

# 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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## Office of Alcoholism and Substance Abuse Services

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

#### Access to Information and Public Access to Records

**I.D. No.** ASA-30-06-00003-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 add Parts 803 and 804 to Title 4 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.05(f), 19.07(b), (e), 19.09(b), 19.15(a), 19.40, 32.01, 32.07(a); Public Officers Law, arts. 6 and 6-A; and Executive Law, section 102

**Subject:** Access to information and public access to records.

**Purpose:** To provide the procedures by which members of the public may access records pursuant to the NY State Freedom of Information Law and the Personal Privacy Protection Law.

**Substance of proposed rule (Full text is posted at the following State website: [www.oasas.state.ny.us](http://www.oasas.state.ny.us)):** The New York Office of Alcoholism and Substance Abuse Services proposes to add a new Part 803, Public Access to Information, and a new Part 804, Access to Information, to 14 NYCRR. Part 803 will consolidate freedom of information law standards and procedures into one uniform regulation. Part 804 will incorporate the former Division of Substance Abuse Services regulation (see 14 NYCRR

Section 1061) on access to personal information and create a new personal access to records regulation for individuals seeking access to their records held by the Office. The proposed Part 803 brings together separate regulations governing public access to records from the former Division of Alcoholism and Alcohol Abuse (see 14 NYCRR Section 303) and the former Division of Substance Abuse Services (see the 14 NYCRR Section 1060) into one Part 803 series regulation. Chapter 223 of the Laws of 1992 consolidated the two Divisions in the Office of Alcoholism and Substance Abuse Services.

#### 14 NYCRR Part 803 – Access to Records

Section 1 of the rule states that the purpose of the rule is to provide procedures to implement the requirements of the New York Freedom of Information law and the New York Committee on Public Access to Records rules.

Section 2 of the rule provides the definitions for terms used in this part.

Section 3 of the rule describes the responsibilities of the Records Access Officer.

Section 4 and 5 of the rule describes the time and place for inspection of records and fees for copying records.

Section 6 of the rule describes the procedures for requesting records.

Section 7 and 8 of the rule describes the circumstances under which a request for records will be approved or denied.

Section 9 of the rule describes the procedures for appeals of denials for records.

Section 10 requires the posting of notices whereby an individual is informed of the procedures to request records.

Section 11 describes the procedures to access trade secrets.

#### Part 804 – Access to Information

Section 1 of the rule states that the purpose of the rule is to comply with Article 6-A of the Public Officers Law by establishing procedures for an individual to access information maintained by the Office pertaining to that individual.

Section 2 of the rule provides the definitions for terms used in this part.

Section 3 of the rule establishes the position of Personal Privacy Compliance Officer and describes this person's responsibilities.

Section 4 of the rule establishes the procedures by which an individual can request access to records.

Section 5 of the rule describes the records that are exempt from disclosure under the law.

Section 6 of the rule describes the procedure to correct or amend a record.

Section 7 of the rule describes that a failure to respond to a request by the Office will be construed as a denial.

Section 8 of the rule procedures the appeal process for a denial.

Section 9 of the rule provides that right to submit a statement of disagreement to the record.

Section 10 of the rule describes the fees charged by the Office for copying documents.

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

**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

Section 87 of Article 6 the Public Officers Law provides that each agency shall promulgate rules and regulations in effectuate the purposes of

the Freedom of Information Law. Section 95 of the Article 6-A of the Public Officers Law provides that each agency shall promulgate rules and regulations to effectuate the purposes of the Personal Privacy Protection Law.

As a result of the consolidation of the Division of Alcoholism and Alcohol Abuse (DAA) and the Division of Substance Abuse Services (DSAS) into the Office of Alcoholism and Substance Abuse Services (OASAS) and the passage of Chapter 558 of the Laws of 1999 which requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers, OASAS has consolidated and promulgated regulations under Part 800, *et seq.* of Title 14 of the New York Codes, Rules and Regulations. The new Part 803, Public Access to Records and Part 804, Access to Information, are consolidation of the regulations of the former divisions. Part 303, Public Access to records was the Freedom of Information regulation for DAAA and Part 1060, Public Access to Records and Part 1061, Access to Information, are the Freedom of Information Law and the Personal Privacy Law regulations for DSAS.

The Parts are a consolidation of the regulations from the former Divisions and relate to non-discretionary statutory provisions contained in the Freedom of Information Law and the Personal Privacy Law and therefore, no person is likely to object to the adoption of the rule as written. The changes to the regulations in the consolidation are minor and technical in nature. Therefore, the proposed rules are advanced as a consensus rule pursuant to section 202(1)(b)(i) of the State Administrative Procedure Act.

#### **Job Impact Statement**

The implementation of Part 803 and Part 804 are internal regulations that describe procedures for public access to documents and records held by the Office. These regulations will have no impact on jobs.

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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

#### **Reimbursement Rates for Legally-Exempt and Informal Child Care Providers**

**I.D. No.** CFS-30-06-00011-E

**Filing No.** 828

**Filing date:** July 11, 2006

**Effective date:** July 31, 2006

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

**Action taken:** Amendment of section 415.9 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 410 and 410-x(3)

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

**Specific reasons underlying the finding of necessity:** To clarify that neither enhanced nor reduced rates for qualified legally-exempt informal child care providers become effective until August 31, 2006, and avoid an unintended temporary decrease in the standard rate payable to legally-exempt informal child care providers for the period of July 31, 2006-August 30, 2006.

**Subject:** Reimbursement rates for legally-exempt and informal child care providers.

**Purpose:** To clarify that neither enhanced nor reduced rates for qualified legally-exempt informal child care providers become effective until August 31, 2006, and avoid an unintended temporary decrease in the standard rate payable to legally-exempt informal child care providers for the period of July 31, 2006-August 30, 2006.

**Text of emergency rule:** Paragraph (2) of subdivision (j) of section 415.9 of 18 NYCRR is REPEALED, and paragraph (3) of subdivision (j) of 18 NYCRR 415.9 is re-numbered paragraph (2).

The LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE Standard RATE and LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE charts set forth at Paragraph (3) of subdivision (j) of section 415.9 of 18 NYCRR are REPEALED.

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire August 30, 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 Commissioner of the Office of Children and Family Services (Office) to establish rules, regulations and policies to carry out the Office's powers and duties under the SSL.

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

Section 410 of the SSL authorizes local social services officials to provide day care for children at public expense and authorizes the Office to establish criteria for when such day is to be provided.

Section 410-x(3) of the SSL requires the Office to establish, in regulation, minimum health and safety requirements that must be met by providers of child care services providing subsidized child care services under the State Child Care Block Grant, who are not required to be licensed or registered under the SSL or the Administrative Code of the City of New York.

##### **2. Legislative objectives:**

The legislative intent of the child care subsidy program is to assist families in meeting their child care costs in programs that provide for the health and safety of their children. Additionally, the child care subsidy program must safeguard the investment of public funds. This emergency filing will clarify that neither enhanced nor reduced rates for qualified legally-exempt informal child care providers become effective until August 31, 2006, and avoid an unintended temporary decrease in the standard rate payable to legally exempt informal child care providers.

##### **3. Needs and benefits:**

Legally-exempt informal child care providers ordinarily care for one or two children in either the children's or the providers' homes. They are exempt from the State's child care licensing and registration requirements but must enroll with the applicable legally-exempt caregiver enrollment agency and meet minimum health and safety regulatory standards established by the Office in order to provide care to children receiving child care subsidies. The proposed regulations are necessary to enhance the health and safety of children receiving subsidized child care services from these informal child care providers and to safeguard the investment of public funds in the child care subsidy program.

The proposed regulations also will provide incentives to encourage informal providers to improve the quality of the care they provide through training. Research consistently reflects that the quality of child care is directly related to the level of ongoing education and development of the provider. Therefore, the regulations would restructure the market rates available for informal child care by authorizing a higher rate for providers who annually complete ten or more hours of training and a lower rate for those who do not obtain such training.

##### **4. Costs:**

It is anticipated that the regulations will result in increased costs. The Office cannot predict the number of informal child care providers that will obtain the annual training needed to be eligible for the enhanced market rates versus the number that will be eligible for the reduced standard market rates. However, the Office does not anticipate that the market rate changes will result in increased costs to the districts during the first year that the regulations are implemented.

There are no additional costs to informal providers to come into compliance with the regulations. Those informal providers who wish to be eligible for the enhanced market rate may incur some costs in attending the necessary training. However, these costs are expected to be minimal as some of the required training is available free of charge by local community groups. In addition, the informal providers may be able to recoup any costs they incur for training through the enhanced market rates they will be eligible to receive.

##### **5. Local government mandates:**

None.

6. Paperwork:

This emergency filing will not result in any new paperwork requirements for social services districts.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

Alternatives:

These initiatives are necessary to promote the health and safety of children in informal child care settings, and to avoid an unintended temporary decrease in the rate payable to legally exempt informal child care providers.

9. Federal standards:

The federal Child Care and Development Block Grant Act (42 U.S.C. 9858 *et seq.*), as amended by the Personal Responsibility and Work Opportunity Reconciliation Act, requires states to establish minimum health and safety requirements for all providers of subsidized child care services including legally-exempt child care providers.

10. Compliance schedule:

This emergency regulation will be effective immediately upon filing and remain effective until August 30, 2006. The new market rates for legally-exempt informal child care providers will become effective on August 31, 2006. This should provide those informal child care providers serving subsidized children who wish to be eligible for the enhanced market rate sufficient time to obtain the necessary training before the new rates become effective.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The proposed regulations will affect 58 social services districts and the approximately 62,000 informal providers who provide child care to children receiving child care subsidies from those social services districts.

2. Compliance requirements:

Those informal providers who choose to be eligible for the enhanced market rates will need to attend ten or more hours of training annually.

3. Professional services:

There are no new professional services required to comply with this emergency filing.

4. Compliance costs:

The Office cannot predict the number of informal child care providers that will obtain the annual training needed to be eligible for the enhanced market rates versus the number that will be eligible for the reduced standard market rates. However, the Office does not anticipate that the market rate changes will result in increased costs to the social services districts during the first year that the regulations are implemented.

There are no additional costs to informal providers to come into compliance with the regulations. Those informal providers who wish to be eligible for the enhanced market rates may incur some costs in attending the necessary training. However, these costs are expected to be minimal as some of the required training is available free of charge by local community groups. In addition, the informal providers may be able to recoup any costs they incur for training through the enhanced market rates they will be eligible to receive.

5. Economic and technological feasibility:

The social services districts and child care providers affected by these regulations will have the economic and technological ability to comply with the regulations. Those informal subsidized child care providers who incur any costs associated with obtaining the necessary annual training required for the enhanced market rates may be able to recoup those costs through the enhanced rates they will be eligible to receive.

6. Minimizing adverse impact:

The provisions in these emergency regulations were carefully developed to minimize adverse impact on legally-exempt informal child care providers while at the same time enhancing the health and safety of children in informal subsidized child care settings.

As an incentive to promote the quality of care provided in informal subsidized child care settings, the market rates will be restructured to provide a higher reimbursement rate for those informal child care providers who improve their training and skills. Therefore, the proposed regula-

tions will have a positive impact for those informal providers who choose to become eligible for the enhanced market rates by complete ten or more hours of training annually. However, to further emphasize on the importance of developing quality child care programs, the basic market rates will be reduced for those informal providers who do not choose to obtain such training.

7. Small business and local government participation:

The OCFS conducted two focus groups and surveyed all social services districts before implementing an earlier version of these regulations. This emergency filing will avoid an unintended temporary decrease in the rate payable to legally exempt informal child care providers.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

The proposed regulations will affect the 44 social services districts located in rural areas of the State and those informal providers who provide child care to children receiving child care subsidies from those districts.

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

There are no new reporting, recordkeeping, and other compliance requirements and professional services necessitated by these emergency regulations.

3. Costs:

The Office cannot predict the number of informal child care providers that will obtain the annual training needed to be eligible for the enhanced market rates versus the number that will be eligible for the reduced standard market rates. However, the Office does not anticipate that the market rate changes will result in increased costs to the social services districts during the first year that the regulations are implemented.

Those informal providers who wish to be eligible for the enhanced market rates may incur some costs in attending the necessary training. However, these costs are expected to be minimal as some of the required training is available free of charge by local community groups. In addition, the informal providers may be able to recoup any costs they incur for training through the enhanced market rates they will be eligible to receive.

4. Minimizing adverse impact:

The provisions in these emergency regulations were carefully developed to minimize adverse impact on social services districts and legally-exempt informal child care providers in all areas of the State while at the same time enhancing the health and safety of children in informal subsidized child care settings.

As an incentive to promote the quality of care provided in informal subsidized child care settings, the market rates will be restructured to provide a higher reimbursement rate for those informal child care providers who improve their training and skills. Therefore, the proposed regulations will have a positive impact for those informal providers who choose to become eligible for the enhanced market rates by complete ten or more hours of training annually. However, to further emphasize on the importance of developing quality child care programs, the basic market rates will be reduced for those informal providers who do not choose to obtain such training.

5. Rural area participation:

The OCFS conducted two focus groups and surveyed all social services districts, including several rural districts before implementing an earlier version of these regulations. This emergency filing will avoid an unintended temporary decrease in the rate payable to legally exempt informal child care providers.

**Job Impact Statement**

Section 201-a of the State Administrative Procedure Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State. A full Job Impact Statement has not been prepared for these emergency regulations, which will avoid an unintended temporary decrease in the rate payable to legally exempt informal child care providers. It is thus evident from the subject matter of the emergency rule that it would not have a substantial adverse impact on jobs and employment opportunities.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Volatile Organic Compound (VOC)

**I.D. No.** ENV-51-05-00016-A

**Filing No.** 825

**Filing date:** July 10, 2006

**Effective date:** 30 days after filing

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

**Action taken:** Amendment of section 200.1 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 19-0301 and 19-0303

**Subject:** Volatile organic compound (VOC).

**Purpose:** To modify New York's air regulations to be consistent with changes in Federal regulations.

**Text or summary was published** in the notice of proposed rule making, I.D. No. ENV-51-05-00016, Issue of December 21, 2005.

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

**Text of rule and any required statements and analyses may be obtained from:** John Barnes, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: 200tbac@gw.dec.state.ny.us

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

#### Assessment of Public Comment

One comment letter was submitted to the New York State Department of Environmental Conservation (NYSDEC) during the public comment period. It was submitted by Mr. James M. Gerek of the Eastman Kodak Company. Summaries of the comments along with the NYSDEC's responses are presented below.

1. Comment: Comment in support of designating certain compounds as exempt from regulation once they have been shown to have negligible environmental impacts.

Response: Noted.

2. Comment: In the Job Impact Statement (JIS), Parts 205, 228, 234, and 235 are cited as rules that would be affected by NYSDEC's proposal to list TBAC as an 'Exempt VOC'. The commenter stated that the list of affected regulations should not be limited to the listed rules, and should include all federally enforceable state Reasonably Available Control Technology (RACT) rules as well as Part 212.

Response: In the JIS, the NYSDEC stated that businesses impacted by the proposed rule would 'include' those subject to the list of regulations cited by the commenter (emphasis added). The NYSDEC did not intend for list to be all-inclusive. Businesses which are subject to Part 212 and VOC RACT rules could also be affected by this rule making.

3. Comment: In cases where an emissions test method measures organic compounds with negligible photoreactivity (*i.e.*, compounds listed under the definition of a 'volatile organic compound' at 6 NYCRR 200.1(cg)), the owner or operator may exclude such compounds when determining compliance with a VOC emission standard. The commenter inquired if 'Exempt VOCs' (6 NYCRR 200.1(ck)) may be excluded when determining compliance with a VOC emission standard in cases where a test method measures compounds that are considered to be 'Exempt VOCs'.

Response: Where an emissions test method measures a compound which is listed under subdivision 200.1(ck) (an Exempt VOC), such compound may be excluded when determining compliance with a VOC emission standard.

4. Comment: A clarification was requested regarding the following text of subdivision 201.1(ck):

"These compounds are considered to be VOCs for purposes of 'all' VOC recordkeeping and emissions reporting requirements. . ." (emphasis added by commenter).

The commenter took the position that since 'Exempt VOCs' would not be subject to emission limits or emission caps, then these compounds should not be subject to recordkeeping requirements.

Response: The text of subdivision 200.1(ck) is consistent with the United States Environmental Protection Agency's (EPA's) rule which was promulgated on November 29, 2004 (69 FR 228, pages 69298-69304). EPA stated that ". . . TBAC emissions will still be subject to reporting requirements that exist for other VOC emissions" (69 FR 228, 69298). Further, at 40 CFR 51.100(s)(5), it states that:

"The following compound(s) are VOC for purposes of all recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements which apply to VOC and shall be uniquely identified in emission reports, but are not VOC for purposes of VOC emissions limitations or VOC content requirements: t-butyl acetate."

In the case of a VOC RACT cap, records pertaining to TBAC (or any future 'Exempt VOC') emissions must be maintained. However, TBAC emissions would not count when determining compliance with a VOC emissions cap.

In summary, 'Exempt VOCs' are subject to all VOC RACT recordkeeping and emission reporting requirements consistent with EPA's November 29, 2004 rule making. The text in Part 200 must be consistent with the EPA rule in order to be approved by EPA as a provision in the New York State Implementation Plan.

5. Comment: The commenter recommended that the text of the NYSDEC rule mirror the text of EPA's rule as much as possible in order to avoid confusion. Specifically, the commenter stated that the NYSDEC rule went beyond the EPA rule by explicitly stating the 'Exempt VOCs' would not be subject to Operating Permit Fees and that these compounds would be subject to emission reporting requirements.

Response: As stated in the response to Comment #4, the NYSDEC rule mirrors the EPA rule with respect to emissions reporting and record keeping requirements. The reference to Operating Permit Fees was incorporated into the NYSDEC rule to clarify that while 'Exempt VOCs' would be subject to emissions reporting, the corresponding emissions fees would not apply to these compounds. This was added to assist the regulated community in planning for expenses associated with Operating Permit Fees.

6. Comment: The commenter noted that VOCs exempted under 40 CFR 51.100(s)(5) must be reported in emissions statements (see response to Comment #4). The commenter concluded that these compounds must be clearly differentiated from "regular" VOCs so that they would not be factored into air program fees. The commenter went on to state that this concept is not reflected in subdivision 200.1(ck) or Subpart 202-2.

Response: The proposed rule states that 'Exempt VOCs' will not be considered VOC emissions for purposes of calculating Title V Operating Permit Program Fees. Thus, they will be handled differently from regulated VOCs. No additional change to the proposed rule is necessary.

### NOTICE OF ADOPTION

#### Hazardous Waste Manifest Program

**I.D. No.** ENV-09-06-00009-A

**Filing No.** 824

**Filing date:** July 7, 2006

**Effective date:** Sept. 5, 2006

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

**Action taken:** Amendment of Parts 370, 371, 372, 373 and Appendix 30 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, art. 3, title 3; art. 27, section 0905; and art. 71, titles 27 and 35

**Subject:** Hazardous waste manifest regulations.

**Purpose:** To incorporate mandated Federal changes published in the March 4, 2005 and June 16, 2005 *Federal Registers* regarding the Hazardous Waste Manifest Program. Specifically, the hazardous waste manifest form is being revised by the Federal government and this revised form must be used starting on September 5, 2006. Other changes to improve and modernize hazardous waste tracking already adopted by the Federal government are adopted by the State. In addition, State initiated changes to the State manifest program are adopted.

**Revised Substance of final rule:** Part 370 is amended to update incorporation by reference material and dates, revise the definitions for "designated treatment, storage or disposal facility" and "manifest", and add a definition for "Manifest tracking number".

Part 371 is amended to revise the definition of a bulk container from 110 gallons to 119 gallons. Text regarding the EPA acknowledgment of consent requirements for international shipments is clarified.

Part 372 is amended to revise the definition of a bulk container from 110 gallons to 119 gallons. Drum marking and vehicle placarding requirements are clarified.

The generator requirements for rejected loads or residue from a shipment which has been returned to the generator are detailed.

Generator manifest requirements are amended to mandate the use of the new federal form which is required to be used nationwide as of September 5, 2006. Prior to shipment off-site, the generator must have written confirmation that the designated facility and alternate facility, if listed, is authorized to receive their waste and can handle their waste. The generator must know how the waste is to be disposed and assure that the ultimate disposal method is provided on the manifest.

If the transporter cannot deliver the waste, the generator will give directions to the transporter either designating another facility or instructing the transporter to return the waste.

The generator must sign the manifest, obtain the transporter signature and date, keep one copy, and mail copies to the generator state and destination state as required by those states, making copies as needed. These must be mailed within 10 business days, rather than the 5 business days in existing regulation.

Clarification is provided that a transporter must have a 364 permit unless otherwise exempt from the permit requirements of Part 364.

The regulation is revised to state that use of a New York State or EPA hazardous waste code on a manifest, rather than use of the manifest, constitutes a determination by the generator that the waste is a hazardous in New York.

The federal government will be authorizing manifest tracking numbers and manifest printing. The manifest form can be obtained from any source that is registered with the EPA as a supplier of manifests.

The waste minimization certification statement on the manifest for small and large quantity generators is revised.

Under transporter requirements, language on the manifest paperwork process is clarified. Detail is provided on the requirements of the transporter if the waste cannot be delivered to the designated facility. This includes details on what to do about full rejected loads and partial rejected loads.

Details are provided on transporter manifest requirements for transport of waste out of the United States.

Manifest requirements for international shipments and imports are revised to reflect the additional fields on the new manifest for these shipments.

The importer must provide the transporter with an additional copy of the manifest to be submitted by the receiving facility to the EPA.

Requirements for shipments by rail or water (bulk) are revised to update cross references and reflect the requirements of the new manifest form. If a manifest is not received within 15 days (rather than 30 days) from receipt of the shipment, an unmanifested waste report must be submitted.

Appendix 30 is amended to provide detailed instructions for the completion of the new manifest form and continuation sheet (EPA Forms 8700-22 and 8700-22A).

Additional copies of the form may be required. For example, the generator must make additional copies of the manifest, as necessary, to be submitted by the generator to the generator state and the disposer state. Extra copies of the manifest will be needed if more than one transporter is used. For exports, the transporter must deliver a copy of the manifest to the U.S. Customs when exporting the waste across U.S. borders and mail a copy to the generator. For imports, the TSD must mail a copy of the manifest to the USEPA. For rejected loads, additional copies may be required.

Distribution deadlines for copies of the manifests are changed. Generators have ten calendar days rather than five working days and TSD facilities have ten calendar days rather than two working days to distribute manifest copies.

Line by line instructions are provided for completion of each form. The instructions match the federal instructions except for the following:

For the manifest form:

- In Item 12, Units of Measure (Weight/Volume), additional text regarding specific gravity is provided as follows: Specific gravity may be provided in Item 14. Special Handling Instructions and Additional Information to assure accurate conversion of volumetric units into weight. The value of 1.0 will be used for calculations if no other value is provided.

- In Item 13, Waste Codes, an additional State requirement is added: **ITEM 13 - ADDITIONAL STATE REQUIREMENT**

*If the receiving TSD facility is not providing a hazardous waste management code in item 19 that reflects the ultimate disposal method for the hazardous waste, the generator must provide a State waste code to designate the ultimate disposal method of the waste using one of following State codes:*

- L = Landfill*
- B = Incineration, heat recovery, burning*
- T = Chemical, physical, or biological treatment*
- R = Material recovery of more than 75 percent of the total material.*

*If the receiving TSD facility uses hazardous waste report management method code for "storage, bulking, and/or transfer off-site - no treatment/recovery, fuel blending, or disposal at this site" in Item 19 of the manifest form, and the generator has failed to provide the ultimate disposal method in Item 13, the ultimate disposal method is deemed landfill (L).*

For the continuation sheet:

- For Item 30. Units of Measure (Weight/Volume) - Refer to the instructions for Item 12 of the manifest form.
- For Item 31. Waste Codes - Refer to the instructions for Item 13 of the manifest form.

See Appendix.

Subparts 373-2 and 373-3 are amended to revise the manifest requirements for receiving facilities.

Receiving facilities must provide the hazardous waste report management method code for each waste received and accepted, using the codes established in the annual report instructions and forms.

As is presently required, the receiving facility must determine that all portions of the manifest have been completed. For example, if the receiving facility is not providing hazardous waste management code in item 19 that reflects the ultimate disposal method for the hazardous waste, the receiving facility must ensure that the state code in Box 13 designating the ultimate disposal method for the waste is completed. A completed form includes signatures and all certifications required from the generator and the initial and delivering transporters. In those cases where the receiving facility completes any of the generator's portions of the manifest (items 1-14), the receiving facility assumes joint responsibility with the generator for the accuracy and completeness of those portions he or she completed.

The receiving facility must sign and date, by hand, each copy of the manifest; note any discrepancies on each copy of the manifest; immediately give the transporter at least one copy of the manifest; within ten calendar days of delivery (rather than two working days), mail a copy of the manifest to the generator, the generator State and the destination State (if different from the generator State), making legible photocopies as necessary (facilities do not need to distribute manifest copies to states other than New York, if those states do not require such a copy be submitted to them); and retain at the facility a copy of each manifest for at least three years from the date of delivery.

If a facility receives hazardous waste imported from a foreign source, the receiving facility must also mail a copy of the manifest to the USEPA.

Manifest discrepancies and differences in quantity definitions are clarified and procedures for resolving these issues are clarified. Procedures for rejected wastes and container residues are established.

Requirements for analysis of received shipments are clarified.

A facility must determine whether the consignment state for a shipment regulates any additional wastes (beyond those regulated Federally) as hazardous wastes under its state hazardous waste program. Facilities must also determine whether the consignment state or generator state requires the facility to submit any copies of the manifest to these states.

For unmanifested shipments, the facility must file an unmanifested waste report with the Department within ten calendar days, rather than two business days.

Communication with the appropriate regional office of the Department is no longer required before instructing the transporter to return a rejected shipment to the generator.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 372.2(a)(8)(ix), (b)(2)(ii), (3)(iii), (6), (10), 372.3(b)(6)(i), (b)(2), 372.7(d)(3), Appendix 30, 373-2.5(b)(1), (3)(i), 373-3.5(b)(1) and (3)(i).

**Text of rule and any required statements and analyses may be obtained from:** Deborah L. Aldrich, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7250, (518) 402-8730, e-mail: hwregs@gw.dec.state.ny.us

**Additional matter required by statute:** Negative Declaration under SEQR.

#### Revised Summary of Regulatory Impact Statement

##### 1. Statutory Authority

ECL Article 3, Title 3; Article 27, Section 0905; and Article 71, Titles 27 and 35.

##### 2. Legislative Objective

The Legislature tasked the Department to promulgate hazardous waste management regulations necessary to protect human health and the environment, consistent with federal regulations. New and amended federal regulations are to be adopted in a timely manner. These amendments adopt federal changes to the hazardous waste manifest program published in the March 4, 2005 Federal Register and the associated June 16, 2005 corrections. In addition, a number of changes to the more stringent aspects of the State manifest program are included.

##### 3. Needs and Benefits

The USEPA promulgated revisions to the hazardous waste manifest program, including a nationally mandated revised manifest form, create national consistency for the program. The revised form was promulgated pursuant to U.S. Department of Transportation (DOT) hazardous materials statute and regulations, in addition to RCRA. Through the DOT authority, the use of the new federal manifest form is mandated nationwide, preempting existing State regulations. These mandated changes to the hazardous waste manifest form will go into effect in New York and nationwide on September 5, 2006 with or without State regulatory amendment. State regulations need to be amended to reflect these new federal mandates as close to this federal effective date as feasible to decrease confusion for the regulated community, ease the transition from the old form to the new form and associated program changes, and assure the State's continued enforcement capability under the hazardous waste management regulations.

USEPA details the needs and benefits of these changes in the federal register. (70 FR 10776, March 4, 2005). From the State perspective, these changes are required to assure national consistency, meet our statutory mandate, and maintain our authorization from USEPA for the hazardous waste management program.

##### State Initiated Changes

a) 370.2(b)(43): Definition of "designated treatment, storage or disposal facility" (TSDf): The State added reference to facilities which can receive manifested shipments but are not permitted facilities, to make the definition consistent with other regulatory text which states that these facilities can receive manifested shipments.

b) 371.1(a)(1)(iii)('a')('1'): Missing text is reinserted into regulation which was deleted in error in a previous rule making.

c) 372.2(b)(2): The State is more stringent than USEPA in that the generator must still receive written communication from the TSDf prior to shipment, however, the content of that communication has been simplified. Requiring the generator to have the written documentation that the TSDf is authorized to receive the generator's specific waste protects the generator and assures the department that the receiving facility is capable of properly managing the waste.

d) 372.2(b)(2)(ii): The State has always required the generator to provide the ultimate disposal method for the waste on the manifest. The generator must know how their waste will be managed, as they are ultimately liable for the proper disposal of the waste.

e) 372.2(b)(3), appendix 30: The State proposes to change the time from 5 business days to 10 calendar days for generators to distribute copies, to take holidays into account and allow facilities to mail forms once a week. In addition, language is revised so generators will not need to distribute manifest copies to states who do not require a copy be sent to them. These administrative changes will not impact the operation of the manifest program and provide regulatory relief allowing generators to simplify their Standard Operating Procedures and save on mailing costs.

f) 372.2(b)(3)(iii): The generator may need to make copies of the form to meet the requirement of mailing a copy to the state(s) involved. The increased amount of time allowed prior to mailing will provide a business which has limited access to a copy machine the time necessary to meet this requirement. The option of not requiring the form be mailed to the state is not acceptable to the department. Tracking of the initiation of a hazardous waste shipment is the backbone to the "cradle to grave" tracking the State completes for each hazardous waste shipment originating from the State or being delivered to a facility in the State. This tracking protects against

midnight dumping of hazardous wastes along the roads or in the waterways of the State and disposal of hazardous wastes at illegal locations by unpermitted facilities.

g) 372.2(b)(5)('b'): This clause is proposed to be deleted. The existing clause is inconsistent with Part 364 of this Title. Since existing clause 372.2(b)(5)('c') covers all cases where a transporter does not require a Part 364 permit, clause ('b') is not necessary.

h) 372.2(b)(6): Since the new form allows non-hazardous waste to be listed on the manifest, this provision will be changed to state that use of a hazardous waste code on a manifest constitutes a determination by the generator that the waste is hazardous in New York. This will provide an enforcement tool to the department while allowing non-hazardous material to be listed on the manifest, as required by the federal regulations.

i) 372.2(b)(9): The State will incorporate the federal form printing regulations by reference. With the advent of a nationally uniform form and the national program for form printing, the State will no longer print manifest forms.

j) 372.3(b)(4)(ii): Transporters can now modify the manifest upon instruction by the generator, if the waste cannot be delivered to the designated TSDf or alternate TSDf. Previously, transporters were not allowed to modify the manifest. From a practical perspective, allowing the original manifest to continue with the shipment with modifications as needed, approved by the generator, is a much simpler and easier approach to implement.

k) 372.7(d)(2): Cross referencing corrected.

l) 372.7(d)(4): Present time of 30 days for submittal of an unmanifested waste report should be 15 days to be consistent with federal regulations.

m) new 373-2.5(b)(1)(i)('b')('1') (similar change in 373-3): The TSDf responsibility to determine form completeness and accountability for any changes made, is maintained. In New York State, information on the form has financial impact to both the generator and the TSDf through hazardous waste regulatory fees and special assessment taxes. It is important to have a complete and accurate form and accountability for changes made to the form by all parties.

n) 373-2.5(b)(1)(ii) (similar change in 373-3): Language is clarified regarding analysis of a representative sample of the hazardous waste shipment to reference "as specified in the waste analysis plan." The receiving facility is required to have a waste analysis plan pursuant to 373-2.2(e)(2). The revision clarifies the use of the waste analysis plan as it pertains to each hazardous waste shipment.

o) 373-2.5(b)(1)(iv) (relocated to 373-2.5(b)(1)(i)('b')('5')) and appendix 30 (similar change in 373-3): Increased time from two business days to 10 calendar days for distribution of manifest copies to allow once a week mailings and allows additional time for resolution of discrepancies. In addition, language is revised so receiving facilities will not need to distribute manifest copies to states who do not require a copy be sent to them. These administrative changes will not impact the operation of the manifest program and provide regulatory relief allowing TSDfs to simplify their Standard Operating Procedures and save on mailing costs and labor.

Maintaining RCRA and HSWA authorization and keeping current with the federal regulations by adopting the federal manifest program changes is beneficial to the State and the regulated community. The State maintains primary responsibility for implementing the federal hazardous waste management program. It decreases confusion for the regulated community. The State's ability to collect information on the ultimate disposal of manifested hazardous waste continues. The State obtains maximum grant support from the USEPA.

##### 4. Costs

##### a. Costs to the Regulated Community

USEPA projects that these amendments will decrease the cost of regulatory conformance. They estimate a 4% to 5% burden hour reduction, producing a national total of \$12.7 to \$20.6 million in average annual paperwork burden reduction benefits.

New York State represents an estimated 13.18 percent of the total waste generators in the United States. Based on this, the cost savings in New York State is estimated to be \$1.67 million to \$2.72 million annually in average annual paperwork burden reduction benefits.

The state requirement for generators to provide the ultimate disposal code, while more stringent than federal regulations, is not a change from existing regulations, so no additional cost is associated with this requirement.

With regard to the State initiated changes to areas of the State regulations which are more stringent than federal regulations, it is projected that cost savings will be realized by larger facilities from postal savings. Mail-

ing costs will also be saved for those facilities who stop mailing manifest copies to States who do not wish to receive them. Additional time to resolve discrepancies before mailing manifest copies will also result in decreased postage and labor.

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

The Department will incur cost to re-write the computer program which manages manifest data. The Department will incur cost to train the regulated community. Other costs to the Department should be minimal. The State will save money from not printing manifest forms. The amendments to the State regulations require no additional statutory authority, do not create new regulatory programs, do not expand existing regulatory programs, and do not increase the universe of the regulated community beyond that which is already required by the Federal regulations. Conformance with these amendments should not result in substantial additional costs to other branches of local or State governments.

5. Local Government Mandates

No additional recordkeeping, reporting, or other requirements will be imposed on local governments by this rule making. To the extent that a local government may be a generator of hazardous waste, they may need to make a copy of a manifest to mail to the state, rather than the existing method of using one of the copies provided as part of the form.

6. Paperwork

The changes to the manifest program are anticipated to decrease paper work for the regulated community.

7. Duplication

The proposed amendments will not result in a duplication of State regulations. Instead, by adopting the recent federal manifest regulation, New York will not only retain authorization, but also reduce duplicative State and federal regulation of hazardous waste in New York State and maintain enforcement authority.

8. Alternatives

For the federal manifest changes, except for amending the existing Part 370 series regulations, there are no other viable regulatory alternatives available for keeping the Department's regulations relevant and enforceable. Similarly, there are no viable non-regulatory options.

The "no-action" alternative for the federal changes would result in the State's loss of authorization and having unenforceable regulations in place. The State would also lose the ability to collect information on the ultimate disposal method for hazardous wastes generated or managed in the State. However, the Department could choose the "no-action" alternative for those state changes which address areas where the State manifest program is more stringent than the federal. The State could choose not to make the administrative changes proposed, however, there would be no environmental benefit to State for maintaining the administrative burden on the regulated community.

9. Federal Standards

The proposed changes will make state regulations consistent with federal standards. If the federal changes were not adopted, the State program would be pre-empted by the federal program and would not be enforceable. The State will continue to have a manifest program which is more stringent than the federal in that it requires submittal of copies of the manifest to the State and requires information on the ultimate disposal of the waste reported on the manifest.

10. Compliance Schedule

Regulated persons must comply with the federal changes included in this as of September 5, 2006.

**Regulatory Flexibility Analysis**

Although changes were made to the proposal, the changes do not necessitate revision to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments. The changes are not considered substantial and reflect the intent of the proposed regulations.

**Rural Area Flexibility Analysis**

Although changes were made to the proposal, the changes do not necessitate revision to the previously published Rural Area Flexibility Analysis. The changes are not considered substantial and reflect the intent of the proposed regulations.

**Job Impact Statement**

A Job Impact Statement was not prepared for the proposed rule as it is not expected to create a substantial adverse impact on jobs and employment opportunities in New York State.

Although changes were made to the proposal, the changes do not necessitate revision to the previously published Job Impact Statement of no effect. The changes are not considered substantial and reflect the intent of the proposed regulations.

**Assessment of Public Comment**

1. General: Comment: The commentor supports the proposed rule to ensure uniformity with federal requirements, and encourages finalizing a manifest rule that is fully consistent with the federal requirements.

Response: The support is appreciated. The Department will finalize a manifest rule that is as consistent with the federal requirements as possible, while still meeting the State's needs.

2. 372.2(b)(2)(ii): Comment: The state proposed the generator designate a New York recognized ultimate disposal method in item 19 (L = landfill, B = incineration, etc.) for each waste listed on the manifest. This contradicts the federal mandate for specific information to be provided in item 19 and, in fact, USEPA has precluded the State from requiring this information in item 19. In its discussion on requiring ultimate disposal method in item 19 in the preamble, USEPA stated that "... it would be confusing and inappropriate to expect a TSDF to enter an ultimate disposition code reflecting how the waste was to be processed at another facility."

Response: The State agrees that additional information cannot be required for item 19. The information the commentor is discussing is required by the state to be entered into item 13, "Waste Codes". USEPA in the preamble stated that States can require additional State waste codes, and a code to designate the ultimate disposal method for the waste is an example of such a code.

It has long been the Department's position that a generator know how their waste is ultimately disposed. While this is potentially requiring additional data on the manifest to be completed by the generator, this is not a new requirement for the generator. Information on the ultimate disposition of the waste was gathered on the previous manifest form in the form of a handling code, using the same codes being designated here (L = landfill, B = incineration, etc.).

In New York State, generation of waste is subject to a special assessment tax based on the ultimate disposal of the waste. While the vast majority of the management method codes that will be listed by the TSD in item 19 will provide enough information for the State to determine the ultimate disposal method, certain codes, such as H141 for "storage", provide no indication as to the ultimate disposal method. With no other information available, the State must assume the waste was handled in the most expensive manner, landfilled. Adding the handling codes presently required on the New York manifest as a waste code on the new manifest provides the generator with the opportunity to notify the State that the waste was perhaps treated or incinerated, which are taxed at a lower rate. With this notification, they will not be billed as if the waste was landfilled. The State sees the additional State waste code as an opportunity for generators to assure they are not over billed for the special assessment tax for their waste.

3. 372.2(b)(1)(i) and (3)(i): Comment: The State requires the generator to make additional copies of the manifest to meet the requirement of mailing a copy to NY State and other states involved. This requirement will cause the USEPA's uniform 6-part manifest to turn into an 8-part manifest thus contributing to lack of uniformity across the board as the USEPA has intended. Some of the small "mom and pop" operations throughout New York do not have a copier readily available. This proposed requirement would add to the cost of producing, mailing and maintaining the additional copies of the manifest and provide an undue burden on many small operations throughout the state. Many states today already utilize a six page manifest. There is no evidence that states utilizing the six page manifest have realized any different environmental performance from those utilizing the eight page manifest. The commentor believes that the burden and cost created by requiring additional copies of the manifest will not be compensated by any additional protection of human health and the environment. The commentor requested New York to require the use of a six page manifest with no additional copies.

Response: In the federal system, USEPA recognizes that additional copies of the manifest may be required beyond the six provided for in the form. In the preamble, pages 10796 and 10797 of the March 4, 2005 *Federal Register*, USEPA states: "In the proposal, we stated that generators should provide a photocopy of the manifest if their state requires it. . . . Under certain circumstances (e.g., exports, imports, additional transporters, exception reporting, and/or states requiring additional copies), more than six copies of a manifest may be necessary. In these cases, the generator or transporter must photocopy the most legible copy of the form available to ensure that the extra manifest copies are legible." The preamble does not indicate that comments were received from the regulated community arguing against this process.

While some states require only a copy of the manifest form once it has reached its destination, New York State's hazardous waste manifest track-

ing program has a primary purpose of “cradle to grave” tracking of hazardous waste to protect the environment from mismanagement of hazardous waste during transportation, as happened in the past before the existence of the program. While we agree that an 8 part form made this easier, USEPA has overruled the State on this issue and has stated that legible copies will suffice. The State recognizes this may be an added burden on some generators and has increased the amount of time a generator has to mail the copy to the State from 5 business days to 10 calendar days. This should decrease the added burden of making a copy of the form.

4. 372.2(a)(8)(ix) and (b)(4)(iii)(a): Comment: The use of a new manifest must be used for partial load rejection or for regulated quantities of container residues, with the TSD or transporter signing as the “offeror” of the waste in the generator box. Regulatory language is requested to be added to clarify that:

a) When a waste is rejected and a new manifest is produced with the TSD facility or the transporter as the “offeror”, no waste taxes or fees will be levied against the transporter or the TSD facility for such manifested waste since neither of them is the actual generator of that hazardous waste;

b) The rejected waste would not be subject to generator annual or biennial hazardous waste reporting requirements for the transporter or the TSD facility;

c) The amount of waste would not affect the transporter generator status; and

d) The offeror liability is limited to the proper transportation of the rejected load.

Response: When a new manifest is used for a rejected load or container residues, the transporter is never the “offeror” of that waste. That role is reserved for the TSD facility that is rejecting the load or returning the container residues. Following are responses to the specific comments:

a) The State agrees that the TSD is not the generator of waste that is rejected or of container residues. That is why EPA coined the term “offeror”, to make this clear. The State data management system is being rewritten to address the data management needs of the new manifest form and this will be taken into account. This is a data management issue to assure that “offerors” of waste are not taxed as generators, and does not need to be delineated in regulation.

b) The transporter will not be the “offeror” of the waste and so will not have the potential confusion of being considered the generator of that waste. The TSD facility will not be reporting rejected waste as waste generated. It is not known at this time if USEPA will modify the annual/biennial reporting requirements to require reporting by TSD facilities of rejected waste.

c) The transporter should never be listed as the “offeror” on a hazardous waste manifest and so confusion over generator status should not occur.

d) “Offeror” liability is discussed in detail in the federal preamble. As the State regulations incorporate the federal use of this term, the federal interpretation on this issue will be used. No additional regulatory language is required.

5. Comment: The commentor proposed an added provision or clarification to mandate that if a transporter is unable to deliver a shipment to the designated or alternate TSDF, the generator must accept the rejected shipment back from the transporter.

Response: In 372.2(b)(2)(iv), it states that, if the transporter cannot deliver the waste to the designated facility or the alternate facility (if listed), the transporter must contact the generator for further directions. “The generator will then either designate another facility or instruct the transporter to return the waste.” This regulation is clear. If the generator does not provide the transporter another place to take the waste, the generator must take it back. It does, however, provide the generator with the ability to send the transporter to a different facility other than the designated facility or the alternate facility listed on the manifest. To limit the possible destinations to those listed on the manifest, as suggested by the commentor, limits the ability for the transporter and generator to resolve emergency situations. No changes are planned to subparagraph 372.2(b)(2)(iv).

## Department of Health

### EMERGENCY RULE MAKING

#### Nursing Home Pharmacy Regulations

**I.D. No.** HLT-50-05-00004-E

**Filing No.** 826

**Filing date:** July 11, 2006

**Effective date:** July 11, 2006

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

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

**Statutory authority:** Public Health Law, section 2803

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

**Specific reasons underlying the finding of necessity:** There is an increasing need to have available to nursing home residents a wider number of antibiotic and pain management medications to respond quickly in the event of a health crisis to these medically fragile residents. Presently, emergency medication kits are limited as to their content and facilities are not permitted to have certain medications including controlled substances in the emergency kits. Delay in responding to resident needs because a medication is not immediately available in the facility, and has to be secured from the pharmacy, is resulting in needless suffering on the part of nursing home residents.

**Subject:** Nursing home pharmacy regulations.

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

**Text of emergency rule:** Subdivisions (g) and (i) of Section 415.18 are amended to read as follows:

Section 415.18 Pharmacy Services.

\* \* \*

(g) Emergency medications. The facility shall ensure the provision of (an) emergency medication kit(s) as follows:

(1) The contents of each kit shall be approved by the medical director, pharmacist and director of nursing.

(2) [Controlled Substances shall be prohibited in emergency kits.] *Limited supplies of controlled substances for use in emergency situations may be stocked in sealed emergency medication kits.*

(i) *Each such kit may contain up to a 24 hour supply of a maximum of ten different controlled substances in unit dose packaging, three of which may be injectable drugs.*

(ii) *Controlled substances contained in emergency medication kits may be administered by authorized personnel pursuant to an order of an authorized practitioner to meet the immediate need of a resident. Personnel authorized to administer controlled substances shall include registered professional nurses, licensed practical nurses or other practitioners, licensed/registered under Title VIII of the Education Law and authorized to administer controlled substances.*

(iii) *The facility shall maintain all records of controlled substances furnished or transferred from the pharmacy and the disposition of all controlled substances in emergency kits, as required by article 33 of the Public Health Law and corresponding regulations.*

(3) *For medications other than controlled substances [The] the medication contents of each kit shall be limited to injectables except that the kit may also include:*

(i) sublingual nitroglycerine; and

(ii) [up to five] noninjectable[,] prepackaged medications not to exceed a 24-hour supply [; which are the same noninjectable, prepackaged medications in all emergency kits throughout the facility.]. *The total number of noninjectables may not exceed 25 medications for the entire facility.*

(4) Each kit shall be kept and secured within or near the nurses' station.

\* \* \*

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order shall be

given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a *legally* designated alternate [physician] *practitioner* within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

**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-50-05-00004-P, Issue of December 14, 2005. The emergency rule will expire September 8, 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:

These regulation revisions of 10 NYCRR Section 415.18, Pharmacy Services, in nursing homes, are proposed under the authority granted to the Commissioner of Health under PHL Section 2803. The PHL outlines the responsibility to conduct inspections of health care facilities to determine compliance with statutes and regulations promulgated under the provisions of those statutes and authorizes the commissioner to propose rules, regulations and amendments thereto for consideration by the State Hospital Review and Planning Council "the Council". The Council, by a majority vote of its members, shall amend rules and regulations, subject to the approval of the commissioner, to effectuate the provisions and purposes as stated in the PHL.

##### Legislative Objectives:

The Department of Health possesses the comprehensive responsibility for the development and administration of programs, standards and methods of operation, and all other matters of policy with respect to nursing home services. Furthermore, through the Social Security Act, the federal government authorizes the State to administer programs and services through Medical Assistance (*i.e.*, Medicaid). This includes responsibility for standards of care within those settings, in order to ensure the health needs of recipients are met. These amended regulations will enable nursing homes to respond more quickly and efficiently to the health care needs of residents requiring emergency medications. The regulation will ensure the protection of the nursing home resident and promote the highest quality of care.

##### Needs and Benefits:

This proposal to amend 10 NYCRR sections 415.18(g) and 415.18(i) responds to the fact that current regulations for nursing home emergency medication kits and verbal orders are outdated and not in keeping with actual practice.

The State's nursing homes provide a variety of clinical services which were not anticipated when the current pharmacy services regulations were promulgated. The Rug-II case mix reimbursement methodology which began in 1986, has allowed nursing homes to open their doors to residents who require resources which were previously unavailable. Currently, nursing homes accept residents whose clinical needs at one time were met in a hospital. In addition, some nursing homes have units that address the unique needs of special populations such as HIV, traumatic brain injury (TBI), or ventilator residents.

The present regulation, section 415.18(g), provides for emergency medication kits but limits the contents to injectables. It also provides for the kit to contain sublingual nitroglycerine and up to five noninjectable prepackaged medications. At the time this regulation was promulgated, the extensive array of oral medications currently available did not exist and emergency medications were primarily viewed in terms of injectable medications. With the greater complexity of clinical conditions often seen in today's nursing home, resident issues of pain management have taken on greater significance. The availability of oral medications for pain and the wide range of antibiotics that did not exist at the time the regulations were written would significantly affect how nursing homes could respond to an emergency need of a resident.

The present regulations call for the contents of the emergency medication kits to be identical on every unit throughout the facility. At a time when the needs of residents were similar in terms of clinical management, this made sense. However, with nursing homes providing care to special populations including HIV, TBI and ventilator care, this requirement inhibits the most efficient use of emergency medications kits to best meet the

unique clinical needs of special populations. When promulgated, these regulations were seeking to address concerns that facilities would establish "mini" pharmacies by having a wide range of noninjectables in the emergency medication kit and that the presence of a high number of medications may result in administration errors. With safe product packaging that is present today, safety concerns have been significantly reduced. Therefore, the proposed regulation eliminates the cap of up to five noninjectable prepackaged medications per each kit. In addition, the proposed regulation changes would limit the total number of noninjectables that would be available in emergency kits for the entire facility to no more than twenty-five. This would further ensure resident safety and eliminate the concern that nursing homes might stock an unlimited amount of noninjectables in the emergency kits. The proposed revisions would also allow for the presence of controlled substances in nursing home emergency kits. This would allow for the nursing home to respond quickly to pain management concerns that are a major issue for some residents.

Regulations at 415.18(i) provide that all medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order. At the time the original regulations were promulgated only physicians could order medications. The proposed changes would insert the phrase designated alternate practitioner in place of designated alternate physician. This change would be reflective of current practices in which other prescribers, such as a nurse practitioner can order medications.

##### Costs:

##### Costs to Regulated Parties:

There will be no additional costs to regulated parties.

##### Costs to State and Local Government:

There will be no additional costs to State or local governments.

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

There will be no additional costs to the Department.

##### Local Government Mandates:

The proposed regulation imposes no program, duty, service, or other responsibility upon any city, town, village, school, fire or other special district.

##### Paperwork:

The regulation imposes no additional reporting requirements, forms or other paperwork.

##### Duplication:

The regulation does not duplicate any federal or state regulation.

##### Alternative Approaches:

No alternative approaches were considered, since all nursing homes would be allowed flexibility in determining the contents of the emergency medication kit in their facility.

##### Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

##### Compliance Schedule:

The proposed regulation will be effective upon filing with the Secretary of State.

#### **Regulatory Flexibility Analysis**

##### Effect on Small Business and Local Government:

For the purposes of this Regulatory Flexibility Analysis, small businesses are considered any nursing home within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes would therefore be considered "small businesses".

##### Compliance Requirements:

The regulation would impose no additional record keeping or other affirmative acts.

##### Professional Services:

The regulation would impose no additional professional services.

##### Compliance Costs:

The regulation would impose no additional costs.

##### Economic and Technological Feasibility:

The proposed regulation would impose no compliance requirements which would raise technological or feasibility issues.

##### Minimizing Adverse Impact:

The agency considered the approaches listed in section 202-b(1) of SAPA and found them inapplicable. The regulation would impose no adverse impact on small businesses or local governments.

##### Small Business and Local Government Input:

The regulation would have no impact on small businesses and local governments. The regulation is supported by provider and consumer groups and feedback from these groups have been gathered. The proposed

revisions have been sent to the Codes and Regulations Committee of the Council and have appeared on the agenda of the Codes and Regulations Committee which is made up of representatives of groups that have as their members representatives of small business and local government.

**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, which include 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	Putnam	Washington
Franklin	Rensselaer	Wayne
Fulton	St. Lawrence	Wyoming
Genesee	Saratoga	Yates

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

The regulation would impose no additional reporting, recordkeeping or other affirmative acts.

**Professional Services:**

The regulation would not require additional professional services.

**Compliance Costs:**

The regulation would not impose additional costs.

**Minimizing Adverse Impact:**

The regulation would not result in any adverse economic impact on providers. The agency considered the approaches listed in section 202-bb(2) of SAPA and found them inapplicable.

**Opportunity for Rural Area Participation:**

The following groups are in support of the modification of 10 NYCRR 415.18:

- New York Association of Homes and Services for the Aging
- Nursing Home Community Coalition
- New York State Health Facilities Association
- New York State Office for Aging Long Term Care Ombudsman
- Health Facility Association of New York
- New York State Board of Pharmacy
- New York Chapter of the American Society of Consulting Pharmacists

The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made up of representatives of groups that have as their members representatives of rural areas.

**Job Impact Statement**

A Job Impact Statement is not necessary because it is apparent from the nature and purpose of the proposed regulation that it will not have a substantial adverse impact on jobs or employment opportunities. The proposal simply clarifies what drugs can be stocked in emergency medication kits, as well as who may sign verbal orders.

**Assessment of Public Comment**

The agency received no public comment.

**EMERGENCY  
RULE MAKING**

**Controlled Substances in Emergency Kits**

**I.D. No.** HLT-50-05-00005-E

**Filing No.** 827

**Filing date:** July 11, 2006

**Effective date:** July 11, 2006

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

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

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

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

**Specific reasons underlying the finding of necessity:** We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety. Having consulted closely with administrators, nursing personnel and consultant pharmacists of Class 3a health care facilities (nursing homes, and other long-term facilities), the Department has determined that the current Part 80 and Part 400 regulations do not ensure timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. However, for purposes of this emergency justification, Class 3a institutional dispenser, Class 3a facility, and Class 3a health-care facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490. The proposed regulations exempt such adult care facilities from its provisions.

Current regulations require controlled substances to be administered to patients in Class 3a facilities only pursuant to a prescription. On urgent occasions, such as when a patient suffers a sudden seizure or onset of acute pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription to promptly treat the condition. Even if a practitioner is able to first issue a prescription in an emergency, the prescription may not immediately be dispensed by a pharmacy. In these situations, a patient is deprived of timely relief from severe symptoms and suffering.

The proposed amendments will allow controlled substances to be maintained in an emergency medication kit in a Class 3a facility and administered to a patient in an emergency situation. To simultaneously protect the public health against the potential for diversion of such drugs, the amendments also specify limitations on their quantities, recordkeeping requirements for their administration, and security requirements for their safeguarding. Immediate adoption of these regulations is necessary to enhance and ensure the quality of health care of every patient in a long-term care facility. Ensuring timely access to controlled substances for immediate administration during medical emergencies will result in substantial benefit to the public health and safety.

**Subject:** Controlled substances in emergency kits.

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

**Text of emergency rule:** Paragraph (6) of subdivision (b) of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, a habitual user of narcotics or any other habit-forming drugs.

Paragraph (6) of subdivision (c), of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, an habitual user of narcotics or other habit-forming drugs; and

Subdivision (f) of Section 80.11 is amended to read as follows:

(f) Persons conducting distributing activities of controlled substances within the State of New York shall obtain a class 2 license from the department, *except that*:

(1) *Except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, a pharmacy may distribute a controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits. Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a*

facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the type and quantity of the drug distributed, and the signature of the pharmacist.

Section 80.47 is amended by creating subdivisions (a), (b) and (c) and new subdivision (b) is amended to read as follows:

Section 80.47 Institutional dispenser, limited. (a) Nursing homes, convalescent homes, health-related facilities, *adult care facilities subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490* [homes for the aged], dispensaries or clinics not qualifying as institutional dispensers in license class 3 shall apply for an institutional dispenser, limited license. Such institutional dispensers qualifying for controlled substances privileges shall obtain a class 3a license from the department.

(b) An institutional dispenser licensed in class 3a may administer controlled substances to patients only pursuant to a prescription issued by an authorized physician or other authorized practitioner and filled by a registered pharmacy; except that [an] *controlled substances in emergency medication kits may be administered to patients as provided in Section 80.49(d) of this Part, except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.*

(c) An institutional dispenser, limited, licensed in class 3a, which is operated as an integral and physical part of a facility licensed as a class 3 institutional dispenser may be provided with bulk stocks of controlled substances obtained pursuant to such class 3 institutional dispenser license. Records of distribution and administration of such bulk stocks of controlled substances shall be kept as provided in section 80.48(a) of this Part.

Subdivision (c) of section 80.49 is amended and a new subdivision (d) is added to read as follows:

(c) A separate record shall be maintained of the administration of prescribed controlled substances indicating the date and hour of administration, name and quantity of controlled substances, name of the prescriber, patient's name, signature of person administering and the balance of the controlled substances on hand after such administration.

(d) *In an emergency situation, a controlled substance from a sealed emergency medication kit may be administered to a patient by an order of an authorized practitioner. An oral order for such controlled substance shall be immediately reduced to writing and a notation made of the condition which required the administration of the drug. Such oral order shall be signed by the practitioner within 48 hours.*

(1) *For purposes of this subdivision, emergency means that the immediate administration of the drug is necessary and that no alternative treatment is available.*

(2) *A separate record shall be maintained of the administration of controlled substances from an emergency medication kit. Such record shall indicate the date and hour of administration, name and quantity of controlled substances, name of the practitioner ordering the administration of the controlled substance, patient's name, signature of the person administering and the balance of the controlled substances in the emergency medication kit after such administration.*

(3) *The institutional dispenser limited shall notify the pharmacy furnishing controlled substances for the emergency medication kit within 24 hours of each time the emergency kit is unsealed, opened, or shows evidence of tampering.*

Subdivision (e) of section 80.50 is amended and a new paragraph (1) is added to read as follows:

(e) *Except as provided in paragraph (1) of this subdivision, [I]nstitutional dispensers limited may only possess controlled substances prescribed for individual patient use, pursuant to prescriptions filled in a registered pharmacy. These controlled substances shall be safeguarded as provided in subdivision (d) of this section.*

(1) *Except for adult care facilities subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, institutional dispensers limited may possess limited supplies of controlled substances in sealed emergency medication kits for use as provided in section 80.49(d) of this Part. Each kit may contain up to a 24-hour supply of a maximum of ten different controlled substances in unit dose packaging, no more than three of which may be in an injectable form. Each kit shall be secured in a stationary, double-locked system or other secure method approved by the Department.*

**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-50-05-00005-P, Issue of December 14, 2005. The emergency rule will expire September 8, 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:**

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purposes and intent.

Section 3321(1)(b) authorizes the commissioner to make regulations that exempt a pharmacy from the licensing requirements of article 33 for the sale of controlled substances to a practitioner for the immediate needs of the practitioner receiving such substances.

##### **Legislative Objectives:**

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering, and distribution of licit controlled substances within New York. Section 3300-a expressly states that one of the statute's purposes is to allow the legitimate use of controlled substances in health care.

##### **Needs and Benefits:**

This regulation effectuates the above stated legislative purpose of section 3300-a of the New York State Controlled Substances Act. It will ensure timely access to controlled substances by practitioners and patients for emergency situations in extended care facilities and other health care facilities licensed by the Department as Class 3a, institutional dispenser limited. (See section 3302(18) of the Public Health Law for the definition of "institutional dispenser".) However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

Section 80.47 of Title 10 regulations requires that controlled substances be administered to patients in healthcare facilities licensed by the Department as Class 3a institutional dispensers limited (*i.e.*, nursing homes, convalescent homes, health-related facilities, adult homes, homes for the aged, correctional facilities) only pursuant to a prescription issued by an authorized practitioner. The regulation also requires that such prescriptions must be dispensed by a registered pharmacy.

Administrators, nursing personnel, and consultant pharmacists of Class 3a facilities have expressed their concern to the Department that the prescription requirements of Section 80.47 are a restriction to timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. On urgent occasions such as a sudden seizure or onset of intractable pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription for the drug in order to promptly treat the condition. Further, Class 3a facilities do not have onsite pharmacies. Even if a practitioner is able to first issue a prescription for a controlled substance to treat a patient in an emergency, that prescription may not immediately be dispensed by an outside pharmacy because the pharmacy may be too distant from the Class 3a facility or the emergency may have occurred during the pharmacy's non-business hours. These situations can, and do, result in needed medications not being administered in a timely fashion to relieve a patient's severe symptoms or suffering.

The proposed amendment to Section 80.47 of the regulations authorizes the administration of a controlled substance from an emergency medication kit to a patient in an emergency situation in a Class 3a healthcare facility. Necessary complements to this amendment are the proposed amendments to Sections 80.11(f), 80.49 and 80.50(e) of Title 10 regulations. The proposed change to Section 80.11(b)(6) is merely grammatical.

The amendment to Section 80.11(f) authorizes a licensed pharmacy to supply controlled substances to a practitioner in a Class 3a facility for stocking in emergency medication kits. The amendments to Section 80.50(e) authorize a Class 3a healthcare facility to possess a limited supply of controlled substances in an emergency medication kit and specify limitations on the quantities of such substances and requirements for their safeguarding. The amendment to Section 80.49 specifies recordkeeping requirements for controlled substances administered from emergency kits. When instituted together, these amendments will provide for timely access to controlled substances by practitioners and patients in the long-term care facility environment while simultaneously requiring adequate measures to ensure the security of such substances.

The federal Drug Enforcement Administration (DEA) also recognizes the need for storing controlled substances in emergency kits for administration to patients during urgent situations in long-term care facilities that are not eligible to hold a DEA registration. Since 1980, the DEA has issued a Statement of Policy containing guidelines for state regulatory agencies to follow when authorizing long-term care facilities to maintain such kits. Such guidelines have been incorporated in the proposed regulatory amendments.

The proposed regulatory amendments will enhance the quality of care of every patient in a long-term care facility licensed by the Department of Health. Such regulation will result in substantial benefit to the public health, which the Department has both a civic and legislative responsibility to ensure.

#### Costs:

##### Costs to Regulated Parties

Healthcare facilities licensed as Class 3a institutional dispensers limited already possess required secure cabinets for safeguarding controlled substances. Such secure cabinets can also safeguard emergency kits containing controlled substances. Those facilities choosing to maintain such emergency kits will incur minimal costs to do so. These costs will be reflected in the purchase of the limited supplies of controlled substances and the sealable emergency kits required to secure and store them.

##### Costs to State and Local Government

There will be no costs to state or local government.

##### Costs to the Department of Health

There will be no additional costs to the Department.

##### Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

##### Paperwork:

Class 3a healthcare facilities are currently required by regulations to keep records of the receipt of all controlled substances prescribed for individual patients. Such facilities are also required to record all controlled substances dispensed and administered to such patients. These recordkeeping requirements would include the requisition and receipt of controlled substances for stocking in emergency medication kits.

Practitioners authorized to prescribe controlled substances are required by regulations to make a notation in a patient record of all controlled substances prescribed for that patient. The amendment to Section 80.47 requires that the administration of a controlled substance to a patient from an emergency kit in a Class 3a facility be pursuant to the written or oral medical order of a practitioner.

The Department anticipates a minimal increase in paperwork documenting the requisition, distribution, medical order, and administration of controlled substances contained in emergency medication kits. Such increase will be more than offset by the enhancement of healthcare for patients in the long term care environment.

##### Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

##### Alternatives:

The intent of the proposed regulation is to ensure access to controlled substance medications when urgently needed. The department believes it is in the best interest of the public health to authorize such accessibility to relieve pain or suffering. There are no alternatives that would ensure accessibility to controlled substances by practitioners and patients for emergency situations in long term care facilities and other health care facilities licensed as Class 3a, institutional dispenser limited.

##### Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government. This amendment achieves consistency with existing federal and New York State laws and regulations promulgated to authorize the legitimate use of controlled substances in health care.

##### Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State. At that time, in order that the public health derive maximum benefit from this regulatory amendment, all Class 3a license holders will be authorized to possess and administer controlled substances in an emergency medication kit to meet the immediate, legitimate need of a patient.

#### **Regulatory Flexibility Analysis**

##### Effect of Rule on Small Business and Local Government:

This proposed rule will affect practitioners, pharmacists, retail pharmacies, and nursing homes and other healthcare facilities licensed by the

Department as Class 3a institutional dispensers limited. Local government will only be affected if it operates one of the above facilities.

According to the New York State Department of Education, Office of the Professions, as of April, 2003, there were 113,666 licensed and registered practitioners authorized to prescribe and order the administration of controlled substances. However, this rule will affect only those practitioners who prescribe or order the administration of controlled substances for patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

According to the New York State Board of Pharmacy, as of June 30, 2003, there were a total of 4,521 pharmacies in New York State. Of these, 60 are sole proprietorship, 297 are partnerships, 73 are small chains (fewer than 3 pharmacies per chain) and the rest are large chains or other corporations (some of which may be small businesses) or located in public institutions. According to the New York State Education Department's Office of the Professions, as of April 1, 2003, there were 18,950 licensed and registered pharmacists in New York. However, this rule will affect only those pharmacies and pharmacists that dispense prescriptions for controlled substances to patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

Of the 1,282 healthcare facilities licensed by the department as Class 3a institutional dispensers limited, the rule will affect only those facilities that choose to maintain controlled substances in emergency medication kits. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

##### Compliance Requirements:

There are no compliance requirements. While the proposed amendment authorizes Class 3a facilities to possess and administer controlled substances from emergency medication kits, the regulation does not require such facilities to do so.

##### Professional Services:

No additional professional services are necessary.

##### Compliance Costs:

Other than the cost of the controlled substances and sealable emergency medication kits for those Class 3a facilities choosing to possess such kits, there are no compliance costs associated with the proposed regulation.

##### Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and recordkeeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

##### Minimizing Adverse Impact:

The agency considered the approaches in section 202-b(1) of SAPA and found them inapplicable. The proposed regulation minimizes any adverse impact by not requiring pharmacies to supply controlled substances to Class 3a facilities for emergency medication kits. Pharmacies are authorized to engage in such activity strictly on a voluntary basis.

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

To ensure that small businesses were given the opportunity to participate in this rule making, the Department met with the pharmacy societies representing independent pharmacies. Local governments are not affected.

During the drafting of this regulation, the Department met with the Pharmaceutical Society of the State of New York (PSSNY), the Chain Pharmacy Association of New York State, the New York Council of Health Systems Pharmacists, and the New York State Chapter of American Society of Consultant Pharmacists.

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

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

The proposed rule will apply to participating pharmacies and Class 3a healthcare facilities located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain widespread rural areas. These can range in extent from small towns and villages, and their surrounding areas, to locations that are very sparsely populated.

##### Compliance Requirements:

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances

to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency situation. However, these actions are undertaken on a voluntary basis by both pharmacy and healthcare facility. The regulation does not require either party to participate.

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration of controlled substances. The proposed regulation requires a minimum of additional recordkeeping to ensure limited access to emergency medication kits and safeguarding of the controlled substances contained therein. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

#### Professional Services:

Pharmacies already employ the professional services of licensed and registered pharmacists. Class 3a healthcare facilities employ the services of practitioners, nurses, and consultant pharmacists. The proposed regulation would require no additional professional services, either public or private, in rural areas.

#### Compliance Costs:

Compliance costs to pharmacies opting to distribute limited supplies of controlled substances to Class 3a facilities will be negligible, since these pharmacies already maintain an existing inventory of such controlled substances. Other than the cost of the controlled substances and the sealable medication kits in which to store them, the compliance cost to Class 3a facilities choosing to possess such kits will be minimal.

#### Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and recordkeeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

#### Minimizing Adverse Impact:

The agency considered the approaches in Section 202-bb(2) of SAPA and found them inapplicable.

In ensuring access to controlled substances for legitimate medical treatment by practitioners and patients in Class 3a healthcare facilities, the proposed amendment does not impose any adverse impact upon rural areas. In fact, because in a rural setting pharmacies supplying prescriptions for controlled substances may be located at increased distances from long term care facilities, it is anticipated that these healthcare facilities would derive maximum benefit for their patients by being authorized to maintain limited supplies of controlled substances in sealed medication kits for use in emergency situations.

#### Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comment from consultant pharmacists to Class 3a facilities, many of which are located in rural areas. It was the overwhelming consensus that pharmacists could better meet and greatly enhance the healthcare of the patients they serve in such facilities by being authorized to supply controlled substances for emergency medication kits. Administrative and nursing personnel in such facilities have also voiced to the Agency their need for emergency access to controlled substances for administration to patients to alleviate suffering in urgent situations. The agency addressed many of these concerns in the proposed regulation.

#### Job Impact Statement

##### Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. In benefiting the public health by ensuring access to controlled substances for legitimate healthcare needs, the proposed amendment is not expected to either increase or decrease jobs overall.

#### Assessment of Public Comment

The agency received no public comment.

## Office of Homeland Security

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

#### Public Access to Records

**I.D. No.** HLS-30-06-00002-P

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

**Proposed action:** Addition of Part 10025 to Title 9 NYCRR.

**Statutory authority:** Public Officers Law, section 87(1)(b); and Executive Law, section 709(2)(n)

**Subject:** Public access to records.

**Purpose:** To provide procedures by which the public can seek to access records of the Office of Homeland Security.

**Substance of proposed rule (Full text is not posted on a State website):** The following provides a summary of each section of the proposed rules for the addition of new Part 10025 to Title 9 of NYCRR relating to the procedures for public access to the records of the Office of Homeland Security.

Section 10025.1 - Notes: provides the statutory authority for the Office of Homeland Security to promulgate the proposed rules.

Section 10025.2 - Definitions: provides the definitions for certain terms used throughout the proposed rules.

Section 10025.3 - Purpose and Scope: provides that these rules are to be promulgated in accordance with Article 6 of the Public Officers Law, commonly known as the Freedom of Information Law.

Section 10025.4 - Designation of Records Access Officer: Duties: outlines the duties and responsibilities of the Records Access Officer as mandated by the Public Officers Law. Duties include: processing requests; compiling records; certifying records, and rendering decisions on the disclosure of records in accordance with the Public Officers Law.

Section 10025.5 - Requests for Inspection and Copying of Records: follows the mandates of the Public Officers Law and provides procedures for the public to access the records of the Office of Homeland Security including: the format for requests, response time and content requirements in accordance with the Public Officers Law.

Section 10025.6 - Requests for exception of trade secrets or critical infrastructure information: follows the mandates of the Public Officers Law and provides procedures for individuals to except trade secrets or critical infrastructure information records from public access, including the format, response times, content requirements, appeal procedures and service requirements.

Section 10025.7 - Requests for inspection and copying of excepted trade secrets or critical infrastructure information: follows the mandates of the Public Officers Law relating to the procedures to be followed for public access to excepted from disclosure records of the Office of Homeland Security.

Section 10025.8 - Location of Records For Inspection: Hours: provides that records can be reviewed at the offices of the Office of Homeland Security between the hours of 10:00 AM and 4:00 PM Monday through Friday, excepting legal holidays, and provides that copies of authorized records may be mailed to the requesting party.

Section 10025.9 - Denial of Access To Records: provides the procedure for appealing a decision by the Records Access Officer to the Chief Counsel. The rule follows the mandates of the Public Officers Law and mirrors the time deadlines for filing appeals and the response of the Chief Counsel. The rule also provides that failure of the Chief Counsel to respond timely permits the aggrieved party to proceed immediately with court review via an Article 78 proceeding under the CPLR.

Section 10025.10 - Denial of requests to except or access trade secrets and critical infrastructure information: provides the procedure for appealing a decision by the Records Access Officer to the Chief Counsel for denials relating to trade secrets and critical infrastructure information. The rule follows the mandates of the Public Officers Law and mirrors the time deadlines for filing appeals and the response of the Chief Counsel. The rule also provides that failure of the Chief Counsel to respond timely permits the aggrieved party to proceed immediately with court review via an Article 78 proceeding under the CPLR.

Section 10025.11 - Failure To Comply With Section 89(3) And (4)(a): provides that the failure of the Records Access Officer or Chief Counsel to follow the time deadlines for responses under Article 6, section 89 (3) and/or (4)(a) permits an immediate Article 78 proceeding under the CPLR.

Section 10025.12 - Fees: provides the statutory fees to be charged for record duplication and the ability of the records access officer to waive any fee.

Section 10025.13 - Severability: provides that any portion of these rules held by a court to be invalid shall not effect any other provision of these rules.

**Text of proposed rule and any required statements and analyses may be obtained from:** James R. Clark, Counsel, Office of Homeland Security, State Campus, 1220 Washington Ave., Bldg. 7A, 7th Fl., Albany, NY 12226, (518) 402-2227, e-mail: jclark@security.state.ny.us

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

**Public comment will be received until:** 60 days after publication of this notice.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

The Office of Homeland Security has the authority under Executive Law, Article 26, section 709-2(n) and Public Officers Law, Article 6, section 87-1(b) to promulgate rules relating to public access to the records of the Office of Homeland Security.

##### Legislative Objectives:

The legislative objectives authorizing the Office of Homeland Security to promulgate rules and regulations permits the office to comply with the legal mandates of the laws of New York, including Public Officers Law, Article 6 commonly known as the Freedom of Information Law and to allow public access to the records of the Office of Homeland Security. The Office of Homeland Security has sought to comply with both the mandates of the legislature and the laws of New York by proposing procedural rules to allow the public to seek access to its records.

##### Needs and Benefits:

Procedural rules are mandated by Article 6, section 87-1(b) of the Public Officers Law to be promulgated by agencies and will benefit the general public by providing the necessary framework through which the public may seek to gain access to the records of the Office of Homeland Security in accordance with law.

##### Costs:

a) Costs to State Government: There are no additional costs to the state other than costs associated with printing and distribution of the rules.

b) Costs to Local Government: There are no costs to local government.

c) Cost to Regulated Parties: Any costs are limited to parties seeking records and fees for duplication of any records are set forth in accordance with Article 6 of the Public Officers Law.

##### Local Government Mandates:

The proposed regulation does not impose a new program duty or responsibility to any county, city, town, village, school district, fire district or special district.

##### Paperwork:

No new paperwork requirements are created by the proposed rule.

##### Duplication:

This regulation does not duplicate any existing local, state or federal regulation relating to the Office of Homeland Security.

##### Alternatives Considered:

No alternative approaches were considered as Article 6, section 87 of the Public Officers Law requires the rules to be promulgated.

##### Federal Standards:

No federal law or regulation is applicable.

##### Compliance Schedule:

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

##### Access to Studies and Data Abstract:

No studies or separate data were utilized in the formation of the proposed public record access rules.

#### **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. This rule merely provides procedures whereby the public can seek access to records of the Office of Homeland Security pursuant to the Public Officers Law.

#### **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. This rule merely provides procedures whereby the public can seek access to records of the Office of Homeland Security pursuant to the Public Officers Law.

#### **Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This rule merely provides procedures whereby the public can seek access to records of the Office of Homeland Security pursuant to the Public Officers Law.

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## Department of Law

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

#### **Cooperative Sponsor Disclosure Requirements**

**I.D. No.** LAW-30-06-00004-P

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

**Proposed action:** Amendment of sections 18.3 and 18.5(c)(3) of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(6)(a) and (b)

**Subject:** Cooperative sponsor disclosure requirements.

**Purpose:** To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and the possible negative repercussions of excessive sponsor retention.

**Text of proposed rule:** 1. New subdivisions (1), (2) and (3) of section 18.3 (c) are added to read as follows:

(1) *Disclose whether sponsor is reserving the right to rent rather than sell units appurtenant to its unsold shares (hereinafter "units") as they become vacant. If sponsor is retaining such right, without committing itself to sell at least 51 percent of the units as they become vacant, to purchasers for personal occupancy, the cover of the plan must state in bold print:*

**BECAUSE SPONSOR IS RETAINING THE RIGHT TO RENT MORE THAN 49 PERCENT OF THE UNITS IN THE BUILDING OR BUILDINGS BEING CONVERTED TO COOPERATIVE OWNERSHIP, FUTURE MARKETABILITY OF ALL UNITS MAY BE ADVERSELY AFFECTED AND PURCHASERS MAY NEVER GAIN EFFECTIVE CONTROL OF THE COOP BOARD OF DIRECTORS. (SEE SPECIAL RISKS SECTION).**

*Disclose that as a result of sponsor retaining more than 49 percent of the units, marketability of the units may be adversely affected. Explain that certain institutional lenders may be unwilling to make loans for the purchase of units in a cooperative in which the sponsor and/or holders of unsold shares retain more than 49 percent of the units and that purchasers may therefore be unable to obtain institutional financing for their own purchase. Disclose that if they do close title and subsequently seek to sell their apartments, prospective purchasers may be unable to obtain institutional financing solely on the basis of sponsor's holding more than 49 percent of the units in the cooperative corporation, regardless of the credit worthiness of the prospective purchaser. If the sponsor is able to demonstrate that an institutional lender has approved the project for coop loans to qualified purchasers, a disclosure identifying the lender, the terms of the loans to be offered, eligibility criteria and other material aspects of the lender's commitment to the project should be included.*

(2) *If sponsor represents that it will sell 51 percent of the units as they become vacant, to purchasers for personal occupancy, disclose whether sponsor further represents that it will endeavor in good faith to sell, in a reasonably timely manner, all remaining unsold units as they become vacant, to purchasers for personal occupancy, in the building or buildings being converted to cooperative ownership. If sponsor intends to sell fewer than all of the units, disclose this fact and the number and percentage which sponsor does intend to sell, in bold print as the first special risk. Disclose that the units reserved by sponsor may remain unsold indefinitely and sponsor may dispose of such units as it chooses, including selling to investors, renting to tenants, permitting occupancy by*

relatives or others, allowing them to remain vacant or selling to purchasers for personal occupancy. If the sponsor later chooses to sell a greater number and percentage of units to the public for personal occupancy than disclosed in the initial offering plan, the plan must be amended to disclose that fact.

If sponsor makes a bulk sale of all or some of its unsold shares, the transferee is bound by sponsor's representations regarding its commitment to sell units as they become vacant.

(3) If the bylaws of the cooperative do not include a provision that after the initial sponsor control period, a majority of the Board of Directors must be owner-occupants or members of owner-occupant's households who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk and the following warning must be placed on the cover:

**THIS PLAN DOES NOT GUARANTEE THAT OWNER-OCCUPANTS WILL EVER CONSTITUTE A MAJORITY OF THE COOP BOARD OF DIRECTORS (SEE SPECIAL RISKS SECTION OF PLAN.)**

Disclose that unless and until a majority of the Board are residents of the building unrelated to the sponsor, owner-occupants will not gain effective control and management of the cooperative. Disclose that owner-occupants and non-resident shareholders, including sponsor, may have inherent conflicts on how the cooperative should be managed because of their different reasons for purchasing, i.e. purchase as a home as opposed to as an investment.

2. Subdivisions (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) are renumbered subdivisions (4), (5), (6), (7), (8), (9), (10), (11), (12), (13) respectively and a new subdivision (3) is added. Subdivision (3) of section 18.3(e) is added to read as follows:

(3) [Describe the interest that the apartment corporation is to acquire in the land and building.] *Disclose sponsor's intent with regard to the sale of apartments offered in the plan. Disclose whether sponsor represents that it will endeavor in good faith to sell, in a reasonably timely manner, all residential units as they become vacant, to purchasers for personal occupancy in the building or buildings being converted to cooperative ownership. If sponsor represents an intent to sell fewer than all of the units in the building or buildings being converted to cooperative ownership, disclose the number and percentage which sponsor does intend to sell. Disclose whether sponsor represents that it will decline to rent apartments, as they become vacant, until it has sold at least 51 percent of the units to purchasers for personal occupancy. If sponsor reserves the right to rent rather than sell after reaching the 51 percent sales level, disclose whether sponsor is limiting its right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions upon which sponsor would resume sales. If sponsor does not represent its good faith intent to sell and to obtain sales of 51 percent of the units prior to renting, include on the cover of the plan the warning set forth in section 18.3(c)(1) above and discuss as a special risk.*

3. Subdivision (ii), (iii), (iv) and (v) of section 18.3(e)(5) are renumbered subdivisions (iii), (iv), (v) and (vi) respectively, new subdivisions (ii) and (vii) are added to read as follows:

(ii) *the apartment corporation, as the fee owner of the entire building, is assessed for the real estate taxes on the property and may be the mortgagor on a mortgage encumbering the entire property. As a result, shareholders are co-dependent on each other and on the sponsor for payment of the mortgage and taxes, default on which will jeopardize each shareholder's equity in his/her shares and unit. Where the sponsor owns a substantial percentage of the units, a default in payment of maintenance by sponsor jeopardizes the equity interest of other shareholders.*

(vii) *Discuss the transitional phase of the conversion process from rental building to owner-occupied cooperative. Disclose that because the plan can be declared effective based on sales of 15 per cent of the units to tenants or bona fide purchasers for their own occupancy, purchasers may be living in a mixed rental/owner-occupied building for an indeterminate period of time, and that purchasers' units may not be marketable and owner-occupants may not control the board or operation of the property during such transition. Further discuss how the existence of rent regulated, non purchasing, tenants, who have a right to continued occupancy, may affect the speed of the conversion process. Discuss other aspects of living in a mixed rental/owner-occupied building, including different interests of owners and renters and the consequences of sponsor's continuing role in the building.*

4. Newly renumbered subdivision (v), formerly subdivision (iv), is amended to read as follows:

(v) *the conduct of the affairs of the apartment corporation will be in the hands of the board of directors;[and]disclose whether sponsor represents, and provides in the by-laws, that a majority of the apartment corporation board must be owner-occupants of the building or members of an owner-occupant's household, who are unrelated to the sponsor or its principals, after the end of the sponsor control period. If sponsor does not make this representation, include the warning set forth in section 18.3(c)(3) above and discuss as a special risk;*

5. Subdivision (i) of section 18.3(v)(5) is amended to read as follows:

(i) *If the plan is an eviction plan, sponsor and other holders must agree not to exercise voting control of the board of directors for more than two years after closing, or whenever the unsold shares constitute less than 50 percent of the shares, whichever is sooner. If the plan is presented as or amended to a non-eviction plan, sponsor and other holders of unsold shares must agree not to exercise voting control of the board of directors for more than five years from closing, or whenever the unsold shares constitute less than 50 percent of the shares, which is sooner. Disclose whether sponsor represents and provides in the by-laws, that a majority of the apartment corporation board must be owner-occupants of the building or members of an owner-occupant's household, who are unrelated to the sponsor or its principals, after the end of the sponsor control period. If sponsor does not make this representation, include the warning set forth in section 18.3(c)(3) above and discuss as a special risk.*

6. A new subdivision (ix) of section 18.5(c)(3) is added to read as follows:

(ix) *If the sponsor or holder(s) of unsold shares own in the aggregate 49 percent or more of the shares, the percentage of such ownership and the consequences on the ability of purchasers to obtain institutional financing for their purchase and on any future resale of their apartment. The following model language may be used:*

*Certain banks and other institutional lenders are imposing various restrictions on extending loans for the purchase of shares and units in cooperatives in which unsold shares constitute 49 percent or more of the total shares and/or units. Such restrictions include requiring that a certain percentage of shares/units, usually 51 percent or more, be sold to owner-occupants before a lender will consider making a loan, regardless of the purchaser's credit worthiness. Thus, a purchaser may experience difficulty obtaining a loan in a building where the percentage of shares/units held by the sponsor or holders is 49 percent or greater. It may also be difficult for a purchaser to resell a unit if prospective purchasers are unable to obtain a loan because of the same minimum sales and occupancy requirements.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth E. Demario, Office of the Attorney General, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario@oag.state.ny.us

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

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

#### **Regulatory Impact Statement**

1. **Statutory Authority.** General Business Law Section 352-e(6) authorizes the Attorney General to promulgate rules and regulations to carry out the legislative mandates of Section 352-e of the General Business Law.

2. **Legislative Objectives.** General Business Law Section 352-e requires offerors of cooperative interests in realty to provide the investing public with a prospectus or offering plan which contains the full and fair disclosure required for such investors to make an informed decision as to whether or not to purchase. The proposed rules will help ensure that these disclosures are full and fair.

3. **Needs and Benefits.** The proposed regulations, amending 13 NYCRR Part 18 were prepared in response to the New York Court of Appeals' decision in *511 West 232nd Owners Corp. v. Jennifer*, 98 N.Y.2d 144 (2002), issued on June 11, 2002. In that case, plaintiffs, the board of directors of a cooperative corporation and individual shareholders in the coop, alleged that the coop's sponsor had breached its contractual obligation to dispose of all its shares within a reasonable time after the effective date of the conversion, which had occurred in 1988. The sponsor had sold no apartments since 1990 and retained 62% of the shares in the building, corresponding to 41 of 66 apartments, when the action was initiated in 1999. The sponsor had ceased updating the offering plan in 1996.

The court affirmed the denial of the sponsor's motion to dismiss the complaint, holding that it stated a cause of action, namely, that the sponsor breached his contractual obligation to create a fully viable cooperative within a reasonable time by refusing to sell a majority of the cooperative shares. The court referred specifically to plaintiffs' claim that they reasonably understood the offering plan to state a duty on the sponsor's part to

sell a sufficient number of shares in a timely manner so as to create a viable cooperative.

The decision focused on important questions of purchasers' expectations based on the offering plan when buying units in cooperatively owned housing. Sponsor's retention of units for rental rather than sale in a property being converted from rental to cooperative or condominium status or newly constructed or rehabilitated for that purpose, may have an impact on purchasers for their own occupancy. Experience in the real estate market over the last fifteen years demonstrates that sponsor's retention of a substantial percentage of the units in a cooperative may affect purchasers' ability to secure institutional financing and frustrate owner-occupants' interest in gaining effective control of the management of the co-op. The Attorney General has determined that explicit disclosure of the sponsor's intent to sell or withhold from sale units included in an offering plan and the ramifications of the sponsor's retention of a substantial number of units are material terms of the offering.

The proposed regulations distinguish between cooperatives and condominiums based on the manner in which they are treated by institutional lenders and the differing expectations a purchaser should have in the cooperative form of ownership as opposed to the condominium. Because certain banks are generally unwilling to make end loans in cooperatives in which sponsor retains 49 percent or more of the units, the proposed Part 18 and 21 regulations (cooperative conversions and new construction, respectively) require that an offering plan prominently disclose that fact, if the sponsor does not agree to sell 51 percent of the units to owner occupants before renting or selling to investors. A similar warning must be provided if there is no provision for the owner-occupants to occupy a majority of the seats on the Board of Directors after the initial sponsor control period. Marketability of one's unit and owner-occupancy control of a cooperative's board are critical attributes of cooperative ownership, which purchasers have reason to expect unless specifically warned to the contrary.

In condominiums, the extent of sponsor ownership of units has proven to be less of an obstacle to obtaining institutional financing. The Attorney General has found no evidence that sponsor or investor ownership of units, by itself, has impeded purchasers' ability to obtain financing. Therefore, the proposed Part 20 and 23 regulations (condominium new construction and conversions, respectively) do not require warnings as to marketability problems based on sponsor's intent to retain a certain percentage of the condominium's units. Instead, the regulations require disclosure of obligations or limitations imposed on the sponsor's right to sell or rent under any construction loan or mortgage encumbering the property. For example, construction lender requirements for release of individual units from the mortgage lien upon sale to a retail purchaser, such as minimum sales percentages before plans can be declared effective, are conditions material to a purchaser's decision to buy or not. Where sponsor retains unlimited discretion to sell or rent, a warning of the consequences must be prominently disclosed. The regulations call for expanded disclosure of the lesser control over sales and subletting exercised by condominium boards compared with cooperatives so that purchasers are apprized not necessarily to expect owner-occupancy majorities in condominiums.

For both cooperatives and condominiums, the proposed regulations require that sponsors disclose whether they intend to sell all of the units and, if not, to specify the percentage and number they intend to withhold. The proposed regulations also call for full disclosure of the consequences of the sponsor holding a significant number of units over a prolonged period of time.

After the proposed regulations were published for public comment in 2003, the Office of the New York State Attorney General received seventeen comments from lawyers, tenants and other interested parties and incorporated the suggested changes it considered constructive and appropriate. In the updated version, there is greater emphasis on requiring sponsors to articulate objective conditions for a decision to rent rather than sell units and conditions under which sales will be resumed. Furthermore, there is an explicit requirement that sponsors discuss how the presence of rent regulated, non-purchasing tenants could effect the conversion process.

4. Costs. Since the proposed rule only elaborates on existing requirements for the filing of offering plans, it is anticipated that there will be no additional costs to either the regulated parties or local and state governments.

5. Local Government Mandates. The proposed rule does not impose any programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork. There are no additional reporting or paperwork requirements as a result of this amendment.

7. Duplication. The proposed rules will not duplicate any existing state or federal rule.

8. Alternatives. Many alternatives were considered by the Attorney General including a requirement that plans be required to state that all units would be sold without any recourse to renting. This alternative was rejected in favor of the approach taken in the proposed rules which would compel that sponsor disclose its intentions with regard to sale or rental of units and point out the risks to purchasers as a consequence.

9. Federal Standards. This rule does not exceed any minimum standards of the federal government for the same or similar subject.

10. Compliance Schedule. The rule will go into effect upon the filing of a Notice of Adoption in the New York State Register.

#### **Regulatory Flexibility Analysis**

1. Effect of rule. Small sponsoring entities will be affected by the proposed rule. It is impossible to predict how many sponsors will take part in a public offering of real estate securities, at any given time. Currently, the total number of sponsors taking part in public offerings of real estate may be as high as 16,000. In any given year, however, only a small number of these submit new plans to the Department of Law's Investment Protection Bureau. In 2002, for example, there were approximately 300 new plans submitted. For the years 2001 and 2002, there were five plans submitted for senior residences.

2. Compliance requirements. The proposed rules elaborate on the disclosure requirements set forth in General Business Law Section 352-e. The proposed regulations require no new obligations in terms of recordkeeping.

3. Professional services. When submitting offering plans, most sponsors (small businesses) retain an attorney to prepare the required disclosure. The proposed regulations require no additional professional.

4. Compliance costs. Since the proposed rules only elaborate on existing filing requirements to ensure compliance, there should be no additional cost incurred by a local government or regulated business in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. These costs will not vary based on the size or type of business.

5. Economic and technological feasibility. It should be economically and technologically feasible for small businesses and local governments to comply with the proposed regulation. The proposed rules contain no technological requirements and impose no new costs on either regulated businesses, including small businesses, or any local government.

6. Minimizing adverse impact. The proposed rules will not create an adverse impact on local government. The proposed rules will not have an adverse impact on small businesses since (a) the real estate securities offerors, including small businesses, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

7. Small business and local government participation. In order to ensure that small businesses and local government have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

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

1. Types and estimated numbers of rural areas. The proposed rules apply uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 rural areas. However, the vast majority of the approximately 300 new offering plans submitted in 2002 came from New York City and its suburbs.

2. Reporting, recordkeeping, and other compliance requirements. The proposed rules elaborate on the disclosure requirements already set forth in General Business Law Section 352-e. There are no new reporting or recordkeeping requirements for the proposed rules. The proposed rules do not require that a small business or local government hire a professional. However, it is likely that a small business will retain an attorney to ensure compliance with the proposed rules as they already do when submitting offering plans to the Department of Law's Investment Protection Bureau.

3. Costs. Since the proposed rules only elaborate on already existing filing requirements, there will be no additional costs incurred by a regulated party in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. There will be no variation in costs for entities in rural areas.

4. Minimizing adverse impact. The proposed rule will not have an adverse impact on rural areas since (a) the real estate security offerors, including those located in rural areas, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

5. Rural area participation. To ensure that entities in rural areas have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Condominium Sponsor Disclosure Requirements

**I.D. No.** LAW-30-06-00005-P

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

**Proposed action:** Amendment of section 23.3 of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(6)(a) and (b)

**Subject:** Condominium sponsor disclosure requirements.

**Purpose:** To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and the possible negative repercussions of excessive sponsor retention.

**Text of proposed rule:** 1. New subdivision (1) and (2) of section 23.3(c) are added to read as follows:

(1) *Disclose whether sponsor is reserving the right to rent rather than sell units as they become vacant and whether sponsor is limiting its right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions upon which the sponsor would resume sales. If a mortgage currently encumbers the property or will encumber the property at the time of the first unit closing, disclose the terms of the mortgage as they apply to sponsor's obligation to market units for sale as they become vacant, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of a minimum release price set by the mortgagee or a required minimum payment per sale which must be made to the mortgagee in order for the mortgagee to release its lien from the unit being sold, and limits or requirements imposed by the mortgagee for sponsor to rent rather than sell under specified market conditions. If sponsor is reserving an unconditional right to rent rather than sell, the cover of the plan must state in bold print:*

**BECAUSE SPONSOR IS RETAINING THE UNCONDITIONAL RIGHT TO RENT RATHER THAN SELL UNITS, THIS PLAN MAY NOT RESULT IN THE CREATION OF A CONDOMINIUM IN WHICH A MAJORITY OF THE UNITS ARE OWNED BY OWNER-OCCUPANTS OR INVESTORS UNRELATED TO THE SPONSOR. (SEE SPECIAL RISKS SECTION OF THE PLAN.)**

*Further disclose, in the Special Risks section, that because sponsor is not limiting the conditions under which it will rent rather than sell units, there is no commitment to sell more units than the 15 percent necessary to declare the plan effective and owner-occupants may never gain effective control and management of the condominium.*

(2) *If the bylaws of the condominium do not include a provision that after the initial sponsor control period, a majority of the board of managers must be owner-occupants or members of an owner-occupant's household who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk and the cover of the plan must state in bold print:*

**PURCHASERS FOR THEIR OWN OCCUPANCY MAY NEVER GAIN CONTROL OF THE BOARD OF MANAGERS UNDER THE TERMS OF THIS PLAN (SEE SPECIAL RISKS SECTION OF THE PLAN.)**

*Disclose further that owner-occupants and non-resident owners, including sponsor, may have inherent conflicts on how the condominium should be managed because of their different reasons for purchasing, i.e., purchase as a home as opposed to as an investment.*

2. In section 23.3 (e), subdivisions (4), (5), (6), (7), (8), (9), (10), (11), (12), (13) are renumbered subdivisions (5), (6), (7), (8), (9), (10), (11), (12), (13), (14) respectively and a new subdivision (4) is added. Subdivision (4) of section 23.3(e) is added to read as follows:

(4) *Disclose sponsor's intent with regard to the sale of units offered for sale in the plan. Disclose whether sponsor represents that it will*

*endeavor in good faith to sell units rather than rent as they become vacant. If sponsor makes a bulk sale of all or some of its units, the transferee successor sponsor is bound by sponsor's representations regarding its commitment to sell units. If a mortgage currently encumbers the property or will encumber the property at the time of the first unit closing, disclose the terms of the mortgage as they apply to sponsor's obligation to market units for sale as they become vacant, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the mortgagee or a required minimum payment per sale which must be made to the mortgagee in order for the mortgagee to release its lien from the unit being sold, and limits or requirements imposed by the mortgagee for sponsor to rent rather than sell under specified market conditions. Disclose any conditions under which sponsor reserves the right to rent rather than sell units after they become vacant, based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume sales. If sponsor retains unconditional discretion to rent rather than sell units, include on the cover of the plan the warning set forth in section 23.3(c)(1) above and discuss as a special risk.*

3. Subdivision (vii) of section 23.3(e)(5) is amended to read as follows:

(vii) that each unit will be separately taxed and may be separately mortgaged; [and]

4. New subdivision (ix) and (x) of section 23.3(e)(5) are added to read as follows:

(ix) *if applicable, that the condominium board does not have the right to approve or disapprove purchasers, that there is no limit on the number of owners who may purchase for investment rather than for personal occupancy and that there may always be a substantial percentage of owners who are non-residents; and*

(x) *discuss the transitional phase of the conversion process from rental building to condominium. Disclose that because the plan can be declared effective based on sales of 15 per cent of the units to tenants or bona fide purchasers for their own occupancy, purchasers may be living in a mixed rental/owner-occupied building for an indeterminate period of time and that owner-occupants may not control the board or operation of the property during such transition or ever, unless the bylaws provide for an owner-occupant majority on the board. Further discuss how the existence of rent regulated, non-purchasing, tenants, who have a right to continued occupancy, may affect the speed of the conversion process. Discuss other aspects of living in a mixed rental/owner-occupied building, including different interests of owners and renters and the consequences of sponsor's continuing role in the building.*

5. Subdivisions (1) through (8) of section 23.3(v) are renumbered subdivisions (2) through (9) respectively and a new subdivision (1) is added to read as follows:

(1) *Disclose sponsor's intent with regard to the sale of the units offered in Schedule A, including whether sponsor will endeavor in good faith to sell all of the units in a reasonably timely manner. If a mortgage currently encumbers the property or will encumber the property at the time of the first unit closing, disclose the terms of the mortgage as they apply to sponsor's obligation to market units for sale as they become vacant, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the mortgagee or a required minimum payment per sale which must be made to the mortgagee in order for the mortgagee to release its lien from the unit being sold, and limits or requirements imposed by the mortgagee for sponsor to rent rather than sell under specified market conditions. Disclose any conditions under which sponsor retains the right to rent rather than sell, based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume sales. If sponsor retains unconditional discretion to rent rather than sell units, include on the cover of the plan the warning set forth in section 23.3(c)(1) and discuss as a special risk.*

6. Subdivision (1) of section 23.3(w) is amended to read as follows:

(1) *If the plan is an eviction plan, sponsor must agree not to exercise voting control of the board of managers for more than two (2) years after the closing of the first unit or whenever the unsold units constitute less than fifty percent (50 percent) of the common interest, whichever is sooner. If the plan is presented as or amended to a non-eviction plan, sponsor must agree not to exercise voting control of the board of managers for more than five (5) years from the closing of the first unit, or whenever the unsold units constitute less than fifty percent (50 percent) of the common interests, whichever is sooner. If the bylaws of the condominium do not include*

a provision that, after an initial sponsor control period, a majority of the board of managers must be owner-occupants or members of an owner-occupant's household who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk. Specify the manner and timing in which the sponsor will relinquish control of the board of managers. Sponsor shall disclose that a meeting will be held to elect new board members unrelated to the sponsor within thirty (30) days of the expiration of the control period.

7. Subdivision (1) of section 23.3(x) is amended to read as follows:

(1) State the number and composition of the board of managers, the eligibility requirements, elections and when the first meeting will be held after the closing of title to the first unit. *Disclose whether the by-laws include a provision that a majority of the board of managers must be owner-occupants or members of an owner-occupant's household who are unrelated to the sponsor and its principals, after the end of an initial sponsor control period.* Discuss when annual meetings will be held and describe the provisions in the by-laws for calling special meetings.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth E. Demario, Office of the Attorney General, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario@oag.state.ny.us

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

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

#### **Regulatory Impact Statement**

1. Statutory Authority. General Business Law Section 352-e(6) authorizes the Attorney General to promulgate rules and regulations to carry out the legislative mandates of Section 352-e of the General Business Law.

2. Legislative Objectives. General Business Law Section 352-e requires offerors of cooperative interests in realty to provide the investing public with a prospectus or offering plan which contains the full and fair disclosure required for such investors to make an informed decision as to whether or not to purchase. The proposed rules will help ensure that these disclosures are full and fair.

3. Needs and Benefits. The proposed regulations, amending 13 NYCRR Part 23 were prepared in response to the New York Court of Appeals' decision in *511 West 232nd Owners Corp. v. Jennifer*, 98 N.Y.2d 144 (2002), issued on June 11, 2002. In that case, plaintiffs, the board of directors of a cooperative corporation and individual shareholders in the coop, alleged that the coop's sponsor had breached its contractual obligation to dispose of all its shares within a reasonable time after the effective date of the conversion, which had occurred in 1988. The sponsor had sold no apartments since 1990 and retained 62% of the shares in the building, corresponding to 41 of 66 apartments, when the action was initiated in 1999. The sponsor had ceased updating the offering plan in 1996.

The court affirmed the denial of the sponsor's motion to dismiss the complaint, holding that it stated a cause of action, namely, that the sponsor breached his contractual obligation to create a fully viable cooperative within a reasonable time by refusing to sell a majority of the cooperative shares. The court referred specifically to plaintiffs' claim that they reasonably understood the offering plan to state a duty on the sponsor's part to sell a sufficient number of shares in a timely manner so as to create a viable cooperative.

The decision focused on important questions of purchasers' expectations based on the offering plan when buying units in cooperatively owned housing. Sponsor's retention of units for rental rather than sale in a property being converted from rental to cooperative or condominium status or newly constructed or rehabilitated for that purpose, may have an impact on purchasers for their own occupancy. Experience in the real estate market over the last fifteen years demonstrates that sponsor's retention of a substantial percentage of the units in a cooperative may affect purchasers' ability to secure institutional financing and frustrate owner-occupants' interest in gaining effective control of the management of the co-op. The Attorney General has determined that explicit disclosure of the sponsor's intent to sell or withhold from sale units included in an offering plan and the ramifications of the sponsor's retention of a substantial number of units are material terms of the offering.

The proposed regulations distinguish between cooperatives and condominiums based on the manner in which they are treated by institutional lenders and the differing expectations a purchaser should have in the cooperative form of ownership as opposed to the condominium. Because certain banks are generally unwilling to make end loans in cooperatives in which sponsor retains 49 percent or more of the units, the proposed Part 18 and 21 regulations (cooperative conversions and new construction, respectively) require that an offering plan prominently disclose that fact, if the

sponsor does not agree to sell 51 percent of the units to owner occupants before renting or selling to investors. A similar warning must be provided if there is no provision for the owner-occupants to occupy a majority of the seats on the Board of Directors after the initial sponsor control period. Marketability of one's unit and owner-occupancy control of a cooperative's board are critical attributes of cooperative ownership, which purchasers have reason to expect unless specifically warned to the contrary.

In condominiums, the extent of sponsor ownership of units has proven to be less of an obstacle to obtaining institutional financing. The Attorney General has found no evidence that sponsor or investor ownership of units, by itself, has impeded purchasers' ability to obtain financing. Therefore, the proposed Part 20 and 23 regulations (condominium new construction and conversions, respectively) do not require warnings as to marketability problems based on sponsor's intent to retain a certain percentage of the condominium's units. Instead, the regulations require disclosure of obligations or limitations imposed on the sponsor's right to sell or rent under any construction loan or mortgage encumbering the property. For example, construction lender requirements for release of individual units from the mortgage lien upon sale to a retail purchaser, such as minimum sales percentages before plans can be declared effective, are conditions material to a purchaser's decision to buy or not. Where sponsor retains unlimited discretion to sell or rent, a warning of the consequences must be prominently disclosed. The regulations call for expanded disclosure of the lesser control over sales and subletting exercised by condominium boards compared with cooperatives so that purchasers are apprized not necessarily to expect owner-occupancy majorities in condominiums.

For both cooperatives and condominiums, the proposed regulations require that sponsors disclose whether they intend to sell all of the units and, if not, to specify the percentage and number they intend to withhold. The proposed regulations also call for full disclosure of the consequences of the sponsor holding a significant number of units over a prolonged period of time.

After the proposed regulations were published for public comment in 2003, the Office of the New York State Attorney General received seventeen comments from lawyers, tenants and other interested parties and incorporated the suggested changes it considered constructive and appropriate. In the updated version, there is greater emphasis on requiring sponsors to articulate objective conditions for a decision to rent rather than sell units and conditions under which sales will be resumed. Furthermore, there is an explicit requirement that sponsors discuss how the presence of rent regulated, non-purchasing tenants could effect the conversion process.

4. Costs. Since the proposed rule only elaborates on existing requirements for the filing of offering plans, it is anticipated that there will be no additional costs to either the regulated parties or local and state governments.

5. Local Government Mandates. The proposed rule does not impose any programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork. There are no additional reporting or paperwork requirements as a result of this amendment.

7. Duplication. The proposed rules will not duplicate any existing state or federal rule.

8. Alternatives. Many alternatives were considered by the Attorney General including a requirement that plans be required to state that all units would be sold without any recourse to renting. This alternative was rejected in favor of the approach taken in the proposed rules which would compel that sponsor disclose its intentions with regard to sale or rental of units and point out the risks to purchasers as a consequence.

9. Federal Standards. This rule does not exceed any minimum standards of the federal government for the same or similar subject.

10. Compliance Schedule. The rule will go into effect upon the filing of a Notice of Adoption in the New York State Register.

#### **Regulatory Flexibility Analysis**

1. Effect of rule. Small sponsoring entities will be affected by the proposed rule. It is impossible to predict how many sponsors will take part in a public offering of real estate securities, at any given time. Currently, the total number of sponsors taking part in public offerings of real estate may be as high as 16,000. In any given year, however, only a small number of these submit new plans to the Department of Law's Investment Protection Bureau. In 2002, for example, there were approximately 300 new plans submitted. For the years 2001 and 2002, there were five plans submitted for senior residences.

2. Compliance requirements. The proposed rules elaborate on the disclosure requirements set forth in General Business Law Section 352-e. The

proposed regulations require no new obligations in terms of recordkeeping.

3. Professional services. When submitting offering plans, most sponsors (small businesses) retain an attorney to prepare the required disclosure. The proposed regulations require no additional professional.

4. Compliance costs. Since the proposed rules only elaborate on existing filing requirements to ensure compliance, there should be no additional cost incurred by a local government or regulated business in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. These costs will not vary based on the size or type of business.

5. Economic and technological feasibility. It should be economically and technologically feasible for small businesses and local governments to comply with the proposed regulation. The proposed rules contain no technological requirements and impose no new costs on either regulated businesses, including small businesses, or any local government.

6. Minimizing adverse impact. The proposed rules will not create an adverse impact on local government. The proposed rules will not have an adverse impact on small businesses since (a) the real estate securities offerors, including small businesses, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

7. Small business and local government participation. In order to ensure that small businesses and local government have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas. The proposed rules apply uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 rural areas. However, the vast majority of the approximately 300 new offering plans submitted in 2002 came from New York City and its suburbs.

2. Reporting, recordkeeping, and other compliance requirements. The proposed rules elaborate on the disclosure requirements already set forth in General Business Law Section 352-e. There are no new reporting or recordkeeping requirements for the proposed rules. The proposed rules do not require that a small business or local government hire a professional. However, it is likely that a small business will retain an attorney to ensure compliance with the proposed rules as they already do when submitting offering plans to the Department of Law’s Investment Protection Bureau.

3. Costs. Since the proposed rules only elaborate on already existing filing requirements, there will be no additional costs incurred by a regulated party in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. There will be no variation in costs for entities in rural areas.

4. Minimizing adverse impact. The proposed rule will not have an adverse impact on rural areas since (a) the real estate security offerors, including those located in rural areas, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

5. Rural area participation. To ensure that entities in rural areas have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

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

**Condominium Sponsor Disclosure Requirements**

**I.D. No.** LAW-30-06-00006-P

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

**Proposed action:** Amendment of section 20.3 of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(6)(a) and (b)

**Subject:** Condominium sponsor disclosure requirements.

**Purpose:** To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and the possible negative repercussions of excessive sponsor retention.

**Text of proposed rule:** 1. New subdivisions (1) and (2) of section 20.3(c) are added to read as follows:

*(1) Disclose whether sponsor is reserving the right to rent rather than sell units and whether sponsor is limiting its right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions upon which the sponsor would resume sales. If sponsor has obtained construction financing, disclose the terms of the construction loan as they apply to the sponsor’s obligation to market the units for sale, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the lender or a required minimum payment per sale which must be made to the lender in order for the lender to release its lien from the unit being sold, and limits or requirements imposed by the lender for sponsor to rent rather than sell under specified market conditions. If sponsor is reserving an unconditional right to rent rather than sell, the cover of the plan must state in bold print:*

**BECAUSE SPONSOR IS RETAINING THE UNCONDITIONAL RIGHT TO RENT RATHER THAN SELL UNITS, THIS PLAN MAY NOT RESULT IN THE CREATION OF A CONDOMINIUM IN WHICH A MAJORITY OF THE UNITS ARE OWNED BY OWNER-OCCUPANTS OR INVESTORS UNRELATED TO THE SPONSOR. (SEE SPECIAL RISKS SECTION OF THE PLAN.)**

*Further disclose, in the Special Risks section, that because sponsor is not limiting the conditions under which it will rent rather than sell units, there is no commitment to sell more units than the 15 percent necessary to declare the plan effective and owner-occupants may never gain effective control and management of the condominium.*

*(2) If the bylaws of the condominium do not include a provision that, after an initial sponsor voting control period a majority of the board of managers must be owner-occupants or members of an owner-occupant’s household who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk and if either of these special risks exist, the cover of the plan must state in bold print:*

**PURCHASERS FOR THEIR OWN OCCUPANCY MAY NEVER GAIN CONTROL OF THE BOARD OF MANAGERS UNDER THE TERMS OF THIS PLAN. (SEE SPECIAL RISKS SECTION OF THE PLAN.)**

*Disclose further that owner-occupants and non-resident owners, including sponsor, may have inherent conflicts on how the condominium should be managed because of their different reasons for purchasing, i.e., purchase as a home as opposed to as an investment.*

2. In section 20.3 (d), subdivisions (4), (5), (6), (7), (8), (9), (10), and (11) are renumbered subdivisions (5), (6), (7), (8), (9), (10), (11), and (12) respectively and a new subdivision (4) is added. Subdivision (4) of section 20.3(d) is added to read as follows:

*(4) Disclose sponsor’s intent with regard to the sale of units offered for sale in the plan. Disclose whether sponsor represents that it will endeavor in good faith to sell units rather than rent. If sponsor makes a bulk sale of all or some of its unsold units, the transferee successor sponsor is bound by sponsor’s representations regarding its commitment to sell units. If sponsor has obtained construction financing, disclose the terms of the construction loan as they apply to the sponsor’s obligation to market the units for sale, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the lender or a required minimum payment per sale which must be made to the lender in order for the lender to release its lien from the unit being sold, and limits or requirements imposed by the lender for sponsor to rent rather than sell under specified market conditions. If sponsor has not obtained construction financing or if the construction loan agreement does not include provisions on the terms set forth in the previous sentence, disclose any conditions under which sponsor reserves the right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume sales. If sponsor retains unconditional discretion to rent rather than sell units, include on the cover of the plan the warning set forth in section 20.3(c)(1) above and discuss as a special risk.*

3. A new subdivision (ix) of section 20.3(d)(6) is added to read as follows:

*(ix) if applicable, that the condominium board does not have the right to approve or disapprove purchasers, that there is no limit on the number of owners who may purchase for investment rather than for per-*

sonal occupancy and that there may always be a substantial percentage of owners who are non-residents.

4. Subdivisions (1) through (18) of section 20.3(t) are renumbered subdivisions (2) through (19) respectively and a new subdivision (1) is added to read as follows:

(1) *Disclose sponsor's intent with regard to the sale of the units offered in Schedule A, including whether sponsor will endeavor in good faith to sell all of the units in a reasonably timely manner. Disclose any conditions under which sponsor retains the right to rent rather than sell based on objective, articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume sales. Disclose any obligations imposed on sponsor by the construction lender with regard to selling and/or renting units. If sponsor retains unconditional discretion to rent rather than sell units, include on the cover of the plan the warning set forth in section 20.3(c)(1) and discuss as a special risk.*

5. Newly renumbered subdivision (9) is amended to read as follows:

(9) The sponsor must state whether construction financing is firmly committed at the time of the submission of the offering plan to the Department of Law. Disclose any conditions placed on the availability of the construction financing and highlight as a special risk if the sponsor may not be able to complete construction of the units offered. Project the timetable for procuring a firm commitment for construction financing. *If sponsor has obtained construction financing, disclose the terms of the construction loan as they apply to the sponsor's obligation to market the units for sale, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the lender or a required minimum payment per sale which must be made to the lender in order for the lender to release its lien from the unit being sold, and limits or requirements imposed by the lender for sponsor to rent rather than sell under specified market conditions. If sponsor has not obtained construction financing at the time the plan is submitted for filing, the plan must state that the construction lender may impose requirements regarding sales by sponsor and the plan must be amended to disclose the relevant terms of the construction loan agreement when financing is obtained.*

6. Subdivision (1) of section 20.3(u) is amended to read as follows:

(1) Highlight as a special risk if sponsor exercises voting control of the board of managers for more than two (2) years after the closing of the first unit or whenever the unsold units constitute less than fifty percent (50%) of the common interests, whichever is sooner. [Specify the manner and timing in which the sponsor will relinquish control of the board of managers. Sponsor shall disclose that a meeting will be held to elect new board members unrelated to the sponsor within 30 days of the expiration of the control period.] *If the bylaws of the condominium do not include a provision that, after an initial sponsor voting control period a majority of the board of managers must be owner-occupants or members of an owner-occupant's household who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk.* Specify the manner and timing in which the sponsor will relinquish control of the board of managers. Sponsor shall disclose that a meeting will be held to elect new board members unrelated to the sponsor within thirty (30) days of the expiration of the control period.

7. Subdivision (1) of section 20.3(v) is amended to read as follows:

(1) State the number and composition of the board of managers, the eligibility requirements, elections and when the first meeting will be held after the closing of title to the first unit. *Disclose whether the by-laws include a provision that a majority of the board of managers must be owner-occupants or members of an owner-occupant's household who are unrelated to the sponsor and its principals, after the end of an initial sponsor control period.* Discuss when annual meetings will be held and describe the provisions in the by-laws for calling special meetings.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth E. Demario, Office of the Attorney General, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario@oag.state.ny.us

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

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

#### Regulatory Impact Statement

1. Statutory Authority. General Business Law Section 352-e(6) authorizes the Attorney General to promulgate rules and regulations to carry out the legislative mandates of Section 352-e of the General Business Law.

2. Legislative Objectives. General Business Law Section 352-e requires offerors of cooperative interests in realty to provide the investing

public with a prospectus or offering plan which contains the full and fair disclosure required for such investors to make an informed decision as to whether or not to purchase. The proposed rules will help ensure that these disclosures are full and fair.

3. Needs and Benefits. The proposed regulations, amending 13 NYCRR Part 20 were prepared in response to the New York Court of Appeals' decision in *511 West 232nd Owners Corp. v. Jennifer*, 98 N.Y.2d 144 (2002), issued on June 11, 2002. In that case, plaintiffs, the board of directors of a cooperative corporation and individual shareholders in the coop, alleged that the coop's sponsor had breached its contractual obligation to dispose of all its shares within a reasonable time after the effective date of the conversion, which had occurred in 1988. The sponsor had sold no apartments since 1990 and retained 62% of the shares in the building, corresponding to 41 of 66 apartments, when the action was initiated in 1999. The sponsor had ceased updating the offering plan in 1996.

The court affirmed the denial of the sponsor's motion to dismiss the complaint, holding that it stated a cause of action, namely, that the sponsor breached his contractual obligation to create a fully viable cooperative within a reasonable time by refusing to sell a majority of the cooperative shares. The court referred specifically to plaintiffs' claim that they reasonably understood the offering plan to state a duty on the sponsor's part to sell a sufficient number of shares in a timely manner so as to create a viable cooperative.

The decision focused on important questions of purchasers' expectations based on the offering plan when buying units in cooperatively owned housing. Sponsor's retention of units for rental rather than sale in a property being converted from rental to cooperative or condominium status or newly constructed or rehabilitated for that purpose, may have an impact on purchasers for their own occupancy. Experience in the real estate market over the last fifteen years demonstrates that sponsor's retention of a substantial percentage of the units in a cooperative may affect purchasers' ability to secure institutional financing and frustrate owner-occupants' interest in gaining effective control of the management of the co-op. The Attorney General has determined that explicit disclosure of the sponsor's intent to sell or withhold from sale units included in an offering plan and the ramifications of the sponsor's retention of a substantial number of units are material terms of the offering.

The proposed regulations distinguish between cooperatives and condominiums based on the manner in which they are treated by institutional lenders and the differing expectations a purchaser should have in the cooperative form of ownership as opposed to the condominium. Because certain banks are generally unwilling to make end loans in cooperatives in which sponsor retains 49 percent or more of the units, the proposed Part 18 and 21 regulations (cooperative conversions and new construction, respectively) require that an offering plan prominently disclose that fact, if the sponsor does not agree to sell 51 percent of the units to owner occupants before renting or selling to investors. A similar warning must be provided if there is no provision for the owner-occupants to occupy a majority of the seats on the Board of Directors after the initial sponsor control period. Marketability of one's unit and owner-occupancy control of a cooperative's board are critical attributes of cooperative ownership, which purchasers have reason to expect unless specifically warned to the contrary.

In condominiums, the extent of sponsor ownership of units has proven to be less of an obstacle to obtaining institutional financing. The Attorney General has found no evidence that sponsor or investor ownership of units, by itself, has impeded purchasers' ability to obtain financing. Therefore, the proposed Part 20 and 23 regulations (condominium new construction and conversions, respectively) do not require warnings as to marketability problems based on sponsor's intent to retain a certain percentage of the condominium's units. Instead, the regulations require disclosure of obligations or limitations imposed on the sponsor's right to sell or rent under any construction loan or mortgage encumbering the property. For example, construction lender requirements for release of individual units from the mortgage lien upon sale to a retail purchaser, such as minimum sales percentages before plans can be declared effective, are conditions material to a purchaser's decision to buy or not. Where sponsor retains unlimited discretion to sell or rent, a warning of the consequences must be prominently disclosed. The regulations call for expanded disclosure of the lesser control over sales and subletting exercised by condominium boards compared with cooperatives so that purchasers are apprized not necessarily to expect owner-occupancy majorities in condominiums.

For both cooperatives and condominiums, the proposed regulations require that sponsors disclose whether they intend to sell all of the units and, if not, to specify the percentage and number they intend to withhold. The proposed regulations also call for full disclosure of the consequences

of the sponsor holding a significant number of units over a prolonged period of time.

After the proposed regulations were published for public comment in 2003, the Office of the New York State Attorney General received seventeen comments from lawyers, tenants and other interested parties and incorporated the suggested changes it considered constructive and appropriate. In the updated version, there is greater emphasis on requiring sponsors to articulate objective conditions for a decision to rent rather than sell units and conditions under which sales will be resumed. Furthermore, there is an explicit requirement that sponsors discuss how the presence of rent regulated, non-purchasing tenants could effect the conversion process.

4. Costs. Since the proposed rule only elaborates on existing requirements for the filing of offering plans, it is anticipated that there will be no additional costs to either the regulated parties or local and state governments.

5. Local Government Mandates. The proposed rule does not impose any programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork. There are no additional reporting or paperwork requirements as a result of this amendment.

7. Duplication. The proposed rules will not duplicate any existing state or federal rule.

8. Alternatives. Many alternatives were considered by the Attorney General including a requirement that plans be required to state that all units would be sold without any recourse to renting. This alternative was rejected in favor of the approach taken in the proposed rules which would compel that sponsor disclose its intentions with regard to sale or rental of units and point out the risks to purchasers as a consequence.

9. Federal Standards. This rule does not exceed any minimum standards of the federal government for the same or similar subject.

10. Compliance Schedule. The rule will go into effect upon the filing of a Notice of Adoption in the New York State Register.

**Regulatory Flexibility Analysis**

1. Effect of rule. Small sponsoring entities will be affected by the proposed rule. It is impossible to predict how many sponsors will take part in a public offering of real estate securities, at any given time. Currently, the total number of sponsors taking part in public offerings of real estate may be as high as 16,000. In any given year, however, only a small number of these submit new plans to the Department of Law’s Investment Protection Bureau. In 2002, for example, there were approximately 300 new plans submitted. For the years 2001 and 2002, there were five plans submitted for senior residences.

2. Compliance requirements. The proposed rules elaborate on the disclosure requirements set forth in General Business Law Section 352-e. The proposed regulations require no new obligations in terms of recordkeeping.

3. Professional services. When submitting offering plans, most sponsors (small businesses) retain an attorney to prepare the required disclosure. The proposed regulations require no additional professional.

4. Compliance costs. Since the proposed rules only elaborate on existing filing requirements to ensure compliance, there should be no additional cost incurred by a local government or regulated business in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. These costs will not vary based on the size or type of business.

5. Economic and technological feasibility. It should be economically and technologically feasible for small businesses and local governments to comply with the proposed regulation. The proposed rules contain no technological requirements and impose no new costs on either regulated businesses, including small businesses, or any local government.

6. Minimizing adverse impact. The proposed rules will not create an adverse impact on local government. The proposed rules will not have an adverse impact on small businesses since (a) the real estate securities offerors, including small businesses, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

7. Small business and local government participation. In order to ensure that small businesses and local government have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas. The proposed rules apply uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 rural areas. However, the vast majority of the approximately 300 new offering plans submitted in 2002 came from New York City and its suburbs.

2. Reporting, recordkeeping, and other compliance requirements. The proposed rules elaborate on the disclosure requirements already set forth in General Business Law Section 352-e. There are no new reporting or recordkeeping requirements for the proposed rules. The proposed rules do not require that a small business or local government hire a professional. However, it is likely that a small business will retain an attorney to ensure compliance with the proposed rules as they already do when submitting offering plans to the Department of Law’s Investment Protection Bureau.

3. Costs. Since the proposed rules only elaborate on already existing filing requirements, there will be no additional costs incurred by a regulated party in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. There will be no variation in costs for entities in rural areas.

4. Minimizing adverse impact. The proposed rule will not have an adverse impact on rural areas since (a) the real estate security offerors, including those located in rural areas, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

5. Rural area participation. To ensure that entities in rural areas have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

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

**Cooperative Sponsor Disclosure Requirements**

**I.D. No. LAW-30-06-00007-P**

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

**Proposed action:** Amendment of section 21.3 of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(6)(a) and (b)

**Subject:** Cooperative sponsor disclosure requirements.

**Purpose:** To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and the possible negative repercussions of excessive sponsor retention.

**Text of proposed rule:** 1. New subdivisions (1), (2) and (3) of section 21.3(c) are added to read as follows:

*(1) Disclose whether sponsor is reserving the right to rent rather than sell units appurtenant to its unsold shares (hereinafter “units”) and whether there are any limits placed on sponsor’s right to rent rather than sell under the terms of the construction loan for the project or whether sponsor is limiting its right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions upon which the sponsor would resume sales. If sponsor is reserving an unconditional right to rent without committing itself to sell at least 51 percent of the units, the cover of the plan must state in bold print:*

**BECAUSE SPONSOR IS RETAINING THE RIGHT TO RENT MORE THAN 49 PERCENT OF THE UNITS IN THE BUILDING OR BUILDINGS BEING CONSTRUCTED FOR COOPERATIVE OWNERSHIP, FUTURE MARKETABILITY OF THE UNITS MAY BE ADVERSELY AFFECTED AND PURCHASERS MAY NEVER GAIN EFFECTIVE CONTROL OF THE COOP BOARD. (SEE SPECIAL RISKS SECTION).**

*Disclose that as a result of sponsor retaining more than 49 percent of the units, marketability of the units may be adversely affected. Explain that certain institutional lenders may be unwilling to make loans for the purchase of units in a cooperative in which the sponsor and/or holders of unsold shares retain more than 49 percent of the units and that purchasers may therefore be unable to obtain institutional financing for their own purchase. Disclose that if they do close title and subsequently seek to sell their apartments, prospective purchasers may be unable to obtain institutional financing solely on the basis of sponsor’s holding more than 49 percent of the units in the cooperative corporation, regardless of the credit worthiness of the prospective purchaser. If the sponsor is able to demon-*

strate that an institutional lender has approved the project for coop loans to qualified purchasers, a disclosure identifying the lender, the terms of the loans to be offered, eligibility criteria and other material aspects of the lender's commitment to the project should be included.

(2) If sponsor represents that it will sell 51 percent of the units, to purchasers for personal occupancy, disclose whether sponsor further represents that it will endeavor in good faith to sell, in a reasonably timely manner, all remaining unsold units to purchasers for personal occupancy, in the building or buildings being converted to cooperative ownership. If sponsor intends to sell fewer than all of the units, disclose this fact and the number and percentage which sponsor does intend to sell, in bold print as the first special risk. Disclose that the units reserved by sponsor may remain unsold indefinitely and sponsor may dispose of such units as it chooses, including selling to investors, renting to tenants, permitting occupancy by relatives or others, allowing them to remain vacant or selling to purchasers for personal occupancy. If the sponsor later chooses to sell a greater number and percentage of units to the public for personal occupancy than disclosed in the initial offering plan, the plan must be amended to disclose that fact.

If sponsor makes a bulk sale of all or some of its unsold shares, the transferee is bound by sponsor's representations regarding its commitment to sell units.

(3) If the bylaws of the cooperative do not include a provision that after the initial sponsor voting control period, a majority of the Board of Directors must be owner-occupants or members of owner-occupants' households, who are unrelated to the sponsor and its principals, this fact must be disclosed as a special risk and the following warning must be placed on the cover:

**THIS PLAN DOES NOT GUARANTEE THAT OWNER-OCCUPANTS WILL EVER CONSTITUTE A MAJORITY OF THE COOP BOARD OF DIRECTORS. (SEE SPECIAL RISKS SECTION OF PLAN.)**

Disclose that unless and until a majority of the Board are residents of the building unrelated to the sponsor, owner-occupants will not gain effective control and management of the cooperative. Disclose that owner-occupants and non-resident shareholders, including sponsor, may have inherent conflicts on how the cooperative should be managed because of their different reasons for purchasing, i.e. purchase as a home as opposed to as an investment.

2. Subdivisions (4), (5), (6), (7), (8), (9), (10) are renumbered subdivisions (5), (6), (7), (8), (9), (10), (11) respectively and a new subdivision (4) is added. Subdivision (4) of section 21.3(e) is added to read as follows:

(4) Disclose sponsor's intent with regard to the sale of apartments offered in the plan. Disclose whether sponsor represents that it will endeavor in good faith to sell, in a reasonably timely manner, all residential units to purchasers for personal occupancy in the building or buildings being constructed for cooperative ownership. If sponsor has obtained construction financing, disclose the terms of the construction loan as they apply to the sponsor's obligation to market the units for sale, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the lender or a required minimum payment per sale which must be made to the lender and limits or requirements imposed by the lender for sponsor to rent rather than sell under specified market conditions. If sponsor has not obtained construction financing or if the construction loan agreement does not include provisions on the terms set forth in the previous sentence, disclose the conditions under which sponsor reserves the right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume sales. If sponsor represents an intent to sell fewer than all of the units in the building or buildings being constructed for cooperative ownership, disclose the number and percentage which sponsor does intend to sell. Disclose whether sponsor represents that it will decline to rent apartments, until it has sold at least 51 per cent of the units to purchasers for personal occupancy. If sponsor reserves the right to rent rather than sell after reaching the 51 per cent sales level, disclose the conditions under which sponsor would rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume its good faith efforts to sell rather than rent. If sponsor does not represent its good faith intent to sell and to obtain sales of 51 per cent of the units prior to renting, include on the cover of the plan the warning set forth in section 21.3(c)(1) above and discuss as a special risk.

3. Subdivision (iv) of section 21.3(e)(8) is amended to read as follows:

(iv) control of the apartment corporation will be in the hands of the board of directors; disclose whether sponsor represents and provides in the by-laws, that a majority of the apartment corporation board must be owner-occupants of the building or members of an owner-occupant's household, who are unrelated to the sponsor or its principals, after the end of the sponsor control period. If sponsor does not make this representation, include the warning set forth in section 21.3(c)(3) above and discuss as a special risk.

4. A new subdivision (vii) of section 21.3(e)(8) is added to read as follows:

(vii) the apartment corporation, as the fee owner of the entire building, is assessed for the real estate taxes on the property and may be the mortgagor on a mortgage encumbering the entire property. As a result, shareholders are co-dependent on each other and on the sponsor for payment of the mortgage and taxes, default on which will jeopardize each shareholder's equity in his/her shares and unit. Where the sponsor owns a substantial percentage of the units, a default in payment of maintenance by sponsor jeopardizes the equity interest of other shareholders.

5. Subdivision (xii)(a) of section 21.3(s)(1) is amended to read as follows:

(xii)(a) Sponsor and sponsor's designees may not retain voting control of the board of directors or veto power over expenditures for more than two years after closing or whenever 50 percent of the units have been closed, whichever is sooner. Disclose whether sponsor represents and provides in the by-laws, that a majority of the apartment corporation board must be owner-occupants of the building or members of an owner-occupant's household, who are unrelated to the sponsor or its principals, after the end of the sponsor control period. If sponsor does not make this representation, include the warning set forth in section 21.3(c)(3) above and discuss as a special risk.

6. Subdivisions (1) through (17) of section 21.3(x) are renumbered subdivisions (2) through (18) respectively and renumbered subdivision (2) is amended to read as follows:

(2) For offering plans involving construction or rehabilitation, the sponsor must state whether construction financing is firmly committed at the time of submission of the offering plan to the Department of Law. Disclose any conditions placed on the availability of the construction financing and highlight as a special risk if the sponsor may not be able to complete construction of the units offered. Project the timetable for procuring a firm commitment of construction financing. If sponsor has obtained construction financing, disclose the terms of the construction loan as they apply to the sponsor's obligation to market the units for sale, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the lender or a required minimum payment per sale which must be made to the lender, and limits or requirements imposed by the lender for sponsor to rent rather than sell under specified market conditions. If sponsor has not obtained construction financing at the time the plan is submitted for filing, the plan must state that the construction lender may impose requirements regarding sales by sponsor and the plan must be amended to disclose the relevant terms of the construction loan agreement when financing is obtained.

7. A new subdivision (1) of section 21.3(x) is added to read as follows:

(1) Disclose sponsor's intent with regard to the sale of apartments offered in the plan. Disclose whether sponsor represents that it will endeavor in good faith to sell, in a reasonably timely manner, all residential units to purchasers for personal occupancy in the building or buildings being constructed for cooperative ownership. If sponsor has obtained construction financing, disclose the terms of the construction loan as they apply to the sponsor's obligation to market the units for sale, including any minimum number or percentage of units which must be under contract before the plan can be declared effective, the existence of either a minimum release price set by the lender or a required minimum payment per sale which must be made to the lender and limits or requirements imposed by the lender for sponsor to rent rather than sell under specified market conditions. If sponsor has not obtained construction financing or if the construction loan agreement does not include provisions on the terms set forth in the previous sentence, disclose the conditions under which sponsor reserves the right to rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume sales. If sponsor represents an intent to sell fewer than all of the units in the building or buildings being constructed for cooperative ownership, disclose the number and percentage which sponsor does intend to sell. Disclose whether sponsor represents that it will decline to rent apartments, until it has sold

at least 51 per cent of the units to purchasers for personal occupancy. If sponsor reserves the right to rent rather than sell after reaching the 51 per cent sales level, disclose the conditions under which sponsor would rent rather than sell based on objective articulable criteria, such as a significant decline in market prices of a specific percentage and the conditions under which sponsor would resume its good faith efforts to sell rather than rent. If sponsor does not represent its good faith intent to sell and to obtain sales of 51 per cent of the units prior to renting, include on the cover of the plan the warning set forth in section 21.3(c)(1) above and discuss as a special risk.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth E. Demario, Office of the Attorney General, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario@oag.state.ny.us

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

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

#### Regulatory Impact Statement

1. Statutory Authority. General Business Law Section 352-e(6) authorizes the Attorney General to promulgate rules and regulations to carry out the legislative mandates of Section 352-e of the General Business Law.

2. Legislative Objectives. General Business Law Section 352-e requires offerors of cooperative interests in realty to provide the investing public with a prospectus or offering plan which contains the full and fair disclosure required for such investors to make an informed decision as to whether or not to purchase. The proposed rules will help ensure that these disclosures are full and fair.

3. Needs and Benefits. The proposed regulations, amending 13 NYCRR Part 21 were prepared in response to the New York Court of Appeals' decision in *511 West 232nd Owners Corp. v. Jennifer*, 98 N.Y.2d 144 (2002), issued on June 11, 2002. In that case, plaintiffs, the board of directors of a cooperative corporation and individual shareholders in the coop, alleged that the coop's sponsor had breached its contractual obligation to dispose of all its shares within a reasonable time after the effective date of the conversion, which had occurred in 1988. The sponsor had sold no apartments since 1990 and retained 62% of the shares in the building, corresponding to 41 of 66 apartments, when the action was initiated in 1999. The sponsor had ceased updating the offering plan in 1996.

The court affirmed the denial of the sponsor's motion to dismiss the complaint, holding that it stated a cause of action, namely, that the sponsor breached his contractual obligation to create a fully viable cooperative within a reasonable time by refusing to sell a majority of the cooperative shares. The court referred specifically to plaintiffs' claim that they reasonably understood the offering plan to state a duty on the sponsor's part to sell a sufficient number of shares in a timely manner so as to create a viable cooperative.

The decision focused on important questions of purchasers' expectations based on the offering plan when buying units in cooperatively owned housing. Sponsor's retention of units for rental rather than sale in a property being converted from rental to cooperative or condominium status or newly constructed or rehabilitated for that purpose, may have an impact on purchasers for their own occupancy. Experience in the real estate market over the last fifteen years demonstrates that sponsor's retention of a substantial percentage of the units in a cooperative may affect purchasers' ability to secure institutional financing and frustrate owner-occupants' interest in gaining effective control of the management of the co-op. The Attorney General has determined that explicit disclosure of the sponsor's intent to sell or withhold from sale units included in an offering plan and the ramifications of the sponsor's retention of a substantial number of units are material terms of the offering.

The proposed regulations distinguish between cooperatives and condominiums based on the manner in which they are treated by institutional lenders and the differing expectations a purchaser should have in the cooperative form of ownership as opposed to the condominium. Because certain banks are generally unwilling to make end loans in cooperatives in which sponsor retains 49 percent or more of the units, the proposed Part 18 and 21 regulations (cooperative conversions and new construction, respectively) require that an offering plan prominently disclose that fact, if the sponsor does not agree to sell 51 percent of the units to owner occupants before renting or selling to investors. A similar warning must be provided if there is no provision for the owner-occupants to occupy a majority of the seats on the Board of Directors after the initial sponsor control period. Marketability of one's unit and owner-occupancy control of a cooperative's board are critical attributes of cooperative ownership, which purchasers have reason to expect unless specifically warned to the contrary.

In condominiums, the extent of sponsor ownership of units has proven to be less of an obstacle to obtaining institutional financing. The Attorney General has found no evidence that sponsor or investor ownership of units, by itself, has impeded purchasers' ability to obtain financing. Therefore, the proposed Part 20 and 23 regulations (condominium new construction and conversions, respectively) do not require warnings as to marketability problems based on sponsor's intent to retain a certain percentage of the condominium's units. Instead, the regulations require disclosure of obligations or limitations imposed on the sponsor's right to sell or rent under any construction loan or mortgage encumbering the property. For example, construction lender requirements for release of individual units from the mortgage lien upon sale to a retail purchaser, such as minimum sales percentages before plans can be declared effective, are conditions material to a purchaser's decision to buy or not. Where sponsor retains unlimited discretion to sell or rent, a warning of the consequences must be prominently disclosed. The regulations call for expanded disclosure of the lesser control over sales and subletting exercised by condominium boards compared with cooperatives so that purchasers are apprized not necessarily to expect owner-occupancy majorities in condominiums.

For both cooperatives and condominiums, the proposed regulations require that sponsors disclose whether they intend to sell all of the units and, if not, to specify the percentage and number they intend to withhold. The proposed regulations also call for full disclosure of the consequences of the sponsor holding a significant number of units over a prolonged period of time.

After the proposed regulations were published for public comment in 2003, the Office of the New York State Attorney General received seventeen comments from lawyers, tenants and other interested parties and incorporated the suggested changes it considered constructive and appropriate. In the updated version, there is greater emphasis on requiring sponsors to articulate objective conditions for a decision to rent rather than sell units and conditions under which sales will be resumed. Furthermore, there is an explicit requirement that sponsors discuss how the presence of rent regulated, non-purchasing tenants could effect the conversion process.

4. Costs. Since the proposed rule only elaborates on existing requirements for the filing of offering plans, it is anticipated that there will be no additional costs to either the regulated parties or local and state governments.

5. Local Government Mandates. The proposed rule does not impose any programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork. There are no additional reporting or paperwork requirements as a result of this amendment.

7. Duplication. The proposed rules will not duplicate any existing state or federal rule.

8. Alternatives. Many alternatives were considered by the Attorney General including a requirement that plans be required to state that all units would be sold without any recourse to renting. This alternative was rejected in favor of the approach taken in the proposed rules which would compel that sponsor disclose its intentions with regard to sale or rental of units and point out the risks to purchasers as a consequence.

9. Federal Standards. This rule does not exceed any minimum standards of the federal government for the same or similar subject.

10. Compliance Schedule. The rule will go into effect upon the filing of a Notice of Adoption in the New York State Register.

#### Regulatory Flexibility Analysis

1. Effect of rule. Small sponsoring entities will be affected by the proposed rule. It is impossible to predict how many sponsors will take part in a public offering of real estate securities, at any given time. Currently, the total number of sponsors taking part in public offerings of real estate may be as high as 16,000. In any given year, however, only a small number of these submit new plans to the Department of Law's Investment Protection Bureau. In 2002, for example, there were approximately 300 new plans submitted. For the years 2001 and 2002, there were five plans submitted for senior residences.

2. Compliance requirements. The proposed rules elaborate on the disclosure requirements set forth in General Business Law Section 352-e. The proposed regulations require no new obligations in terms of recordkeeping.

3. Professional services. When submitting offering plans, most sponsors (small businesses) retain an attorney to prepare the required disclosure. The proposed regulations require no additional professional.

4. Compliance costs. Since the proposed rules only elaborate on existing filing requirements to ensure compliance, there should be no additional cost incurred by a local government or regulated business in the

initial compliance with the proposed rules or in the continued compliance with the proposed rules. These costs will not vary based on the size or type of business.

5. Economic and technological feasibility. It should be economically and technologically feasible for small businesses and local governments to comply with the proposed regulation. The proposed rules contain no technological requirements and impose no new costs on either regulated businesses, including small businesses, or any local government.

6. Minimizing adverse impact. The proposed rules will not create an adverse impact on local government. The proposed rules will not have an adverse impact on small businesses since (a) the real estate securities offerors, including small businesses, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

7. Small business and local government participation. In order to ensure that small businesses and local government have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

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

1. Types and estimated numbers of rural areas. The proposed rules apply uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 rural areas. However, the vast majority of the approximately 300 new offering plans submitted in 2002 came from New York City and its suburbs.

2. Reporting, recordkeeping, and other compliance requirements. The proposed rules elaborate on the disclosure requirements already set forth in General Business Law Section 352-e. There are no new reporting or recordkeeping requirements for the proposed rules. The proposed rules do not require that a small business or local government hire a professional. However, it is likely that a small business will retain an attorney to ensure compliance with the proposed rules as they already do when submitting offering plans to the Department of Law's Investment Protection Bureau.

3. Costs. Since the proposed rules only elaborate on already existing filing requirements, there will be no additional costs incurred by a regulated party in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. There will be no variation in costs for entities in rural areas.

4. Minimizing adverse impact. The proposed rule will not have an adverse impact on rural areas since (a) the real estate security offerors, including those located in rural areas, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

5. Rural area participation. To ensure that entities in rural areas have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

purposes by Consolidated Edison Company of New York, Inc. at the Mott Haven Substation located at 415 Bruckner Blvd., Bronx, NY.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of new types of electricity meters, transformers and auxiliary devices.

**Purpose:** To approve the Hitachi Current Transformers Type UB-R.

**Substance of final rule:** The Commission adopted an order approving HVB AE Power Systems, Inc.'s request for approval and use of the Hitachi, Current Transformers Type UB-R to be used for metering purposes by Consolidated Edison Company of New York, Inc. at the Mott Haven Substation located at 415 Bruckner Boulevard, Bronx, New York.

**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-1637SA1)

### NOTICE OF ADOPTION

#### **Approval of New Types of Electricity Meters by Elster Electricity**

**I.D. No.** PSC-07-06-00011-A

**Filing date:** July 6, 2006

**Effective date:** July 6, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 05-E-1607 approving Elster Electricity's request for the use of the Elster Electricity REX residential electronic meters for use in utility metering applications.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of new types of electricity meters.

**Purpose:** To permit utilities in New York State to use the Elster Electricity REX line of electricity meters.

**Substance of final rule:** The Commission adopted an order approving Elster Electricity's request for the use of the Elster Electricity REX residential electronic meters for use in utility metering applications.

**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-1607SA1)

### NOTICE OF ADOPTION

#### **Waiver of Regulatory Provisions by N.E.A. Cross of N.Y., Inc.**

**I.D. No.** PSC-17-06-00012-A

**Filing date:** July 5, 2006

**Effective date:** July 5, 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, approved N.E.A. Cross of N.Y., Inc.'s request for waiver of regulatory provisions requiring records to be kept in New York State, to permit the transfer of records to Pennsylvania.

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

**Subject:** Request by N.E.A. Cross for waiver of regulatory provisions.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### **Hitachi Ltd. Current Transformer Type UB-R by HVB AE Power Systems Incorporated**

**I.D. No.** PCS-05-06-00017-A

**Filing date:** July 6, 2006

**Effective date:** July 6, 2006

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

**Action taken:** The commission, on June 20, 2006, adopted an order in Case 05-E-1637 approving HVB AE Power Systems, Inc.'s request to use the Hitachi Current Transformers Type UB-R to be used for metering

**Purpose:** To consider the waiver of 16 NYCRR sections 255.17 and 311.2 so that the transfer of records may be approved to 16 NYCRR Part 293.

**Substance of final rule:** The Commission adopted an order approving N.E.A. Cross of N.Y., Inc.'s request waiving regulatory provisions requiring that its records be kept in New York and approving the transfer of such records to an office in Pennsylvania, 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-G-0357SA1)

### NOTICE OF ADOPTION

**Agreement for the Provision of Water Service by Saratoga Water Services, Inc.**

**I.D. No.** PSC-17-06-00013-A

**Filing date:** July 5, 2006

**Effective date:** July 5, 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 Saratoga Water Services, Inc.'s request of an agreement for the provision of water service and a waiver of certain tariff provisions and 16 NYCRR Parts 501 and 502.

**Statutory authority:** Public Service Law, section 89-b

**Subject:** Parts 501 and 502—water main extensions.

**Purpose:** To approve an agreement for the provision of water service, waive certain tariff provisions and 16 NYCRR Parts 501 and 502.

**Substance of final rule:** The Commission adopted an order approving Saratoga Water Services, Inc.'s request for an agreement between Saratoga Water Services, Inc. and Boss Enterprises of Saratoga, LLC for the provision of water service by Saratoga Water Services, Inc. to a proposed development in the Town of Malta, Saratoga County, and for a waiver of the requirements and provisions of 16 NYCRR Sections 501 and 502 concerning water main extensions.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-W-0192SA1)

### NOTICE OF ADOPTION

**Agreement for the Provision of Water Service by Saratoga Water Services, Inc.**

**I.D. No.** PSC-17-06-00014-A

**Filing date:** July 5, 2006

**Effective date:** July 5, 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 Saratoga Water Services, Inc.'s request for an agreement for the provision of water service and a waiver of certain tariff provisions and 16 NYCRR Parts 501 and 502.

**Statutory authority:** Public Service Law, section 89-b

**Subject:** Parts 501 and 502—water main extensions.

**Purpose:** To approve an agreement for the provision of water service, waive certain tariff provisions and 16 NYCRR Parts 501 and 502.

**Substance of final rule:** The Commission adopted an order approving Saratoga Water Services, Inc.'s request for an agreement between Saratoga Water Services, Inc. and The Enclave at Malta, LLC for the provision of water service by Saratoga Water Services, Inc. to a proposed development in the Town of Malta, Saratoga County, and for waiver of the requirements and provisions of 16 NYCRR Sections 501 and 502 concerning water main extensions.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-W-0239SA1)

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

**Issuance of Securities by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-30-06-00008-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, Central Hudson Gas & Electric Corporation's petition to enter into new revolving credit agreements and issue and sell medium term notes.

**Statutory authority:** Public Service Law, section 69 (not subdivided)

**Subject:** Issuance of securities.

**Purpose:** To permit Central Hudson Gas & Electric Corporation to issue and sell securities.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, the petition of Central Hudson Gas & Electric Corporation to a) enter into a new revolving credit agreements to provide committed funding to meet expected liquidity needs, in amounts not exceed \$125 million in the aggregate and maturities not to exceed five years; and b) to issue and sell from time and time unsecured Medium Term Notes from January 1, 2007 through December 31, 2009, in an amount not to exceed \$140 million. The proceeds of the two financing vehicles will be used to provide service to the public.

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

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

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

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

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

(06-M-0785SA1)

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

**Article VII Proceedings by Consolidated Edison of New York, Inc.**

**I.D. No.** PSC-30-06-00009-P

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

**Proposed action:** Consideration of Consolidated Edison of New York, Inc.'s request for waivers of 16 NYCRR section 86.3(a)(1)(i), (iii), (2) and (b)(2) in its application for a Certificate of Environmental Compatibility and Public Need under art. VII of the Public Service Law for the M29 Transmission Line Project.

**Statutory authority:** Public Service Law, sections 4(1) and 122(1)

**Subject:** The filing requirements in art. VII proceedings concerning the submission of maps and drawings; archaeological, geologic, historic, scenic park and wilderness areas; transportation systems; and, aerial photographs.

**Purpose:** To determine whether the appropriate filing requirements are met without imposing any undue burdens.

**Substance of proposed rule:** The Commission is considering a request from the Consolidated Edison Company of New York, Inc. (Consolidated Edison) for waivers of certain filing requirements of the Commission's rules. Specifically, Consolidated Edison seeks waivers of 16 NYCRR § 86.3(a)(1)(i); 86.3(a)(1)(iii); 86.3(a)(2); and 86.3(b)(2). Consolidated Edison seeks a Certificate of Environmental Compatibility and Public Need to construct a 9.5 mile long 345 kV electric transmission line from the Sprain Brook Substation in the City of Yonkers, Westchester County, to the new Academy Substation in upper Manhattan, in the City of New York. This matter is being considered by the Commission in Case 06-T-0710.

**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-T-0710SA1)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Water Company Assets and Other Related Matters by Airmont Construction Corp. and the Town of Goshen

**I.D. No.** PSC-30-06-00010-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, a request by Airmont Construction Corp. to sell its water plant assets to the Town of Goshen, Orange County. The commission may also consider other, related matters.

**Statutory authority:** Public Service Law, sections 2, 5, 89-b and 89-h

**Subject:** Transfer of water company assets and other related matters.

**Purpose:** To consider the transfer of the water company assets of Airmont Construction Corp. to the Town of Goshen and other related matters.

**Substance of proposed rule:** On June 14, 2006, the Town of Goshen, Orange County (Town), and Airmont Construction Corp. (Airmont) filed a joint petition requesting permission for Airmont to transfer its water plant assets to the Town at no cost. Airmont provides water service to 45 residential customers in a development known as Scotchtown Park, Town of Goshen, Orange County.

If the transfer is approved, the Town will make a number of changes and improvements to the water system, including replacement of meters and curb stops, well testing, and installation of a new air compressor for the hydropneumatic tank. Long term, the Town intends to construct a new structure for the treatment plant and a new hydropneumatic tank; it also intends to replace the fire hydrants in Scotchtown Park.

The Commission may approve, reject, or modify, in whole or in part, the parties' request. It may also consider other related matters.

**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-0709SA1)

## Racing and Wagering Board

### EMERGENCY RULE MAKING

#### Administration of Race Day Medications by Veterinarians

**I.D. No.** RWB-20-06-00010-E

**Filing No.** 820

**Filing date:** July 5, 2006

**Effective date:** July 5, 2006

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule

making, I.D. No. RWB-20-06-00010-P, Issue of May 17, 2006. The emergency rule will expire September 2, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Mark A. Stuart, Assistant Counsel, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: mstuart@racing.state.ny.us

**Regulatory Impact Statement**

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

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

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

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

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

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

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

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

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

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

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

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment merely allows veterinarians employed by the New York State Racing and Wagering Board and thoroughbred racing associations to administer race day medications to thoroughbreds. The impact of this rule is limited to those two types of veterinarians. Other rules prohibit veterinarians from entering a security barn area where thoroughbreds are quartered prior to races. It is necessary for Board and association veterinarians to enter security barns to administer race day medications, and this rule would allow that. These amendments do not impact upon State Administrative Procedure Act § 102(8). Nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above,

because the rule is a permissive rule that will allow state and association veterinarians to administer race day medications.

**Department of Taxation and Finance**

**NOTICE OF ADOPTION**

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel**

**I.D. No.** TAF-19-06-00021-A

**Filing No.** 821

**Filing date:** July 6, 2006

**Effective date:** July 6, 2006

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

**Action taken:** Amendment of section 492.1(b)(1) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); 528(a); and L. 2006, ch. 35

**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning July 1, 2006, and ending Sept. 30, 2006, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of fuel use tax and the art. 13-A carrier tax.

**Text of final rule:** Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xlili) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xlii) April - June 2006					
15.4	23.4	39.3	16.6	24.6	38.75
(xlili) July - September 2006					
14.0	22.0	37.9	14.0	22.0	36.15

This is a "rate making" as defined in SAPA § 102(2)(a)(ii). Substantial revisions were made in section 492.1(b)(1)(xlili).

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**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 rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

**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.

**NOTICE OF ADOPTION**

**Taxpayer Record Retention Formats**

**I.D. No.** TAF-19-06-00022-A

**Filing No.** 822

**Filing date:** July 6, 2006

**Effective date:** July 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 2402.1(a) of Title 20 NYCRR.

**Statutory authority:** Tax Law, section 171, subdivisions First and Fourteenth

**Subject:** Taxpayer record retention formats.

**Purpose:** To update the department's procedural regulations to reflect L. 2004, ch. 437.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-19-06-00022-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:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### Reporting and Paying Unpaid Sales and Compensating Use Taxes by Purchasers

**I.D. No.** TAF-19-06-00023-A

**Filing No.** 823

**Filing date:** July 6, 2006

**Effective date:** July 26, 2006

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

**Action taken:** Amendment of sections 531.6, 532.1(e), 533.4(b)(3), and 537.3(e) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subdivision First; 1133, subdivisions (b) and (c); 1142, subdivisions (1) and (8); 1250 (not subdivided); and L. 2003, ch. 62, part R3, as amended by L. 2003, ch. 686, part V

**Subject:** Reporting and paying unpaid sales and compensating use taxes by purchasers.

**Purpose:** To update the sales and compensating use tax regulations to reflect L. 2003, chs. 62 and 686.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-19-06-00023-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:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Electronic Funds Transfer Program

**I.D. No.** TAF-30-06-00001-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 Parts 2396 and 2397 of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 9(b), (e), (i); 10(i); 171, subd. First; 289(f); 315(b); 658(a); 697(a); 1142(1); 1142(8); and 1250

**Subject:** Electronic Funds Transfer Program.

**Purpose:** To update the regulations to reflect the department's enhanced electronic funds transfer system.

**Substance of proposed rule (Full text is posted at the following State website: [www.tax.state.ny.us](http://www.tax.state.ny.us)):** This proposal contains amendments to Parts 2396 (withholding tax-Article 22 of the Tax Law) and 2397 (Articles 12-A, 13-A, 28 and 29 of the Tax Law) of the regulations of the Department of Taxation and Finance concerning electronic funds transfer ("EFT"). The EFT system is used by taxpayers to remit payments of taxes due and is the required mode of payment for large payors. The primary purpose of the amendments is to update the regulations to reflect the Department's enhanced EFT system (under a new banking services contract) which is planned for implementation sometime in 2006.

Besides addressing the upcoming changes in the EFT program, the amendments include other updating changes. Also, some unnecessary provisions, and provisions which are better suited for inclusion in the program material which is sent to participants, have been deleted.

Some of the specific amendments contained in the proposal are the following:

- changing the definitions sections of both Parts 2396 and 2397 to remove those definitions already contained in the Tax Law and referring readers to the law for those terms;
- conforming the common definitions in the Parts to each other; for example, the term "business day" is defined to mean a day other than Saturday, Sunday or certain holidays, which is consistent with how the term has been defined in practice for the program for both withholding tax and the other taxes;
- allowing voluntary participants in the program to opt out of the program at a later date (10 days before the end of the program period, if done in writing, or the last day of the period, if done online) than is currently allowed;
- adding specific language providing that the Department may exercise its statutory authority and limit the selection of payment options available to voluntary participants; this is current Department policy (currently, only ACH credit and ACH debit are available to withholding tax voluntary participants) but was not addressed in the previous regulations;
- reflecting the current Department policy of keeping participants, whose status has changed and who are no longer required to participate, enrolled in the program unless they choose not to participate, instead of having a re-enrollment process;
- repealing the current provisions concerning the Department's mailing of advices of deposit or payment and substituting provisions reflecting the enhanced system's greater use of the program's web site; acknowledgement of payment will be provided by a record of deposits in a participant's online account but participants may also request that the Department mail an advice of deposit or payment to them;
- conforming the regulations to existing policy by providing that taxpayers in the program who pay by certified check can deliver their certified check to the Department by the due date instead of by the second business day prior to the due date (as provided in Part 2396); and
- repealing and replacing the provisions concerning changing payment options to reflect the greater flexibility allowed by the enhanced system; participants will be allowed to change their payment option at any time instead of at prescribed times.

**Text of proposed rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**Data, views or arguments may be submitted to:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: Marilyn\_Kaltenborn@tax.state.ny.us

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

### Consensus Rule Making Determination

The Department of Taxation and Finance has considered the proposed amendments to Parts 2396 and 2397 of Title 20 NYCRR and has determined that no person is likely to object to the rule as written.

The primary purpose of these amendments is to update the regulations to reflect the Department's enhanced electronic funds transfer ("EFT") system (under a new banking services contract) which is planned for implementation sometime in 2006. The EFT system is used by taxpayers to remit payments of taxes due and is the required mode of payment for large payors. Under the enhanced system, there will be a greater utilization of the program's website to handle the transmission of bank transactions and less need for use of the paper mail system. Participants in the program will benefit from quicker processing times and the relaxation of administrative time limits.

The text of this proposal is the same as proposed rule making ID# TAF-33-05-00002-P, which was published in the *State Register* on August 17, 2005 and will expire on August 17, 2006. We have received no comments about this rule making. Since the new banking services contract has not yet been implemented, this prior proposed rule making has not been adopted.

### Job Impact Statement

A Job Impact Statement is not being submitted with this rule because the rule will have no adverse impact on jobs and employment opportunities. This rule making updates Parts 2396 and 2397 of the Department's regulations to reflect the Department's enhanced electronic funds transfer system under a new banking services contract which is planned for implementa-

tion sometime in 2006. The electronic funds transfer system is used by taxpayers to remit payments of taxes due and is the required mode of payment for large payors.