vapor and the potential for vapor intrusion as part of the remedial program for every site consistent with Division of Environmental Remediation and NYS Department of Health guidance. The Department has revised the regulation to further support the need to evaluate this on a site-by-site basis.

COMMENT: The Departments failed to consider mixtures, additivity and synergistic affects as required by law.

RESPONSE: The Department has added a discussion in the Technical Support Document which details the consideration of mixtures, additivity and synergistic affects. However, the Department has not changed its approach.

COMMENT: The Department fails to adequately consider adjacent residential properties.

RESPONSE: The SCOs, except for commercial and industrial, do not account for residential uses on-site – which by extension would be protective of adjacent residential uses. However, the Department discussed in the Technical Support Document, and in the regulation, that such adjacent uses need to be considered on a site-by-site basis in the selection of a remedy. This approach was adopted given the significant variability between sites.

COMMENT: The Department fails to adequately consider surface water.

RESPONSE: The SCOs were not adjusted to account for this consideration. However, the Department has added a discussion in the proposed rule, clearly requiring that this media be considered as part of the overall remedy. This approach was adopted given the significant variability between sites.

COMMENT: The Department has not adequately protected sensitive populations, including children.

RESPONSE: SCOs for the protection of human health for all land use categories were calculated based on the behaviors and characteristics of children. The Technical Support Document and the response to comments details the exposure scenarios employed.

COMMENT: The SCOs were developed using outdated information.

RESPONSE: The authoritative bodies may change from time to time; however, the ones used are those currently accepted and relied upon. The Department does not intend to change the SCOs based upon this comment.

PART E: COMMENTS ON SUBPART 375-4 (Environmental Restoration Program)

COMMENT: The ERP should not be use based, rather it should follow the SSF pre-disposal goal.

RESPONSE: The Department disagrees. The proposed goal is not inconsistent with the statute and is protective of public health and the environment.

PART F: COMMENTS ON MATTERS OUTSIDE PART 375

The Department reviewed comments received on several matters that do not pertain directly to the Part 375 rule making (*i.e.*, Brownfield Opportunity Areas, Tax Credits). Responses to these comments are included in this section.

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## Environmental Facilities Corporation

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

#### New York State Drinking Water Revolving Fund (DWSRF) Program

**I.D. No.** EFC-28-06-00008-P

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

**Proposed action:** This is a consensus rule making to amend Part 2604 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 1284(5)

**Subject:** New York State Drinking Water Revolving Fund (DWSRF) Program.

**Purpose:** To conform the DWSRF regulations to current practices and to certain changes in the Clean Water State Revolving Fund regulations which were recently amended. The proposed rule revises the definition of "corpus allocations" to refer to the applicable Public Health Law section, and allow EFC to use other security or funds to reduce financing costs to borrowers under the DWSRF program. The proposed rule also simplifies the definition of "interest rate subsidy" across the program. The proposed rule clarifies that the definition of loans also includes bonds purchased with moneys from the DWSRF. The proposed rule also raises the maximum project cost for projects eligible for grant and reduced interest rate loans from \$10 million to \$14 million. The word "grant" has also been added to the definition of "hardship assistance" to make it clear to prospective DWSRF recipients that grants are available under the DWSRF program.

**Substance of proposed rule (Full text is not posted on a State website):** The proposed rule seeks amendments to the New York State Drinking Water Revolving Fund (DWSRF). The DWSRF provides financial assistance to eligible recipients throughout New York State for the planning, design and construction of drinking water facilities. The DWSRF is co-administered by the New York State Environmental Facilities Corporation (EFC) and the New York State Department of Health (DOH). The pro-

posed rule revises the definition of “corpus allocation” to refer to the applicable Public Health Law section, and allow EFC to use other security or funds to reduce financing costs to borrowers under the DWSRF program. The proposed rule also simplifies the definition of “interest rate subsidy” across the program. The proposed rule clarifies that the definition of loans also includes bonds purchased with moneys from the DWSRF. The proposed rule also raises the maximum project cost for projects eligible for grant and reduced interest rate loans from \$10 million to \$14 million. The word “grant” has also been added to the definition of “hardship assistance” to make it clear to prospective DWSRF recipients that grants are available under the DWSRF program. EFC has determined that this is a consensus rule making under State Administrative Procedure Act Section 202(1)(b)(i) and, therefore, no person is likely to object to the rule as written. A summary of these express terms is as follows:

- 1) Section 2604.1 sets forth the purpose, scope and applicability of the regulations in connection with the DWSRF program.
- 2) Section 2604.2 sets forth defined terms in 21 NYCRR Part 2604.
- 3) Section 2604.3 states that EFC shall not provide DWSRF financial assistance to a recipient unless and until DOH has certified in writing to EFC that the project to be financed is an eligible project.
- 4) Section 2604.4 establishes certain standards applicable to direct loans. It provides that EFC may make a long-term or short-term direct loan at an interest rate of no more than two-thirds of the market rate of interest for eligible projects.
- 5) Section 2604.5 establishes certain standards applicable to eligible projects seeking hardship assistance under the DWSRF.
- 6) Section 2604.6 establishes certain standards for those cases where EFC provides DWSRF assistance in the form of a loan funded from the proceeds of bonds or notes of EFC where a corpus allocation needs to be determined.
- 7) Section 2604.7 establishes standards for providing DWSRF assistance for project planning costs.
- 8) Section 2604.8 states general project requirements applicable to all projects receiving financial assistance from the DWSRF.
- 9) Section 2604.9 sets forth the requirements for submission of a financial assistance application and conditions precedent to the execution of a Project Financing and Loan Agreement (PFLA).
- 10) Section 2604.10 establishes standards and requirements for disbursements of DWSRF assistance.
- 11) Section 2604.11 establishes remedies for the misapplication of DWSRF money or failure to comply with Federal or State laws or the terms of the PFLA.
- 12) Section 2604.12 is a severability provision.

**Text of proposed rule and any required statements and analyses may be obtained from:** James R. Levine, Environmental Facilities Corporation, 625 Broadway, Albany, NY 12207-2997, (518) 402-6969, e-mail: Levine@nysefc.org

**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** This rule, which seeks to amend the provisions of the New York State Drinking Water Revolving Fund (DWSRF) set forth in 21 NYCRR Part 2604, is proposed as a consensus rule making, pursuant to the expectation that no person is likely to object to its adoption. The proposed rule makes technical changes or is otherwise non-controversial under State Administrative Procedure Act Section 102(11). The proposed amendments to the regulations are technical in that they seek to conform the DWSRF regulations to current practices and to certain changes in the Clean Water State Revolving Fund regulations which were recently amended. The proposed regulations revise the definition of “corpus allocation” to refer to the applicable Public Health Law section, and allow EFC to use other security or funds to reduce financing costs to borrowers under the DWSRF. The proposed rule also simplifies the definition of “interest rate subsidy” across the program. The proposed rule clarifies that the definition of loans also includes bonds purchased with moneys from the DWSRF. This conforms the regulations to the financing options currently provided to prospective DWSRF applicants. The proposed regulations also raise the eligibility threshold for DWSRF projects seeking hardship assistance in the form of a grant or a reduced interest rate loan from \$10 million to \$14 million in maximum project costs in order to account for the effects of inflation.

The amendments are non-controversial. The increased maximum project cost eligibility provision will not engender controversy because this change accounts for the effects of inflation – a change which will be unanimously endorsed by the residents of New York State. The amend-

ments also add the word “grant” to the definition of “hardship assistance” which will make it clearer to prospective DWSRF applicants that grants are an available form of assistance under the DWSRF program. This change serves a valuable public function by allowing the public to be better informed as to the types of DWSRF hardship assistance available. The amendments conform the regulations to EFC’s current practice. As such, EFC has determined that no one is likely to object to the rule as written.

**Job Impact Statement**

This rule will have a positive, rather than a substantial adverse impact on jobs and employment opportunities. The proposed regulations raise the eligibility threshold for DWSRF projects seeking hardship assistance in the form of a grant or a reduced interest rate loan from \$10 million to \$14 million in maximum project costs in order to account for the effects of inflation. This will result in more DWSRF projects throughout the state being built due to the availability of low cost financing under the program. This will result in increased jobs and employment opportunities for engineers, accountants, financial advisors and attorneys involved in the planning, design, construction and financing of environmental infrastructure projects which receive DWSRF funding. The addition of the word “grant” within the definition of “hardship assistance”, a broader definition of “corpus allocation”, a simplified definition of “interest rate subsidy” and the inclusion of bonds purchased from recipients with moneys in the DWSRF as an additional financing option in the proposed regulations will also have a positive impact because the changes allow for greater flexibility in providing DWSRF eligible recipients with DWSRF funding options.

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## Department of Health

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### EMERGENCY RULE MAKING

**NYS AP-DRG Patient Classification System**

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

**Filing No.** 792

**Filing date:** June 27, 2006

**Effective date:** June 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 86-1.62 and 86-1.63 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-c(3)

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

**Specific reasons underlying the finding of necessity:** The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). This is required by Section 2807-c(3) of the Public Health Law, which states, “The Commissioner shall establish as a basis for case classification for case based rates of payment the same system of diagnosis-related groups for classification of hospital discharges as established for purposes of reimbursement of inpatient hospital service pursuant to Title XVIII of the Federal Social Security Act (Medicare) in effect on the first day of July in the year preceding the rate period.” Additionally, such amendments modify existing DRGs and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2006 hospital Medicaid and like payor inpatient rates. The amendments provide payors of inpatient hospital services with the new values used to determine the correct case based payment for each DRG for each hospital so hospital claims can be submitted and paid in a timely manner. Additionally, the Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health use and services. Such requirements warrant adoption of these amendments as soon as practicable.

**Subject:** NYS AP-DRGs, service intensity weights and group average arithmetic inlier lengths of stay.

**Purpose:** To update the NYS AP-DRG patient classification system to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and modify existing and add new DRGs to more accurately reflect the pattern of health resource use.

**Substance of emergency rule:** 86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

#### 86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system.

The changes in the DRG classification system described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-20-06-00002-P, Issue of May 17, 2006. The emergency rule will expire August 25, 2006.

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

#### Regulatory Impact Statement

##### Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2) and 2807(3) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c (3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG.

##### Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

##### Needs and Benefits:

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs)

and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2006 hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Additionally, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

##### Costs:

##### Costs to State Government:

The proposed regulations do not impact the cost base upon which payments are made. Therefore, costs to the State are not expected to markedly change as a result of these amendments.

##### Costs of Local Government:

No increase in costs to local governments is anticipated as a result of these amendments.

##### Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

##### Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

##### Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

##### Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

##### Duplication:

These regulations do not duplicate existing State and Federal regulations.

##### Alternatives:

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to new medical technologies. No other significant alternatives were considered.

##### Federal Standards:

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

##### Compliance Schedule:

The proposed rule establishes rates of payment as of January 1, 2006; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Mr. William R. Johnson  
New York State Department of Health  
Office of Regulatory Reform  
Corning Tower Building, Room 2415  
Empire State Plaza  
Albany, New York 12237  
(518) 473-7488  
(518) 486-4834 (FAX)  
REGSQNA@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

#### Regulatory Flexibility Analysis

Effect on Small Business and Local Governments

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

**Compliance Requirements**

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of this rule.

**Professional Services**

No new or additional professional services are required in order to comply with the proposed amendments.

**Economic and Technological Feasibility**

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS), and add new, delete or redefine existing DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications.

**Compliance Costs**

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no anticipated increases or decreases in hospitals' revenues in the aggregate. Revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

**Minimizing Adverse Impact**

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b(1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

**Small Business and Local Government Participation**

Local governments and small businesses were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 17, 2005 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas**

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

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

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements**

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

**Professional Services**

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

**Compliance Costs**

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

**Minimizing Adverse Impact**

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

**Opportunity for Rural Area Participation**

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 17, 2005, meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations update the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weights and length of stay standards for each DRG. This classification system, which has been in effect since 1988 in New York State, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. Since this is merely an update, the proposed regulations have no implications for job opportunities.

**EMERGENCY  
RULE MAKING**

**Payment for FQHC Psychotherapy and Offsite Services**

**I.D. No.** HLT-28-06-00021-E

**Filing No.** 791

**Filing date:** June 27, 2006

**Effective date:** June 27, 2006

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

**Action taken:** Amendment of section 86-4.9 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201.1(v)

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

**Specific reasons underlying the finding of necessity:** The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimburse-

ment for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

**Subject:** Payment for FQHC psychotherapy and offsite services.

**Purpose:** To permit psychotherapy by certified social workers as a billable service under certain circumstances.

**Text of emergency rule:** Section 86-4.9 is amended to read as follows:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in paragraph (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services with the exception of clinical social services in FQHC clinics as defined in paragraph (g) of this section, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g) For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(h) Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.

(i) Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.

(1) FQHC offsite services must:

(i) consist of services normally rendered at the FQHC site.

(ii) be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.

(iii) be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.

(iv) be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.

(v) not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.

(vi) not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.

(2) Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 14, 1006.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act and 1905(a)(2) of the Social Security Act require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

- Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.
- Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.
- Payment will be made on the basis of a FQHC group rate.
- Payment will only be made for services that occur in FQHCs.

Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.
- Services must be rendered by a physician, physician assistant, mid-wife or nurse practitioner and reimbursed at the FQHC offsite professional rate.
- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

**Needs and Benefits:**

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

**Costs:**

Costs for the Implementation of, and Continuing Compliance with this Regulation to Regulated Entity:

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services. These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Cost Estimates			Offsite Visits
	Downstate	Upstate	Statewide Average	
Offsite Visits				
Subsequent Hospital Care	\$62.73	\$55.19	\$58.96	\$1,117,212
Psychotherapy Services				Group Therapy
Group Psychotherapy	\$34.86	\$30.81	\$32.84	\$6,222,733
2004 FQHC Visit Volume	1,894,864			
Volume Increase Assumptions				Total
Group Therapy Increase = 10%				\$7,339,945
Increase 2004 FQHC Volume				
Off-site Visit Increase = 1%				
Increase Over 2004 FQHC Volume				

**Cost to the Department of Health:**

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

**Local Government Mandates:**

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

**Paperwork:**

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

**Duplication:**

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

**Alternatives:**

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

**Federal Standards:**

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

**Compliance Schedule:**

The proposed amendment will become effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

**Effect on Small Businesses and Local Governments:**

No impact on small businesses or local governments is expected.

**Compliance Requirements:**

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Professional Services:**

No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department's (SED) new standards for social worker licensure.

**Compliance Costs:**

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Economic and Technological Feasibility:**

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

**Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Small Business Participation:**

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**

This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:**

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

**Compliance Costs:**

There are no direct costs associated with compliance.

**Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Rural Area Participation:**

The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and associations represent social workers and clinic providers from across the State, including rural areas.

**Job Impact Statement**

**Nature of Impact:**

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

**Categories and Numbers Affected:**

There are almost 1000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

**Regions of Adverse Impact:**

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

**Minimizing Adverse Impact:**

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

**Self-Employment Opportunities:**

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

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

**Personal Care Services Program**

**I.D. No.** HLT-28-06-00020-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 505.14 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 363-a(1)

**Subject:** Personal Care Services Program.

**Purpose:** To repeal provisions that are obsolete due to court decisions and/or expired statutory authority.

**Text of proposed rule:** Paragraph (1) of subdivision (a) of Section 505.14 is amended to read as follows:

(1) Personal care services means some or total assistance with personal hygiene, dressing and feeding [; and nutritional and environmental support functions [; and health-related tasks]. Such services must be essential to the maintenance of the patient's health and safety in his or her own home, as determined by the social services district in accordance with the regulations of the Department of Health; ordered by the attending physician; based on an assessment of the patient's needs and of the appropriateness and cost-effectiveness of services specified in subparagraph (b)(3)(v)] *iv* of this section; provided by a qualified person in accordance with a plan of care; and supervised by a registered professional nurse [; and, if required for more than 60 continuous days, be provided in accordance with the fiscal assessment procedures specified in subparagraph (b)(3)(vi) of this section].

Paragraph (6) of subdivision (a) of Section 505.14 is amended to read as follows:

(6) Personal care services shall include the following [three] *two* levels of care, and be provided in accordance with the following standards:

Clause (b) of Section 505.14(a)(6)(ii) is repealed and a new clause (b) is added to read as follows:

(b) *When continuous 24-hour care is indicated, additional requirements for the provision of services, as specified in clause (b)(4)(i)(c) of this section, must be met.*

Subparagraph (iii) of Section 505.14(a)(6) is repealed.

Paragraph (7) of subdivision (a) of Section 505.14 is amended to read as follows:

(7) Shared aide means a method of providing personal care services under which a social services district authorizes one or more nutritional and environmental support functions [,] *or* personal care functions [, or health-related tasks] for each personal care services recipient who resides with other personal care services recipients in a designated geographic area, such as in the same apartment building, and a personal care services provider completes the authorized functions [or health-related tasks] by making short visits to each such recipient.

Paragraph (2) of subdivision (b) of Section 505.14 is repealed and a new paragraph (2) is added to read as follows:

(2) *The initial authorization for personal care services must be based on the following:*

(i) *a physician's order that meets the requirements of subparagraph (3)(i) of this subdivision;*

(ii) *a social assessment that meets the requirements of subparagraph (3)(ii) of this subdivision;*

(iii) *a nursing assessment that meets the requirements of subparagraph (3)(iii) of this subdivision;*

(iv) *an assessment of the patient's appropriateness for hospice services and assessments of the appropriateness and cost-effectiveness of the services specified in subparagraph (3)(iv) of this subdivision; and*

(v) *such other factors as may be required by paragraph (4) of this subdivision.*

Subparagraph (iv) of Section 505.14(b)(3) is repealed.

Subparagraph (v) of Section 505.14(b)(3) is renumbered as subparagraph (iv), and subclauses (2) and (5) of such renumbered subparagraph (iv) are amended to read as follows:

(2) whether the patient can be served appropriately and more cost-effectively by personal care services provided under a [patient managed home care] *consumer directed personal assistance* program authorized in accordance with Section 365-f of the Social Services Law;

(5) whether a patient who requires, as a part of a routine plan of care, part-time or intermittent nursing or other therapeutic services [,

except for services expected to be required for fewer than 60 continuous days] or nursing services provided to a medically stable patient can be served appropriately and more cost-effectively through the provision of home health services in accordance with section 505.23 of the Part;

Subparagraph (vi) of Section 505.14(b)(3) is repealed.

Subparagraph (vii) of Section 505.14(b)(3) is renumbered as subparagraph (vi) of such paragraph.

Clause (a) of Section 505.14(b)(4)(i) is amended to read as follows:

(a) there is disagreement between physician's orders and the social, nursing [, fiscal] and other required assessments; or

Subparagraph (ii) of Section 505.14(b)(4) is amended to read as follows:

(ii) The local professional director, or designee, must review the physician's order and the social, nursing [, fiscal] and other required assessments in accordance with the standards for levels of services set forth in subdivision (a) of this section, and is responsible for the final determination of the level and amount of care to be provided. The final determination must be made within five working days of the request.

Subparagraph (iv) of Section 505.14(b)(5) is amended to read as follows:

(iv) When the patient needs Level I or Level II services immediately to protect his or her health or safety and the nursing assessment [and the fiscal assessment] cannot be completed in five business days, the social services district may authorize the services based on the physician's order and the social assessment, provided that:

(a) the nursing [and fiscal assessments are] *assessment is* obtained within 30 calendar days; and

(b) the recommendations of the nursing [and fiscal assessments] assessment are reviewed and changes are made in the authorization as required.

Clause (b) of Section 505.14(b)(5)(ix) is amended to read as follows:

(b) Reauthorization of Level II [and Level III] services shall include an evaluation of the services provided during the previous authorization period. The evaluation shall include a review of the nursing supervisory reports to assure that the patient's needs have been adequately met during the initial authorization period. [Based on the evaluation, reauthorization may exceed four hours per day or 28 hours per week.]

Clause (c) of Section 505.14(b)(5)(ix) is repealed.

Subparagraph (x) of Section 505.14(b)(5) is amended to read as follows:

(x) When an unexpected change in the patient's social circumstances, mental status or medical condition occurs which affect the type, amount [,] *or* frequency [or average monthly cost] of personal care services [and any home health services and private duty nursing services] being provided during the authorization period, the social services district is responsible for making necessary changes in the authorization on a timely basis [and conducting an initial or subsequent fiscal assessment, if the social services district reasonably expects that the patient will require personal care services for more than 60 continuous days and if the average monthly cost of the services the social services district reasonably expects the patient will require for 12 months will exceed 90 percent of the average monthly cost of RHCf services in the social services district,] in accordance with the following procedures:

Subparagraph (ii) of Section 505.14(c)(8) is amended to read as follows:

(ii) the provider agency, without subcontracting with other provider agencies, is able to provide personnel who meet the minimum criteria for providers of personal care services, as described in subdivision (d) of this section, and who have successfully completed a training program approved by the department [or the State Department of Health], as provided in subdivision (e) [and clause (a)(6)(iii)(e)] of this section [, respectively];

Subparagraphs (iii) through (vii) of Section 505.14(d)(2) are amended to read as follows:

(iii) a contractual agreement approved by the [State Department of Social Services] *Department* and the State Director of the Budget with a certified home health agency for the services of a person providing personal care services;

(iv) a contractual agreement approved by the [State Department of Social Services] and the State Director of the Budget with a voluntary homemaker-home health aide agency for the services of persons providing personal care services;

(v) a contractual agreement approved by the [State Department of Social Services] *Department* and the State Director of the Budget with a

proprietary agency for the service of persons providing personal care services;

(vi) a contractual agreement approved by the [State Department of Social Services] *Department* and the State Director of the Budget with an individual provider of service for the provision of Level I (environmental and nutritional) personal care functions only;

(vii) a contractual agreement approved by the [State Department of Social Services] *Department* and the State Director of the Budget with an individual provider of service when the service needs require more than Level I (environmental and nutritional) personal care functions only. Such providers of service may be used only under the following conditions:

(a) prior approval has been received by the local social services department from the [State Department of Social Services] *Department* to use individual providers in cases where the local social services department can justify that such providers of service are the only alternative available to the district. Such approval will be based upon the justification provided by the local department of social services and the agency's plan for the use of such individual providers of service;

(b) the local social services department shall review and evaluate the qualifications of each individual provider in accordance with procedures established by the local department of social services and approved by the [State Department of Social Services] *Department*;

Paragraph (1) of subdivision (e) of Section 505.14 is amended to read as follows:

(1) Each person performing personal care services other than household functions only shall be required as a condition of initial or continued participation in the provision of personal care services under this Part to participate successfully in a training program approved by the [State Department of Social Services] *Department*.

Paragraph (4) of subdivision (e) of Section 505.14 is amended to read as follows:

(4) The requirement for completion of a basic training program may be waived by the department if the person performing personal care services can demonstrate competency in the required areas of content included in the basic training as specified in clause (2)(i)(a) of this subdivision. Methods of evaluating competency shall be approved by the [State Department of Social Services] *Department* and shall meet the following requirements:

Paragraph (6) of subdivision (e) of Section 505.14 (e) is amended to read as follows:

(6) Each local social services department shall require that agencies with whom they contract for services submit to them a training program for providers of personal care services. This training program shall be submitted by the local social services department to the [State Department of Social Services] *Department* for approval. The [State Department of Social Services] *Department* shall notify the local social services department of its decision within 45 days of the plan's receipt by the department.

Paragraphs (8) and (9) of subdivision (e) of Section 505.14 are amended to read as follows:

(8) The local social services district shall develop a plan for monitoring the assignments of individuals providing personal care services to assure that individuals are in compliance with the training requirements. This plan shall be submitted by the local social services district to the [State Department of Social Services] *Department* for approval and shall include, as a minimum specific methods for monitoring each individual's compliance with the basic training, competency testing, and in-service requirements specified in this subdivision. Methods of monitoring may include: onsite reviews of employee personnel records; establishment of a formal reporting system on training activities; establishment of requirements for submittal of certificates or other documentation prior to each individual's assignment to a personal care service case; or any combination of these or other methods.

(9) When a provider agency is not in compliance with department requirements for training, or when the agency's training efforts do not comply with the approved plan for that agency, the [State Department of Social Services] *Department* shall withdraw the approval of that agency's training plan. No reimbursement shall be available to local social services districts, and no payments shall be made to provider agencies for services provided by individuals who are not trained in accordance with department requirements and the agency's approved training plan.

Paragraph (1) of subdivision (f) of Section 505.14 is amended to read as follows:

(1) All persons providing [Level I, II or III] personal care services are subject to administrative and nursing supervision.

Clause (a) of Section 505.14(f)(3)(iv) is amended to read as follows:

(a) orienting the person providing [Level I, II or III] personal care services to his or her responsibilities.

Items (i) and (ii) of Section 505.14(f)(3)(iv)(a)(1) are amended to read as follows:

(i) For all initial authorizations of [Level I, II or III] personal care services, [except Level III services involving a task or activity performed under special circumstances, as provided in clause (a)(6)(iii)(b) of this section] the nurse supervisor must conduct an orientation visit within seven calendar days after the person providing personal care services is assigned to the patient. [For all initial authorizations involving a Level III task or activity performed under special circumstances, the nurse supervisor must conduct an orientation visit the first day the person providing personal care is assigned to the patient.]

(ii) Scheduling of orientation visits for all initial authorizations of [Level I, II or III] personal care services [, except Level III services involving a task or activity performed under special circumstances,] should be based on the following four criteria:

Subclause (3) of Section 505.14(f)(3)(iv)(a) is repealed and new subclause (3) is added to read as follows:

(3) *The nurse supervisor is not required to conduct an orientation visit when:*

(i) *personal care services are reauthorized, the patient requires a continuation or resumption of services initially authorized and the patient's mental status, social circumstances and medical condition have not changed; or*

(ii) *the person providing personal care services is temporarily substituting for or replacing the person assigned to provide services; the patient's plan of care is current and available to the person providing personal care services; the patient is self directing, as defined in subparagraph (a)(4)(ii) of this section or, if non-self directing, has a self-directing individual or other agency willing to assume responsibility for making choices about the patient's activities of daily living, as provided in such subdivision; and the person providing personal care services has the documented training or experience to appropriately and safely perform the functions and tasks identified in the patient's plan of care.*

Subparagraph (vi) of Section 505.14(f)(3) is amended to read as follows:

(vi) The nurse who completes the nursing assessment, as specified in subparagraph (b)(3)(iii) of this section, must recommend the frequency of nursing supervisory visits for a [Level I, II or III] personal care services patient and must specify the recommended frequency in the patient's plan of care.

Clause (b) of Section 505.14(f)(3)(vi) is amended to read as follows:

(b) The nursing supervisor must make nursing supervisory visits at least every 90 days for a [Level I, II or III] personal care services patient except that:

Paragraph (1) of subdivision (g) of Section 505.14 is amended to read as follows:

(1) All patients receiving [Level I, II or III] personal care services must be provided with case management services according to this subdivision.

Subparagraph (iii) of Section 505.14(g)(3) is repealed.

Subparagraph (iv), (v) and (vi) of Section 505.14(g)(3) are renumbered as subparagraphs (iii), (iv) and (v), respectively.

Subparagraph (vii) of Section 505.14(g)(3) is repealed.

Subparagraph (viii) of Section 505.14(g)(3) is renumbered as subparagraph (vi) and amended to read as follows:

[(viii)] (vi) forwarding the physician's order; the social and nursing assessments; the assessments required by subparagraph (b)(3)(iv) of this section [; and the fiscal assessment, if required in accordance with subparagraph (b)(3)(v) of this section;] for an independent medical review according to subparagraph (b)(4)(i) of this section;

Subparagraphs (ix) through (xx) of Section 505.14(g)(3) are renumbered as subparagraph (vii) through (xviii), respectively.

Subparagraph (xxi) of Section 505.14(g)(3) is renumbered as subparagraph (xix) and amended to read as follows:

[(xxi)] (xix) informing the patient or the patient's representative of the procedures for addressing the situations specified in subparagraph [(xvii)] (xv) of this paragraph;

Subparagraphs (xxii) through (xxv) of Section 505.14 (g)(3) are renumbered as subparagraphs (xx) through (xxiii), respectively.

Subparagraph (ii) of Section 505.14(g)(4) is repealed.

Subparagraphs (iii) and (iv) of Section of 505.14(g)(4) are renumbered as subparagraphs (ii) and (iii), respectively.

Subparagraph (v) of Section 505.14(g)(4) is repealed.

Subparagraph (vi) of Section 505.14(g)(4) is renumbered as subparagraph (iv) and amended to read as follows:

[(vi)] (iv) for a patient whose case must be referred to the local professional director or designee in accordance with subparagraph (b)(4)(i) of this section, a record that the physician's order, the social and nursing assessments, and the assessments required by subparagraph [(b)(3)(v)] (b)(3)(iv) of this section [, and the fiscal assessment, if a fiscal assessment is required in accordance with subparagraph (b)(3)(vi) of this section,] were forwarded to the local professional director or designee;

Subparagraph (vii) of Section 505.14(g)(4) is renumbered as subparagraph (v) of such paragraph.

Subparagraphs (viii) and (ix) of Section 505.14(g)(4) are repealed.

Subparagraphs (x) through (xvii) of Section 505.14(g)(4) are renumbered as subparagraphs (vi) through (xiii), respectively.

**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.

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

#### Consensus Rule Making Determination

Statutory Authority:

Social Services Law ("SSL") Section 363-a(1) provides that the Department is the "single state agency" responsible for supervising the administration of the State's medical assistance ("Medicaid") plan. As such, the Department is responsible for adopting such regulations, not inconsistent with law, as may be necessary to implement SSL Title 11, Article 5, entitled "Medical Assistance for Needy Persons" [SSL Section 363-a(2)]. Section 201(1)(v) of the Public Health Law is in accord, providing that the Department, as the Medicaid "single state agency," shall adopt such regulations as may be necessary to implement the State's Medicaid plan.

Pursuant to SSL Section 365-a(2)(e), the State's Medicaid program includes personal care services.

Basis:

The proposed regulations repeal obsolete provisions of the Department's personal care services regulations at 18 NYCRR Section 505.14. The repealed provisions are obsolete due to expired statutory authority, court decisions or as otherwise set forth herein.

The proposed regulations repeal all references to fiscal assessments of personal care services applicants and recipients. These provisions have been obsolete since July 1, 1999, when the statutory authority for fiscal assessments expired. [SSL Section 367-k, added by L. 1991, c. 165, Section 23; amended L. 1992, c. 41, Sections 71 to 73; expired and deemed repealed pursuant to L. 1991, c. 165, Section 62(g), effective July 1, 1999].

The proposed regulations also repeal all references to the home care assessment instrument. These provisions are also obsolete due to expired statutory authority [SSL Section 367-o, added by L.1992, c.41 Section 78; expired and deemed repealed July 1, 1997, pursuant to L. 1992, c. 41 Section 165(w), as amended].

The proposed regulations repeal the "initial cap" regulation, 18 NYCRR Section 505.14(a)(6)(ii)(b). Until 1996, this regulation generally limited – to four hours per day, or 28 hours per week – the number of Level II personal care services hours that social services districts could authorize for initial applicants for personal care services recipients. This regulation has been invalid and obsolete since 1996, when a federal district court decision held that it violated federal Medicaid law. *Deluca v. Hammons*, 927 F. Supp. 132 (S.D.N.Y. 1996).

The proposed regulations also repeal all references to Level III personal care services. These provisions are obsolete. The Department has never implemented Level III services and social services districts have never authorized Level III services for Medicaid recipients.

Finally, the proposed regulations delete obsolete references to the former New York State Department of Social Services ("DSS"). Prior to October 1, 1996, the DSS was the single State Medicaid agency. Effective on such date, the New York State Department of Health assumed that responsibility. (L. 1996, c. 474, Sections 233 to 247) The DSS was renamed the Department of Family Assistance effective April 1, 1997. (L. 1997, c. 436, Section 122).

#### Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act since it is apparent, from the nature

and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations serve only to incorporate in Department regulation, policy and practice that was Court ordered and has been in effect since 1997.

## Housing Finance Agency

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Housing Finance Agency publishes a new notice of proposed rule making in the *NYS Register*.

#### Public Access to Information

I.D. No.	Proposed	Expiration Date
HFA-52-05-00002-P	December 28, 2005	June 26, 2006

## Insurance Department

### EMERGENCY RULE MAKING

#### Claims for Personal Injury Protection Benefits

**I.D. No.** INS-28-06-00003-E

**Filing No.** 779

**Filing date:** June 23, 2006

**Effective date:** June 23, 2006

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

**Action taken:** Amendment of sections 65-3.12 and 65-3.13 of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2601, 5106 and 5221; and Vehicle and Traffic Law, section 2407

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

**Specific reasons underlying the finding of necessity:** Section 11 of Chapter 452 of the Laws of 2005 amended Section 5106(b) and added a new subsection (d) to Section 5106 of the Insurance Law. These sections relate to the eligible insurer's liability to pay first party benefits. Section 11 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 first party benefits. It also enhances the current arbitration procedures to provide an expedited eligibility hearing option, when required, to designate an insurer responsible for processing the first party benefits. The amendment uses the terms "special expedited arbitration" and "applicant" when referring to the "expedited eligibility hearing" and "claimant".

Chapter 452 of the Laws of 2005 becomes effective on September 8, 2005 and it is essential that this amendment be promulgated on an emergency basis in order to have the procedures in place to implement the provisions in the law. The amendment provides the mechanism for informing applicants of the availability of the special expedited arbitration option.

For the reasons cited above, this amendment is being promulgated on an emergency basis for the preservation of the general welfare.

**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 emergency 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. *Once an insurer concludes that it was not the first insurer contacted to provide first party benefits it 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 refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

(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, *and the insurer to whom notice was not given first 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 refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

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 any 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 refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

(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 any 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 refuses to*

*process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

(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 any 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 refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

**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 September 20, 2006.

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

#### **Regulatory Impact Statement**

1. Statutory authority: 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 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, reimbursing filing fees whenever the applicants prevail and paying applicants' attorney fees. These additional cases will increase the insurers' and self insurers' share of costs from the American Arbitration Association. 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. There will also be paperwork associated with reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. 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.

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 affect.

#### **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 business.

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 reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. 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. 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, reimbursing filing fees whenever the appli-

cants prevail in whole or part and paying applicants their attorney fees. The additional cases will increase the self insured local government's costs from the American Arbitration Association. 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.

#### **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 reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. The insurers and self-insurers will also incur additional paperwork to comply with record retention requirements. 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). 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 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. The additional costs would include: the costs of defending cases, reimbursing filing fees whenever the applicants prevail and paying applicants' attorney fees. These additional cases will increase the insurers' and self insurers' share of costs from the American Arbitration Association. 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. This rule does not impose any greater burden on persons located in rural areas, and 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 party benefits.

## **EMERGENCY RULE MAKING**

#### **Arbitration**

**I.D. No.** INS-28-06-00004-E

**Filing No.** 780

**Filing date:** June 23, 2006

**Effective date:** June 23, 2006

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

**Action taken:** 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

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

**Specific reasons underlying the finding of necessity:** Section 11 of Chapter 452 of the Laws of 2005 amended Section 5106(b) and added a new subsection (d) to Section 5106 of the Insurance Law. These sections relate to the insurer's liability to pay first party benefits. Section 11 codifies the resolution process when multiple insurers may be responsible to the claimant for the processing of first party benefits. It also enhances the current arbitration procedures to provide an expedited eligibility hearing option, when required, to designate an insurer responsible for processing the first party benefits. The amendment uses the term "special expedited arbitration" and "applicant" when referring to the "expedited eligibility hearing" and "claimant".

Chapter 452 of the Laws of 2005 becomes effective on September 8, 2005 and it is essential that this amendment be promulgated on an emergency basis in order to have the procedures in place to implement the provisions in the law. The amendment provides the procedures for admin-

istration of the special expedited arbitration for disputes regarding the designation of an insurer for the processing of first party benefits. By making the insurers and applicants aware of these procedures, applicants will be able to utilize special expedited arbitration when there is a dispute between multiple eligible insurers over which carrier has primary responsibility for the payment of first party benefits.

For the reasons cited above, this amendment is being promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Arbitration.

**Purpose:** To provide procedures for administration of the special expedited arbitration for disputes regarding the designation of the insurer for first party benefits.

**Text of emergency 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.

[(3)] (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.

[(4)] (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.

[(5)] (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.

[(6)] (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.

[(7)] (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.

[(8)] (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.

**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 September 20, 2006.

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

#### **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 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, reimbursing filing fees whenever the applicants prevail and paying applicants' attorney fees. These additional cases will increase the insurers' and self insurers' share of costs from the American Arbitration Association. Health care providers that may be considered small businesses and that accept assignments should not experi-

ence 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. There will also be paperwork associated with reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. 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.

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 affect.

#### **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 business.

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 business.

Some local governments are self-insured for no-fault benefits. The Department has not been able to determine the number of local govern-

ments 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 reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. 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. 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, reimbursing filing fees whenever the applicants prevail in whole or part and paying applicants their attorney fees. The additional cases will increase the self insured local government's costs from the American Arbitration Association. 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 reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. The insurers and self-insurers will also incur additional paperwork to comply with record retention requirements. 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). 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 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. The additional costs would include: the costs of defending cases, reimbursing filing fees whenever the applicants prevail and paying applicants' attorney fees. These additional cases will increase the insurers' and self insurers' share of costs from the American Arbitration Association. 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. This rule does not impose any greater burden on persons located in rural areas, and 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.

### Consolidated 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 party benefits.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### Medical Assistance Payment for Outpatient Programs

**I.D. No.** OMH-28-06-00001-E

**Filing No.** June 21, 2006

**Filing date:** June 21, 2006

**Effective date:** 777

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

**Action taken:** Amendment of Part 588 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a)

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

**Specific reasons underlying the finding of necessity:** These amendments increase the Medicaid rate schedule associated with clinic treatment programs and day treatment programs serving children and makes certain other changes consistent with the enacted 2005-2006 State budget. These changes will avoid a reduction in services that would otherwise take place.

**Subject:** Medical assistance payment for outpatient programs.

**Purpose:** To increase the Medicaid rate schedule associated with certain clinic treatment and children's day treatment programs licensed under art. 31 of the Mental Hygiene Law.

**Text of emergency rule:** Part 588 of 14 NYCRR is amended as follows:

New subdivisions (e) and (f) are added to § 588.7 to read as follows:

(e) *The need for continuing day treatment benefits beyond 156 visits per benefit year shall be subject to the medical care utilization threshold requirements of 18 N.Y.C.R.R. Part 511, and shall be determined, in accordance with subdivision (f) of this section, no later than the 156th visit during the benefit year. Such determination shall include an estimate of the number of visits beyond 156 required for the recipient within the remaining benefit year. The need for continued continuing day treatment benefit beyond this estimated number of visits shall be determined at or prior to the provision of the estimated number of visits during the benefit year. The need for any additional revised estimates shall be determined accordingly.*

(f) *Determinations required in accordance with subdivision (e) of this section shall be:*

(1) *completed by the treating clinician;*

(2) *documented in the case record; and*

(3) *reviewable by the Office of Mental Health or its designated agent.*

Subdivision (a) of Section 588.13 is amended to read as follows:

(a) Reimbursement under the medical assistance program for outpatient programs licensed pursuant to Article 31 of the Mental Hygiene Law and Part 587 of this Title which serve adults with a diagnosis of mental illness and children with a diagnosis of emotional disturbance shall be in accordance with the following fee schedule. This section shall not apply to programs licensed by both the Office of Mental Health and the Department of Health.

(1) Reimbursement under the medical assistance program for clinic treatment programs operated by agencies which received State aid under article 41 of the Mental Hygiene Law, during the fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule. Such reimbursement shall be adjusted pursuant to [Section 579.7] subdivisions (i), (j) and (k) of this [Title] Section.

(i) For programs operated in Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, Putnam, Rockland and Westchester counties:

- Regular at least 30 minutes [\$66.00] \$71.94
- Brief at least 15 minutes [33.00] 35.97
- Group at least 60 minutes [23.10] 25.18
- Collateral at least 30 minutes [66.00] 71.94
- Group Collateral at least 60 minutes [23.10] 25.18
- Crisis at least 30 minutes [66.00] 71.94

(ii) For programs operated in Allegheny, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Tioga, Tompkins, Wayne, Wyoming and Yates counties:

- Regular at least 30 minutes [\$59.40] \$64.75
- Brief at least 15 minutes [29.70] 32.37
- Group at least 60 minutes [20.79] 22.66
- Collateral at least 30 minutes [59.40] 64.75
- Group Collateral at least 60 minutes [20.79] 22.66
- Crisis at least 30 minutes [59.40] 64.75

(iii) For programs operated in Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, St. Lawrence, Tioga, Albany, Columbia, Dutchess, Greene, Orange, Rensselaer, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren and Washington counties:

- Regular at least 30 minutes [\$58.30] \$63.55
- Brief at least 15 minutes [29.15] 31.77
- Group at least 60 minutes [20.41] 22.25
- Collateral at least 30 minutes [58.30] 63.55
- Group Collateral at least 60 minutes [20.41] 22.25
- Crisis at least 30 minutes [58.30] 63.55

(2) Reimbursement under the medical assistance program for clinic treatment programs operated by providers of services which did not receive State aid under article 41 of the Mental Hygiene Law during fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule unless a higher fee was approved by the commissioner in accordance with the appeal methodology under the previous reimbursement regulations.

- Regular at least 30 minutes [\$58.30] \$63.55
- Brief at least 15 minutes [29.15] 31.77
- Group at least 60 minutes [20.41] 22.25
- Collateral at least 30 minutes [58.30] 63.55
- Group Collateral at least 60 minutes [20.41] 22.25
- Crisis at least 30 minutes [58.30] 63.55

(3) *The minimum duration of a group or group collateral visit at a school-based clinic program shall consist of the duration of a scheduled class period at the school in which the program is based, or 60 minutes, whichever is less.*

Sub-paragraphs (4) and (5) of § 588.13(a) are renumbered sub-paragraphs (5) and (6) are amended to read as follows:

(4) Reimbursement under the medical assistance program for non-state operated continuing day treatment programs licensed pursuant to Article 31 of the Mental Hygiene Law and Part 587 of this Title shall be in accordance with the following fee schedule. Such reimbursement shall be adjusted pursuant to Part 579.7 of this Title.

(i) For programs operated in Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, Putnam, Rockland and Westchester counties:

(a) Regular, collateral, group collateral, and crisis visits shall be reimbursed on the basis of service hours. The reimbursement for any service hour shall be based upon the cumulative number of service hours provided in a calendar month to an individual recipient. When the service hours of any single visit include more than one rate the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. The rates of reimbursement are as follows:

- Service hour 1-50 \$13.20 per service hour
- Service hour 51-80 \$10.45 per service hour
- Service hour beyond 80 \$ 7.70 per service hour

(ii) For programs operated in Allegheny, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Tompkins, Wayne, Wyoming and Yates counties:

(a) Regular, collateral, group collateral, and crisis visits shall be reimbursed on the basis of service hours. The reimbursement for any service hour shall be based upon the cumulative number of service hours provided in a calendar month to an individual recipient. When service

hours of any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. The rates of reimbursement are as follows:

- Service hour 1-50 \$11.88 per service hour
- Service hour 51-80 \$10.45 per service hour
- Service hour beyond 80 \$ 7.70 per service hour

(iii) For programs operated in Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, St. Lawrence, Tioga, Albany, Columbia, Dutchess, Greene, Orange, Rensselaer, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren and Washington counties:

(a) Regular, collateral, group collateral, and crisis visits shall be reimbursed on the basis of service hours. The reimbursement for any service hour shall be based upon the cumulative number of service hours provided in a calendar month to an individual recipient. When the service hours for any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. The rates of reimbursement are as follows:

- Service hour 1-50 \$11.88 per service hour
- Service hour 51-80 \$10.45 per service hour
- Service hour beyond 80 \$ 7.70 per service hour

[(4)] (5) Reimbursement under the medical assistance program for day treatment programs serving children operated by agencies which received State aid under article 41 of the Mental Hygiene Law, during the fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule.

(i) For programs operated in Bronx, Kings, New York, Queens and Richmond counties:

- Full day at least 5 hours [\$66.00] \$70.01
- Half day at least 3 hours [33.00] 35.01
- Brief day at least 1 hour [22.00] 23.34
- Collateral at least 30 minutes [22.00] 23.34
- Home at least 30 minutes [66.00] 70.01
- Crisis at least 30 minutes [66.00] 70.01
- Preadmission - full day at least 5 hours [66.00] 70.01
- Preadmission - half day at least 3 hours [33.00] 35.01

(ii) For programs operated in other than Bronx, Kings, New York, Queens and Richmond counties:

- Full day at least 5 hours [\$63.80] 67.68
- Half day at least 3 hours [31.90] 33.84
- Brief day at least 1 hour [21.23] 22.52
- Collateral at least 30 minutes [21.23] 22.52
- Home at least 30 minutes [63.80] 67.68
- Crisis at least 30 minutes [63.80] 67.68
- Preadmission - full day at least 5 hours [63.80] 67.68
- Preadmission - half day at least 3 hours [31.90] 33.84

[(5)] (6) Reimbursement under the medical assistance program for day treatment programs serving children operated by agencies which did not receive State aid under article 41 of the Mental Hygiene Law, during the fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule unless a higher fee was approved by the commissioner in accordance with the appeal methodology under the previous reimbursement regulations.

- Full day at least 5 hours [\$63.80] \$67.68
- Half day at least 3 hours [31.90] 33.84
- Brief day at least 1 hour [21.23] 22.52
- Collateral at least 30 minutes [21.23] 22.52
- Home at least 30 minutes [63.80] 67.68
- Crisis at least 30 minutes [63.80] 67.68
- Preadmission - full day at least 5 hours [63.80] 67.68
- Preadmission - half day at least 3 hours [31.90] 33.84

[(6)] (7) Providers whose reimbursement under the medical assistance program for clinic, continuing day treatment, and/or day treatment has been supplemented in accordance with subdivision (g) of this section will have this additional reimbursement limited in total to an amount established by the Commissioner which shall be subject to the availability of appropriations in the Office of Mental Health's budget. Supplemental reimbursement received in excess of this threshold will be recovered in a succeeding year through the medical assistance recovery process authorized pursuant to Section 368-c of the Social Services Law.

Section 588.13 is amended by adding new subdivisions (i), (j), and (k) to read as follows:

(i) Clinic treatment programs for which an operating certificate has been issued shall receive an adjustment to the fee schedules set forth in paragraph (1) of subdivision (a) of this Section if they are enrolled in a continuous quality improvement initiative implemented by the Commissioner. In order to be enrolled in such continuous quality improvement initiative, the program shall execute an agreement with the Office of Mental Health under which the provider agrees to participate in such initiative, and undertake such quality improvement measures as shall be developed by the Commissioner.

(j) Any program eligible to receive supplemental medical assistance reimbursement pursuant to subdivision (i) of this Section, and which fails at any time to meet the requirements set forth in the agreement executed pursuant to such subdivision, shall have its continuous quality improvement adjustment suspended until such time as the program meets such requirements, as determined by the Commissioner.

(k) A clinic treatment program that has been approved by the Office of Mental Health to provide services to children and adolescents during evening and weekend hours shall receive a rate enhancement for regular or collateral clinic visits provided to recipients under the age of 18 years, when such services are provided during weekdays commencing 6 p.m. or later, or on a Saturday or Sunday, provided, however, that the enhanced rate shall only be paid for one visit provided for a recipient on any given day.

**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 September 18, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

#### **Regulatory Impact Statement**

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

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. Needs and benefits: These amendments increase the medicaid reimbursement associated with certain outpatient treatment programs consistent with the enacted 2005-2006 state budget. These changes will be targeted in such a way as to provide general fiscal relief to providers, as well as improve the quality and availability of services. They will also effectuate the provision of the 2005-2006 state budget that eliminates the exemption from medicaid utilization thresholds for continuing day treatment programs, and clarifies the minimum duration of a group or group collateral visit for a school-based clinic is the shorter of 60 minutes or the duration of a scheduled class period at the school.

4. Costs:

a) Costs of regulated parties: There are no costs to providers associated with these amendments.

b) Costs to State and Local government and the agency: Implementation of the children's day treatment initiatives has been budgeted to cost New York State \$200,000 annually, and appropriations for the state share of medicaid are included on page 273, line 20, of Chapter 54 of the Laws of 2005. Implementation of clinic fee initiatives has been budgeted to cost New York State \$6,000,000 annually, and appropriations for the state share of medicaid are included in the \$609,468,000 Aid to Localities Local Assistance Account 001, which is set forth on page 268, line 29 of Chapter 54 of the Laws of 2005. The costs to local governments, for the local share of medicaid, will be equal to the state costs listed above.

5. Local government mandates: Other than the required local share of medicaid, noted in Section 4, these regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected as inconsistent with statutory requirements of the enacted budget.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: These regulatory amendments will be effective upon their adoption, and shall be deemed to have been effective on and after April 1, 2005.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant economic impact on small businesses, or local governments. The rate increase associated with this rule is required by state statute, the enacted state budget for state fiscal year 2005-2006.

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

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. This rule impacts outpatient treatment program rates of reimbursement. The impact of the rate change will be to increase the medicaid reimbursement rates associated with outpatient programs in rural and non-rural areas. This will support the continued provision of these vital programs which serve children, adolescents and adults.

#### **Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves adjustments to financing mechanisms for existing outpatient treatment programs and will not have a substantial adverse impact on jobs and employment activities.

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## Office of Mental Retardation and Developmental Disabilities

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### EMERGENCY RULE MAKING

#### **Criminal History Record Checks**

**I.D. No.** MRD-28-06-00002-E

**Filing No.** 778

**Filing date:** June 23, 2006

**Effective date:** June 23, 2006

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

**Action taken:** 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) and 16.33; and Executive Law, section 845-b

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

**Specific reasons underlying the finding of necessity:** The regulations require fingerprinting and criminal history record checks for various individuals who provide services to people with developmental disabilities in the OMRDD system. The regulations are necessary to keep certain convicted criminals, including violent felons and sexual predators, out of positions that include regular and substantial contact with people with developmental disabilities. If regulations were not adopted as an emergency measure, convicted criminals could have unrestricted and unsupervised contact with consumers as new employees or volunteers or family care providers, which would endanger the health, safety and general welfare of people receiving services. Consumers could be unnecessarily victimized by people with criminal history records for the period of time between April 1, 2005 and the earliest date that regulations could be finalized using the regular regulatory process.

**Subject:** Requirements related to criminal history record checks.

**Purpose:** To promulgate regulations necessary to implement ch. 575 of the L. of 2004, concerning criminal history record checks. The regulations

require that agencies, sponsoring agencies and providers of services request history record checks for specified employees, volunteers, family care providers and parties who are to reside in a family care home.

**Substance of emergency rule:** ● Effective June 23, 2006. Replaces similar emergency regulations that were effective April 1, June 30, September 28, December 27, 2005, and March 27, 2006.

● No changes were made compared to the March 27 emergency regulations.

● 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 "approved providers" if they contract with a 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.

● 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 person has already had a check through OMRDD or OMH, providers may be able to use an expedited process without additional fingerprinting if OMRDD criteria are met.

● 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, which can assist in further decision-making by the agency (such as evaluating whether the applicant provided false information about convictions or pending charges). Approved 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.

**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 September 20, 2006.

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

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

a. 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, 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. 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 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 "approved 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 "approved 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 "approved providers." Providers of services that contract with agencies to provide transportation services or staff are required to apply to OMRDD to become "approved 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 39,305 requests for a criminal history record check on an annual basis. The total annual cost is estimated to be approximately \$6,950,000. This cost includes the costs of the processing fee charged by the Division of Criminal Justice Services, which is \$75 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 \$5,500,000 of the total costs will be subject to a 50 percent Federal share, and approximately \$1,452,000 will be borne entirely by the State. The new requirements will therefore result in the expenditure of approximately \$2,750,000 in Federal funds, and approximately \$4,202,000 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 nor 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 and March 27, 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 "approved 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 of 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](http://www.omr.state.ny.us).

OMRDD distributed similar emergency regulations in April, June, September and December of 2005 and March 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**

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.

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

**Fee Settings**

**I.D. No.** MRD-28-06-00019-P

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

**Proposed action:** Amendment of sections 671.7, 679.6 and 690.7 of Title 14 NYCRR.

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

**Subject:** Fee setting in home and community-based (HCBS) waiver community residential habilitation services, clinic treatment facilities, and day treatment facilities for persons with developmental disabilities.

**Purpose:** To establish cost of living (COLA) adjustments and trend factors applicable to these facilities and services, effective Oct. 1, 2006.

**Public hearing(s) will be held at:** 10:30 a.m., Aug. 28, 2006 at OMRDD, 44 Holland Ave., 3rd Fl., Counsel’s Office Conference Rm., Albany, NY\*; 10:30 a.m., Aug. 29, 2006 at OMRDD, 44 Holland Ave., 4th Fl., Conference Rm. B, Albany, NY

\* Please call OMRDD at (518) 474-1830 no later than Monday, August 21, 2006 to indicate that you intend to participate.

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

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

**Text of proposed rule:** ° Paragraph 671.7(a)(1) - Add new subparagraphs (xxiv) and (xxv):

(xxiv) *Effective October 1, 2006, community residences are eligible for a cost of living adjustment (COLA) to be included in their final net fee. This add-on is a 2.8 percent increase to the operating portion of allowed reimbursement and is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the COLA is expended.*

(xxv) *Facilities initially certified on or after April 1, 2007, shall be deemed to have met the requirements for an approved COLA add-on described in subparagraph (xxiv) of this paragraph, and a corresponding factor shall be included in the final net fee.*

° Subparagraph 679.6(j)(1)(v) - Add new clauses (n)-(t):

(n) *Effective October 1, 2006, facilities are eligible for a cost of living adjustment (COLA) of 2.8 percent to the operating portion of allowed reimbursement. This adjustment is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the COLA is expended. For facilities which did not participate in the increases described in clauses (d) and (e) of this subparagraph, and which did participate in the increases in clause (j) of this paragraph, the fee with the COLA is:*

	Schedule A	Schedule B
(1) Full clinic visit	\$ 56.07	\$ 91.92
(2) Comprehensive diagnostic and evaluation visit	\$ 168.20	\$ 275.77
(3) Group clinic visit (per person)	\$ 18.69	\$ 30.64

(o) *Effective October 1, 2006, facilities are eligible for a cost of living adjustment (COLA) of 2.8 percent on the operating portion of allowed reimbursement. This adjustment is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the COLA is expended. For facilities which participated*

in the increases described in clause (d) of this subparagraph but did not participate in the increases described in clause (e) of this subparagraph, and which did participate in the increases in clause (j) of this paragraph, the fee with the COLA is:

	Schedule A	Schedule B
(1) Full clinic visit	\$ 57.12	\$ 92.98
(2) Comprehensive diagnostic and evaluation visit	\$ 171.37	\$ 278.95
(3) Group clinic visit (per person)	\$ 19.04	\$ 30.99

(p) Effective October 1, 2006, facilities are eligible for a cost of living adjustment (COLA) of 2.8 percent on the operating portion of allowed reimbursement. This adjustment is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the COLA is expended. For facilities which participated in both of the increases described in clauses (d) and (e) of this subparagraph, and which did participate in the increases in clause (j) of this paragraph, the fee with the COLA is:

	Schedule A	Schedule B
(1) Full clinic visit	\$ 57.44	\$ 93.30
(2) Comprehensive diagnostic and evaluation visit	\$ 172.33	\$ 279.91
(3) Group clinic visit (per person)	\$ 19.15	\$ 31.10

(q) Effective October 1, 2006, facilities are eligible for a cost of living adjustment (COLA) of 2.8 percent on the operating portion of allowed reimbursement. This adjustment is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the COLA is expended. For facilities which did not participate in the increases described in clauses (d) and (e) of this subparagraph, and which did not participate in the increases in clause (j) of this paragraph, the fee with the COLA is:

	Schedule A	Schedule B
(1) Full clinic visit	\$ 54.51	\$ 89.37
(2) Comprehensive diagnostic and evaluation visit	\$ 163.54	\$ 268.12
(3) Group clinic visit (per person)	\$ 18.17	\$ 29.79

(r) Effective October 1, 2006, facilities are eligible for a cost of living adjustment (COLA) of 2.8 percent on the operating portion of allowed reimbursement. This adjustment is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the COLA is expended. For facilities which participated in the increases described in clause (d) of this subparagraph but did not participate in the increases described in clause (e) of this subparagraph, and which did not participate in the increases in clause (j) of this paragraph, the fee with the COLA is:

	Schedule A	Schedule B
(1) Full clinic visit	\$ 55.54	\$ 90.40
(2) Comprehensive diagnostic and evaluation visit	\$ 166.62	\$ 271.21
(3) Group clinic visit (per person)	\$ 18.51	\$ 30.13

(s) Effective October 1, 2006, facilities are eligible for a cost of living adjustment (COLA) of 2.8 percent on the operating portion of allowed reimbursement. This adjustment is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this adjustment, the provider is required to submit to OMRDD a Letter of Attestation, signed by the

Executive Director and President or equivalent of the governing body, which details how the COLA is expended. For facilities which participated in both of the increases described in clauses (d) and (e) of this subparagraph, and which did not participate in the increases in clause (j) of this paragraph, the fee with the COLA is:

	Schedule A	Schedule B
(1) Full clinic visit	\$ 55.85	\$ 90.71
(2) Comprehensive diagnostic and evaluation visit	\$ 167.55	\$ 272.13
(3) Group clinic visit (per person)	\$ 18.61	\$ 30.23

(t) Facilities initially certified on or after April 1, 2007 shall be deemed to have met the requirements for the Letter of Attestation required in clauses (n)-(s) of this subparagraph.

Note: Current clause (v)(n) is renumbered as (u).

° Paragraph 690.7(d)(6) - Subparagraph (iii) is amended as follows: (iii) Regions I, II, and III.

(a) Effective January 1, 2006, facilities in all three regions may be eligible to receive a variable trend factor for employee health care benefits.

Note: Current clauses (iii)(a) through (g) are renumbered as subclauses (a)(1) through (a)(7), and current subclauses (c)(1)-(2) and (d)(1)-(2) are renumbered as items (a)(3)(i)-(ii) and (a)(4)(i)-(ii). A new clause (iii)(b) is added to read as follows:

(b) Effective October 1, 2006, facilities are eligible for a trend factor of 2.8 percent to the operating portion of the fee. This trend factor is for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. In order to receive this trend factor, the provider is required to submit to OMRDD a Letter of Attestation, signed by the Executive Director and President or equivalent of the governing body, which details how the trend factor monies are expended. Facilities initially certified on or after April 1, 2007 shall be deemed to have met the requirements for the Letter of Attestation required by this clause.

**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:** five days after the last scheduled public hearing.

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

**Regulatory Impact Statement**

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OMRDD.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law. The enactment of these proposed amendments will ensure the funding to voluntary agency providers of the following services:

a. Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7).

b. Clinic Treatment Facilities (amendments to section 679.6).

c. Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7).

This funding is necessary in order to enable voluntary agencies that operate the above facilities to maintain services in the areas of care, treatment, rehabilitation, and training of persons with mental retardation and developmental disabilities.

3. Needs and benefits: From the time of their inception and implementation in New York State, OMRDD has provided funding for the above referenced facilities and services. Such funding is necessary to assure the continued delivery of services to persons with developmental disabilities. The proposed amendments are concerned with establishing the respective cost of living (COLA) adjustments and trend factors applicable to these facilities and services, effective October 1, 2006.

4. Costs:

a. Costs to the Agency and to the State and its local governments. The aggregate cost of the application of the COLAs and trend factors contained in the proposed amendments is approximately \$4.8 million. This represents approximately \$2.4 million in State funds and \$2.4 million in federal funds.

Pursuant to Social Services Law sections 365 and 368-a, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Further, for the current State fiscal year, there are no costs to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

The specific impacts by facility or program type are as follows:

◦ For Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). Currently, OMRDD funds voluntary operated community residence facilities which are providing services to approximately 900 persons as of May 2006. The amendments implement a COLA of 2.8 percent on the operating portion of allowed reimbursement for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. OMRDD anticipates that all eligible providers will avail themselves of this increase. The estimated total cost for implementation of this COLA on an aggregate annualized basis is approximately \$1.5 million for the period beginning October 1, 2006. This represents approximately \$750,000 in State share and \$750,000 in federal funds. There are no costs to local governments as a result of the amendments.

◦ For Clinic Treatment Facilities (amendments to section 679.6). As of May, 2006 there were 48 such facilities certified by OMRDD to provide Clinic Treatment services. The proposed amendments establish fee schedules which include a COLA of 2.8 percent on the operating portion of allowed reimbursement for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. OMRDD anticipates that all eligible providers will avail themselves of this increase. The estimated total cost for implementation of this COLA on an aggregate annualized basis is approximately \$1.4 million for the period beginning October 1, 2006. This represents approximately \$700,000 in State share and \$700,000 in federal funds. There are no costs to local governments as a result of the amendments.

◦ For Day Treatment facilities serving persons with developmental disabilities (amendments to section 690.7). As of May 2006, there were 112 sites certified by OMRDD to provide day treatment services statewide. The proposed amendments implement a trend factor of 2.8 percent on the operating portion of allowed reimbursement for expenditures related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. OMRDD anticipates that all eligible providers will avail themselves of this increase. The aggregate cost of this trend factor for day treatment facilities is approximately \$1.9 million. This represents approximately \$950,000 in State share and \$950,000 in federal government funding. There will be no additional costs to local governments as a result of these trend factor amendments.

In all instances, these estimated cost impacts have been derived by applying the COLA and trend factor provisions of the proposed amendments within the context of the respective reimbursement methodologies to the providers of services certified or authorized as of May, 2006.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are necessary to maintain funding of the above cited facilities at revised levels of reimbursement in effect as of October 1, 2006. Since the amendments provide for COLA and trend factor increases to the providers of the various facilities and services, the amendments will result in increased funding to provider agencies.

There will be some minor administrative effort involved in the submission of the required Letters of Attestation signed by the Executive Director and President or equivalent of the governing body of eligible facilities. Consistent with the requirements of Chapter 57 of the Laws of 2006, these letters are to attest that the COLA is or was used for the purposes of promoting recruitment and retention of staff or respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. The letters must detail how the COLA or trend factor is to be or was expended.

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: As discussed above, there will be some paperwork associated with the preparation and forwarding of the required Letters of Attestation signed by the Executive Director and President or equivalent of the governing body.

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

8. Alternatives: The current course of action as embodied in these emergency/proposed amendments reflects what OMRDD believes to be a fiscally prudent, cost-effective reimbursement of the facilities and developmental disabilities services in question. No alternatives to these COLAs and trend factors were considered.

9. Federal standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The proposed regulations have been filed to achieve an October 1, 2006 effective date consistent with time frames set forth in the State Administrative Procedure Act (SAPA). The proposed amendments are concerned with revising the various reimbursement methodologies to implement COLA and trend factor adjustments for facilities and providers of services to persons with developmental disabilities. The amendments do not impose any significant new requirements with which regulated parties are expected to comply since similar Letter of Attestation or Board Resolution requirements have, in the past, been associated with such COLA and trend factor provisions. There will be some compliance effort associated with the preparation and forwarding of the previously discussed Letters of Attestation, but this will be more than offset by the benefits.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: These regulatory amendments will apply to voluntary not-for-profit corporations that operate the following facilities and/or provide the following services for persons with developmental disabilities in New York State:

◦ Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). Currently, OMRDD funds voluntary operated community residence facilities which serve approximately 900 persons as of May 2006.

◦ Clinic Treatment facilities serving persons with developmental disabilities in New York State (amendments to section 679.6). As of May, 2006, there were 48 such facilities certified by OMRDD to provide services pursuant to Part 679.

◦ Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7). As of May 2006, there were 112 voluntary-operated sites certified by OMRDD to provide day treatment services statewide.

The OMRDD has determined, through a review of the certified cost reports, that most of the organizations which operate the above referenced 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 continue to provide appropriate funding for small business providers of developmental disabilities services. Further, OMRDD expects that the amendments will not cause undue

hardship to small business providers due to increased costs for additional services or increased compliance requirements. In fact, the provisions contained in the amendments will provide for increased reimbursements to small business providers of services, due to the application of the COLAs and trend factor established by the amendments. Specific impacts of the increased funding are set forth in the accompanying Regulatory Impact Statement as costs to State and Federal government.

The increased funding in the COLA and trend factor adjustments must be used by providers for purposes related to the promotion of recruitment and retention of staff or to respond to other critical non-personal service costs during the period of April 1, 2006 through March 31, 2007. As discussed in the Regulatory Impact Statement, there will be some minor administrative effort involved in the submission of the required Letters of Attestation signed by the Executive Director and President or equivalent of the governing body of eligible facilities. These requirements will be kept to a minimum, consistent with Chapter 57 of the Laws of 2006.

Pursuant to Social Services Law sections 365 and 368-a, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Further, for the current State fiscal year, there are no costs to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

2. Compliance requirements: There are no significant additional compliance requirements for small businesses or local governments resulting from the implementation of these amendments. For facilities which are eligible for the COLA or trend factor adjustments contained in the amendments, there will be some minor administrative effort involved in the submission of the required Letters of Attestation signed by the Executive Director and President or equivalent of the governing body eligible facilities. Chapter 57 of the Laws of 2006 requires that these letters are to attest that the COLA or trend factor is used for the purposes of promoting recruitment and retention of staff or to respond to other critical non-personal service costs for the period of April 1, 2006 through March 31, 2007. The letters must detail how the COLA or trend factor is to be or was expended. These requirements will be kept to a minimum, consistent with Chapter 57 of the Laws of 2006.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The amendments do not alter this requirement. Therefore, 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 additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these amendments.

5. Economic and technological feasibility: The amendments are concerned with rate/fee setting in the affected facilities or services, and only revise the reimbursement methodologies which describe the ways in which OMRDD calculates the appropriate reimbursement of such facilities and services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: The purpose of these amendments is to allow OMRDD to reimburse providers of the referenced facilities and services at revised levels in effect as of October 1, 2006. Specifically, these amendments establish trend factor and COLA adjustments of 2.8 percent on the operating portion of allowed reimbursement of the referenced facilities or services for the period beginning April 1, 2006 through March 31, 2007. The trend factor and COLA provisions will have positive impacts resulting from increased reimbursements to the providers.

The amendments will have no fiscal impact on local governments due to the implementation of the 2.8 percent COLA and trend factor provisions. Pursuant to Social Services Law sections 365 and 368-a, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Further, there are no costs to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

7. Small business and local government participation: To the extent that information regarding provider reimbursement has been available, OMRDD has shared and discussed such information with provider representatives.

In addition, OMRDD is required to hold public hearings only on those amendments to section 671.7 as they may affect reimbursement of the room and board components of the community residence fees. OMRDD has scheduled public hearings to be held on August 28, 2006 and August 29, 2006 according to the information provided in the Notice of Proposed Rule Making.

**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. The amendments are concerned with providing necessary revisions to the reimbursement methodologies which OMRDD uses in determining the reimbursement of the affected developmental disabilities services or facilities. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

As discussed in the Regulatory Impact Statement, there will be some minor administrative effort involved in the submission of the required Letters of Attestation signed by the Executive Director and President or equivalent of the governing body of eligible facilities. These requirements will be kept to a minimum, consistent with Chapter 57 of the Laws of 2006, and will be greatly offset by the benefits of the additional funding resulting from the trend factor and COLA increases.

**Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with providing revisions to the reimbursement methodologies which OMRDD uses in determining the appropriate reimbursement of the affected developmental disabilities services or facilities. The amendments are primarily concerned with establishing trend factor and cost of living adjustments (COLA) to be applied within the context of reimbursement methodologies for the affected program and services. They will not have any adverse impacts. Consistent with Chapter 57 of the Laws of 2006, the trend factor and COLA increases are primarily intended to be used for expenditures related to the promotion of recruitment and retention of staff. Therefore, it is reasonable to expect that the amendments will have a positive impact on jobs or employment opportunities in New York State.

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## New York State Mortgage Agency

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**NOTICE OF EXPIRATION**

The following notice has expired and cannot be reconsidered unless the Mortgage Finance Agency publishes a new notice of proposed rule making in the *NYS Register*.

**Public Access to Information**

I.D. No.	Proposed	Expiration Date
MTG-52-05-00003-P	December 28, 2005	June 26, 2006

## Municipal Bond Bank Agency

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Municipal Bond Bank Agency publishes a new notice of proposed rule making in the NYS Register.

**December 28, 2005**

I.D. No.	Proposed	Expiration Date
MBB-52-05-00026-P	December 28, 2005	June 26, 2006

## Ogdensburg Bridge and Port Authority

### NOTICE OF ADOPTION

#### Increase in Bridge Toll Structure

**I.D. No.** OBA-19-06-00003-A

**Filing No.** 794

**Filing date:** June 27, 2006

**Effective date:** July 12, 2006

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

**Action taken:** Amendment of Part 5704 of Title 21 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, section 1630, subsection 4; and Public Authorities Law, section 703-b

**Subject:** Increase in bridge toll structure.

**Purpose:** To substantially increase bridge toll revenue in order to become financially self-supporting. Our bridge operations are losing money and will continue to lose money, resulting in deficit.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OBA-19-06-00003-P, Issue of May 10, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Wade A. Davis, Executive Director, Ogdensburg Bridge and Port Authority, One Bridge Plaza, Ogdensburg, NY 13669, (315) 393-4080, e-mail: wadavis@ogdensport.com

**Assessment of Public Comment**

The agency received no public comment.

## Power Authority of the State of New York

### NOTICE OF ADOPTION

#### Rates for the Sale of Power and Energy

**I.D. No.** PAS-18-06-00006-A

**Filing date:** June 27, 2006

**Effective date:** First full billing period following the date of filing this notice

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

**Action taken:** Revision in rates for Delaware County Electric Cooperative.

**Statutory authority:** Public Authorities Law, section 1005(5)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To maintain the system's fiscal integrity. This increase in rates if not the result of a Power Authority rate increase to the cooperative.

**Text or summary was published** in the notice of proposed rule making, I.D. No. PAS-18-06-00006-P, Issue of May 3, 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 B. Cahill, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8036, e-mail: anne.cahill@nypa.gov

**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.

## Public Service Commission

### NOTICE OF ADOPTION

#### Transfer of Certain Parcels of Vacant Real Property by Central Hudson Gas & Electric Corporation

**I.D. No.** PSC-33-05-00007-A

**Filing date:** June 23, 2006

**Effective date:** June 23, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order approving Central Hudson Gas & Electric Corporation's request for transfer to new owners certain parcels of vacant real property originally purchased in anticipation of future utility use but later transferred to non-utility accounts.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of certain parcels of vacant real property.

**Purpose:** To approve Central Hudson Gas & Electric Corporation's request for transfer of certain parcels of vacant real property originally purchased for future utility use.

**Substance of final rule:** The Commission adopted an order approving Central Hudson Gas & Electric Corporation's request to transfer to new owners certain parcels of vacant property originally purchased in anticipation of future utility use but later transferred to non-utility accounts, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-0859SA1)

### NOTICE OF ADOPTION

#### Exit Financing and Debtor-in-Possession Financing by Mirant Bowline, LLC, et al.

**I.D. No.** PSC-04-06-00023-A

**Filing date:** June 27, 2006

**Effective date:** June 27, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order approving Mirant Bowline, LLC, Mirant Lovett, LLC, Mirant NY-Gen, LLC, and Hudson Valley Gas Corporation for authorization to enter into agreements for exit financing and debtor-in-possession financing.

**Statutory authority:** Public Service Law, section 69

**Subject:** Request by petitioners for authorization to enter into agreements for exit financing and debtor-in-possession financing.

**Purpose:** To consider petitioner's request for authorization to enter into agreements for exit financing and debtor-in-possession financing.

**Substance of final rule:** The Commission adopted an order approving Mirant Bowline, LLC, Mirant Lovett, LLC and Mirant NY-Gen, LLC, for authorization to enter into agreements for exit financing and debtor-in-possession financing, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-M-1542SA1)

### NOTICE OF ADOPTION

#### Wireless Rates by Niagara Mohawk Power Corporation

**I.D. No.** PSC-06-06-00012-A

**Filing date:** June 23, 2006

**Effective date:** June 23, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 06-E-0082 approving Niagara Mohawk Power Corporation's request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 207.

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

**Subject:** Wireless rates.

**Purpose:** To revise Rule 35 — Cable Television Pole Attachment Rate and Electric Distribution Pole Wireless Attachment Rate to have two wireless attachment rates to be determined by the pole height requirements of the attacher to the distribution pole.

**Substance of final rule:** The Commission adopted an order approving Niagara Mohawk Power Corporation's request to revise Rule 35 — Cable Television Pole Attachment Rate and Electric Distribution Pole Wireless Attachment Rate to have two wireless attachment rates to be determined by the pole height requirements of the attacher to the distribution pole and directed the company to file the necessary revision to implement the change.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0082SA1)

### NOTICE OF ADOPTION

#### Reliability Rules, Measurements and Compliance Elements of the New York State Reliability Council

**I.D. No.** PSC-09-06-00005-A

**Filing date:** June 26, 2006

**Effective date:** June 26, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted the modifications to New York State reliability rules.

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

**Subject:** Reliability rules, measurements and compliance elements of the New York State Reliability Council.

**Purpose:** To adopt changes to the reliability rules, measurements and compliance elements of the New York State Reliability Council.

**Substance of final rule:** The Commission adopted the modifications to the Reliability Rules of the New York State Reliability Council (Version 16).

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-1180SA2)

### NOTICE OF ADOPTION

#### Tariff Leaves by The Brooklyn Union Gas Company d/b/a Key Span Energy Delivery New York

**I.D. No.** PSC-10-06-00011-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392, approving the tariff amendments by The Brooklyn Union Gas Company regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 12.

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

**Subject:** Service Classification No. 20—transportation service for electric generation.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by The Brooklyn Union Gas Company regarding the methodology used to calculate the value added charge applicable to Service Classification No. 20 - Transportation Service for Electric Generation.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA2)

### NOTICE OF ADOPTION

#### Tariff Leaves by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island

**I.D. No.** PSC-10-06-00012-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1395 approving the tariff amendments by KeySpan Gas East Corporation d/b/a Brooklyn Union of L.I. regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 1.

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

**Subject:** Service Classification No. 14—transportation service for electric generation.

**Purpose:** To approve the methodology for calculation the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by KeySpan Gas East Corporation d/b/a Brooklyn Union of L.I. regarding the methodology used to calculate the value added charge applicable to Service Classification No. 14 - Transportation Service for Electric Generation.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1395SA2)

**NOTICE OF ADOPTION**

**Value Added Charge by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-12-06-00011-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by Niagara Mohawk Power Corporation regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 219.

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

**Subject:** Service Classification No. 14—gas transportation service for dual fuel electric generators.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by Niagara Mohawk Power Corporation regarding the methodology used to calculate the value added charge applicable to Service Classification No. 14 - Gas Transportation Service for Dual Fuel Electric Generators.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA3)

**NOTICE OF ADOPTION**

**Inter-Carrier Telephone Service Quality Standards and Metrics by the Carrier Working Group**

**I.D. No.** PSC-14-06-00007-A

**Filing date:** June 26, 2006

**Effective date:** June 26, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order approving the Carrier Working Group’s modifications to existing inter-carrier telephone service quality measures and standards.

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

**Subject:** Inter-carrier telephone service quality standards and metrics.

**Purpose:** To incorporate appropriate modifications to the existing inter-carrier telephone service quality measures and standards.

**Substance of final rule:** The Commission adopted an order approving the Carrier Working Group’s modifications to existing inter-carrier telephone service quality measures and standards.

**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. (97-C-0139SA25)

**NOTICE OF ADOPTION**

**Mini Rate Increase by the Village of Churchville**

**I.D. No.** PSC-14-06-00011-A

**Filing date:** June 26, 2006

**Effective date:** June 26, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 06-EG-0334 approving the Village of Churchville’s request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 1.

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

**Subject:** Mini rate increase.

**Purpose:** To increase annual electric base revenues by \$107,522 or 14.1 percent.

**Substance of final rule:** The Commission adopted an order approving the Village of Churchville’s (Village) request to increase its annual electric base revenues by approximately \$107,522, or 12.8% to become effective July 1, 2006, and directed the Village to file further revisions to implement the change.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0334SA1)

**NOTICE OF ADOPTION**

**Value Added Charge by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-14-06-00012-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by Central Hudson Gas & Electric Corporation regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 12.

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

**Subject:** Service Classification No. 14—interruptible transportation service for electric generation facilities.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by Central Hudson Gas & Electric Corporation regarding the methodology used to calculate the value added charge applicable to Service Classification No. 14 - Interruptible Transportation Service for Electric Generation Facilities.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA4)

### NOTICE OF ADOPTION

#### Value Added Charge by Consolidated Edison Company of New York, Inc.

**I.D. No.** PSC-14-06-00013-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by Consolidated Edison Company of New York, Inc. regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 9.

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

**Subject:** Service Classification No. 9—transportation service.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by Consolidated Edison Company of New York, Inc. regarding the methodology used to calculate the value added charge applicable to Service Classification No. 9 - Transportation Service.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA5)

### NOTICE OF ADOPTION

#### Value Added Charge by National Fuel Gas Distribution Corporation

**I.D. No.** PSC-14-06-00014-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by National Fuel Gas Distribution Corporation regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 8.

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

**Subject:** Service Classification No. 21—basic gas for electric generation service.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by National Fuel Gas Distribution Corporation regarding the methodology used to calculate the value added charge applicable to Service Classification No. 21 - Basic Gas for Electric Generation Service.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA6)

### NOTICE OF ADOPTION

#### Value Added Charge by New York State Electric & Gas Corporation

**I.D. No.** PSC-14-06-00015-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by New York State Electric & Gas Corporation regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 88.

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

**Subject:** Service Classification No. 15—basic electric generation transportation service

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by New York State Electric & Gas Corporation regarding the methodology used to calculate the value added charge applicable to Service Classification No. 15 - Basic Electric Generation Transportation Service.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA7)

### NOTICE OF ADOPTION

#### Value Added Charge by Orange and Rockland Utilities, Inc.

**I.D. No.** PSC-14-06-00016-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by Orange and Rockland Utilities, Inc. regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 4.

**Statutory authority:** Public Service Law, section 66(12)  
**Subject:** Service Classification No. 14—withdrawable transportation to fuel electric generation facilities of 50 megawatts or greater.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by Orange and Rockland Utilities, Inc. regarding the methodology used to calculate the value added charge applicable to Service Classification No. 14 - Withdrawable Transportation to Fuel Electric Generation Facilities of 50 MegaWatts or Greater.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA8)

**NOTICE OF ADOPTION**

**Value Added Charge by Rochester Gas & Electric Corporation**

**I.D. No.** PSC-14-06-00017-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 03-G-1392 approving the tariff amendments by Rochester Gas and Electric Corporation regarding the methodology used to calculate the value added charge, contained in its schedule of gas service—P.S.C. No. 16.

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

**Subject:** Service Classification No. 10—gas service point transportation service.

**Purpose:** To approve the methodology for calculating the value added charge which is applicable to non-core transportation service for electric generators.

**Substance of final rule:** The Commission approved the tariff amendments filed by Rochester Gas and Electric Corporation regarding the methodology used to calculate the value added charge applicable to Service Classification No. 10 - Gas Service Point Transportation Service.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-1392SA9)

**NOTICE OF ADOPTION**

**Transfer of Books and Records by Taconic Telephone Corp., et al.**

**I.D. No.** PSC-16-06-00009-A

**Filing date:** June 21, 2006

**Effective date:** June 21, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order approving Taconic Telephone Corp., Berkshire Telephone Corporation and Chautauqua and Erie Telephone Corporation to transfer their accounts, books and records from their principal offices in New York State to one central location in South Portland, Maine.

**Statutory authority:** Public Service Law, section 94

**Subject:** Transfer of books and records.

**Purpose:** To approve the transfer of the books and records of Taconic Telephone Corp., Berkshire Telephone Corporation and Chautauqua and Erie Telephone Corporation from their principal offices in New York State to one central location in South Portland, Maine.

**Substance of final rule:** The Commission adopted an order approving Taconic Telephone Corp., Berkshire Telephone Corporation and Chautauqua and Erie Telephone Corporation to transfer their accounts, books and records from their principal offices in New York State to one central location in South Portland, Maine, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-C-0341SA1)

**NOTICE OF ADOPTION**

**Approval of Loans by Alltel New York, Inc.**

**I.D. No.** PSC-18-06-00010-A

**Filing date:** June 22, 2006

**Effective date:** June 22, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order allowing short term loans by Alltel New York to its parent holding company Alltel Communications, Inc. or any of its affiliates in the implementation of a cash management system.

**Statutory authority:** Public Service Law, section 106

**Subject:** Approval of loans.

**Purpose:** To allow short term loans by Alltel New York, Inc. to its parent holding company, Alltel Communications, Inc.

**Substance of final rule:** The Commission adopted an order allowing short term loans by Alltel New York to its parent holding company Alltel Communications, Inc. or any of its affiliates in the implementation of a cash management system, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-C-1631SA1)

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

**Interconnection Agreement between DFT Local Service Corporation d/b/a DFT Select One and Chautauqua and Erie Telephone Corp.**

**I.D. No.** PSC-28-06-00009-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by DFT Local Service Corporation d/b/a DFT Select One and Chautauqua and Erie

Telephone Corp. for approval of an interconnection agreement executed on June 1, 2006.

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

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

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

**Substance of proposed rule:** DFT Local Service Corporation d/b/a DFT Select One and Chautauqua and Erie Telephone Corp. have reached a negotiated agreement whereby DFT Local Service Corporation d/b/a DFT Select One and Chautauqua and Erie Telephone Corp. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until June 1, 2009, or as extended.

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

**Data, views or arguments may be submitted to:** Jaclyn A. 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-C-0730SA1)

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

#### Potential Electric Delivery Rates Disincentives

**I.D. No.** PSC-28-06-00010-P

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

**Proposed action:** As discussed in notice issued June 26, 2006 in Cases 03-E-0640 in Cases 06-G-0746, the Public Service Commission is considering the degree to which electric delivery utilities may have a disincentive against the promotion of energy efficiency, renewable technologies, and distributed generation. The commission may adopt, modify or reject, in whole or in part, any determinations that disincentives may or may not exist and consider, implement or reject any potential remedy.

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

**Subject:** Potential electric delivery rates disincentives.

**Purpose:** To assess if there are potential electric delivery rate disincentives against the promotion of energy efficiency, renewable technologies and distribution generation.

**Substance of proposed rule:** As discussed in a Notice issued June 26, 2006, the Public Service Commission is considering the degree to which electric delivery utilities may have a disincentive against the promotion of energy efficiency, renewable technologies, and distributed generation. To the extent any disincentive may continue to exist, the Commission is seeking the identification of appropriate remedies, which may include, among other actions, redesigning delivery rates or implementing revenue mechanisms to offset a residual net lost revenue and profit effect. The Commission may, or may not, determine that disincentives exist and consider, implement, or reject any potential remedy.

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

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

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

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

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

(03-E-0640SA1)

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

#### Submetering of Electricity by Solow Management Corporation

**I.D. No.** PSC-28-06-00011-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Solow Management Corporation, on behalf of 501 East 87th Street, LLC, to submeter electricity at 501 E. 87th St., New York, NY.

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

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of Solow Management Corporation, on behalf of 501 East 87th Street, LLC, to submeter electricity at 501 E. 87th St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Solow Management Corporation, on behalf of 501 East 87th Street, LLC, to submeter electricity at 501 East 87th Street, New York, New York.

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

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

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

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

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

(06-E-0701SA1)

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

#### Lightened Regulation of 161 MW Coal-Fired Electric Generation Facility by AES Greenidge LLC

**I.D. No.** PSC-28-06-00012-P

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

**Proposed action:** The Public Service Commission is considering a filing from AES Greenidge LLC requesting that a 161 MW coal-fired electric generation facility located in the Town of Torrey, Yates County, NY be subjected to lightened regulation under the Public Services Law, and that financing and transfer approvals, as appropriate, be granted.

**Statutory authority:** Public Service Law, sections 2(13), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

**Subject:** Lightened regulation, ownership and financing of a 161 MW coal-fired electric generation facility located in Yates County.

**Purpose:** To approve lightened regulation, ownership and financing of a 161 MW coal-fired electric generation facility located in Yates County.

**Substance of proposed rule:** The Public Service Commission is considering a filing from AES Greenidge LLC requesting that a 161 MW coal-fired electric generation facility located in the Town of Torrey, Yates County, NY be subjected to lightened regulation under the Public Service Law, and that financing and transfer approvals, as appropriate, be granted.

The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

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

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

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

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

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

(06-E-0745SA1)

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

**Potential Gas Delivery Rates Disincentive**

**I.D. No.** PSC-28-06-00013-P

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

**Proposed action:** As discussed in notice issued June 26, 2006 in Cases 03-E-0640 and 06-G-0746, the Public Service Commission is considering the degree to which gas delivery utilities may have a disincentive against the promotion of energy efficiency, renewable technologies, and distributed generation. The commission may adopt, modify or reject, in whole or in part, any determinations that disincentives may or may not exist and consider, implement or reject any potential remedy.

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

**Subject:** Potential gas delivery rates disincentives.

**Purpose:** To assess if there are potential gas delivery rate disincentives against the promotion of energy efficiency, renewable technologies and distribution generation.

**Substance of proposed rule:** As discussed in a Notice issued June 26, 2006, the Public Service Commission is considering the degree to which gas delivery utilities may have a disincentive against the promotion of energy efficiency, renewable technologies, and distributed generation. To the extent any disincentive may continue to exist, the Commission is seeking the identification of appropriate remedies, which may include, among other actions, redesigning delivery rates or implementing revenue mechanisms to offset a residual net lost revenue and profit effect. The Commission may, or may not, determine that disincentives exist and consider, implement, or reject any potential remedy.

**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-0746SA1)

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

**New Billing System and Unbundled Rates by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-28-06-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedules for electric service—P.S.C. Nos. 18 and 19 and schedule for gas service—P.S.C. No. 16 to become effective Oct. 2, 2006.

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

**Subject:** New billing system and unbundled rates.

**Purpose:** To conform to the billing specifications of RG&E's new billing system and further unbundle rates for full service customer bills pursuant to commission order issued Feb. 18, 2005 in Case 00-M-0504.

**Substance of proposed rule:** The Commission is considering Rochester Gas and Electric Corporation's (RG&E's) request to revise language in its electric and gas tariff schedules to conform to the billing specifications of RG&E's new billing system - Customer Care and Service System. RG&E is also proposing to further unbundle rates for full service customer bills in compliance with Commission Order Directing Submission of Unbundled Bill Formats ("Bill Format Order"), issued February 18, 2005 in Case 00-M-0504. The Commission may approve, reject or modify, in whole or in part, RG&E's request.

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

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

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

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

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

(00-M-0504SA16)

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

**Economic Development Program Costs by National Grid**

**I.D. No.** PSC-28-06-00015-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 a filing from National Grid dated June 16, 2006 making economic development plan cost proposals in response to an order approving and modifying, in part, Economic Development Program proposals and requiring an additional filing issued April 14, 2006 in Case 01-M-0075.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

**Subject:** Economic Development Program costs.

**Purpose:** To adopt Economic Development Program cost proposals.

**Substance of proposed rule:** The Public Service Commission is considering a filing from National Grid dated June 16, 2006 making economic development plan cost proposals in response to an Order Approving and Modifying, in Part, Economic Development Program Proposals and Requiring an Additional Filing issued April 14, 2006 in Case 01-M-0075. The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

**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.

(01-M-0075SA30)

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

**Transfer of Water Supply Assets by Peek'n Peak Water Services, Inc. and Kiebler Water Services, Inc.**

**I.D. No.** PSC-28-06-00016-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, or modify, a joint petition filed by Peek'n Peak Water Services, Inc. and Kiebler Water Services, Inc. for approval to transfer the water supply assets of Peek'n Peak Water Services, Inc. to Kiebler Water Services, Inc.

**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 plan assets of Peek'n Peak Water Services, Inc. to Kiebler Water Services, Inc.

**Substance of proposed rule:** On May 8, 2006, Peek'n Peak Water Services, Inc. (Peek'n Peak) and Kiebler Water Services, Inc. (Kiebler) filed a joint petition requesting approval to transfer the water supply assets of Peek'n Peak to Kiebler. Peek'n Peak currently provides water service to the Peek'n Peak Resort and Conference Center and 216 residential customers in the Town of French Creek, Chautauqua 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-0558SA1)

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

**Transfer of Franchises or Stock and Water Rates and Charges by Aqua New York Inc. and New York Water Service Corporation**

**I.D. No.** PSC-28-06-00017-P

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

**Proposed action:** The commission is considering the joint petition of Aqua New York Inc. and New York Water Service Corporation for approval of: (1) the acquisition by Aqua New York Inc. of the stock of New York Water Service; (2) the accounting treatment of New York Water Service's pension and OPEBs expense; and (3) an acquisition incentive account.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and 89-h

**Subject:** Transfer of franchises or stock and water rates and charges.

**Purpose:** To allow Aqua New York to purchase the stock of New York Water Service, account for pensions and OPEBs, and to start an acquisition incentive account.

**Substance of proposed rule:** The Commission is considering whether to approve, reject or modify the joint petition of Aqua New York Inc. and New York Water Service Corporation to: (1) permit the purchase of New York Water Service's stock by Aqua New York Inc.; (2) establish accounting recognition of New York Water Service Corporation's pension and OPEB's expenses; and (3) allow Aqua New York to establish an acquisition incentive account related to the purchase of small water utilities. The incentive account would allow Aqua to recover a portion of the purchase premium it paid for New York Water's stock (estimated at \$15 million) over the next 30 years as it purchases troubled water companies in New York State. The accounting treatment for pensions and OPEB's would recognize that rates must eventually recover pension and OPEB expenses as proscribed in the Commission's policy on pensions.

**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-0700SA1)

## State University of New York

### NOTICE OF ADOPTION

**Policies of the Board of Trustees**

**I.D. No.** SUN-13-06-00012-A

**Filing No.** 787

**Filing date:** June 27, 2006

**Effective date:** July 12, 2006

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

**Action taken:** Amendment of Part 342 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 355(2)(b)

**Subject:** Amendments to policies of the Board of Trustees relating to composition of University Council of Presidents, one of the State University governance organizations.

**Purpose:** To amend the policies to conform to the new campus groupings.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SUN-13-06-00012-P, Issue of March 29, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Marti Anne Ellermann, Senior Managing Campus Counsel, State University of New York, System Administration, University Plaza, S-333, Albany, NY 12246, (518) 443-5400, e-mail: Marti.Ellermann@suny.edu

**Assessment of Public Comment**

The agency received no public comment.

## Tobacco Settlement Financing Corporation

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Tobacco Settlement Financing Corporation publishes a new notice of proposed rule making in the *NYS Register*.

#### Public Access to Records

I.D. No.	Proposed	Expiration Date
TSF-52-05-00024-P	December 28, 2005	June 26, 2006

## Workers' Compensation Board

### EMERGENCY RULE MAKING

#### Independent Medical Examinations (IMEs)

**I.D. No.** WCB-28-06-00007-E  
**Filing No.** 786  
**Filing date:** June 26, 2006  
**Effective date:** June 26, 2006

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

**Action taken:** Amendment of section 300.2(d)(11) of Title 12 NYCRR.  
**Statutory authority:** Workers' Compensation Law, sections 117 and 137  
**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** Recent decisions issued by Board Panels have interpreted the current regulation as requiring reports of independent medical examinations (IMEs) be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays, and that U.S. Post Offices are not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is precluded and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, workers' compensation insurance carrier/self-insured employer, claimant's treating provider and representative, and the claimant it is not possible to send the report by facsimile or electronic means. The recent decisions have greatly, negatively impact the professionals who conduct IMEs, the IME entities, insurance carriers and self-insured employers. When untimely reports are precluded, the insurance carriers and self-insured employers are prevented from adequately defending their position. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Filing written reports of independent medical examinations (IMEs).

**Purpose:** To amend the time for filing written reports of IMEs with the board and furnished to all others.

**Text of emergency rule:** Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 business days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 business days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 23, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 486-9564, e-mail: Office ofGeneralCounsel@wcb.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

##### 2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

##### 3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001. Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the

system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

#### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

#### 6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

#### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

Approximately 2,511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar

days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

#### 2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

#### 3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

#### 4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

#### 5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

#### 6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

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

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

### **Rural Area Flexibility Analysis**

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

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

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

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

#### 3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

#### 4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

#### 5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

***Job Impact Statement***

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers compensation system by providing a fair time period in which to file a report.