

RULE MAKING ACTIVITIES

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

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

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

Department of Audit and Control

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Disposition of Unpaid State Checks Outstanding for More than One Year

I.D. No. AAC-27-06-00003-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 14.4 of Title 2 NYCRR.

Statutory authority: State Finance Law, sections 8(14), 102

Subject: Disposition of unpaid State checks outstanding for more than one year.

Purpose: To provide methods for State agencies to report State checks issued, but remaining outstanding, to the Abandoned Property Fund.

Text of proposed rule: Section 14.4 of Title 2 of NYCRR is amended to read as follows:

§ 14.4 Unpaid checks outstanding more than [three] *one* [years] year.
The amounts of all checks on bank accounts of any [fund] *funds* of the State which have been outstanding for more than [three years] *one year* from the respective dates thereof shall be paid into the [State Treasury to the credit of the general fund] *abandoned property fund pursuant to subdivision four of section one thousand three hundred fifteen of the*

abandoned property law. [Upon payment to the treasury, the custodian of any] *The proper disbursing officers or agents of such funds [will] shall* notify the banks on which such checks were drawn to stop payment thereon (*State Finance Law, § 102*) and shall follow all proper procedures in accordance with the *New York State Accounting System User Procedures Manual, volume XI, section 7.0500.* [The initial cash book entry for each such check shall bear notation of cancellation, the date thereof, and reference to the page on which such cancellation was effected.]

Text of proposed rule and any required statements and analyses may be obtained from: Wendy H. Reeder, Office of the State Comptroller, 110 State St., Albany, NY 12236, (518) 474-5714, e-mail: wreeder@osc.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority

Section 8(14) of the State Finance Law authorizes the Comptroller to adopt rules and regulations in order to carry out the duties of his Office. Section 102 of the State Finance Law charges the Comptroller with the duty of keeping a record of all state checks issued and remaining outstanding for a period of one year.

2. Legislative Objectives

State Finance Law section 102, which serves as the basis for 2 NYCRR section 14.4, was amended in 2003 in the following manner:

- The period of time for which a State check remains payable was reduced from three years to one year.
- The amounts of un-cashed State checks are now to be paid to the State's Abandoned Property Fund rather than being paid into the State Treasury to the credit of the General Fund.
- The words "custodian of any such fund" was replaced with "proper disbursing officers or agents of such funds" with respect to notifying the bank to not pay such checks.

3. Needs and Benefits

Section 14.4 of 2 NYCRR provides the methodology for State agencies to report State checks issued but remaining outstanding to the Abandoned Property Fund in accordance with State Finance Law section 102. This amendment is necessary to conform section 14.4 of Title 2 NYCRR to the amendments to State Finance Law, section. Further archaic, irrelevant language will be deleted from the Regulation.

4. Costs

Not applicable.

5. Local Government Mandates

The proposed amendment does not impose any duty or responsibility on, or involve any program or service involving, any county, city, town, village, school district or fire district.

6. Paperwork

There are no additional forms or paperwork as a result of this regulatory change.

7. Duplication

This action does not conflict with or duplicate any State or Federal requirements.

8. Alternatives

Not applicable.

9. Federal Standards

Not applicable.

10. Compliance Schedule

Not applicable as State agencies have been complying with State Finance Law section 102 since its amendment in 2003.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because the proposal will not impose any reporting, recordkeeping or compliance requirements on small businesses and local governments. Rather, this proposal applies to methods in which State agencies report un-cashed State checks remaining outstanding for a period of one year. It does not involve compliance by small businesses and local governments in any manner.

Rural Area Flexibility Analysis

This action will not impose any adverse impact, reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The only compliance requirement of any kind is the regulations requirement that state agencies report to the abandoned property fund and un-cashed state checks remaining outstanding for a period of one year.

Banking Department

EMERGENCY RULE MAKING

Permissible Banking Institutions with which Licensed Check Cashers May Maintain Deposit Accounts

I.D. No. BNK-27-06-00005-E

Filing No. 742

Filing date: June 16, 2006

Effective date: June 19, 2006

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

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

Statutory authority: Banking Law, section 371

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

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

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

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

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

§ 400.5 Depositing of checks, etc.

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

(2) Any account maintained by a licensee for the deposit of checks, drafts or money orders in a banking institution shall be subject to a written

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 13, 2006.

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

Regulatory Impact Statement

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

2. Legislative objectives. The Legislature, when enacting and periodically amending Article 9-A of the Banking Law, which requires regulatory supervision of the business of check cashing, has stated as matter of legislative intent that such businesses provide an important and vital service to New York citizens. The regulatory regime applicable to such industry is intended to ensure the consumer confidence in such business is maintained and the public interest is protected. The regulatory requirements addressed in this rule making are necessary to maintain the financial stability of the licensees, thus maintaining the public confidence in their operations.

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

maintain deposit accounts with banks or branches located out of state should assist in addressing this problem. While doing business with banks or branches located out of state may present certain logistical problems for check cashers in meeting the one-business day deposit requirement, there are mechanisms available within the banking system which should make such arrangements workable.

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

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

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

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

7. Duplication. None.

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

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

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

Regulatory Flexibility Analysis

The emergency rule facilitates the conduct of business by and the financial stability of licensed check cashers, which are private businesses. Though the rule requires the licensee to obtain the agreement of the banking institution, when opening an account, to governance of the account relationship under New York law and courts located in New York, as well as to examination of its account-related records by the Superintendent, these are necessary additional conditions in order for the Superintendent to properly supervise licensed check cashers that may choose to open accounts in banking institutions outside New York and also in national banks regardless of where located. The Department has determined that the emergency rule has no impact upon other private businesses, or any unit of local government.

Rural Area Flexibility Analysis

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

Job Impact Statement

The emergency rule is intended to facilitate the conduct of business by and the financial stability of check cashing businesses. Without deposit ac-

count relationships with banking institutions, licensed check cashers could not function. Therefore, the Department has determined the emergency rule has no adverse impact upon employment in the check cashing industry.

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-06-00004-A

Filing No. 738

Filing date: June 15, 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 Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-15-06-00004-P, Issue of April 12, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-06-00005-A

Filing No. 736

Filing date: June 15, 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 Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete a position from and to classify a position in the exempt class in the Executive Department and the Department of State.

Text was published in the notice of proposed rule making, I.D. No. CVS-15-06-00005-P, Issue of April 12, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-06-00006-A

Filing No. 737

Filing date: June 15, 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 Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete a position from and to classify a position in the exempt class in the Department of Taxation and Finance.

Text was published in the notice of proposed rule making, I.D. No. CVS-15-06-00006-P, Issue of April 12, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-06-00007-A

Filing No. 734

Filing date: June 15, 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 Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-15-06-00007-P, Issue of April 12, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-06-00008-A

Filing No. 735

Filing date: June 15, 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 Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-15-06-00008-P, Issue of April 12, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-15-06-00009-A

Filing No. 739

Filing date: June 15, 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 Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete a position from and to classify a position in the non-competitive class in the Department of Civil Service.

Text was published in the notice of proposed rule making, I.D. No. CVS-15-06-00009-P, Issue of April 12, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

The agency received no public comment.

Education Department

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

Education Requirements for Licensure in Public Accountancy

I.D. No. EDU-27-06-00009-P

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

Proposed action: Amendment of sections 52.13, 70.1 and 70.4(b) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 6506(1) and (6); 6507(2)(a), (3)(a) and (4)(a); and 7404 (1)(2) and (2)

Subject: Education requirements for licensure in public accountancy and the endorsement of an out-of-state license in this field.

Purpose: To revise requirements for college programs leading to licensure in public accountancy; make changes in the education requirements that applicants for licensure as a certified public accountant must meet; and revise requirements for licensure in this field through the endorsement of an out-of-state license.

Text of proposed rule: 1. Section 52.13 of the Regulations of the Commissioner of Education is amended, effective October 5, 2006, as follows:
52.13 Accountancy.

(a) Prior to August 1, 2004, the program shall meet the curricular requirements in this subdivision or subdivision (b) of this section.

(1) Undergraduate curriculum. An undergraduate curriculum shall [include not less than] *lead to a baccalaureate degree and include not less than 120 semester hours or their equivalent, including* the following semester hours or their equivalent in the specified subjects:

Subject	Semester hours
Accounting, including course coverage in each of the following subject areas - accounting principles, cost accounting, tax accounting and auditing	24
Commercial law	6
Finance	6
Basic statistics	3
[Liberal arts and science courses]	[60]
Business and accounting electives	21
[Total, including at least six semester hours of economic principles which hours may be used to satisfy either the business electives or liberal arts requirements]	[120]
<i>Economic principles (which may be used to satisfy the business and accounting electives requirement)</i>	6

The department may recognize a curriculum of comparable course content but with fewer semester hours, if given wholly or partly at the graduate level, as being equivalent to the undergraduate curriculum outlined above.

(2) Graduate curriculum. A graduate curriculum shall include not less than the following semester hours or their equivalent in the specified subjects depending on the undergraduate preparation of the students:

Subject	Semester hours (prerequisites for the respective programs are described below)	
	Alternative A	Alternative B

Accounting, including at least one course each in accounting theory, tax accounting, and auditing, and in addition, under the B program, at least one course in cost accounting	9	24
Economic analysis	3	3
Finance	3	3
Commercial law - six semester hours at the undergraduate level will be considered equivalent		4
Other business accounting electives [, including at least one course in quantitative measurements]	15	26
Total	30	60

(i) . . .

(ii) The prerequisite for alternative B is a bachelor's degree or the equivalent in a field other than accounting or business administration, including:

(a) [at least 60 semester hours in liberal arts and science courses, of which] at least six semester hours [shall be] in economic principles;

(b) . . .

(c) . . .

If such curriculum did not include the requirements set forth in this paragraph relating to economic principles, finance and business statistics, equivalent study in these subjects shall be carried out through the use of electives in the graduate curriculum.

(b) (1) Definitions. As used in this subdivision:

(i) Professional accountancy content area shall mean [coursework, which includes but is not limited to, each of the following curricular areas] *curricular content that includes but is not limited to each of the following subjects:*

(a) . . .

(b) . . .

(c) . . .

(d) . . .

(ii) General business content area shall mean [coursework, which includes but is not limited to, each of the following curricular areas] *curricular content that includes but is not limited to each of the following subjects:*

(a) . . .

(b) . . .

(c) . . .

(d) economics; and

(e) finance [; and].

[(f) quantitative methods.]

[(iii) . . .]

(2) Curriculum. On or after August 1, 2004, in addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to licensure in public accountancy which meets the requirements in section 70.1 of this Title, such program shall be a baccalaureate or higher program that, by requisites or prerequisites, shall ensure completion of at least 150 semester hours or its equivalent, including a minimum of 33 semester hours or its equivalent in the professional accounting content area[,] and a minimum of 36 semester hours or its equivalent in the general business content area [, and a minimum of 60 semester hours or its equivalent in the liberal arts and sciences content area, with a maximum of 90 semester hours in a combination of the professional accounting and general business content areas and a maximum of 80 semester hours in the liberal arts and sciences content area]. Such curriculum shall include the study of business and accounting communications, ethics and professional responsibility, and accounting research, either by integration into the coursework of other courses or in separate courses.

2. Section 70.1 of the Regulations of the Commissioner of Education is repealed and a new section 70.1 is added, effective October 5, 2006, as follows:

70.1 Professional study of public accountancy.

(a) For purposes of this section, acceptable accrediting agency shall mean an organization accepted by the department as a reliable authority for the purpose of accreditation of accountancy programs, having accreditation standards that are substantially equivalent to the requirements for programs registered pursuant to section 52.13 of this Title, and applying its criteria for granting accreditation in a fair, consistent, and nondiscriminatory manner.

(b) (1) To meet the professional educational requirements for licensure, the applicant shall present satisfactory evidence of completing a baccalaureate or higher degree program in accountancy that is registered by the department pursuant to section 52.13 of this Title, or a baccalaureate or higher degree program in accountancy that is accredited by an acceptable accrediting agency, or a baccalaureate or higher degree program that is substantially equivalent to such a registered or accredited program, as determined by the department.

(2) An applicant who applies to the department for licensure on or after August 1, 2009 shall be required to have satisfactorily completed a curriculum of at least 150 semester hours in the program prescribed in paragraph (1) of this subdivision.

(3) An applicant who applies to the department for licensure prior to August 1, 2009 shall be required to have either:

(i) satisfactorily completed a curriculum of at least 150 semester hours in the program prescribed in paragraph (1) of this subdivision; or

(ii) satisfactorily completed a curriculum of at least 120 semester hours in the program prescribed in paragraph (1) of this subdivision prior to August 1, 2009 and submitted the required application forms for licensure to the department prior to August 1, 2009.

(c) In lieu of meeting the education requirements prescribed in subdivision (b) of this section, the applicant may meet the following requirement: at least 15 years of full-time experience in the practice of public accountancy satisfactory to the State Board for Public Accountancy.

3. Subdivision (b) of section 70.4 of the Regulations of the Commissioner of Education is amended, effective October 5, 2006, as follows:

(b) If licensing standards of the other jurisdiction at the time of licensure were not fully equivalent to New York State standards at the time of application for endorsement, or if an examination acceptable to the State Board was passed in another jurisdiction but under conditions not applicable in this State, the department may accept, for purposes of endorsement, evidence satisfactory to the State Board of at least [five] four years of professional experience in the practice of public accountancy following initial licensure and within 10 years immediately preceding application for licensure by endorsement.

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

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to supervise the admission to practice of the professions and the regulation of such practice and to promulgate rules to carry out such supervision.

Subdivision (6) of section 6506 of the Education Law authorizes the Board of Regents to indorse a license issued by a licensing board of another state or country, upon the applicant meeting requirements prescribed in Commissioner's Regulations.

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

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

Paragraph (a) of subdivision (4) of section 6507 of the Education Law authorizes the State Education Department to register or approve educational programs designed for the purpose of providing professional prepa-

ration which meet standards established by the State Education Department.

Paragraph (2) of subdivision (1) of section 7404 of the Education Law requires an applicant for a license as a certified public accountant to have received an education, including a bachelor's or higher degree based upon a program in accountancy, in accordance with Commissioner's Regulations.

Subdivision (2) of section 7404 of the Education Law establishes an acceptable alternative to meeting the regular education and experience requirements for a license as a certified public accountant.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes by establishing requirements for registered college programs leading to licensure as a certified public accountant in New York State, education requirements that an applicant for licensure must meet, and requirements for the endorsement of an out-of-state license in this field.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to revise requirements for college programs leading to licensure in public accountancy, make changes in the education requirements that applicants for licensure as a certified public accountant must meet, and revise requirements for licensure in this field through the endorsement of an out-of-state license.

Section 52.13 of the Regulations of the Commissioner of Education sets forth requirements for registered college programs leading to licensure as a certified public accountant in New York State. The amendment makes a number of changes in the requirements of these registered programs.

The amendment deletes a 60 semester-hour liberal arts and sciences requirement for such registered programs. Instead, it permits the registered programs to provide liberal arts and sciences coursework in accordance with the requirements of Regents Rules for the type of degree conferred. The amendment would permit a program to offer fewer liberal arts and sciences courses. For example, the Bachelor of Business Administration (BBA) program may limit liberal arts and sciences coursework to one-quarter of the curriculum (e.g., 30 semester hours for a 120 semester hour program). The Department believes that the change would provide accountants with sufficient liberal and sciences preparation. The State Board for Public Accountancy has approved this change.

Deleting the 60 semester hour liberal arts and sciences requirement will remove a barrier to licensure for certified public accountants who are licensed in other states and have completed out-of-state programs. To be licensed they have to complete an equivalent educational program to a New York State registered program and many have not taken 60 semester hours in the liberal arts and sciences because such an education requirement does not exist in most other states.

The amendment also removes a requirement in the registered licensure-qualifying programs for a course in quantitative measurements or methods. This specific requirement does not exist in the education requirements for licensure in most other states. As a result, this requirement has been a barrier to licensure in New York State. The State Board for Public Accountancy has approved this change.

The amendment makes a clarifying change in the requirements specifying content requirements for registered 150-semester hour programs leading to licensure. The language clarifies that the subjects listed under each content area must be completed in curricular content, meaning that the subjects may be provided in individual courses or within the curricular content of several courses. This change is needed to ensure that colleges have the flexibility to structure their registered programs as they see fit, provided that the prescribed subject matter is covered.

The amendment also permits an applicant to meet the education requirement for licensure by completing an accountancy program that is accredited by an acceptable accrediting agency. The regulation defines an acceptable accrediting agency as an agency that has accreditation standards that are substantially equivalent to the requirements in Commissioner's Regulations for registered programs leading to licensure, among other requirements. This change will ease access to licensure in New York State for applicants who have completed out-of-state accredited programs. It will streamline the licensure process, and expedite the processing of licensure applications. It will save staff time because the Department will no longer have to compare the course content of out-of-state programs to registered New York State programs, if the programs are accredited by an acceptable accrediting agency that the Department has already determined to have substantially equivalent standards to New York's.

The amendment also changes requirements for the endorsement of an out-of-state license in this field. The proposed amendment changes the experience requirement for applicants who do not meet the regular educa-

tion and/or experience requirement for licensure. It reduces from five years to four years in the preceding 10 years the number of years of professional experience that such an applicant for licensure through the endorsement of an out-of-state license must have. This is needed to ease access to licensure in New York State for experienced certified public accountants who are licensed in other jurisdictions. The change is consistent with the standard included in the Uniform Accountancy Act of the American Institute for Certified Public Accountants and the National Association of State Boards of Accountancy and with the experience requirement prescribed by many other jurisdictions for the endorsement of an out-of-state license. The State Board for Public Accountancy has approved this change.

4. COSTS:

(a) Cost to State government: The proposed amendment will not impose additional costs on State government. The Department will continue to determine whether applicants for licensure in accountancy meet educational requirements. Accepting accredited accountancy programs as qualifying licensure programs will streamline the licensure process by reducing administrative costs because staff will no longer have to review the educational requirements of individual out-of-state programs that are accredited by an acceptable accrediting agency.

(b) Cost to local government: None.

(c) Cost to private regulated parties: The proposed amendment will not impose any additional cost on applicants for licensure in public accountancy or licensure-qualifying registered college programs. It does not change the total number of semester hours in the licensure-qualifying programs that an applicant for licensure as a certified public accountant must complete.

(d) Costs to the regulatory agency: As stated above in "Costs to State Government," the proposed amendment will not impose additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to education requirements for licensure in public accountancy, the requirements for licensure-qualifying college programs, and experience requirements for licensure through the endorsement of an out-of-state license in this field. The amendment does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The amendment does not establish additional reporting or recordkeeping requirements for applicants for licensure or college programs. In fact, the amendment is likely to reduce the application requirements for licensure applicants who have completed acceptable accredited out-of-state education programs. They will likely have to submit less documentation to substantiate the course content of the out-of-state program.

7. DUPLICATION:

There are no other State or Federal requirements on the subject matter of the proposed amendment. Therefore, the proposed amendment does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

There are no Federal standards concerning the subject matter of the amendment, educational requirements for licensure in certified public accountancy, requirements for licensure-qualifying college programs, and professional experience requirements for the endorsement of an out-of-state license in certified public accountancy.

10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its effective date. No additional period of time is necessary to enable regulated parties to comply with the regulation.

Regulatory Flexibility Analysis

The proposed amendment changes education requirements that individuals must meet to be licensed as a certified public accountant and requirements that colleges must meet for the registration of licensure-qualifying programs in this field. It also changes professional experience requirements for individuals seeking licensure through the endorsement of an out-of-state license. The amendment does not regulate small businesses or local governments. It does not impose any reporting, recordkeeping, or other compliance requirements on small business or local governments, or have any adverse economic effect on them. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small

businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect individuals who apply for licensure as certified public accountants (CPA) and college programs leading to licensure in public accountancy, including those that are located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Each year about 1,750 individuals apply for licensure as a certified public accountant. The Department estimates that about eight percent or about 140 come from a rural county of New York State. At present, there are 143 licensure-qualifying college programs in New York State. Of these, 10 are located in rural counties of New York State.

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

The proposed amendment revises education requirements for licensure as a certified public accountant and requirements for licensure in this field through the endorsement of an out-of-state license. Section 52.13 of the Regulations of the Commissioner of Education sets forth requirements for registered college programs leading to licensure as a certified public accountant in New York State. The amendment makes a number of changes in the requirements for registered New York State programs leading to licensure. The amendment deletes a 60 semester-hour liberal arts and sciences requirement for such registered programs. Instead, it permits the registered programs to provide liberal arts and sciences coursework in accordance with the requirements of Regents Rules based upon the type of degree conferred. The amendment would permit a program to offer fewer liberal arts and sciences courses. For example, the Bachelor of Business Administration (BBA) program may limit liberal arts and sciences coursework to one-quarter of the curriculum (e.g., 30 semester hours for a 120 semester hour program).

The amendment removes a requirement in the registered licensure-qualifying programs for a course in quantitative measurements or methods. It also makes a clarifying change in the requirements specifying content requirements for registered 150-semester hour programs leading to licensure. The language clarifies that the subjects listed under each content area must be completed in curricular content, meaning that the subjects may be provided in individual courses or within the curricular content of several courses.

The amendment changes the education requirement for licensure, permitting an applicant to meet the education requirement by completing an accountancy program that is accredited by an acceptable accrediting agency. The regulation defines an acceptable accrediting agency as an agency that has accreditation standards that are substantially equivalent to the requirements in Commissioner's Regulations for registered programs leading to licensure, among other requirements.

The amendment also makes a change in the professional experience requirement for the endorsement of an out-of-state license for licensure as a certified public accountant in New York State. The proposed amendment changes the experience requirement for applicants who do not meet the regular education and/or experience requirement for licensure. It reduces from five years to four years in the preceding 10 years the number of years of professional experience that an applicant for licensure through the endorsement of an out-of-state license must have.

The proposed amendment does not impose a need for additional professional services and does not establish additional reporting or recordkeeping requirements on applicants for licensure or licensure-qualifying programs, including those located in rural areas of New York State.

3. COSTS:

The proposed amendment will not impose any additional cost on applicants for licensure in accountancy or licensure-qualifying registered college programs, including those located in rural areas of New York State. It does not change the total number of semester hours in the licensure-qualifying programs that an applicant for licensure as a certified public accountant must complete.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment provides additional flexibility in the requirements that registered licensure-qualifying programs in accountancy must meet. It deletes the liberal arts and sciences requirement for registered programs leading to licensure in public accountancy, and permits such programs to offer such coursework based upon the requirements of Regents Rules for the type of degree conferred. It also permits applicants for licensure in this field to meet the education requirement by completing out-of-state programs accredited by an acceptable accrediting agency, and

reduces the number of years of professional experience that an applicant for endorsement of an out-of-state license must complete. Because the amendment liberalizes requirements, it is unnecessary to minimize an adverse impact on applicants for licensure or college programs located in rural areas of the State.

5. RURAL AREA PARTICIPATION:

The State Board Public Accountancy assisted in the development of the proposed amendment and approves the changes. This Board includes members who live and work in rural areas of New York State. In addition, the State Education Department solicited comments on the proposed amendments from the Society of Certified Public Accountants and all colleges in the State that offer licensure-qualifying programs in this field, which include members and institutions located in all areas of New York State, including rural areas of the State.

Job Impact Statement

The purpose of the proposed amendment is to revise requirements for college programs leading to licensure in public accountancy, make changes in the education requirements that applicants for licensure as a certified public accountant must meet, and revise requirements for licensure in this field through the endorsement of an out-of-state license. The amendment will ease access to licensure in this field for individuals who are already licensed in other jurisdictions. It deletes a 60 semester-hour liberal arts and sciences requirement for registered programs leading to licensure in public accountancy in New York State. Deleting this requirement will remove a barrier to licensure in New York State for certified public accountants who are licensed in other states and have not completed this total number of semester hours in the liberal arts and sciences. The amendment also permits an applicant to meet the education requirement for licensure by completing an accredited out-of-state program in accountancy, and reduces the number of years of professional experience that must be completed to be licensed through the endorsement of an out-of-state license.

The amendment does not affect the number of jobs or the number of employment opportunities in public accountancy, or any other field. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment or only a positive impact, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Moose

I.D. No. ENV-01-06-00003-A

Filing No. 749

Filing date: June 20, 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 Part 189 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301 and 11-0325

Subject: Definition for the genus *Alces* (moose); prohibition on the importation of moose carcasses and parts from certain states; and imposition of restrictions concerning cervid carcasses imported from West Virginia.

Purpose: To prevent the spread of chronic wasting disease in New York.

Text of final rule: Title 6 of the Codes, Rules and Regulations of the State of New York, Part 189, "Chronic Wasting Disease," is amended as follows:

Section 189.2 is amended as follows:

Subdivisions 189.2 (e) through (j) are relettered as subdivisions 189.2 (f) through (k).

A new subdivision 189.2(e) is added to read as follows:

(e) “*Genus Alces*” means the following species and hybrids: moose (*Alces alces*).

Section 189.3 is amended as follows:

Subdivision 189.3 (a) is amended to read as follows:

(a) “Importation of animals of the Genus Cervus [or the] , Genus *Odocoileus*, or *Genus Alces*.” No person shall import into New York State any wild or captive animal of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* except under permit issued by the New York State Department of Agriculture and Markets, in consultation with the department, pursuant to Section 68.2 of Title 1 NYCRR.

Paragraph 189.3(b)(4) is amended to read as follows:

(4) by distribution of food material for legally possessed captive animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces*; or

Subdivision 189.3 (c) is amended to read as follows:

(c) “Distribution of certain food materials.” No person shall feed any wild or captive animal of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* with any material that contains protein derived from any mammalian tissues.

Subdivision 189.3 (d) is amended to read as follows:

(d) “Importation and possession of certain animal parts.” No person shall import into New York or possess the brain, eyes, spinal cord, tonsils, intestinal tract, spleen or retropharyngeal lymph nodes, or any portion of such parts, of wild, captive, or captive-bred animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* obtained from or taken outside New York, or any carcass containing such parts, except that:

Subdivision 189.3 (e) is amended to read as follows:

(e) “Importation of carcasses and parts.” No person shall import into New York or possess in New York the carcasses or parts of wild, captive, or captive-bred animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* obtained from or taken outside New York, except that:

(1) carcasses and parts of wild animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* taken in the following states and provinces may be imported and possessed provided that all such carcasses and parts are marked as described in Section 189.4 of this Part:

(i) United States: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia [, and West Virginia];

(ii) Canada: New Brunswick, Newfoundland, Nunavut, Ontario, Prince Edward Island, and Quebec.

(2) carcasses and parts of wild animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* taken outside New York, except for those states and provinces listed in paragraph (1) of this subdivision, may be imported and possessed provided that the parts listed in subdivision (d) of this section have been removed.

(3) carcasses and parts of captive or captive-bred animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* taken or obtained from outside New York may be imported and possessed provided that the parts listed in subdivision (d) of this section have been removed.

(4) any meat of wild animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* may be imported and possessed provided that such meat does not contain any parts listed in subdivision (d) of this section;

Subdivision 189.3 (f) is amended to read as follows:

(f) “Liberation of wild or captive animals.” No person shall:

(1) liberate or release to the wild in New York any captive or captive-bred animal of the Genus Cervus or the *Genus Alces* or the Genus *Odocoileus* except for wild white-tailed deer (*O. virginianus*) held in temporary captivity under license or permit issued by the Department pursuant to Environmental Conservation Law Sections 11-0507 or 11-0515(3) and Part 184 of this [Title] Chapter; or

(2) liberate or release to the wild in New York any wild animal of the *Genus Alces* or the Genus Cervus or the Genus *Odocoileus* except under license or permit issued by the Department pursuant to Environmental Conservation Law Sections 11-0507 or 11-0515(3) and Part 184 of this [Title] Chapter.

Subdivision 189.3 (g) is amended to read as follows:

(g) “Transportation of captive animals.” No person shall transport within New York any captive animal of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* except under permit issued by the New York State Department of Agriculture and Markets pursuant to 1 NYCRR 68.2.

Subdivision 189.3 (i) is amended to read as follows:

(i) “Possession of wild white-tailed deer.”

(1) No person who possesses any captive bred animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* shall capture or possess any live wild white-tailed deer.

(2) No person who engages in the art or operation of preparing, stuffing, and mounting the skins or other parts of animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* shall capture or possess any live wild white-tailed deer.

Section 189.4 is amended to read as follows:

§ 189.4 Marking of Carcasses and Parts.

All carcasses and parts of any wild animal of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* imported into New York, or packages or containers containing such carcasses or parts, shall be affixed with a legible label bearing the following information: the species of animal, the state or province where the animal was taken, and the name and address of the person who took the animal.

Section 189.5 is amended to read as follows:

§ 189.5 Transportation or shipment of carcasses and parts through New York.

A person may transport or ship carcasses or parts of any wild or captive animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* through New York provided that all such carcasses and parts are not disposed of in any manner or delivered to any person in New York.

Section 189.6 is amended to read as follows:

§ 189.6 Special Provisions

(a) Any person who imports into New York a carcass or part or possesses an imported carcass or part of an animal of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* and who is notified that such animal has tested positive for chronic wasting disease must report such test results to the Department within 24 hours of receiving such notification. Test results shall be reported to the Department either by mail or telephone at the following address and phone number:

Mail: Director, Division of Fish, Wildlife and Marine Resources,
NYSDEC, 625 Broadway, Albany, NY 12233-4750
Telephone: (518) 402-8923

(b) The Department may immediately seize any carcass or part of an animal of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* if the carcass or part is imported or possessed in violation of the provisions of this Part or if the animal has tested positive for chronic wasting disease.

(c) The Department may immediately seize, quarantine and euthanize any animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* that are imported or possessed in violation of the provisions of this Part.

(d) The Department may direct any person possessing any animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* suspected of having chronic wasting disease to comply with any measures that are deemed necessary to prevent or mitigate the spread or introduction of chronic wasting disease.

Subdivision 189.7(c) is amended to read as follows:

(c) “Exportation of certain animal parts from the CWD Containment Area.” No person shall remove from the CWD containment area the brain, eyes, spinal cord, tonsils, intestinal tract, spleen, or retropharyngeal lymph nodes, or any portion of such parts, of wild, captive, or captive-bred animals of the Genus Cervus or the Genus *Odocoileus* or the *Genus Alces* obtained from or taken within the CWD containment area, or any carcass containing such parts, except under permit issued by the Department or as authorized by subdivision (h) of this section.

Paragraphs 189.7 (d) (1) and (2) are amended to read as follows:

(1) All wild white-tailed deer taken within the CWD containment area during the open hunting seasons for deer shall be registered at a designated DEC check station, located within the CWD containment area, no later than 5:00 p.m. on the day after it was taken. The Department shall post on the DEC website (www.dec.state.ny.us) and publish in the Environmental Notice Bulletin information regarding deer check station locations within the containment area and times of operation. Hunters may also obtain check station information by contacting DEC’s Watertown office at (315) 785-2261, [or] DEC’s Utica office at (315) 793-2555, or DEC’s Oneida Check Station at (315) 336-4809.

(2) [Deer shall be kept intact, except for field dressing, prior to registration.] Any person required to register a deer at a DEC check station pursuant to this section shall bring to the check station: (i) the field dressed deer carcass; or (ii) the deer head, which shall be unfrozen, with antlers still attached (if any), with approximately three inches of neck still attached, and marked with a tag bearing the printed name, signature, and address of the person who took the deer, and the carcass tag doc number,

season of kill, date of kill and location of kill. The deer head tag shall be provided by the person registering the deer.

A new paragraph 189.7 (d) (3) is added to read as follows:

(3) Any person required to register a deer at a DEC check station pursuant to this section shall allow DEC staff to collect and retain tissue samples from the deer in order to test for the presence of CWD.

Subdivision 189.7 (h) is amended to read as follows:

(h) "Disposal of carcasses and parts." [All] No person shall dispose of carcasses and parts of animals of the Genus Cervus or the Genus Odocoileus [which are to be discarded] or the Genus Alces in the CWD containment area, except those parts removed in the field during normal field dressing, unless such parts shall be disposed of in a landfill authorized pursuant to Part 360 of this Title. Transfer or treatment of the waste prior to disposal, at a facility authorized pursuant to Part 360 of this Title, is acceptable.

Section 189.8 is amended to read as follows:

§ 189.8 Taxidermy.

(a) No person who engages in the art or operation of preparing, stuffing, and mounting the skins or other parts of animals of the Genus Cervus or the Genus Odocoileus or the Genus Alces shall allow live cervids to come in contact with any materials, including taxidermy materials, [that may contain the infectious agent that causes CWD] and any waste generated from taxidermy.

(b) In addition to the requirements of Environmental Conservation Law Section 11-1733, any person who engages in the art or operation of preparing, stuffing, and mounting the skins or other parts of animals of the Genus Cervus or the Genus Odocoileus or the Genus Alces shall maintain and keep in their taxidermy shop or place of business a taxidermy log, on forms provided by the Department, that includes the following information for each specimen of the Genus Cervus or the Genus Odocoileus or the Genus Alces:

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 189.2, 189.3, 189.7 and 189.8.

Text of rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, e-mail: grbatche@gw.dec.state.ny.us

Additional matter required by statute: A negative declaration has been prepared pursuant to Article 8 of the Environmental Conservation Law and is on file with the Department of Environmental Conservation.

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

Non-substantive changes were made by the Department of Environmental Conservation (Department) to the text of the final rule as adopted. The substance and purpose of the rule remains unchanged. Therefore, the Department has determined that it is not necessary to revise the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Assessment of Public Comment

The Department of Environmental Conservation (Department) received public comments on the proposed rule making. The comments submitted to the Department concerning the proposal are summarized below, followed by the Department's response:

Comment: A comment was received supporting the ban on importation of carcasses and parts from all states where CWD has been found, but objected to including the ban on states, specifically Missouri, where CWD has not been found.

Response: In early 2002, known locations of the CWD were centered in western states and some Canadian provinces. Disease spread was seen to be slowly moving from the disease center in all directions, with "hot spots" occurring in isolated locations. Many states had limited or no testing procedures in place.

When the Department first sought to implement Chronic Wasting Disease regulations in New York, a decision was made to restrict importation of whole carcasses and high risk carcass parts from all states west of the Mississippi River (including the State of Missouri), from other states

where CWD had been identified, and from neighboring states in relatively close proximity to the CWD finding. It was recognized that some of these states did not identify CWD within their borders. The Department elected for a very cautious approach in preventing CWD from spreading in New York because of the seriousness of this disease. However, the existing regulations still allow for importation of deer, elk, and moose meat from Missouri, and other states not specifically exempted, as long as certain anatomical parts are removed. Thus, hunters traveling to western states may still import their game meat to New York as long as those conditions are met.

The finding of CWD in West Virginia prompted the Department to propose an amendment to Part 189 that would remove West Virginia from the list of states exempted from importation restrictions. At this time, the Department has not proposed to remove states neighboring West Virginia, including Pennsylvania, Virginia, Ohio, Maryland, and Kentucky, from the list of states exempted from carcass and parts importation restrictions. CWD has not been detected in these states. Moreover, all of these states have very active CWD monitoring programs in place and have intensified their sampling protocols along the West Virginia border. It is the Department's position that the current efforts by these states is sufficient to reasonably identify if CWD has entered their state. The findings thus far indicate that deer carcasses and parts imported from these states do not pose a significant threat of carrying CWD into New York.

Comment: One comment was received suggesting that West Virginia be removed from the list of exempted states because CWD has been identified.

Response: The proposed regulation does in fact remove West Virginia from the list of exempted states.

Comment: One comment was received expressing opposition to the practice of deer farming.

Response: This comment is outside the scope of the proposed regulation. The proposed rule making did not address deer farming.

Comment: One comment was received objecting to the ban on recreational feeding of White-tailed deer.

Response: The proposed regulation does not amend or otherwise change any existing regulations governing the feeding of White-tailed deer. Therefore, the comment is outside the scope of the proposed regulation.

NOTICE OF ADOPTION

Scallops and Oysters

I.D. No. ENV-16-06-00021-A

Filing No. 748

Filing date: June 20, 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: Addition of Part 49 to Title 6 NYCRR.

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

Subject: Scallops and oysters.

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

Text or summary was published in the notice of proposed rule making, I.D. No. ENV-16-06-00021-P, Issue of April 19, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Debra A. Barnes, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (631) 444-0483, e-mail: dabarnes@gw.dec.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Cytotechnologists Work Standard

I.D. No. HLT-20-06-00005-E

Filing No. 740

Filing date: June 16, 2006

Effective date: June 16, 2006

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

Action taken: Amendment of section 58-1.12(b)(7) of Title 10 NYCRR.

Statutory authority: Public Health Law, section 576-a

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

Specific reasons underlying the finding of necessity: New York Public Health Law Section 576-a establishes work standards for cytotechnologists who examine cytology slides at clinical laboratories. After initial enactment of Section 576-a, the Department adopted the first regulations in the United States establishing cytotechnologist workload limits, a registration process for cytotechnologists, quality standards for cytology slides, as well as operational standards for clinical laboratories performing cytopathology testing. Since that time, the Department has worked closely with 285 clinical laboratories holding permits in the category of cytology (and which employ approximately 1,100 registered cytotechnologists full-time and part-time). The Department has gained significant experience in applying workload standards at these clinical laboratories.

Public Health Law Section 576-a also authorizes the Department to promulgate regulations to increase the maximum number of cytology slides that may be examined in a workday by cytotechnologists who use cytology slide examination or preparation technologies approved by the federal Food and Drug Administration (FDA). The Department has become aware of recent advances in cytology slide preparation and examination technology, which, according to recent studies conducted with the involvement of device manufacturers, improve detection of serious diseases (*i.e.*, cervical cancers). These new technologies also vastly increase the rate at which cytotechnologists can effectively examine slides. The Department has examined claims made by developers of these new technologies and has considered the potential impact that they could have on public health and welfare.

The vast majority of New York permitted clinical laboratories are not acquiring and using these costly new slide examination technologies. Use of these technologies by cytotechnologists at workload levels currently authorized by New York law is not cost effective. Increased workload standards are essential to ensure that clinical laboratories can afford, and immediately acquire and use these important, potentially life saving technologies. Therefore, the Department must immediately authorize, pursuant to this proposed emergency rulemaking, clinical laboratories to increase the workload limits for its cytotechnologists who use this new technology. This proposed rule making allows needed flexibility in increasing workload limits for cytotechnologists using FDA approved slide preparation and/or examination devices, as soon as they become commercially available for use by clinical laboratories.

The Department is committed to ensuring that New York residents and laboratories promptly benefit from new technologies with potential to improve gynecological cytology test methods without adding significantly to health care costs. This proposed rule making, once adopted, would promote use of new technologies that hold promise for more accurate, efficient and effective cervical cancer diagnosis, without compromising accuracy and reliability.

For the foregoing reasons, the Department finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) for this rulemaking would be contrary to the public interest and welfare. The alternative—to promulgate this proposed rulemaking pursuant to SAPA section 202(1) would unreasonably delay and hinder the Department's ability encourage appropriate use of new, and perhaps better, technology. To avoid unnecessary and potentially detrimental delay in the Department's implementation of appropriate work standards for cytotechnologists using new technologies for cervical cancer

detection and diagnosis, the amendment to 10 NYCRR Section 58-1.12(b) is hereby proposed for adoption by emergency promulgation.

Subject: Cytotechnologist work standard.

Purpose: To provide flexibility to the department in establishing work standards that consider new technologies for pap smear screening.

Text of emergency rule: Paragraph (7) of subdivision (b) of Section 58-1.12 is amended to read as follows:

(7) Exceptions. (i) Each laboratory [must] *shall* evaluate the performance of each cytotechnologist *in its employ*, and establish an appropriate examination volume limitation based on *the cytotechnologist's* experience, documented accuracy[,] and performance in proficiency testing, or [for] *on* other reasons, including false-negative or false-positive interpretations [reports]. Under no circumstances [should] *shall* this volume be exceeded, even if it is [less] *lower* than the maximum work standard.

(ii) A cytotechnologist may exceed the work standard by [10] *twenty (20)* percent, with the written approval of the department. The laboratory director may request such approval based on each cytotechnologist's experience, documented accuracy, including false-negative or false-positive [reports] *interpretations*, and a performance score in proficiency testing of not more than two (2) errors. Documentation of [this] *department* approval [must] *shall* be available in the laboratory, and may be revoked by the department with prior notice to the laboratory, based on a cytotechnologist's performance in proficiency testing or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. The laboratory director [must] *shall* monitor the performance of each cytotechnologist and advise the department [when the] *whenever* the approval is to be revoked based on on-the-job performance.

(iii) Cytotechnologists who qualify as supervisors under section 58-1.4 of this Subpart may re-examine up to [20] *twenty (20)* slides per day [separate from] *in addition* to the workload standard, *provided the combined total number of slides does not exceed one-hundred (100)*, as part of the [quality control-] quality assurance program of the laboratory, with the prior approval of the department, based on documented accuracy, including [false negative or positive reports] *false-negative and false-positive interpretations*, and performance in proficiency testing. Such approval may be revoked, with prior notice to the laboratory, based on proficiency testing performance or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. Records [must] *shall* be maintained to document the *examination* volume and hours worked by *each cytotechnologist*.

(iv) *The department may increase the cytotechnologist work standard beyond the level already authorized elsewhere in this section for cytotechnologists using a federal Food and Drug Administration (FDA)-approved device in the preparation or examination of cytology slides:*

(a) *in determining whether to increase the cytotechnologist work standard with respect to a particular device, the department shall consider the following: the FDA's approved use of the device; studies of the accuracy, reliability and appropriate use of the device; input from clinical laboratories using the device; recommendations of experts in the field of cytology and/or cytotechnology; and other relevant information as appropriate;*

(b)(1) *the department may require a clinical laboratory wishing to exceed the cytotechnologist work standard set forth elsewhere in this section to request in writing the department's approval. The department may also require the applicant laboratory to provide, in a form acceptable to the department, some or all of the following information regarding the device in use at the laboratory: the device manufacturer's recommendations, if any, regarding the quantity (i.e., slide volume), speed or manner of slide examination, and the basis for such recommendations; documentation of training for each cytotechnologist using the device; each cytotechnologist's experience using the device, including false-negative and false-positive interpretations, workload, and number of hours spent examining slides; each cytotechnologist's performance on proficiency testing; as well as any other information as determined appropriate by the department to assess device capacity and user capability; and*

(2) *the department shall provide written notice of the authorized work standard established pursuant to this subparagraph. The department may set a work standard in writing that applies to one or more cytotechnologists.*

(c) *laboratories shall maintain documentation of approval pursuant to this subparagraph for a minimum of two (2) years after use of the device is discontinued;*

(d) *if the department determines that a cytotechnologist work standard authorized pursuant to this subparagraph increases the rate of*

errors or compromises the reliability of results, the department shall adjust the standard as it deems appropriate and shall notify the affected clinical laboratories in writing of such change. Clinical laboratories that find the adjustment unacceptable may request only in writing that the department reconsider its determination; and

(e) notwithstanding the foregoing, any cytotechnologist work standard authorized by the department pursuant to this subparagraph shall be at least as stringent as the federal standards promulgated under the federal clinical laboratory improvement amendments of nineteen hundred and eighty-eight (1988) and/or other applicable law(s).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-20-06-00005-P, Issue of May 17, 2006. The emergency rule will expire August 14, 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:

Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The statute established standards for cytotechnologists' workload, a registration requirement for individuals engaged in initial examination of slides, and quality standards for preparing and examining the slides. Regulations adopted as 10 N.Y.C.R.R. Sections 58-1.12 and 58-1.13 pursuant to that legislation have been in effect since 1989. Public Health Law, Article 5, Title V was amended by Chapter 436 of the Laws of 1993. Section 576-a of that legislation modified the state's cytotechnologist work standard, (*i.e.*, a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist may examine during a work day) to effect parity with federal standards in the Clinical Laboratory Improvement Amendments of 1988 (CLIA '88). Section 576-a also includes a provision authorizing the Department to increase the cytotechnologist work standard in response to technological advances in instrumentation and devices for assisted examination of cytology slides.

Legislative Objectives:

In 1988, media reports made the public aware of problems associated with inordinate cytotechnologist workloads in clinical laboratories examining gynecologic slides (Pap smears) for evidence of cervical cancer. At that time, New York was the only state with a comprehensive program of oversight of these laboratories, including review of cytotechnologist qualifications, and on-site assessment of laboratory operations and proficiency testing. While excessive testing volumes had not been reported in New York State, the Legislature determined that additional steps were required to protect women residents of the State, and Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The legislation established a work standard for initial examination of cytologic specimens (*i.e.*, a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist or pathologist may examine during a work day), a registration requirement for individuals engaged in slide examination, and quality standards for the slides. Chapter 436 of the Laws of 1993 modified the State's cytotechnologist work standard for parity with federal standards in CLIA '88; specifically, the Legislature enacted an increase of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day, from the previous limit of 10 percent above the 80-slide limit, or 88 slides.

Needs and Benefits:

After initial enactment of Section 576-a, the Department adopted the first regulations in the country establishing cytotechnologist workload standards, a registration process for cytotechnologists, requirements for the quality of slides, as well as general standards for operation of cytopathology laboratories. The Department has not revised these regulations since their promulgation in 1990. During that time, the Department has gained significant experience in applying workload standards for 285 clinical laboratories with a permit in the cytology testing category that employ more than 1,200 registered cytotechnologists full-time and part-time.

The Food and Drug Administration (FDA) has approved for marketing a cytology slide screening device that increases the number of slides a cytotechnologist can accurately and reliably examine per day. The Department needs to consider, on a case by case basis and in the most expeditious manner possible, establishment of a cytotechnologist workload limit other than that set earlier to promote accurate and reliable slide examination by the conventional (manual) method. The Department must now ensure that

New York residents and laboratories benefit from new technologies with the potential to improve gynecological cytology test methods without adding significantly to health care costs. To this end, it is proposed to amend existing regulations, and allow needed flexibility for increasing the workload limit for cytotechnologists using automated slide preparation and/or examination methods as new methods are approved by the FDA and become available for use by clinical laboratories.

Technological advances have permitted automation to make inroads in the discipline of cytology, a field of laboratory medicine that historically has relied solely on the joint expertise of cytotechnologists and pathologists for accurate and reliable diagnosis of cancers and other abnormalities detectable at the cellular level. Slides for cervical cancer screening, once prepared in the physician's office, can now be produced in the laboratory as a clean preparation of target cells, free of any obscuring blood or inflammation debris, deposited on a glass slide in a single layer, well-separated and with little or no overlap of cells to interfere with a cytotechnologist's ability to locate and identify aberrant cell types indicative of cervical cancer and other abnormalities. The FDA's approval of several automated systems for cytology slide preparation (*i.e.*, fix-and-stain material on microscopic slides) as in-vitro diagnostic devices, and overwhelming acceptance of the devices by the clinical laboratory industry and women's health practitioners and advocates have opened the door to further advances in the science of cytology, specifically, development of computerized algorithms for detection of cells not meeting criteria as normal. The purported advantage of this new technology is that it allows cytotechnologists to focus on accurate interpretation, resulting not only in increased productivity but, more importantly, the potential to improve diagnostic performance.

During conventional (manual) slide examination, the cytotechnologist must use locator skills to detect cells that are abnormal according to pre-established criteria for nuclear density and other factors, such as the relative size of the cell nucleus compared to the rest of the cell. Several device manufacturers have programmed a computer with an algorithm similar to that used by cytotechnologists to identify abnormal cells, thereby allowing a computer to take over the tiresome task of scanning numerous slides to look for the usually rare abnormal cell. The algorithms are sophisticated, but, as yet, are not capable of definitively classifying cells as pre-cancerous or indicative of malignancy. Devices that locate and mark suspect cells, guiding the cytotechnologist to them for interpretation, have already received FDA approval. Another device approved by the FDA classifies as within normal limits slides with no to very low probability of an abnormal finding, allowing up to 25 percent of gynecologic specimens to be reported as within normal limits without human review.

New slide preparation and screening technologies are changing the way laboratories diagnose cervical cancer and other malignant diseases detectable at the cellular level. Clinical trial data and preliminary data from laboratories using location guidance devices for detection of cancerous cells may increase by 50 percent or more the number of slides a cytotechnologist may reliably examine during a given time period. More importantly, evidence is emerging that this technology can increase the probability that no truly abnormal cell, however rare, would be missed due to human factors, such as fatigue and momentary lapses in vigilance, which have been widely recognized as capable of compromising result reliability. Manufacturers' claims that this technology can better locate cells typical of low- and high-grade squamous intraepithelial lesions (LSIL and HSIL, respectively), the most clinically important findings other than squamous cell carcinoma, are of particular interest to the Department in fulfilling its mandate to promote and protect the public health, because such claims, if proved correct, signal the potential to reduce morbidity in women who are routinely screened for cervical cancer.

Moreover, the Department has been informed that laboratories are reluctant to purchase automated devices for cytology examinations if the instrumentation cannot be utilized to near-full potential or in an otherwise cost-effective manner. This proposed rulemaking to increase the workload limit would better enable laboratories to acquire new technologies that hold promise for more efficient and effective cervical cancer diagnosis without compromising safety, accuracy and reliability.

In addition to allowing flexibility to change cytology workload standards without repetitive rulemaking, the proposed regulation would also provide affected parties with Department criteria for setting such standards, and make clear that, at the Department's discretion, laboratories may be required to request and be granted device-specific approval to examine Pap smears applying a workload standard other than that in place for conventional (manual) examination methods. Moreover, the proposed amendment establishes the Department's authority to make an immediate

adjustment to any work standard pursuant to the rule upon a determination that error rates have increased or the reliability of results has been compromised following approval of an increased work standard.

The proposed amendment would also make the regulation consistent with its authorizing statute as modified by Chapter 436 of the Laws of 1993, which provided for an increase in the work standard of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day. Existing regulation must be changed, as it set the previous restriction as 10 percent above the 80-slide limit, or 88 slides, and, as such, does not accurately reflect the Department's practice of authorizing up to 96 slides to be examined per work day.

Several housekeeping modifications were also proposed to facilitate compliance. The Department has received numerous inquiries related to the allowance for cytotechnologists' qualified supervisors to examine up to 20 slides beyond the work standard, and finds it necessary to clarify that the combined total number of slides may not exceed 100. In three instances, the term "reports" has been changed to "interpretations" to make clear that the Department considers all errors as relevant to approval (*i.e.*, false-negatives and false-positives), including errors in the cytotechnologist's interpretation, regardless whether corrected during re-examination or slide review by a pathologist prior to reporting - and not only erroneous results (typically false-negatives) reported to medical practitioners and discovered through retrospective review following a finding of HSIL or an equivalent, or malignancy.

Costs:

Costs to private regulated parties:

Since the proposed rule making does not require purchase or use of any devices for preparation and/or examination of cytology slides, this proposed rule making does not require private affect parties to incur costs. To the contrary, several clinical laboratories operating in New York State and using or considering use of new technology for examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that specimen throughput may be increased, which, in turn, would allow for increased reimbursement for cytopathology services and potentially increased profits.

Costs for implementation and administration of the rule:

Costs to State government:

State government is not expected to incur costs attributable to this proposed amendment.

Costs to the department:

The Department is not expected to incur costs attributable to this proposed amendment. A system is already in place for review of laboratories' requests for qualified cytotechnologists to exceed the existing workload limit by 20 percent, and it is expected that the few additional requests submitted as a direct result of this amendment would be able to be processed under the same system and using the same personnel.

Costs to local government:

Local government-operated clinical laboratories would have the opportunity to increase reimbursement and profits by increasing throughput of cytology examination specimens under the provisions of this proposal, as described for private regulated parties.

Paperwork:

The Department may experience a minimal increase in paperwork from the intermittent need to communicate new standards to affected laboratories in writing. The Department already has an established system for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and expects few additional requests as a direct result of this amendment.

Local Government Mandates:

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

Duplication:

These rules do not duplicate any other law, rule or regulation.

Alternative Approaches:

In drafting this proposed rule, the Department has considered the diversity of technological approaches to automating Pap smear examinations already in place and those known to be in development. The only consistent feature of these devices appears to be generalized use of a computerized algorithm to simulate human decision-making. The Department believes it is not feasible to arrive at a single, universally applicable work standard that could be set forth in regulation for all existing and future Pap examination technologies. The alternative—promulgation of revised regulations to establish workload limits each time a device is granted FDA approval—would be unacceptably burdensome to the De-

partment, and would possibly delay the use of technology in New York that could more effectively identify cancerous and precancerous cells.

Federal Standards:

Federal workload standards for cytotechnologists performing conventional (manual) examination of cytology slides have been promulgated under CLIA '88. Both the FDA and U.S. Centers for Medicaid and Medicare Services (CMS) have declined to set in federal regulation standards specific to any current commercial automated slide examination device. This proposed amendment contains a provision that any cytotechnologist work standard authorized by the Department pursuant to the amendment must be at least as stringent as the respective federal standards.

Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, efficient and effective tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester-Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using automated devices, and there appears to be no potential for organized opposition. Regulated parties should be able to comply with these amendments as of their effective date, upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

This proposed amendment to allow needed flexibility to increase workload limits for cytotechnologists using automated slide preparation and/or examination methods would affect clinical laboratories operated as small businesses or by local government, provided such facilities hold or are seeking a permit in the category of cytology, and opt to use U.S. Food and Drug Administration (FDA)-approved devices for automated slide preparation and/or examination. Of the 253 clinical laboratories holding a Department permit in cytology, 44 have declared themselves to be small businesses in permit applications submitted to the Department, and local governments, including the City of New York, operate seven such laboratories.

Compliance Requirements:

The Department expects that affected clinical laboratories operated as small businesses or by local governments would experience minimal impact from this proposal's adoption. Most of these facilities engaged in the examination of cytologic material, including Pap smears, do not process the high number or type of specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased automated devices for preparation and/or examination of cytology slides would benefit from the flexibility this amendment would afford.

The Department has a system already established for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and anticipates few, if any, additional requests as a direct result of this amendment from laboratories operated as small businesses or by a local government. Therefore, the Department expects that this small segment of the affected regulated parties would be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

This rule making does not impose any additional costs on clinical laboratories operating as small businesses or by a local government since it does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State, and using or considering use of such devices have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing for increased reimbursement for cytopathology services and potentially increased profits. This potential benefit may also apply to any

small business or local government laboratory operator opting to use automated devices for cytologic material examination.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that operate clinical laboratories affected by this amendment. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, automated devices for cytologic material examination.

Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties that are small businesses or operated by local governments to comply with Department requirements for cytotechnologist work standards.

Small Business and Local Government Participation:

This amendment is being proposed as an emergency rule. Notifying small businesses or local government affected parties about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would incur unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those operated as small businesses or by local government, are being notified of the provisions of this amendment, and, following its adoption, will be invited to provide comments and otherwise participate in the development of standards for workload limits.

Compliance Schedule:

The director of the Department's Wadsworth Center and his staff, including the director for Regulatory Affairs, held discussions with representatives of the Governor's Office, the Commissioner of Health's Office, firms that manufacture and/or distribute automated devices for cytological examinations, and regulated parties (*i.e.*, clinical laboratories) currently using such devices. Various Department groups, including the Office of Medicaid Management and the Office of Managed Care, have been working together in an ongoing effort to ensure adequate reimbursement for cytological examinations, including Pap smears, using FDA-approved cytological screening devices.

This amendment does not impose any new or more stringent requirements on regulated clinical laboratories; rather, it affords flexibility to laboratories that handle medium- to high-volumes of cytology specimens, and wish to use automated devices to examine increased numbers of slides without compromising testing accuracy and reliability. Strong support for the amendment is expected from clinical laboratories holding or seeking a permit in the category of cytology, and patient advocacy organizations, especially those focused on women's health; indications of support have been expressed by the medical community at large, which has just begun to become educated in the availability and reliability of the new technologies for cytological examination. The Department will continue to work with interested and affected parties in carrying out this amendment's provisions, and will notify laboratories in an unequivocal and timely manner of any changes affecting the cytotechnologists' workload standard or exceptions to that standard following adoption of this proposal.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technologies, and no potential of organized opposition is apparent. Consequently, regulated parties, including those operated as a small business or by local government, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Rural Area Flexibility Analysis

Effect of Rule:

Rural areas are defined as counties with a population under 200,000 and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. Of the 253 clinical laboratories holding a permit in the category of cytology, 88, many of which are hospital-based, are located in rural areas.

Compliance Requirements:

The Department expects that affected clinical laboratories located in and serving rural areas will experience minimal impact by anticipated adoption of this proposal. With the possible exception of one or two large rural hospital pathology departments, most laboratories operated in rural areas and engaged in examination of cytologic material, including Pap smears, do not process the high volume and type of cytologic specimens that would make purchase and use of an automated device for slide exami-

nation a financially prudent decision. However, any laboratory that has purchased such automated devices will be able to take advantage of the flexibility this amendment would afford. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with this amendment as of its effective date, upon filing with the Secretary of State.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

Clinical laboratories operating in rural areas are not required to incur additional costs as a result of this proposed amendment, since this rule making does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State and using or considering use of devices for the examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing increased reimbursement for cytopathology services and potentially increased profits. This benefit may also apply to laboratories located in rural areas, especially larger hospital-based pathology laboratories opting to use automated devices for cytologic material examination.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, devices for cytologic material examination.

Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for cytotechnologist work standards.

Participation by Parties in Rural Areas:

This amendment is being proposed as an emergency rule. Notifying affected parties in rural areas about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would cause unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those located in rural areas, are being notified of this amendment's provisions, and, following its adoption, will be invited to provide comments and otherwise participate in development of standards for workload limits.

Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, effective, and efficient tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester—Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technology, and no potential for organized opposition is apparent. Regulated parties, including those operating in rural areas, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Job Impact Statement

Nature of Impact:

This proposed rule making would have an impact on the productivity of cytotechnologists who use the new cytology slide preparation and examination technology. The proposed rule would authorize cytotechnologists using such technologies to increase, with Department approval, the number of slides that can be effectively reviewed in a given time period.

In addition, the proposed rule making would make it more financially attractive for clinical laboratories to acquire new cytology slide preparation and examination technology. Therefore, more cytotechnologists will use such technology. Experienced cytotechnologists will have to receive on the job training to use some of the new technologies, while persons studying to become cytotechnologists will learn to use the new technology as part of their course work. However, given workforce shortage of

cytotechnologists nationally and in New York, the Department does not expect that the use of the new technologies will have an adverse impact on employment opportunities for cytotechnologists.

Categories and Numbers Affected:

Cytotechnologists working in New York licensed clinical laboratories may be affected by this rule. There are approximately 1,100 registered cytotechnologists working (on a part time or full time basis) in New York licensed clinical laboratories. However, many of these cytotechnologists work in clinical laboratories that are not located in New York State. It is unclear how many cytotechnologists will use new technologies pursuant to this proposed rule making to review more slides than is currently permissible.

Regions of Impact:

Cytotechnologists work in laboratories throughout New York State. However, as described below, the Department of Health does not believe that this proposed rule making would have a significant adverse impact on employment opportunities for cytotechnologists.

Likelihood of Adverse Impact:

The Department expects that the proposed rule making, if implemented, will increase cytotechnologists' productivity, and it will not adversely affect job opportunities for cytotechnologists. There is currently a significant workforce shortage of cytotechnologists in the United States, including New York. This workforce shortage is expected to worsen in coming years as large numbers of cytotechnologists retire and relatively few are being trained to replace them. The federal Clinical Laboratory Advisory Committee, the US Department of Labor and several health care professional organizations have acknowledged this workforce shortage problem. Some clinical laboratories have urged the Department to promulgate this regulation to alleviate cytotechnologist-staffing shortages.

EMERGENCY RULE MAKING

Provision of Information by the EPIC Program

I.D. No. HLT-27-06-00004-E

Filing No. 741

Filing date: June 16, 2006

Effective date: June 16, 2006

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

Action taken: Amendment of section 9600.4(c) of Title 9 NYCRR.

Statutory authority: Elder Law, sections 244, 245 and 246

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

Specific reasons underlying the finding of necessity: The specific reason underlying the finding of necessity to adopt as an emergency rule: The proposed regulation will require EPIC to share data with OTDA so that OTDA can match the data against its files of individuals who are in receipt of Food Stamp benefits. The match will enable an automated increase in Food Stamp benefits for those EPIC participants enrolled in the Medicare prescription drug discount program who are also Food Stamp beneficiaries. In order to obtain a deduction for medical expenses that will result in this increased benefit for calendar year 2004, the exchange of data must take place before the end of the calendar year. There is not enough time to canvas all EPIC participants for their consent to release of data. An emergency regulation mandating the sharing of data is the only way to ensure that those EPIC participants enrolled in the Medicare prescription drug program who are Food Stamp eligible will have the opportunity to get their medical deduction before the end of this calendar year and that the sharing of the data does not violate the confidentiality requirements of HIPAA. For these reasons, the Department finds that the immediate adoption of the regulation is necessary for the preservation of the public health, safety and general welfare and that compliance with the procedural requirements of the State Administrative Procedure Act (SAPA) 202(1) would be contrary to the public interest.

Subject: Provision of information by the EPIC Program.

Purpose: To enable the provision of information to OTDA by EPIC regarding participants who are enrolled in the Medicare Prescription Drug Card Program, thereby assisting those participants to receive an enhanced medical deduction in the calculation of food stamp benefits.

Text of emergency rule: A new subdivision (c) is added to Section 9600.4 of Title 9 NYCRR to read as follows:

(c) For the purpose of assisting participants to receive an appropriate amount of federal Food Stamp benefits, the Program for Elderly Pharma-

ceutical Insurance Coverage (EPIC) shall provide to the Office of Temporary and Disability Assistance (OTDA) information identifying EPIC participants who are also enrolled in the Medicare prescription drug discount card program authorized by Title XVIII of the Social Security Act. Information provided shall be limited to eligibility and enrollment data available to EPIC and sufficient to enable OTDA to identify those participants who are also Food Stamp recipients. OTDA's use of this information shall be limited to the purpose of identifying EPIC participants who are also Food Stamp recipients and are eligible for additional Food Stamp benefits by virtue of their enrollment in the Medicare prescription drug discount card program.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 13, 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: regsqa@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The authority for the amendment of this regulation is contained sections 244(5)(a), 245(2) and 246(4) of the Elder Law.

Legislative Objectives:

Section 244(5)(a) of the Elder Law requires the Elderly Pharmaceutical Insurance Coverage (EPIC) panel, consisting of the Commissioners of the Departments of Education and Health, the Superintendent of Insurance, and the Directors of the State Office for the Aging and the Division of the Budget to promulgate regulations pursuant to Section 246(4) of the Elder Law, subject to the approval of the Director of the Budget. The Director of the Budget approved the promulgation of these regulations. Section 245(2) of the Elder Law requires the Executive Director of EPIC to appoint staff and request the assistance of any department or other agency of the State in performing such functions as may be necessary to carry out the provisions of the EPIC law and to perform such other functions as may be specifically required by the law, assigned by the EPIC panel, or necessary to ensure the efficient operation of the program. Section 246(4) of the Elder Law defines the scope of EPIC regulations as including procedures to ensure that all information obtained on persons applying for EPIC benefits remains confidential and is not disclosed to persons or agencies other than those entitled to such information because such disclosure is necessary for the proper administration of the EPIC program.

Needs and Benefits:

The EPIC program provides coverage of certain drugs for residents of the State of New York who are at least 65 years of age, who have incomes within the limitations prescribed by law, who are not in receipt of Medical Assistance and who do not have equivalent or better drug coverage from any other public or private third party payment source or insurance plan. The program provides an essential benefit for elderly New York residents who need financial assistance in order to obtain medications but who do not have other insurance benefits and are not in receipt of Medical Assistance coverage of their drug expenses. Chapter 49 of the Laws of 2004 authorizes the EPIC program to apply for transitional assistance under the Medicare prescription drug discount card program with a specific drug discount card under Title XVIII of the federal Social Security Act. EPIC automatically enrolled eligible participants in the Medicare prescription drug discount card program.

Section 1860D-31(g)(6) of the Social Security Act, as amended by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), 42 USC 1395w-141(g)(6), states that the availability of negotiated prices or transitional assistance received through the Medicare prescription drug card "shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or the amount of benefits under, any other Federal program." The Secretary of the United States Department of Agriculture, through its Northeast Regional office, has interpreted this statute as requiring that the discounts and subsidy a household receives through the Medicare prescription drug discount card be treated as standard medical expenses to be used in determining the household's medical expenses deduction for Food Stamp eligibility purposes.

EPIC seeks to assist its participants who are enrolled in the Medicare prescription drug discount program who are applying for or in receipt of Food Stamp benefits to receive the appropriate amount of Food Stamp benefits. Providing information to the Office of Temporary and Disability

Assistance (OTDA) about its participants who are also enrolled in the Medicare Prescription Drug card program will assist these participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits. Improved health outcomes for these participants as a result of increased Food Stamp benefits and the resultant potential for decreased prescription drug needs for these participants has a direct impact on the EPIC program and justifies the sharing of this information with OTDA.

COSTS:

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

There are no costs to regulated entities as a result of this proposed regulation which requires EPIC to share data with OTDA.

Costs to State and Local Governments:

There are no costs to State and local governments as a result of this proposed regulation.

Costs to the Department of Health:

The Department of Health will incur minimal costs in producing and transmitting the data required by this proposed regulation.

Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates on local governments.

Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment.

Duplication:

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

Alternatives:

The alternative considered to the proposed regulatory amendment was to obtain individual consents for release of information from all EPIC participants who were enrolled in the Medicare prescription drug card program. The length of time required to obtain this consent would have meant that many elderly participants would lose the medical deduction to which they are entitled for the current year. Release of the information pursuant to regulation is a permissible release of protected health information under regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) pursuant to 45 CFR 164.512(k)(6)(i).

Federal Standards:

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

Compliance Schedule:

The EPIC program will transfer data as required by this regulation as of the effective date of the regulation's filing.

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would require the EPIC program to share data concerning EPIC participants enrolled in the Medicare prescription drug program with OTDA in order for those participants to receive appropriate Food Stamp benefits. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, record keeping or any other new compliance requirements on rural or non-rural areas.

Job Impact Statement

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to assist EPIC participants enrolled in the Medicare prescription drug program to receive in a timely manner medical deductions, to which they are entitled, for Food Stamp eligibility purposes.

**EMERGENCY
RULE MAKING**

Opioid Overdose Prevention Programs

I.D. No. HLT-27-06-00007-E

Filing No. 743

Filing date: June 19, 2006

Effective date: June 19, 2006

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

Action taken: Amendment of Part 80 and addition of section 80.138 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 3309(1)

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

Specific reasons underlying the finding of necessity: The immediate adoption of this regulation is necessary for the preservation of the public health, safety and general welfare because any delay with the implementation of opioid overdose prevention programs could result in additional deaths that could have been prevented through proper training to be offered through these programs. The legislation recognized the immediacy of the need for opioid overdose prevention programs by making the effective date April 1, 2006. Since compliance with standard rule making procedures would make implementation by the effective date of this law impossible, compliance with those requirements is contrary to the public interest.

Subject: Opioid overdose prevention programs.

Purpose: To implement L. 2005, ch. 413 which calls for the establishment of standards for opioid overdose prevention programs to prevent fatalities due to overdose.

Text of emergency rule: The Table of Contents for Part 80 of Title 10 NYCRR is amended to read as follows:

PART 80

RULES AND REGULATIONS ON CONTROLLED SUBSTANCES
(Statutory authority: Public Health Law, Sections 338, 3300, 3305, 3307, 3308, 3309, 3381, 3701(1), (6), art. 33)

Sec.

GENERAL PROVISIONS

* * *

80.138. Opioid Overdose Prevention Programs

A new Section 80.138 is added as follows:

Section 80.138. Opioid Overdose Prevention Programs.

(a) Definitions.

(1) "Registered provider" for the purposes of this section shall mean any of the following that have registered with the Department pursuant to subsection (b):

(i) a health care facility licensed under the public health law;

(ii) a physician, physician assistant, or nurse practitioner who is authorized to prescribe the use of an opioid antagonist;

(iii) a drug treatment program licensed under the mental hygiene law;

(iv) a not-for-profit community-based organization incorporated under the not-for-profit corporation law and having the services of a Clinical Director;

(v) a local health department as defined by the public health law.

(2) "Opioid Overdose Prevention Program" means a program the purpose of which is to train individuals to prevent a fatal opioid overdose in accordance with these regulations.

(3) "Program Director" means an individual who is identified to manage and have overall responsibility for the Opioid Overdose Prevention Program.

(4) "Clinical Director" means a physician, physician assistant or nurse practitioner who provides oversight of the clinical aspects of the Opioid Overdose Prevention Program. This oversight includes serving as a clinical advisor and liaison concerning medical issues related to the Opioid Overdose Prevention Program, providing consultation on training and reviewing reports of all administrations of an opioid antagonist.

(5) "Opioid" means an opiate as defined in section 3302 of the public health law.

(6) "Opioid antagonist" means an FDA-approved drug that, when administered, negates or neutralizes in whole or in part the pharmacological effects of an opioid in the body. The opioid antagonist is limited to naloxone or other medications approved by the Department for this purpose.

(7) "Opioid Overdose Prevention Training Program" means a training program offered by an authorized Opioid Overdose Prevention Program which instructs a person to prevent opioid overdoses, including by providing resuscitation, contacting emergency medical services and administering an opioid antagonist.

(8) "Person" means an individual other than a licensed health care professional, law enforcement personnel, and first responders otherwise permitted by law to administer an opioid antagonist.

(9) "Trained Overdose Responder" means a person who has successfully completed an authorized Opioid Overdose Prevention Training Program offered by an authorized Opioid Overdose Prevention Program within the past two years and has been authorized by a Registered Provider to possess the opioid antagonist.

(b) Registration.

(1) Authorized providers may operate an Opioid Overdose Prevention Program if they obtain a certificate of approval from the Department and otherwise comply with the provisions of this section.

(2) Authorized providers in good standing may apply to the Department to operate an Opioid Overdose Prevention Program on forms prescribed by the Department which must include, at a minimum, the following information:

(i) the provider name, address, operating certificate or license number where appropriate, telephone number, fax number, e-mail address, Program Director and Clinical Director;

(ii) the name, license type and license number of the affiliated prescriber(s);

(iii) the name and location of the site(s) at which the Opioid Overdose Prevention Program will be conducted;

(iv) a description of the targeted population to be served and recruitment strategies to be employed by the Opioid Overdose Prevention Program; and

(v) the addresses, telephone numbers, fax numbers, e-mail addresses and signatures of the Program Director and Clinical Director.

(c) Program Operation.

(1) Each Opioid Overdose Prevention Program shall have a Program Director who is responsible for managing the Opioid Overdose Prevention Program and shall, at a minimum:

(i) identify a physician, physician assistant or nurse practitioner to oversee the clinical aspects of the Opioid Overdose Prevention Program;

(ii) establish the content of the training program, which meets the approval of the Department;

(iii) identify and train other program staff;

(iv) select and identify persons as Trained Overdose Responders;

(v) issue certificates of completion to Trained Overdose Responders who have completed the prescribed program;

(vi) maintain Opioid Overdose Prevention Program records including Trained Overdose Responder training records, Opioid Overdose Prevention Program usage records and inventories of Opioid Overdose Prevention Program supplies and materials;

(vii) ensure that all Trained Overdose Responders successfully complete all components of Opioid Overdose Prevention Training Program;

(viii) provide liaison with local emergency medical services and emergency dispatch agencies, where appropriate;

(ix) assist the Clinical Director with review of reports of all overdose responses, particularly those including opioid antagonist administration; and

(x) report all administrations of an opioid antagonist on forms prescribed by the Department.

(2) Each Opioid Overdose Prevention Program shall have a Clinical Director who is responsible for clinical oversight and liaison concerning medical issues related to the Opioid Overdose Prevention Program and, at a minimum, shall:

(i) provide clinical consultation, expertise, and oversight;

(ii) serve as a clinical advisor and liaison concerning medical issues related to the Opioid Overdose Prevention Program;

(iii) provide consultation to ensure that all Trained Overdose Responders are properly trained;

(iv) adapt and approve training program content and protocols; and

(v) review reports of all administrations of an opioid antagonist.

(3) The Trained Overdose Responders shall:

(i) complete an initial Opioid Overdose Prevention Training Program;

(ii) complete a refresher Opioid Overdose Prevention Training program at least every two (2) years;

(iii) contact the emergency medical system during any response to a victim of suspected drug overdose and advise if an opioid antagonist is being used;

(iv) comply with protocols for response to victims of suspected drug overdose; and

(v) report all responses to victims of suspected drug overdose to the Opioid Overdose Prevention Program Director.

(4) The opioid antagonist shall be dispensed to the Trained Overdose Responder in accordance with all applicable laws, rules and regulations.

(5) The Opioid Overdose Prevention Program will maintain and provide response supplies including: latex gloves, mask or other barrier for use during rescue breathing, and agent to prepare skin before injection.

(6) The Opioid Overdose Prevention Program will establish and maintain a record keeping system that will include, at a minimum, the following information:

(i) list of Trained Overdose Responders, including dates of completion of training;

(ii) a log of Opioid Overdose Prevention Trainings which have been conducted;

(iii) copies of program policies and procedures;

(iv) copy of the contract/agreement with the Clinical Director, if appropriate;

(v) opioid antagonist administration usage reports and forms; and

(vi) documentation of review of administration of an opioid antagonist.

(7) The Opioid Overdose Prevention Program will establish a procedure by which any administration of Opioid Antagonist to another individual by a Trained Overdose Responder affiliated with an Opioid Overdose Prevention Program, shall be reported on forms prescribed by the Department.

(8) Approval obtained pursuant to this section shall consist of a certificate of approval provided by the Department that shall remain in effect for two years or until receipt by the authorized provider of a written notice of termination of the program from the Department, whichever shall first occur. The Department may renew a certificate of approval for a subsequent two-year period if the registered provider is in good standing with all applicable state and federal licensing agencies and such provider is found to have complied with the requirements of this section and has submitted a request for renewal.

(9) Pursuant to 3309(2) the purchase, acquisition, possession or use of an opioid antagonist by an Opioid Overdose Prevention Program or a Trained Overdose Responder in accordance with this section and the training provided by an authorized Opioid Overdose Prevention Program shall not constitute the unlawful practice of a professional or other violation under title eight of the education law or article 33 of the public health law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 16, 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:

Chapter 413 of the Laws of 2005 amended the Public Health Law to add a new Section 3309 to provide for opioid overdose prevention programs in New York State. Section 3309(1) authorizes the Commissioner of Health to establish standards for approval of opioid overdose prevention programs, including, but not limited to, standards for program directors, clinical oversight, training, recordkeeping and reporting. The effective date of Chapter 413 of the Laws of 2005 is April 1, 2006.

Legislative Objectives:

This legislation was enacted to reduce the incidence of fatal opioid overdoses by providing training to individuals to increase the likelihood that timely administration of life-saving medication will be provided on an emergency basis to individuals who experience accidental opioid drug overdoses.

Needs and Benefits:

Approximately half of all injection drug users (IDUs) experience at least one nonfatal overdose during their lifetime. According to the New York State (NYS) Office of Alcoholism and Substance Abuse Services (OASAS) estimates, there are approximately 171,500 IDUs in NYS. Overdose is a preventable cause of death in the majority of cases involving opioids. Opioids include heroin, morphine, codeine, methadone, oxycodone (Oxycontin, Percodan, Percocet), hydrocodone (Vicodin), fentanyl (Duragsic) and hydromorphone (Dilaudid). In an opioid overdose, the user becomes sedated and gradually loses the urge to breathe, leading to death from respiratory depression. Naloxone is an opioid receptor antagonist that can be used to reverse an opioid overdose within 1-2 minutes of administration. An untreated heroin overdose will result in death in 1-3 hours.

Although a comprehensive picture of the extent of opioid overdose in NYS does not yet exist, drug overdose is known to be a major cause of death among heroin users (Garfield and Drucker, 2001). Accidental fatal drug overdose continues to be a substantial cause of death. It has been one of the top ten causes of death in New York City (NYC) from 1993 to present (NYC Department of Health and Mental Hygiene, 2003). According to a study conducted by the New York Academy of Medicine, between 1990 and 1998 there were 5,506 accidental fatal overdoses in NYC involving opiates (Galea et al., 2003). These reflected 74% of all accidental overdose deaths (7,451) in NYC during that period.

NYS Department of Health (NYSDOH) hospital data show that, during 1998-2004, there were 3,408 hospital discharges reflecting admissions for which heroin-overdose was a factor. Of these, 2,183 (64%) were in NYC. Another 25% were in the Syracuse, Rochester, Buffalo, Albany and Nassau-Suffolk regions.

The federal Substance Abuse and Mental Health Services Administration (SAMHSA) determined that the case rate for emergency department heroin admissions in NYC in 2002 was reported to be 123 per 100,000 population, which was more than three times the national rate of 36 per 100,000 (SAMHSA, March 2004). Between 1995 and 2002, heroin-related emergency department visits in Buffalo increased 125 percent (from 41 to 93 visits per 100,000 population with a 29 percent increase from 2001 to 2002 (from 72 visits) (SAMHSA, April 2004).

Most overdoses are not instantaneous and the majority of them are witnessed by others. Therefore, many overdose fatalities are preventable, especially if witnesses have had appropriate training and are prepared to respond in a safe and effective manner. Prevention measures include education on risk factors (such as polydrug use and recent abstinence), recognition of the overdose and an appropriate response. Response includes contacting emergency medical services (EMS) and providing resuscitation while awaiting the arrival of EMS. Resuscitation consists of rescue breathing, or if available, injectable naloxone which immediately reverses the effects of heroin overdose. Naloxone is an opioid antagonist with no abuse potential and no effect on a recipient who has not taken opioids. Provision of naloxone has been suggested for many years and is being offered in a variety of settings in jurisdictions outside of NYS. Complications of naloxone in the medical setting are rare. Naloxone is inexpensive (\$1.00-\$1.50) and there have been no cases in which it has developed a street value.

Opioid overdose prevention programs have proven effective in preventing unnecessary deaths abroad and elsewhere in the United States (US). In the US, opioid overdose prevention programs exist in New Mexico; Chicago, Illinois; Baltimore, Maryland; and San Francisco, California, for example, and programs are being planned elsewhere. A recently published evaluation of an opioid overdose prevention program in San Francisco showed that of the 20 heroin overdoses witnessed by trained program participants there were no deaths. (Seal et al., 2005). As of August 2005, the New Mexico Department of Health had trained and provided naloxone to a total of 1,168 individuals. There were over 191 reports of lives saved, of which 185 involved administration of naloxone. Almost all administrations of naloxone were accompanied by rescue breathing and 5 lives were saved with rescue breathing alone. (Fiuty, P., personal communication, November 3, 2005). The Chicago Recovery Alliance has reported training over 4,500 individuals, with 374 reported reversals using naloxone, as of November 3, 2005. There has been a 30% overall decline in overdose related deaths reported in Cook County, Illinois (Carlberg, S. Personal communication, November 3, 2005). The Baltimore City Health Department has reported 888 persons trained, 101 reported reversals and over 20 persons placed into drug treatment. A 17% decrease in overdose deaths was observed from 2001 to 2002 (Rucker, M., personal communication, November 3, 2005).

The potential exists to achieve similar outcomes in NYS through the establishment of opioid overdose prevention programs. Potential providers that may register voluntarily with NYSDOH to offer such programs include health and human service providers serving IDUs (such as NYSDOH-approved syringe exchange programs and other community-based organizations, health care practitioners (specifically physicians, physician assistants and nurse practitioners), local health departments, health care facilities licensed by NYSDOH under Article 28 of the NYS Public Health Law and drug treatment programs licensed by the NYS Office of Alcoholism and Substance Abuse Services (OASAS) pursuant to the NYS Mental Hygiene Law).

The proposed rule, which is entirely within the legislative mandate of Section 3309 of the Public Health Law, is consistent with established models for opioid overdose prevention programs elsewhere. Common features of opioid overdose prevention programs operating elsewhere that have been incorporated into the proposed rule include: a Program Director who is responsible for managing the program and assuring that program participants receive adequate training; a Clinical Director who oversees clinical aspects; use of a curriculum that provides program participants with the necessary knowledge, skills and abilities to prevent fatal overdoses through administration of naloxone, use of rescue breathing and contacting emergency medical services; maintaining program records, such as those surrounding trainings offered, including issuance of certificates of completion to those who successfully complete the training; and collection of basic information about impact of the program in terms of incidents and lives saved.

The anticipated benefits under the proposed rule are: reduced incidence of fatal opioid overdoses, increased contact of IDUs with medical personnel, greater awareness of risk factors for overdose, increased knowledge of safer injection practices and an increased number of persons trained in rescue breathing. The creation of opioid overdose prevention programs will not lead to increased drug use. Naloxone is not addictive and does not cause a "high." It has no potential for abuse or street value.

Costs:

Since this regulation allows providers to establish opioid overdose prevention programs, but does not require a provider to establish such a program, no provider will be required to incur costs as a result of the adoption of this regulation. Existing staff can serve as the Program Director and provide clinical oversight. No registration fee will be collected and the reporting requirements will be minimal. A one-time, registration process to receive a certificate of approval is required with review and renewal every two years. An internal operational policy and procedure and training of staff regarding program implementation will be required. Since it is expected that registration, record keeping and the development of policies, procedures and training materials will be done by existing staff, the costs of complying with this regulation will be minimal. Costs to the Department of Health are also expected to be minimal since the production and review of all documents will be done by existing staff.

Local Government Mandates:

This regulation does not impose any program, service, duty, or other responsibility on any county, city, town, village, school, fire district, or other special district except to the extent that such entities choose to provide opioid overdose prevention programs and, consequently, would be subject to the same requirements as all other providers.

Paperwork:

The NYSDOH anticipates a simple and streamlined registration process for seeking a certificate of approval to establish an opioid overdose prevention program. Additional recordkeeping requirements and reporting requirements will be minimal. Paperwork will include documentation of staff training, program policies and procedures, logs of training sessions offered and certificates of completion provided, inventories of program supplies and materials, reports of overdoses to which trained program participants have responded and reports to the Department. Only those providers voluntarily participating will be required to provide information to the Department.

Duplication:

The proposed regulation does not duplicate any existing state or federal law or regulation regarding opioid overdose prevention.

Alternatives:

The proposed regulation does not exceed the specific requirements of the legislation. Because offering an opioid overdose prevention program is voluntary, the regulation was designed to encourage eligible individuals and organizations to provide opioid overdose prevention services allowed under law and regulation. The registration process will be simple and the reporting and financial impact of establishing a voluntary opioid overdose

prevention program will be minimal. Any other alternatives would require a more complex and more costly approach for both the NYSDOH and volunteer operators of opioid overdose prevention programs.

Federal Standards:

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

Compliance Schedule:

Each individual or organization that chooses to establish an opioid overdose prevention program must submit a registration form to the Department. Information will be distributed to eligible parties to allow implementation on April 1, 2006. Registration information will be used to develop a listing of opioid overdose prevention programs holding certificates of approval issued by the Department. Registration forms from those seeking to establish opioid overdose prevention programs will be accepted on a continuous basis, with review and renewal of certificates of approval taking place at two-year intervals.

Regulatory Flexibility Analysis

Effect of Rule:

The proposed rule will have no impact on small businesses unless such businesses voluntarily decide to operate an Opioid Overdose Prevention Program. The types of businesses that could be affected include hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local governments (health departments). In New York State there are 7 hospitals, 245 clinics, 1,164 drug treatment programs, an unknown number of community-based organizations and 36 county health departments that are considered small businesses.

Compliance Requirements:

Under the proposed rule, hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments that elect to establish opioid overdose prevention programs will report aggregate data on forms prescribed by the NYSDOH. Providers must have a Program Director who is responsible for managing the program and assuring that program participants receive adequate training; a Clinical Director who oversees clinical aspects; use of a curriculum that provides program participants with the necessary knowledge, skills and abilities to prevent fatal overdoses through administration of naloxone, use of rescue breathing and contacting emergency medical services; maintaining program records, such as those surrounding trainings offered, including issuance of certificates of completion to those who successfully complete the training; and collection of basic information about impact of the program in terms of incidents and lives saved.

Programs must also keep records including but not limited to documentation of staff training, program policies and procedures, logs of training sessions offered and certificates of completion provided, inventories of program supplies and materials, reports of overdoses to which trained program participants have responded and reports to the Department. Aside from simple reporting of certain easy-to-collect data, no new requirements are mandated.

Professional Services:

No additional professional services will be required since providers and others will be able to utilize existing staff.

Compliance Costs:

Since this regulation allows providers to establish opioid overdose prevention programs, but does not require a provider to establish such a program, no provider will be required to incur costs as a result of the adoption of this regulation. Existing staff can serve as the Program Director and provide clinical oversight. No registration fee will be collected and the reporting requirements will be minimal. A one-time, registration process to receive a certificate of approval is required with review and renewal every two years. An internal operational policy and procedure and training of staff regarding program implementation will be required. Since it is expected that registration, recordkeeping and the development of policies, procedures and training materials will be done by existing staff, the costs of complying with this regulation will be minimal. Costs to the Department of Health are also expected to be minimal since the production and review of all documents will be done by existing staff.

Economic and Technological Feasibility:

Most health care facilities, health care practitioners, drug treatment programs, community-based organizations and local health departments that are eligible to offer opioid overdose prevention programs have the capacity and expertise to carry out the necessary activities. Small businesses that opt to voluntarily offer opioid overdose prevention programs will be provided with necessary forms and instructions to register and comply with reporting requirements. In large part, these forms and instructions are being/will be developed with specific input from regulated parties

and NYSDOH staff are being made available to provide instructions and technical assistance.

Minimizing Adverse Impact:

There are no alternatives to the proposed recordkeeping and reporting requirements due to the need for the NYSDOH to assure that registered providers holding certificates of approval to operate opioid overdose prevention programs conduct activities in a safe and effective manner. Reporting requirements are those minimally necessary for the Department to coordinate oversight and provide information to the Governor and the Legislature as required by Section 3309(4) of the Public Health Law.

Small Business and Local Government Participation:

The regulations are minimal and consultation on program implementation will take place prior to the April 1, 2006 effective date of the law, and beyond. Small businesses (hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments) will have opportunities to review and comment on the proposed regulations. The NYSDOH has already begun to have conversations with providers interested in offering this service that are small businesses and local health departments and has consulted with representatives of opioid overdose prevention programs already operating in other states that are offered by small businesses and local health departments.

NYSDOH staff will consult with statewide organizations representing hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments. Examples include the Hospital Association of NYS, Greater New York Hospital Association, Community Health Center Association of NYS (CHCANYS), Medical Society of the State of New York, New York Academy of Medicine, Harm Reduction Coalition, NYSDOH-approved syringe exchange programs, New York AIDS Coalition, and the NYS Association of County Health Officials (NYSACHO). The proposed regulation will be discussed at meetings of the NYS AIDS Advisory Council and the NYS HIV Prevention Planning Group (PPG), both of which include representatives from a variety of types of organizations.

The NYSDOH has considered all comments received in this process in development of the proposed rule. Additional comments are being sought and will be considered.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. There are 44 counties in NYS with a population less than 200,000. Nine counties have certain townships with population densities of 150 persons or less per square mile. The proposed rule will have no impact on hospitals, clinics, health care practitioners, drug treatment programs and local governments in these rural areas, unless such providers voluntarily decide to operate opioid overdose prevention programs.

Hospital, clinic, health care practitioner, drug treatment program, community-based organization and local health department participation in making opioid overdose prevention programs available will be on a voluntary basis and potential providers will make individual decisions regarding participation. Potential providers are most likely to be located in urban or suburban, not rural, areas. For example, NYSDOH SPARCS data show 3,408 hospital discharges for admissions related to opioid overdose during 1998-2002. Of these, 2,183 (64%) were in NYC. Another 25% were in the Syracuse, Rochester, Buffalo, Albany and Nassau-Suffolk regions. Similarly, OASAS county-level estimates of treatment need show that the greatest need for opioid overdose prevention programs is in urban or suburban areas (OASAS, 2004 County Resource Book, Volume 1. Service Need and Utilization Data, Table 2).

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

The NYSDOH anticipates a simple and streamlined registration process for seeking a certificate of approval to establish an opioid overdose prevention program. Additional recordkeeping requirements and reporting requirements will be minimal. Paperwork will include documentation of staff training, program policies and procedures, logs of training sessions offered and certificates of completion provided, inventories of program supplies and materials, reports of overdoses to which trained program participants have responded and reports to the Department. Only those providers voluntarily participating will be required to provide information to the Department.

Costs:

Since this regulation allows providers to establish opioid overdose prevention programs, but does not require a provider to establish such a

program, no provider will be required to incur costs as a result of the adoption of this regulation. Existing staff can serve as the Program Director and provide clinical oversight. No registration fee will be collected and the reporting requirements will be minimal. A one-time, registration process to receive a certificate of approval is required with review and renewal every two years. An internal operational policy and procedure and training of staff regarding program implementation will be required. Since it is expected that registration, recordkeeping and the development of policies, procedures and training materials will be done by existing staff, the costs of complying with this regulation will be minimal. Costs to the Department of Health are also expected to be minimal since the production and review of all documents will be done by existing staff.

Minimizing Adverse Impact:

The program is designed to minimize impact on those who will participate: participation is voluntary, the registration process will be simple, no fee will be charged, and recordkeeping requirements will be minimal.

The new opioid overdose prevention programs will build upon already-existing programs and services for IDUs - - through hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments. The NYSDOH will maintain and make available a list of registered programs holding certificates of approval.

Rural Area Participation:

The regulations are minimal and consultation on program implementation will take place prior to the April 1, 2006 effective date of the law, and beyond. Hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments in rural areas will have opportunities to review and comment on the proposed regulations. The NYSDOH has already consulted with representatives of opioid overdose prevention programs already operating in rural areas of other states.

NYSDOH staff will consult with statewide organizations representing hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments. Examples include the Hospital Association of NYS, Greater New York Hospital Association, Community Health Center Association of NYS (CHCANYS), Medical Society of the State of New York, New York Academy of Medicine, Harm Reduction Coalition, NYSDOH-approved syringe exchange programs, New York AIDS Coalition, and the NYS Association of County Health Officials (NYSACHO). The proposed regulation will be discussed at meetings of the NYS AIDS Advisory Council and the NYS HIV Prevention Planning Group (PPG), both of which include representatives from a variety of types of organizations.

The NYSDOH has considered all comments received in this process in development of the proposed rule. Additional comments are being sought and will be considered.

Job Impact Statement

A Job Impact Statement is not required. The proposed rule will not have a substantial adverse impact on jobs and employment opportunities based upon its nature and purpose.

Specific reasons underlying the finding of necessity: Corporate-owned life insurance covering rank-and-file employees, also called "janitors insurance" or "dead peasant insurance," has been the focus of numerous negative press articles and public commentaries over the last several years. In many cases, the covered employees were not notified and did not consent to such insurance. In addition, the Internal Revenue Service has pursued litigation against some companies using corporate-owned life insurance as a means of evading taxes.

Most recently in response to criticism concerning COLI, the United States Senate has drafted legislation that provides for the taxation of death proceeds of corporate-owned life insurance under certain circumstances. The Senate's proposal addresses the abuses of "janitor insurance" and recognizes the legitimate business need for COLI to serve as a funding vehicle for employee benefit plans. As a result, the Senate's legislative proposal provides that death benefits under corporate-owned life insurance policies will not be taxable if the employee is a key employee as defined in the proposed legislation.

The potential for abuse in the corporate-owned life insurance market has long been a concern of the New York Legislature. Chapter 491 of the Laws of 1996 added a new subsection (d) to Section 3205 to provide notice, consent and termination rights to employees, including rank-and-file employees, whose lives were insured under corporate-owned life insurance programs designed to fund employee benefit plans. Such notice, consent and termination rights were designed to reduce the potential for abuse in the COLI market.

Since the notice, consent and termination rights only apply in the case of Section 3205(d) COLI and not key person COLI under Section 3205(a)(1)(B), it is imperative that insurers only insure key employees under Section 3205(a)(1)(B). This will also ensure that rank and file employees and other non-key employees receive the notice, consent and termination rights prescribed by Section 3205(d) and to curb some of the reported abuses associated with COLI on rank-and-file employees. This will serve to ensure that employees insured pursuant to the insurable interest provisions of Section 3205(a)(1)(B) are key employees.

The establishment of a key employee standard based on the proposed federal legislation will aid in curbing abuse in the corporate-owned life insurance market. Therefore, for the reasons stated above, this rule must be promulgated on an emergency basis for the preservation of the general welfare.

Subject: Rules for key person corporate-owned life insurance.

Purpose: To provide guidance to insurers in defining the term key person for the purpose of compliance with the requirements of Insurance Law, section 3205(a)(1)(B) and (d).

Text of emergency rule: A new Part 48 of Title 11 NYCRR (Regulation No. 180) is adopted to read as follows:

§ 48.0 Preamble and Purpose.

(a) Section 3205(b)(2) of the Insurance Law provides in part that "No person shall procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable . . . to a person having, at the time when such contract is made, an insurable interest in the person insured."

(b) Section 3205(a)(1)(B) of the Insurance Law defines the term "insurable interest", for the purposes of life and accident and health insurance, to include "a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured."

(c) Under Section 3205(a)(1)(B), an employer has an insurable interest in the lives of certain employees and other persons, commonly referred to as "key employees" or "key persons", whose services and qualifications are of such nature that their death or disability would cause the employer to incur a substantial pecuniary loss.

(d) The purpose of this Part is to establish standards for life insurers and fraternal benefit societies issuing key person company-owned life insurance to ensure that the employees or other persons on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key persons.

§ 48.1 Underwriting Guidelines.

An insurer using key person company-owned life insurance shall establish and apply appropriate underwriting guidelines to ensure that the employees or other persons on whose lives policies are written pursuant to Section 3205(a)(1)(B) are actually key persons.

§ 48.2 Standards.

Insurance Department

EMERGENCY RULE MAKING

Rules for Key Person Corporate-Owned Life Insurance

I.D. No. INS-27-06-00002-E

Filing No. 733

Filing date: June 15, 2006

Effective date: June 15, 2006

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

Action taken: Addition of Part 48 (Regulation No. 180) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3205

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

For purposes of this Part and for establishing whether there exists an insurable interest under Section 3205(a)(1)(B) at the time the policy is issued, the term key person shall include the following persons:

(a) An employee who is one of the five highest paid officers of the employer;

(b) An employee who is a five-percent owner of the employer. A "five-percent owner" shall mean:

(1) If the employer is a corporation, any person who owns or controls more than five percent of the outstanding stock of the corporation or stock possessing more than five percent of the total combined voting power of all stock of the corporation; or

(2) If the employer is not a corporation, any person who owns more than five percent of the capital or profits interest in the employer;

(c) An employee who had compensation from the employer in excess of \$90,000 in the preceding year;

(d) An employee who is among the highest paid 35 percent of all employees; or

(e) An employee or other person who makes a significant economic contribution to the company, including but not limited to, an employee who is responsible for management decisions, has a significant impact on sales or a special rapport with customers and creditors, possesses special skills, or would be difficult to replace. Criteria for the employer's determination shall be included in the insurer's underwriting guidelines.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 12, 2006.

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

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation 180 (11 NYCRR 48) is derived from Sections 201, 301, and 3205 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him (under the provisions of the Insurance Law) to prescribe forms or otherwise to make regulations.

Section 3205 of the Insurance Law defines the term "insurable interest" and sets forth insurable interest requirements for any policy of life insurance and accident and health insurance.

2. Legislative objectives:

The insurable interest requirements contained in Section 3205 reflect the state's public policy against contracts wagering on human life. Section 3205(b)(2) prohibits the issuance of any policy upon the life of another person unless the beneficiary is the insured, personal representative of the insured, or a person having an insurable interest in the insured at the time the policy is issued.

Section 3205(a)(1)(B), applicable when policies are purchased by persons not closely related to the insured by blood or by law, defines "insurable interest" to include a lawful and substantial economic interest in the continued, life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured. Employers and insurers have historically relied upon Section 3205(a)(1)(B) to satisfy the insurable interest requirement for the purchase of insurance on the lives of "key persons" or "key employees."

In 1996, the Legislature added new subsections (d) and (e) to Section 3205 of the Insurance Law (L. 1996 c. 491) to specifically grant employers an insurable interest in any employee or retiree who is eligible to participate in an employee benefit plan. The Legislature enacted Section 3205(d) in order to assist employers with the financing of employee benefit plans through the use of corporate-owned life insurance ("COLI") purchased on the lives of employees.

The purpose of the proposed regulation is to establish standards for life insurers issuing key employee COLI, pursuant to Section 3205(a) rather than Section 3205(d) COLI, to ensure that the employees on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key employees.

3. Needs and benefits:

As noted in the Federal Standard section below, the definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft bill pending in the United States Senate which

provides for the taxation of death proceeds of COLI under certain circumstances. The Senate's proposal is intended to eliminate well-publicized abuses of COLI. The proposal also recognizes the legitimate business need for employers to use corporate owned policies as a funding vehicle for employee benefits, and specifically provides that COLI death benefits would not be taxable if the covered employee meets the definition of a key employee.

The potential for abuse in the COLI market has historically been a concern of the New York legislature as evidenced by the enactment of notice, consent and termination rights in Section 3205(d) and (e) of the Insurance Law in 1996, establishing an insurable interest for the purchase of life insurance used to fund employee benefit plans. Since the employee notice, consent and termination rights are not required when company-owned life insurance is purchased under Section 3205(a)(1)(B), it is imperative that insurers be provided with standards for key employees to ensure that such employees are key employees and to avoid the potential for any further abuses in the market. The establishment of a key employee standard would provide such guidance.

In addition, a key employee standard would enhance the Department's market conduct exams by providing field examiners with a reference point. Field examiners currently lack statutory or regulatory standards for determining the proper application of Section 3205(a) and, specifically, whether COLI insurance issued pursuant to Section 3205(a) is on key employees.

The key employee standard is particularly important in the bank-owned life insurance market, in which employees do not receive Section 3205(d) protections. Currently, banks do not purchase coverage under Section 3205(d) because the employee's ability to terminate coverage makes the policy an unreliable mechanism for funding plan liabilities and results in adverse tax consequences to the bank. When bank-owned life insurance is issued as key employee coverage under Section 3205(a)(1)(B), the key employee standard created by this proposed regulation will help ensure that the covered employees will in fact be key employees.

4. Costs:

Life insurers licensed in New York that sell key employee COLI are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key employee COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the proposed regulation. Any insurers in the key employee COLI market that lack established key person underwriting guidelines would incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the proposed regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

5. Local government mandates:

The proposed regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The proposed regulation imposes no new reporting requirements.

7. Duplication:

The proposed regulation does not duplicate any existing law or regulation.

8. Alternatives:

The Department considered but rejected the prospect of issuing a Circular Letter to establish the standard for key person. The Department was concerned that the Circular Letter proposal would not have the same force and effect of a regulation, and would therefore be an inadequate mechanism to apply and enforce the insurable interest requirements of Section 3205.

9. Federal standards:

The definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft COLI bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate bill, which was approved by the Senate Finance Committee in February, 2004, provides that a key employee may be either a "highly compensated employee" under Section 414(q) of the Internal Revenue Code or a "highly compensated individual" under Section 105(h)(5) of the Internal Revenue Code (except that '35 percent' shall be substituted for '25 percent' in subparagraph (C) thereof). The purpose of the definition of key employee in the Senate bill is to create an exemption from tax for death proceeds paid to employers in connection with COLI, and does not relate to state insurable interest laws. There is no

federal standard that defines key employee in the context of insurable interest for life insurance.

10. Compliance schedule:

The proposed regulation establishes a standard for all key employee life insurance policies issued before and after the effective date of the Regulation.

Regulatory Flexibility Analysis

1. Small Businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies licensed to do business in New York State, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurers covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

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

The regulation provides guidance to insurers in defining the term key person.

3. Costs:

Life insurers that sell key person COLI to fund broad-based employee benefit plans are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key person COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the Regulation. Any insurers in the key person COLI market that lack established key person underwriting guidelines will incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the Regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with the Life Insurance Council of New York, a trade organization representing life insurers in New York.

Job Impact Statement

Nature of impact: The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation provides guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) of the Insurance Law.

Categories and number affected: No categories of jobs or number of jobs will be affected.

Regions of adverse impact: This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact: No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities: This rule would not have a measurable impact on self-employment opportunities.

**EMERGENCY
RULE MAKING**

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-27-06-00008-E

Filing No. 745

Filing date: June 20, 2006

Effective date: June 20, 2006

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

Action taken: Amendment of Part 83 (Regulation No. 172) of Title 11 NYCRR.

Statutory authority: Insurance Law, secs. 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, secs. 4403, 4403-a, 4403-c and 4408-a; and L. 2002, ch. 599

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

Specific reasons underlying the finding of necessity: Certain provisions of the Insurance Law require that insurers file financial statements annually and quarterly with the Superintendent. These insurers are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as Annual and Quarterly Statement Blanks on forms prescribed by the Superintendent. The Superintendent has prescribed forms and Annual and Quarterly Statement Instructions that are adopted from time to time by the National Association of Insurance Commissioners ("NAIC"), as supplemented by additional New York forms and instructions. To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy procedure and instruction manuals. The latest edition of one of the manuals, Accounting Practices and Procedures Manual As Of March 2005 ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). The Accounting Manual, which is incorporated by reference into this regulation, was adopted by the NAIC in March 2005.

The Accounting Manual represents a codification of statutory accounting principles. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. This amendment will take effect upon filing with the Secretary of State so that the accounting principles of this part will be in place for use in the preparation of Quarterly Statements and the Annual Statement for 2005. This amendment adopts the latest version of the Accounting Manual and also updates the list of SSAPs or sections thereof that are either not adopted, or are modified with additional guidance provided.

This regulation, as amended, will enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by entities subject to the regulation, by clearly setting forth the accounting practices and procedures to be followed in completing quarterly and annual statements required by law. In the preparation of this amendment, it was necessary for the Insurance Department to take into account determinations made by the NAIC at its meeting in 2005.

Absent the amendment being effective immediately, many of New York's accounting practices and procedures would not be consistent with the practices and procedures followed in most other states.

For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the general welfare.

Subject: Financial statement filings and accounting practices and procedures.

Purpose: To update references in the regulatory text to documents incorporated by reference that have been revised and republished and to make minor modifications regarding accounting treatment of certain insurer assets.

Text of emergency rule: Subdivision (c) of Section 83.2 of Part 83 is amended to read as follows:

(c) To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy, procedures and instruction manuals. The latest of these manuals, the *Accounting Practices and Procedures Manual as of March [2004*]2005** ("Accounting Manual") includes a body of accounting guidelines referred to as *Statements of Statutory Accounting Principles* ("SSAPs").

The footnote to subdivision (c) of Section 83.2 is amended to read as follows:

*ACCOUNTING PRACTICES AND PROCEDURES MANUAL AS OF MARCH [2004] 2005. Copyright 1999, 2000, 2001, 2002, 2003, 2004, 2005 by National Association of Insurance Commissioners, in Kansas City, Missouri.

Subdivision (m) of Section 83.4 is amended to read as follows:

(m)(1) For life insurers, Paragraph 8 of SSAP No. 40 *Real Estate Investments* is not adopted. Depreciation on real estate investments owned by life insurers shall be computed at a rate no greater than two and one-half percent per annum, in accordance with Section 1405(b)(1)(C) of the Insurance Law.

(2)(i) For Article 43 corporations and not-for-profit Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Services Plans and Comprehensive HIV Special Needs Plans authorized pursuant to Article 44 of the Public Health Law, SSAP No. 40 *Real Estate Investments* is adopted with the following addition:

In accordance with Section 4310(1) of the Insurance Law, in determining the financial condition of Article 43 corporations and not-for-profit Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Service Plans and Comprehensive HIV Special Needs Plans authorized pursuant to Article 44 of the Public Health Law, real estate, including buildings, property, capital improvements and appurtenances owned and held that are utilized in the ordinary course of the business of such entities, may be valued by the corporation at either its current amortized book value or at ninety percent of its current market value, less encumbrances. Market value shall be determined by an independent appraisal undertaken annually, no earlier than September 30 of each year, by a member of the Appraisal Institute, 55 West Van Buren Street, Suite 1000, Chicago IL 60607. (website address is <http://appraisalinstitute.org>.) This option is not applicable to for-profit corporations authorized pursuant to Article 44 of the Public Health Law.

(ii) Real estate "owned and held" and "utilized in the ordinary course of business" as set forth in subparagraph (m)(2)(i) of this subdivision shall have the same definition as "property occupied by the company" as set forth in Paragraph 5 of SSAP No. 40 *Real Estate Investments*.

(iii) The provisions of paragraph 11 of SSAP No. 40 shall govern the independent appraisal requirement set forth in subparagraph (m)(2)(i) of this subdivision.

(iv) The election to value real estate at either its current amortized book value or at ninety percent of its current market value, less encumbrances, shall be applied to the valuation of all property not held for sale. As of any determination date either all real estate shall be valued at current amortized book value or all real estate shall be valued at ninety percent of its current market value, less encumbrances. Changes in the statement value of real estate held under this election shall be accounted for as unrealized capital gains or losses.

(v) If an entity elects to value its real estate at ninety percent of its current market value, less encumbrances, in addition to the Schedule A filed as part of the NAIC Annual Statement Health Blank, a Supplemental Schedule A must be completed for what the current amortized book value would be if the entity had not made such an election as of the determination date. A Supplemental Schedule A is herein defined as a Schedule A submitted for informational purposes only, not intended to supersede the Schedule A filed as part of the NAIC Annual Statement Health Blank. The completed Supplemental Schedule A shall be submitted annually on or before the first day of March for Article 43 corporations and on or before the first day of April for not-for-profit Health Maintenance Organizations as a supplement to the NAIC Annual Statement Health Blank in support of the note requirement of subparagraph 83.4(m)(2)(vii) of this subdivision.

(vi) Notwithstanding the valuation methodology permitted in subparagraph (m)(2)(i) of this subdivision and the instructions of subparagraph (m)(2)(iv) of this subdivision, properties that the reporting entity has the intent to sell, or is required to sell, shall be classified as properties held for sale and carried at the lower of depreciated cost or current market value less encumbrances and estimated sales costs consistent with the requirements of paragraph 10 of SSAP No. 40.

(vii) An entity which elects to change its valuation of real estate pursuant to sub-paragraph (m)(2)(i) of this subdivision shall disclose all of the following in the notes to its annual and quarterly financial statements:

- a. The current amortized book value of each property.
- b. The current market value and ninety percent of the current market value, less encumbrances, of each property.
- c. The determination date of the annual appraisal.
- d. The name and qualifications of the independent appraiser.

(viii) Appraisals obtained in satisfaction of subparagraph (m)(2)(i) of this subdivision shall be maintained in good order and shall be readily available for examination.

Subdivision (n) of Section 83.4 is amended to read as follows:

(n)(1) Paragraph [5]6 of SSAP No. [46]88 *Investments in Subsidiary, Controlled, and Affiliated Entities, A Replacement of SSAP No. 46*, is not adopted. Pursuant to Section 1501(c) of the Insurance Law, the superintendent may determine upon application that any person does not, or will not upon taking of some proposed action, control another person. 10 NYCRR 98-1.9(d) authorizes the Commissioner of Health to make a similar determination with respect to organizations with a certificate of authority pursuant to Public Health Law Article 44.

(2) Paragraph [7]8 of SSAP No. [46]88 is not adopted with respect to subsidiaries that are insurers. Pursuant to Section 1414(c)(2) of the Insurance Law, the shares of an insurer that is a subsidiary shall be valued at the lesser of its market value or book value as shown by its last annual statement or the last report on examination, whichever is more recent.

(3) Paragraph [7 b(i)]8(b)(i) of SSAP No. [46]88 is not adopted with respect to Public Health Law Article 44 Health Maintenance Organizations which are subsidiaries and which record goodwill as an admitted asset pursuant to Section 83.4(t) of this Part. Investments in such entities shall be recorded based on the underlying statutory equity of the respective entity's financial statements, including an admitted asset for goodwill as provided for in Section 83.4(t) of this Part.

Subdivision (t) of Section 83.4 is amended to read as follows:

(t) Paragraph 7 of SSAP No. 68 *Business Combinations and Goodwill* is not adopted. Section 1302(a)(1) of the Insurance Law shall apply. Goodwill recorded as an admitted asset on the books of a Public Health Law Article 44 Health Maintenance Organization, Integrated Delivery System, Prepaid Health Services Plan or Comprehensive HIV Special Needs Plan as of December 31, 2000], which is in compliance with Generally Accepted Accounting Principles, [shall continue to be treated as an admitted asset on Financial Statements filed with the superintendent or the Commissioner of Health. *Goodwill shall be written off over its useful life. The period of amortization shall not exceed 40 years.*

Subdivision (v) of Section 83.4 is amended to read as follows:

(v) Paragraph 9 of SSAP No. 73 *Health Care Delivery Assets – Supplies, Pharmaceutical and Surgical Supplies, Durable Medical Equipment, Furniture, Medical Equipment and Fixtures, and Leasehold Improvements in Health Care Facilities* is not adopted. Durable medical equipment, furniture, medical equipment and fixtures, and leasehold improvements shall be depreciated utilizing a depreciation schedule no less conservative than that set forth in the latest revision of *Estimated Useful Lives of Depreciable Hospital Assets (Revised [1998]2004 Edition)***. The document may also be viewed at the New York State Insurance Department's New York City office at 25 Beaver Street, New York, NY 10004. Lease improvements in health care facilities shall be amortized against net income over the shorter of their estimated useful life or the remaining life of the original lease excluding renewal or option periods, using methods detailed in SSAP No. 19.

The footnote to subdivision (v) of Section 83.4 is amended to read as follows:

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This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 17, 2006.

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

Regulatory Impact Statement

1. Statutory authority: Insurance Law Section 107(a)(2) defines the term "accredited reinsurer" which is used in sections 83.2, 83.3, and 83.5 of Part 83.

Insurance Law Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the Insurance Law; effectuate any power granted to the superintendent under the Insurance Law; prescribe forms; or otherwise make regulations.

Insurance Law Sections 307 and 308 require insurers to file annual and quarterly statement blanks on forms prescribed by the superintendent and in accordance with instructions prescribed by the superintendent. Section 307(a)(1) of the Insurance Law requires every insurer authorized in New

York to file an annual statement showing its financial condition in such form as prescribed by the superintendent. Section 307(a)(2) permits the use of the annual statement form adopted from time to time by the NAIC. Provisions of Article 44 of the Public Health Law and Sections 98-1.16(a) and 98-1.16(b) of Title 10 of the New York Code of Rules and Regulations provide that Public Health Law Article 44 Health Maintenance Organizations and Integrated Delivery Systems shall file financial statements annually and quarterly with both the commissioner of health and the superintendent.

Insurance Law Section 1109(a) provides that an organization complying with the provisions of Article 44 of the Public Health Law is subject to various specified sections of the Insurance Law, including Section 308. Section 1109(e) provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Article 13 specifies the requirements regarding the treatment of assets and deposits in determining the financial condition of insurers for the purposes of the Insurance Law.

Insurance Law Article 14 contains provisions regarding the authorization of, and restrictions on, investments of insurers regulated by the Insurance Department and sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Article 15 contains provisions sets forth procedures for the establishment and operation of holding company systems including controlled insurers.

Insurance Law Section 3233 sets forth provisions concerning stabilization of health insurance markets and premium rates.

Insurance Law Section 4117 sets forth provisions concerning loss reserves and loss expense reserves of property/casualty insurance companies.

Insurance Law Section 4233 sets forth provisions concerning the annual statements of life insurance companies including a provision that in addition to any other matter which may be required to be stated therein, either by law or by the superintendent pursuant to law, every annual statement of every life insurer doing business in New York shall conform substantially to the form of statement adopted from time to time for such purpose by, or by the authority of, the National Association of Insurance Commissioners, together with such additions, omissions or modifications, similarly adopted from time to time, as may be approved by the superintendent.

Insurance Law Section 4239 sets forth provisions concerning allocation and reporting of income and expenses of life insurers.

Insurance Law Article 43 establishes organizational requirements, investment and reserve requirements for non-profit medical and dental indemnity, or health and hospital service corporations organized in this state. The article also establishes "stop loss" funds", from which health maintenance organizations, corporations or insurers may receive reimbursement, to the extent of funds available therefor, for claims paid by such entities for members covered under certain contracts.

Insurance Law Section 6404 sets forth provisions concerning the assets, title plant, and valuation and allowance of admitted assets of title insurance corporations.

Pursuant to the above provisions, the superintendent is authorized to implement the National Association of Insurance Commissioners *Accounting Practices and Procedures Manual As Of March 2005* ("Accounting Manual"), subject to any provisions in New York statute which conflict with particular points in those rules. The Accounting Manual includes a body of accounting guidelines referred to as *Statements of Statutory Accounting Principles* ("SSAPs"). The Accounting Manual represents a codification of *Statutory Accounting Principles*.

Additionally, in regard to Public Health Law Article 44 Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Services Plans and Comprehensive HIV Special Needs Plans, Insurance Law Sections 1109(e) and 4301(e)(5) respectively provide that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law and authorize the superintendent to modify any regulatory requirement in order to encourage the development of Health Maintenance Organizations in this state. Article 43 of the Public Health Law provides for the issuance of certificates of authority to health maintenance organizations, the granting by the Commissioner of Health of a special purpose certificate of authority, provided the applicant complies with certain requirements, authorizes the superintendent to establish standards governing the fiscal solvency of Integrated Delivery Systems, and requires the filing of financial reports by Prepaid Health Service Plans and Comprehensive HIV Special Needs

Plans. In accordance with these sections, the regulation sets forth certain accounting rules applicable to Public Health Law Article 44 Health Maintenance Organizations, Integrated Delivery Systems, Prepaid Health Services Plans and Comprehensive HIV Special Needs Plans. This Part does not apply to managed long term programs licensed pursuant to Section 4403-f of the Public Health Law.

2. Legislative objectives: Certain provisions of the Insurance Law provide that authorized insurers, accredited reinsurers, authorized fraternal benefit societies, and Public Health Law Article 44 Health Maintenance Organizations and Integrated Delivery Systems shall file financial statements annually and quarterly with the superintendent. These entities are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as Annual and Quarterly Statement Blanks on forms prescribed by the superintendent. Except in regard to filings made by Underwriters at Lloyd's, London, the superintendent has prescribed forms and Annual and Quarterly Statement Instructions that are adopted from time to time by the National Association of Insurance Commissioners, as supplemented by additional New York forms and instructions. To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy, procedure and instruction manuals. One of these manuals, the *Accounting Practices and Procedures Manual As Of March 2005* ("Accounting Manual") includes a body of accounting guidelines referred to as *Statements of Statutory Accounting Principles*. The Accounting Manual is incorporated by reference into this regulation. The preamble to the Accounting Manual states that "...this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations...."(Accounting Manual at Pg. P-1).

3. Needs and benefits: The purpose of this Part is to enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by entities subject hereto, by clearly setting forth the accounting practices and procedures to be followed in completing annual and quarterly financial statements required by law.

The National Association of Insurance Commissioners has most recently adopted a new Accounting Manual as of March 2005. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of *Statement of Statutory Accounting Principles* ("SSAP's"). The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. *Statutory Accounting Principles* ("SAP") prior to codification did not always provide a consistent and complete basis of accounting and reporting. The prescribed statutory accounting model resulted in practices that varied from state to state. The codification project results in more comparable financial statements and in more complete disclosures, which will make regulators' analysis techniques more meaningful and effective. Codification will provide examiners and analysts with uniform accounting rules against which insurers' financial statements can be evaluated. Also, calculations under Risk Based Capital will be reported more consistently under codification.

The NAIC's instructions to insurers and Public Health Law Article 44 HMOs for completing their 2005 annual statement forms include the following: "The annual statement is to be completed in accordance with the NAIC Annual Statement Instructions and Accounting Practices and Procedures Manual – version as of March 2005 except to the extent that state law, rules or regulations are in conflict with these publication." In some instances, a New York statute or regulation may preclude implementation of particular codification rules. In a few instances, for various reasons, the Department has not implemented the codification rule.

Chapter 462 of the Laws of 2004 added a subsection (l) to Insurance Law Section 4310. The new subsection requires that in determining the financial condition of corporations subject to the provisions of Article 43 and not-for-profit corporations authorized pursuant to Article 44 of the Public Health Law, the Insurance Department shall include real estate, including buildings, property, capital improvements and appurtenances owned and held that are utilized in the ordinary course of the business of such entities, provided that such real estate may be valued by the corporation at either its current amortized book value or at ninety percent of its current market value, as determined by an independent appraisal undertaken annually and in accordance with regulations promulgated by the Superintendent of Insurance. This required modification of SSAP No. 40 regarding permissible valuation methods.

The deviation from SSAP No. 88 is a continuation of the deviation to old SSAP No. 46, which it replaced in the 2005 Manual. The paragraphs of

SSAP No. 88 that were not adopted were contrary to provisions of the Insurance Law regarding certain holding companies and subsidiaries.

The deviation from SSAP No. 68 is continued since Section 1302(a)(1) of the Insurance Law dictates that goodwill shall not be treated as an admitted asset by insurers. In the case of certain HMOs however, goodwill can be treated as an admitted asset to be depreciated over a period not to exceed 40 years. The amendment was necessary to preserve the permissibility of this practice. The existing regulatory language was based upon Generally Accepted Accounting Principles ("GAAP") practices in place at the time the regulation was originally promulgated. GAAP accounting principles have since been modified with regard to the treatment of goodwill. This amendment eliminates the reference to existing GAAP principles and allows certain HMO's to continue accounting for goodwill as an admitted asset subject to the aforementioned 40 year depreciation limitation.

The amendment of the provision regarding SSAP No. 73 was necessitated by the issuance of a revised edition of ESTIMATED USEFUL LIVES OF DEPRECIABLE HOSPITAL ASSETS, which is incorporated by reference in regulation.

4. Costs: Cost to regulated entities as a result of implementing Part 83 are the acquisition of the Accounting Manual from the National Association of Insurance Commissioners and the acquisition of *Estimated Useful Lives of Depreciable Hospital Assets (Revised 2004 Edition)* from the American Hospital Association. The Accounting Manual costs \$425.00 per copy plus shipping charges. It is estimated that an insurer with 2,000 employees would require between 15 and 20 copies for a total cost of between \$6,375 and \$8,500 exclusive of shipping charges. *Estimated Useful Lives of Depreciable Hospital Assets* is only needed by Insurance Law Article 43 Corporations and Public Health Law Article 44 Health Maintenance Organizations with medical facilities. Currently, there are only three plans that have medical facilities. For these Plans, it is estimated that between 7 and 15 copies would be needed. *Estimated Useful Lives of Depreciable Hospital Assets (Revised 2004 Edition)* costs \$45.00 per copy with a 15% discount if between 11 to 50 copies are ordered. Total costs would be between \$315.00 for 7 copies and \$573.75 for 15 copies, exclusive of shipping charges.

There is no cost to the Insurance Department for the Accounting Manual since it is obtainable free of charge from the National Association of Insurance Commissioners. The Department will need to acquire 35 copies of *Estimated Useful Lives of Depreciable Hospital Assets (Revised 2004 Edition)* at a total cost of \$1,338.75, exclusive of shipping charges.

5. Paperwork: To the very minor extent to which the regulation makes changes in accounting principles, staffs of insurers will need to familiarize themselves with this regulation. To the extent that the regulation conforms New York filings, for the most part, to other states' requirements, the need for separate New York filings is reduced.

6. Local government mandate: This regulation does not impose any obligations on local governments.

7. Duplication: This regulation will not duplicate any existing state or federal rule.

8. Viable alternatives: None. The regulation ensures conformance with New York statutes and regulations that preclude implementation of particular rules found in the Accounting Manual.

9. Federal standards: There are no minimum standards of the Federal government in the same or similar areas.

10. Compliance schedule: The regulated parties should already be in compliance with the provisions of the Accounting Manual instructions unless and until the Insurance Department promulgates a regulation delineating exceptions.

Regulatory Flexibility Analysis

The Insurance Department finds that this regulation will have no adverse economic impact on local governments, and will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis of this finding is that this regulation is directed to insurers as defined under this regulation, none of which are local governments.

The Insurance Department finds that this regulation will have no adverse impact on small businesses, and will not impose reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this regulation is directed to insurers. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and determined that none of them would come within the definition of small businesses, within the meaning of the State Administrative Procedure Act, because none are both independently owned and have fewer than one hundred employees.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: This regulation applies to insurers which do business or are resident in every county in the state, including those that are, or contain, rural areas, as defined under section 102(13) of the State Administrative Procedure Act. Some of the home offices of these insurers lie within rural areas.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment does not impose new reporting or recordkeeping requirements. To the extent that the regulation conforms New York filings, for the most part, to other States' requirements, the need for separate New York filings is reduced. To the very minor extent to which the regulation makes changes in accounting principles, staffs of insurers will need to familiarize themselves with the provisions of this regulation.

3. Costs: Insurers as defined under this regulation are the regulated persons. Since the regulation is for the most part merely declaratory of existing accounting practices and procedures, there is no negative cost impact on regulated persons, and possibly a beneficial one, because the regulation is intended to enhance consistency of accounting treatment of assets, liabilities, reserves, income and expenses. Accounting is facilitated because the practices and procedures are organized and consolidated pursuant to one regulation.

4. Minimizing adverse impact: This regulation applies to any insurers that do business in New York State. The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: The amendment would not have a negative impact on rural areas. Insurers that have home offices that lie within rural areas were represented in industry organizations that were consulted in every stage of the development of this regulation.

Job Impact Statement

The proposed rule changes should have no adverse impact on jobs and employment opportunities in New York State. The regulation codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner. The current amendment, in addition to changing the publication date references to publications incorporated by reference in the regulation, makes some minor changes to current accounting practices but should have no adverse impact on jobs or employment opportunities.

Division of the Lottery

EMERGENCY RULE MAKING

Video Lottery Gaming

I.D. No. LTR-27-06-00001-E

Filing No. 732

Filing date: June 14, 2006

Effective date: June 14, 2006

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

Action taken: Addition of Part 2836 to Title 21 NYCRR.

Statutory authority: Tax Law, 1617-a

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

Specific reasons underlying the finding of necessity: (1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. It is projected that the operation of video lottery gaming in New York State may generate over \$1 billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately \$1 to \$4 million weekly in aid to education that are needed to offset anticipated shortfalls.

Since passage of the legislation in October 2001 which authorized the Division to license the operation of video lottery gaming at racetracks in New York State, the Division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. Five facilities are now in operation. The Legislature enacted changes to the

legislation in April 2005. In enacting Chapter 61 of the Laws of 2005, the Legislature found that the revenue generated from video lottery gaming to that date had not met predictions. Overall, the Legislature found that lottery revenue would be maximized by making available to the video lottery gaming facilities an increased vendor's fee and a vendor's marketing allowance. The legislation was designed to provide the necessary resources and incentives to the video lottery gaming facilities to undertake the capital, marketing and other expenditures necessary to create and sustain video lottery gaming and maximize lottery revenue to support education. These regulations are a result of that legislation and were initially issued in September 2005, almost six (6) months after passage of Chapter 61. These Emergency Regulations permit the vendor's to receive the benefits of the increased vendors fee and the vendor's marketing allowance, pending formal adoption of these regulations by the Division. The Division met with each of the current and pending vendors and operators of the video gaming facilities during the months of October and November, 2005 to solicit comments on the Emergency Regulations. While the facilities agreed to submit written comments, the regulations expired requiring a new emergency filing on December 20, 2005. The video lottery gaming facilities submitted comments in late December, 2005. Since that date, the Division has been meeting with the facility owners and operators and determining the best approach on implementing proposed and acceptable changes. Accordingly, although timing requires issuance of these Emergency Regulations for a third time, it is expected that final regulations will be published for public comment within sixty (60) days.

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rule making is that the stated Legislative goal of Chapter 61 of the Laws of 2005 will be implemented and lottery revenue to support education will be maximized. The Division intends to file shortly a Notice of Proposed Rule making pursuant to the State Administrative Procedure Act Section 202(4-a) to continue the normal rule making procedures relative to these regulations within sixty (60) days.

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation and deprive the state of needed revenue to education.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment at this time since there is insufficient time to commence a formal rule making process and permit such public comment period. The Division expects to commence the formal rule making process within sixty (60) days. Such delay would thereby result in a loss of needed aid to education. This is the earliest the regulations could have been finalized in light of the new legislation, leaving inadequate time to comply with the normal rule making procedure set forth in the State Administrative Procedure Act Section 202(1). Delaying the implementation of the increased vendor's fee and the providing of the marketing allowance would mean a loss in lottery revenue to aid education and frustrate the legislative intent of Chapter 61 of the Laws of 2005.

Subject: Video lottery gaming.

Purpose: To allow the licensed operation of video lottery gaming.

Substance of emergency rule: Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the Laws of 2002, as amended further by Chapters 62 and 63 of the Laws of 2003, and as amended further by Chapter 61 of the Laws of 2005, codified as §§ 1612 and 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks in New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

In April, 2005, Chapter 61 of the Laws of 2005 amended § 1612 of the Tax Law to provide an increase to the vendor fee to be paid to each video lottery terminal operator and also permits a marketing allowance for each such facility. These changes have necessitated a revision to the Emergency Regulations. Regulations were initially adopted on an Emergency basis in 2003. Since that date, the regulations have been renewed every 90 days. The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as

gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principles and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. Annually, the agents will be required to submit a marketing plan for approval by the Division. The marketing plan will identify those marketing or promotion costs which may be reimbursed from the marketing allowance permitted by § 1612 of the Tax Law. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations. Since issuing the Emergency Regulations in September, 2005, the Division has met and discussed the marketing procedures with each of the existing and pending vendors and operators. Formal comments have been submitted by those facilities. The Division is in the process of responding to these comments and expects to commence the formal rule making within sixty (60) days.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 11, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Robert J. McLaughlin, Deputy Director and General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: rmclaughlin@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, codified as §§ 1612 and 1617-a of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of video lottery gaming at racetrack locations around the state. Chapter 383 of the Laws of 2001 has been amended by Chapter 85 of the laws of 2002, as amended further by Chapters 62 and 63 of the Laws of 2003, and amended further by Chapter 61 of the Laws of 2005. The legislation directs the Division to promulgate regulations allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. Legislative Objectives: These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming and, as required by Chapter 61 of the Laws of 2005, permitted vendors to receive an increased vendor fee and a vendor marketing allowance.

3. Needs and Benefits: The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, certain requirements for the physical layout of the gaming facilities, and how the marketing allowance will be disbursed. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While video lottery gaming has been held to be similar to other lottery games that the Division has successfully conducted for over thirty years, some components set it apart from those more traditional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming requires the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key and other employees.

A Notice of Proposed Rule Making was first published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Based on comments received during the public comment period, it was necessary to revise the proposed regulations. Emergency regulations have been promulgated since early 2004. Subsequently, the Legislature made certain additional changes to the statute authorizing video lottery gaming. By way of example, Chapter 61 of the Laws of 2005 increases the vendors fee originally promulgated and adds a new marketing allowance subject to the supervision of the Lottery.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York. Since issuing the Emergency Regulations in September, 2005, the Division has met and discussed the marketing procedures with each of the existing and pending vendors and operators. Formal comments have been submitted by those facilities. The Division is in the process of responding to these comments and expects to commence the formal rule making within sixty (60) days.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$550 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from \$4 million to \$250 million. The regulations require video lottery gaming agents to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. Such gaming facilities throughout the state are expected to employ more than 4,000 people. Individual video lottery gaming agents will be employing approximately 110 to 1,200 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries ranging from \$22,000 to \$250,000. Total annual payroll for each racetrack could range from \$1.8 million to over \$10.8 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately \$100,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

Portions of these rules and regulations identify the guidelines and requirements in relation to marketing expenses and the utilization of the legislatively provided funds. It is anticipated that the licensed video gaming facilities will take full advantage of the allowable uses of the funds which when fully implemented will create over \$70 million annually in available resources for increasing the amount of aid to education from the video gaming program. The use of the marketing allowance funds is voluntary for video gaming facilities as is participation in the video gaming program in general.

The Lottery expects to annually expend over \$110 million in gaming vendor fees in generating over \$800 million in aid to education annually from the video gaming program when fully implemented. Video gaming facilities which are not yet open, but have construction intentions, will

likely expend approximately \$300 million in renovations and new construction for video gaming.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. Any registered vendor may be required to be licensed as determined by the Division and if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

(a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds \$150,000.00 in any twelve (12) month period;

(b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed \$500,000.00 in any twelve (12) month period;

Video lottery gaming agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures, marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

Finally, video lottery gaming agents are required to submit an annual marketing plan to the Division which describes the proposed use of the marketing allowance permitted by Chapter 61 of the Laws of 2005.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the New York State Racing and Wagering Board must license the operation of pari-mutuel wagering at the racetracks as well as licensing racetrack employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Division may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Division and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: The Division has conducted outreach sessions with each of the operating video lottery gaming facilities and believes that these regulations fulfill its statutory mandate while addressing those comments. While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. All comments received are available for public review by contacting Robert J. McLaughlin, Esq., General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to rmclaughlin@lottery.state.ny.us.

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-going throughout the operation of the games.

Regulatory Flexibility Analysis

1. Effect of Rule: The Division of the Lottery finds that the rule will not adversely affect local government. The rule will impact a number of different types of businesses:

(a) Licensed racetracks: It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses" as that term is defined in New York State Administrative Procedure Act § 102;

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central computer system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain lenders. It is anticipated that, these companies will recoup any costs associated with licensing and start-up from operations;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process only. However, if their contract exceeds a certain value, or if the Division otherwise determines, such vendors will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, should not exceed \$100 per application for the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. Certain small vendors may not even be required to register.

3. Professional Services: It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming operation. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$550 million if all eligible remaining venues participate. Each facility's proposed project differs. The cost for each facility ranges is from \$4 million to over \$250 million dollars. The regulations require video lottery gaming agents equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional \$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each racetrack's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ more than 4,000 people. Individual gaming agents will be employing between approximately 110 to 1,200 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racetrack facilities. The majority of these controls are put in place through adequate experienced

personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately \$100,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. These emergency regulations include revisions made to the regulations as a result of such comments.

Rural Area Flexibility Analysis

Many of the racetracks eligible for video lottery gaming licenses are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Division believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

Job Impact Statement

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ more than 4,000 people. Individual gaming agents will be employing between approximately 110 to 1,200 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs. It is expected that, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

Office of Mental Health

NOTICE OF ADOPTION

Patient Visiting Rights

I.D. No. OMH-27-05-00003-A

Filing No. 746

Filing date: June 20, 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: Repeal of Part 21; amendment of section 527.2 and addition of section 527.10 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, art. 7, section 33.05

Subject: Patient visiting rights.

Purpose: To update regulations governing patients' visiting rights and repeal obsolete regulations.

Text of final rule: 1. Part 21 of Title 14 NYCRR is repealed.

2. Subdivision (c) of Section 527.2 is amended, a new subdivision (d) is added, and subdivisions (d) and (e) are renumbered as (e) and (f) to read as follows:

(c) [Article 33] *Section 33.02* of the Mental Hygiene Law establishes statutory rights of mentally disabled persons [Section 33.02 of such law] and requires the commissioner to publish regulations informing [patients] *residents of facilities or programs operated or licensed by the Office of Mental Health* of their rights under law.

(d) *Section 33.05 of the Mental Hygiene Law provides that each patient in a facility shall have the right to communicate freely and privately with persons outside the facility as frequently as he wishes, subject to regulations of the commissioner designed to assure the safety and welfare of patients and to avoid serious harassment to others.*

(e) Article 29-C of the Public Health Law establishes the right of competent adults to appoint an agent to make health care decisions in the event they lose decision-making capacity. Article 29-C further empowers the Office of Mental Health to establish regulations regarding the creation and use of health care proxies in mental health facilities.

[(e)] (f) The Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, sections 4206 and 4751) requires that institutional providers participating in the Medicare or Medical Assistance program inform patients about their rights, under State law, to express their preferences regarding health care decisions.

3. Subdivision (e) of Section 527.4 is amended to read as follows:

(e) Plans of treatment or services developed for persons who are non-English speaking, deaf, [or] hard of hearing, or who, for any cause, are unable to read or write, shall identify any significant related impact on such persons' functioning and treatment, and identify associated recommendations for treatment, including any reasonable accommodations.

4. A new Section 527.10 is added to this Part to read as follows:

§ 527.10 *Visiting at facilities.*

(a) *Subject to the provisions of Section 527.12 of this Part, residents of facilities operated or licensed by the Office of Mental Health have a right to receive visitors at reasonable times, to have privacy when visited, to authorize those family members and other adults who will be given priority to visit, and to communicate freely with persons within or outside the facility.*

(b) *Visiting rights at facilities.*

(1) *Recognizing that, in general, having visitors and visiting outside of the facility is part of the recovery process which maintains ties with family and the rest of the community, all facilities shall establish visiting hours and policies which are designed to facilitate the exercise of the right to receive visitors. Such policies:*

(i) *must not be unduly onerous to patients;*

(ii) *must be as flexible as administratively feasible;*

(iii) *shall not require prior notification or request by either the patient or the visitor, except when such visits would interfere with the regularly scheduled therapeutic activities in which patients are engaged, or as provided in Section 527.12 of this Part;*

(iv) *should, in order to preserve the therapeutic environment of the facility, be tailored in a manner that facilitates visiting while avoiding interference with the regularly scheduled activities in which patients are engaged, such as school attendance, program participation, and mealtime, by ensuring that in individual cases where an accommodation can be made without compromising the clinical care of the patient or other patients, facilities shall make reasonable efforts to do so;*

(v) *shall require the establishment of regular visiting hours during every day and every evening of the week, provided, however, that facilities operated by the Office shall establish regular visiting hours based on the facility's security needs and the needs of the specific population served (i.e., adults, children, or forensic), their families, and the community, as well as all other requirements of this subdivision; and*

(vi) *with respect to facilities which serve minors eighteen years of age or under, may require prior authorization of visitors by the person or entity with legal authority to consent to treatment for such minor, if in the best clinical interests of the patient.*

(2) *Each facility shall establish a space where visitors may meet with patients in comfortable surroundings with a reasonable degree of privacy.*

Visitors should be encouraged to visit in the living, dining, and recreational areas with patients, as well as to visit outside the facility with the patient.

(3) *In exceptional instances, it may be necessary to restrict a patient's visiting right. Such restriction can only be imposed in accordance with Section 527.12 of this Part.*

527.11 *Communicating freely with others within and outside the facility.*

(a) *Residents of facilities or programs operated or licensed by the Office of Mental Health have the right to communicate freely and privately with persons within and outside the facility, subject to the provisions of Section 527.12 of this Part.*

(b) *To assist in the exercise of this right, facilities shall provide patients with reasonable access to stationery and telephones to assist patients to freely communicate with others outside the facility.*

(c) *Patients shall have full opportunity to communicate freely with clergy and with their legal representatives, and these communications shall not be restricted. With respect to other correspondence, there shall be no censorship or restriction of incoming or outgoing letters or packages, except in the following circumstances:*

(1) *To assure the safety and welfare of patients, facilities subject to this Part may institute policies governing possession of contraband. Letters or packages which are reasonably suspected to contain contraband or, in the case of facilities operated by the Office, otherwise implicate significant security or safety concerns, shall be processed in accordance with such facility policies.*

(2) *To assure the safety and welfare of patients and avoid harassment to others, any patient whose condition, in the opinion of the treatment team, warrants some selectivity, may have incoming and/or outgoing letters or packages not subject to a facility's contraband policy censored or restricted in accordance with Section 527.12 of this Part.*

(d) *With the exception of mail that is processed or restricted in accordance with subdivision (c) of this Section, incoming letters and packages should be delivered sealed and unopened to all patients, and all outgoing letters and packages shall be mailed in a like manner, provided, however, in an individual case where there exists an unanticipated, overriding compelling safety or security concern, the reasons why the letter or package was not delivered sealed or unopened to the patient, and a description of how the matter was handled (e.g., in consultation with the United States Postal Service, or other appropriate security intervention) should be appropriately documented in accordance with facility procedure.*

527.12 *Restriction of rights.*

(a) *A right set forth in Article 33 of the Mental Hygiene Law and this Part may be restricted within the patient's treatment plan by a written order signed by a physician stating the clinical justification for the restriction. The order imposing the restriction and a notation detailing the clinical justification therefor and the specific period of time in which the restriction shall be in effect must be entered into the patient's record. In no event may any right set forth in this section be restricted or limited as a punishment or for the convenience of staff.*

(b) *Any restriction on a right identified in this section shall be the least restrictive appropriate method for protecting the interest or interests involved.*

(c) *The treatment team or its designee shall discuss any restrictions of a right set forth in this section and the reason for such decision with the patient, and his or her family (if the patient does not object), and/or other authorized representative of the patient, and shall advise such persons of the patient's right to appeal this decision to the director of the facility. A notation that such persons were advised of the restriction, and the patient's right to appeal the decision, must be entered in the patient's record.*

(d) *In cases where a restriction is placed on incoming and/or outgoing mail in accordance with paragraph (2) of subdivision (c) of Section 527.11 of this Part, such mail may be withheld from the patient during the time the restriction is in place, or may be opened by a member of the treatment team in the presence of the patient. In no case may a staff member other than a member of the treatment team open such packages or letters, unless there exists an overriding compelling safety or security concern. In such cases, the reason why a treatment team member did not open a package or document, and a description of how the matter was handled (e.g., in consultation with the United States Postal Service, or other appropriate security intervention) must be appropriately documented in accordance with facility procedure.*

(e) *Appeals. Patients whose rights have been restricted in accordance with this Section shall be notified of their right to appeal such decision in accordance with Section 27.8 of this Title.*

Final rule as compared with last published rule: Nonsubstantial changes were made in sections 527.4(f), 527.10(a), (b)(1), (2), (c), (d)(2), (e), 527.11(a), (b), (c).

Text of rule and any required statements and analyses may be obtained from: Julie Rodak, Director, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 473-6945, e-mail: colejar@omh.state.ny.us

Revised Regulatory Impact Statement, Revised Consolidated Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement A Revised Regulatory Impact Statement, Flexibility Analysis for Small Businesses and Local Governments, and Rural Area Flexibility Analysis are not being submitted with this notice because the amendments made to the last published rule are defining or clarifying in nature and/or restate language from existing 14 NYCRR Part 21, and hence do not necessitate revision to the previously published Regulatory Impact Statement, Flexibility Analysis for Small Businesses and Local Governments, and Rural Area Flexibility Analysis.

A Revised Job Impact Statement is not being submitted with this notice because the amendments made to the last published rule are defining or clarifying in nature and/or restate language from existing 14 NYCRR Part 21, and hence do not necessitate revision to the previously published Job Impact Statement.

Assessment of Public Comment

1. Issue: 14 NYCRR Section 21.7 indicates that staff will help illiterate or non-reading and non-English speaking patients communicate. Should this language be included in the revised rule?

Response: 14 NYCRR Section 527.4, promulgated after 14 NYCRR Section 21.7, addresses communication needs of non-English speaking, deaf, and hard of hearing patients, and is consistent with statutory requirements. However, to accommodate the concern with respect to illiterate or non-reading patients, subdivision (e) of Section 527.4 has been amended to reference their needs.

2. Issue: In this day and age, for security reasons, perhaps packages and letters could be opened in the mailroom and delivered appropriately and privately by a member of the treatment team.

Response: Security is obviously a greater concern post 9/11/01 than it was in the 1970's, when Part 21 was initially enacted. OMH is attempting to address security issues while not infringing on patient rights by providing that in cases where security is an overriding concern, packages may be opened by someone other than a treatment team member, with appropriate documentation. We will continue to monitor this issue.

3. Issue: It is not uncommon for families or visitors to send packages with seemingly innocuous items contained therein, such as plastic bags, nail clippers, matches, food, etc, which could impact the health, safety, and welfare of all patients in the facility. This places the health and life of all patients at risk. Perhaps all items brought by visitors into an inpatient psychiatric unit should be screened.

Response: OMH agrees that some common items can present considerable risk to the health and safety of all patients in a facility, and for that reason, psychiatric facilities must be entitled to classify certain items as contraband and not permit them into the facility. Screening may be a practical option for facilities which have the resources to effectively do so, but, depending on the screening process at issue, it is not foolproof. A multi-faceted strategy for eliminating the entry of contraband into a facility is most effective. Since many of the items noted in the comments are not, on their face, dangerous objects (like weapons), families and friends of patients, as well as patients themselves, should be made aware ahead of time (e.g., in visitor's brochures) as to what is contraband to prevent them from bringing these items along in the first instance, and items that are considered contraband can be withheld from patients for general health and safety reasons. In response to this comment, the amendments have been clarified to avoid confusion on this point, as general restrictions on contraband must be established in facility policy, which will serve to put both patients and their families on notice as to what items should not be brought or sent to patients in visits or through the mail.

4. Issue: Concern was registered that the revisions weaken visitation rights by not carrying over language indicating that visiting hours be scheduled, that the most liberal visiting policies that are administratively feasible must be established, that space where visitors can meet patients with reasonable privacy must be established, that visitors are encouraged to visit the living, dining, and recreational areas with patients, as well as

meet with patients outside the facility. Thus, facilities would be permitted to drastically limit what families see and hear when they visit their loved ones.

Response: There seems to be a misconception among some parties that, by not carrying over the language of Part 21 verbatim into Part 527, this proposal is intended to remove or restrict the visiting rights of patients, or diminish the importance of visitation in the therapeutic process. It was never OMH's intent to do so; language was simply being updated to more closely parallel current authorizing statutes. Nonetheless, to allay these concerns, all of the concepts set forth in the identified language (e.g., established visiting hours, Aliberal@visitation policies, providing a space for visitation, and family being able to go outside the facility with patients) have been carried over in Section 527.10(a) and (b); (it should be noted that facility visiting policies were, in fact, required in the proposed revisions and were never excluded).

In addition, language has been carried over from Part 21 to reflect that, in general, visiting is part of the recovery process which maintains ties with the rest of the community, specifically in Section 527.10(b). The proposed regulation is consistent with the visitation rights established in statute in Mental Hygiene Law Sections 33.02 and 33.05.

5. Issue: The revisions remove the requirement in NYCRR Part 21 that visiting hours be scheduled every day and evening every day of the week.

Response: Mental Hygiene Law Section 33.05 requires that "each patient in a facility shall have the right to communicate freely and privately with persons outside of the facility as frequently as he wishes, subject to regulations of the commissioner designed to assure the safety and welfare of patients and to avoid serious harassment to others." Patients are further assured, in this statute, the right to frequent and convenient opportunities to meet with visitors. Because OMRDD superseded 14 NYCRR Part 21 in its revisions in 14 NYCRR Part 633, this Part, in effect, applies only to OMH. OMH updated its patient rights regulation in 1986, through the establishment of 14 NYCRR Part 527, but neglected to repeal 14 NYCRR Part 21.

Because the requirement for the establishment of seven-day-a week, daily and evening visiting hours is not a statutory requirement, it was considered reasonable to revise the regulation to remove the bright line requirement to provide facilities with necessary flexibility. However, OMH recognized that it is critical to include sufficient protections in the language of the regulation to assure that the articulated rights of patients for frequent visitation opportunities are safeguarded.

The regulation clearly indicates that visiting policies must not be unduly onerous to patients, must be as flexible as administratively feasible, and must provide for accommodations when such can be made without compromising care. However, as the comments on this point were the most vociferous, the requirement for facilities to maintain 7 day a week day and evening visiting schedules has been restored for licensed facilities. OMH operated facilities will continue to establish visiting hours that meet statutory requirements through established policy, with accommodations made in hardship cases.

6. Issue: Because 14 NYCRR Part 21 is a Department of Mental Hygiene regulation, it was questioned whether or not OMH has the statutory authority to unilaterally repeal the rule.

Response: Prior to filing the proposed rule, OMH asked OMRDD whether or not it had any objection to repeal of the rule. OMRDD indicated it did not, as the provisions of Part 21 had already been superseded in 14 NYCRR Part 633. OMH also contacted OASAS and received confirmation that it, too, had no objection to the repeal of Part 21, because it does not apply to OASAS (Article 33 of the Mental Hygiene Law, the authorizing statute, governs patient rights at OMH and OMRDD facilities, and Article 22 of the Mental Hygiene Law governs patient rights at OASAS facilities). Thus, prior to proposing repeal of the rule, OMH established that it currently has no application to, and is not followed by, any agency other than OMH. No public comments were received from any entities under the jurisdiction of OASAS or OMRDD objecting to the repeal of 14 NYCRR Part 21, presumably because it has no application to them.

Furthermore, this proposal was filed with, reviewed by, and approved for filing as a Notice of Proposed Rulemaking by, the Governor's Office of Regulatory Reform (GORR) in accordance with Executive Order No. 20. The GORR review includes consideration as to whether or not the proposed regulatory action is clearly within the agency authority as delegated by law.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Restoration of Commercial Driver's Licenses

I.D. No. MTV-27-06-00010-P

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

Proposed action: Amendment of Part 136 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 510(6)(a) and 1193(2)(c)(1)

Subject: Restoration of commercial driver's licenses.

Purpose: To provide automatic restoration of CDL licenses in certain circumstances.

Text of proposed rule: 136.2 Approval of application. Except as provided in sections 136.3, 136.4 and 136.5 of this Part, an application for a driver's license shall be approved. *In addition, an application for re-licensure shall be waived under the following circumstances:*

(a) *If the licensee holds a commercial driver's license and a conviction results in the revocation of both the commercial and non-commercial portion of his or her driver's license, the commercial portion of the driver's license shall be automatically restored after the minimum one year revocation period is served, if the non-commercial portion of the license has been restored as the result of either completion of the alcohol and drug rehabilitation program or approval for re-licensure pursuant to this Part.*

(b) *If the licensee holds a commercial driver's license and such license is revoked as the result of a conviction that results solely in the revocation of the commercial portion of such license, then such license shall be automatically restored after the one year minimum revocation period is served.*

(c) *Subdivisions (a) and (b) shall not be applicable to a person whose license is suspended or revoked for an independent violation or violations at the time at which such person would be eligible for restoration of the commercial portion of his or her license pursuant to such subdivisions.*

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

Data, views or arguments may be submitted to: Ida L. Traschen, Supervising Attorney, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. Section 510(6)(a) of such law provides that where a license is revoked, such license shall not be restored except in the discretion of the Commissioner. Section 1193(2)(c) of such law provides that when a license is revoked as the result of alcohol-related conviction, no new license shall be issued after the expiration of the minimum revocation period, except in the discretion of the Commissioner.

2. Legislative objectives: This proposal is consistent with the legislative objective of insuring that drivers whose licenses have been revoked are relicensed only when they satisfy certain requirements established by the Commissioner. The criteria set forth in Part 136 are designed to permit relicensure of motorists who do not pose a danger on our highways.

3. Needs and benefits: The opening paragraph of Part 136 describes its purpose as:

In exercising such discretion and in keeping with his responsibility to provide meaningful safeguards for the general public who are users of the highways, it is the purpose of the commissioner to utilize departmental driver improvement programs in order to rehabilitate problem drivers through the use of education and explanation. It is the further purpose of the commissioner to take disciplinary action in order to force a change in the attitude and driving habits of problem drivers, where review of the

applicant's total record indicates that such action is necessary for the protection of the applicant and the public alike. This part is intended to implement such purposes by establishing criteria to identify individual problem drivers, the application of which shall result in a presumption, in certain cases, that the involved driver would present a potential danger to himself or other users of the highway if allowed to be licensed or relicensed.

Part 136 provides that if an individual's license is revoked, he or she may be relicensed only upon demonstrating that he or she does not pose a danger to the motoring public. The enactment of Chapter 60, Part E, of the Laws of 2005 presents the need for an amendment to the Part 136 review process.

As background, in 1999, Congress enacted the Motor Carrier Safety Improvement Act, which provided enhanced sanctions for commercial driver's license (CDL) holders. The Federal Motor Carrier Safety Administration promulgated regulations to set forth specific disqualifications for CDL holders. (See 49 CFR Part 383.51) The states were required to adopt such disqualifications into state law by September 30, 2005 or lose a significant amount of federal highway funding. New York State adopted the federal law in Chapter 60.

A CDL holder only has one driver's license. However, as the result of the new disqualification scheme, the Department will, in some situations, revoke the commercial portion of the license for one year and the non-commercial portion for 90 days or six months, depending on the violation. For example, if a CDL holder commits a DWI violation in his or her non-commercial vehicle, we will revoke the commercial portion of his or her license for one year and the non-commercial portion for six months. If this individual is a first time offender, he or she will be eligible for the alcohol and drug rehabilitation program (known as the Drinking Driver Program or DDP). If he or she successfully completes the DDP, the non-commercial portion of his or her license will be immediately restored. (This is current law.) However, the commercial portion of his or her license will not be restored for the full one year. Under this proposal, if the individual has completed the DDP, the Department will automatically restore his or her license at the end of the one year period, because he has demonstrated successful rehabilitation by completion of the DDP. Similarly, if this same driver chose not to enter the DDP, but applied for reinstatement of the non-commercial portion of his or her license at the end of the six month period, and such license was reinstated after a Part 136 review, then the Department would reinstate the commercial portion of his or her license at the end of the one year period because he or she has demonstrated that he or she does not pose a danger on the State's highways. If during the course of the year, his or her license is suspended or revoked for a different violation, his license will not be restored at the end of the year.

The amendment also provides that if a violation results in the revocation of only the commercial portion of a CDL license, then such license shall automatically be restored after the one year license period is served. For example, if a CDL holder leaves the scene of a property damage accident, the commercial portion of his or her license is revoked for one year, but no action is taken against the non-commercial portion. Since this individual will be driving for the full year in non-commercial status, it only follows that the commercial portion should be restored after one year, since if he or she had committed a series of violations or one or more serious violation, his or her non-commercial portion would have been suspended or revoked. Thus, it makes no sense to require this licensee to reapply at the end of the year if he or she has demonstrated during the course of the year that he or she does not pose a danger to the motoring public.

This proposal presents two obvious benefits. First, it establishes a relicensing for CDL holders that is rational and fair, but without minimizing the emphasis on highway safety. The CDL holder is not made to jump through excessive rescinding hoops as long as he or she has demonstrated during the revocation period proof of rehabilitation or an otherwise clean driving record. Second, this process will save the Department a significant amount of staff time by automatically restoring a CDL at the end of the revocation period. There is simply no need or benefit in requiring DMV staff to re-evaluate driving records that have already been reviewed by DMV staff.

4. Costs: There are no costs to consumers, state agencies or to local governments. In fact, by automatically restoring the commercial license, as described above, the Department will most likely save hundreds, if not thousands, of hours of staff time. Although the Department cannot accurately estimate the costs of the savings, it is likely that thousands of CDL drivers will commit offenses that would otherwise require a "second" Part 136 review if not for adoption of this regulation.

- 5. Local government mandates: This proposal does not impose any mandates upon local governments.
- 6. Paperwork: This proposal does not impose any additional paperwork or recordkeeping requirements upon the Department.
- 7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.
- 8. Alternatives: No significant alternatives were considered. A no action alternative was not considered.
- 9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.
- 10. Compliance schedule: Compliance shall commence immediately upon adoption of this regulation.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal, because it will have no adverse impact on existing jobs or job development in the State.

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. (04-G-1047SA5)

NOTICE OF ADOPTION

Emergency Demand Response Program

I.D. No. PSC-15-06-00013-A
Filing date: June 20, 2006
Effective date: June 20, 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 Consolidated Edison Company of New York, Inc.’s (Con Edison) request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 9.

Statutory authority: Public Service Law, section 66(12)

Subject: Emergency Demand Response Program (EDRP).

Purpose: To reinstate Con Edison’s EDRP contained in Rider V.

Substance of final rule: The Commission approved Consolidated Edison Company of New York, Inc.’s tariff filing to reinstate its Emergency Demand Response Program and to eliminate the expiration date for this program.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (00-E-2054SA34)

NOTICE OF ADOPTION

Day-Ahead Demand Response Program and Emergency Demand Response Program

I.D. No. PSC-15-06-00014-A
Filing date: June 20, 2006
Effective date: June 20, 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 Orange and Rockland Utilities, Inc.’s (O&R) request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 2.

Statutory authority: Public Service Law, section 66(12)

Subject: Day-Ahead Demand Response Program (DADRP) and Emergency Demand Response Program (EDRP).

Purpose: To reinstate O&R’s DADRP and EDRP contained in Riders K and L.

Substance of final rule: The Commission approved Orange and Rockland Utilities, Inc.’s tariff filing to reinstate its Day Ahead Demand Response Program and its Emergency Demand Response Program and to eliminate the expiration dates for these programs.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (00-E2054SA35)

Public Service Commission

ERRATUM

A Notice of Proposed Rule Making, I.D. No. PSC-25-06-00017-P, pertaining to Purchased Power Adjustment by Massena Electric Department, published in the June 21, 2006 issue of the *State Register* contained an incorrect case number. The correct case number is 06-E-0651SA1.

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

NOTICE OF ADOPTION

Pilot Marketer Hedge Program by National Fuel Gas Distribution Corporation

I.D. No. PSC-13-06-00024-A
Filing date: June 20, 2006
Effective date: June 20, 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 National Fuel Gas Distribution Corporation’s request to make various changes in the rates, rules and regulations contained in its schedule for gas service—P.S.C. No. 8.

Statutory authority: Public Service Law, section 66(12)

Subject: Pilot Marketer Hedge Program.

Purpose: To implement a Pilot Marketer Hedge Program.

Substance of final rule: The Commission adopted an order approving National Fuel Gas Distribution Corporation’s (NFG) request to implement a pilot Marketer Hedge Program which will allow marketers in NFG’s territory additional opportunity to offer customers more fixed price and hedged gas options when customers consider and shop for their gas commodity needs.

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

NOTICE OF ADOPTION

Electric Space Heating by Consolidated Edison Company of New York, Inc.**I.D. No.** PSC-16-06-00012-A**Filing date:** June 20, 2006**Effective date:** June 20, 2006

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

Action taken: The commission, on June 20, 2006, adopted an order in Case 06-E-0396 approving Consolidated Edison Company of New York, Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 9.

Statutory authority: Public Service Law, section 66(12)

Subject: Electric space heating.

Purpose: To revise service classification nos. 4 and 9 regarding customer's eligibility or continued eligibility for Special Provision D and to eliminate ambiguity concerning the determination of eligibility.

Substance of final rule: The Commission adopted an order approving Consolidated Edison Company of New York, Inc.'s tariff filing to revise Service Classification Nos. 4 and 9 regarding customer's eligibility or continued eligibility for Special Provision D and to eliminate ambiguity concerning the determination of eligibility.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0396SA1)

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

Exemptions from Electric Standby Rates for Small Non-Demand Customers by Plug Power, Inc.**I.D. No.** PSC-27-06-00012-P

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

Proposed action: The Public Service Commission is considering a request for rehearing dated June 7, 2006 from Plug Power, Inc., asking that the order extending deadline and continuing standby rate exemption issued May 23, 2006 in Case 02-E-0551 be modified, to extend the deadlines for the expiration of exemptions from electric standby rates for residential and other small non-demand customers.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5) and (10)

Subject: Exemptions from electric standby rates for small non-demand customers.

Purpose: To adopt extensions of deadlines for the expiration of exemptions from electric standby rates for small non-demand customers.

Substance of proposed rule: The Public Services Commission is considering a request for rehearing dated June 7, 2006 from Plug Power, Inc., asking that the Order Extending Deadline and Continuing Standby Rate Exemption issued May 23, 2006 in Case 02-E-0551 be modified, to extend the deadlines for the expiration of exemptions from electric standby rates for residential and other small non-demand customers. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (02-E-0551SA5)

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

Prescription Drug and Medicare Improvement Act of 2003**I.D. No.** PSC-27-06-00013-P

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

Proposed action: As discussed in a notice issued June 16, 2006 in Case 04-M-1693, the Public Service Commission is considering adopting protocols for accounting and ratemaking relating to implementation of the Prescription Drug and Medicare Improvement Act of 2003.

Statutory authority: Public Service Law, sections 64, 65(1), 66(1), (4), (5), (9) and (10), 78, 79(1), 80(1), (3), (4), (7) and (8), 89-a, 89-b(1), 89-c(1), (3), (4), (7) and (8), 90(1), 91(1), 94(1), (2) and (3) and 95(2)

Subject: Accounting and ratemaking relating to implementation of the Prescription Drug and Medicare Improvement Act of 2003.

Purpose: To adopt protocols for accounting and ratemaking.

Substance of proposed rule: As discussed in a Notice issued June 16, 2006 in Case 04-M-1693, the Public Services Commission is considering adopting protocols for accounting and ratemaking relating to implementation of the Prescription Drug and Medicare Improvement Act of 2003. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-M-1693SA2)

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

High Pressure Gas Service by The New York and Presbyterian Hospital**I.D. No.** PSC-27-06-00014-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by The New York and Presbyterian Hospital requesting that Consolidated Edison Company of New York, Inc. provide high pressure gas service to the hospital's proposed cogeneration facility. The commission may also consider matters related to this request.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66

Subject: A customer request for a direct connection to Con Edison's gas transmission system and related matters.

Purpose: To consider whether Con Edison should be required to directly connect a customer to its gas transmission system, as well as other matters related to this dispute.

Substance of proposed rule: The New York and Presbyterian Hospital (the Hospital) filed a petition requesting that Consolidated Edison Com-

pany of New York, Inc. (Con Edison) be directed to provide high pressure gas service through a new service line connected to Con Edison's gas transmission main located adjacent to the Hospital's proposed cogeneration facility on 71st Street in Manhattan. The Hospital also requests a penalty action be imposed on Con Edison for its refusal to provide the requested high pressure service. The Commission may approve, modify or reject, in whole or in part, the company's request, and it may consider other matters related to this dispute.

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-G-0723SA1)

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

Deferral of an Expense Item by Orange and Rockland Utilities, Inc.

I.D. No. PSC-27-06-00015-P

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

Proposed action: The Public Service Commission is considering a request by Orange and Rockland Utilities, Inc. for authorization to defer and recover the expenditures involved in connection with the termination of a power supply agreement with a non-utility generator. The commission may approve, reject, or modify, in whole or in part, this request, and may consider other related matters.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66(9)

Subject: Deferral of an expense item and related matters.

Purpose: To consider whether to authorize Orange and Rockland Utilities, Inc. to defer certain expenditures, and other related matters.

Substance of proposed rule: Orange and Rockland Utilities, Inc. filed a petition for authorization from the New York State Public Service Commission to defer certain costs related to the termination of a power supply agreement with a non-utility generator. The company proposes to recover these costs through its Energy Cost Agreement. The Commission may grant, deny, or modify, in whole or in part, the petition, and it may 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. 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-0002SA1)

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

Energy Services Company Price Reporting Requirements

I.D. No. PSC-27-06-00016-P

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

Proposed action: As discussed in a notice issued May 31, 2006 in Case 06-M-0647, the Public Service Commission is considering the requirements, if any, that should be imposed on energy services companies for the reporting of the prices and price formulas they offer to or charge customers and the appropriate enforcement mechanisms for ensuring compliance with any reporting requirements that are adopted.

Statutory authority: Public Service Law, sections 2(12) and (13), 5(1)(b) and (2)

Subject: Energy services company price reporting requirements.

Purpose: To adopt energy services company price reporting requirements.

Substance of proposed rule: As discussed in a Notice issued May 31, 2006 in Case 06-M-0647, the Public Service Commission is considering the requirements, if any, that should be imposed on energy services companies for the reporting of the prices and price formulas they offer to or charge customers and the appropriate enforcement mechanisms for ensuring compliance with any reporting requirements that are adopted. The Commissioner may adopt, reject or modify, in whole or in part, the relief proposed.

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

Data, views or arguments may be submitted to: Jaclyn A. 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-0647SA1)

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

Issuance of Debt and Water Rates and Charges by Dutchess Estates Water Company, Inc.

I.D. No. PSC-27-06-00017-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by Dutchess Estates Water Company, Inc. to issue debt in order to fund the construction of water system replacements and improvements and recover the associated costs from its customers.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10) and 89-f

Subject: Issuance of debt and water rates and charges.

Purpose: To fund the construction of water system replacements and improvements and recover the associated costs from customers.

Substance of proposed rule: On June 14, 2006, Dutchess Estates Water Company, Inc. (Dutchess Estates or the company) filed a letter requesting Public Service Commission approval to finance up to \$636,000 to fund the construction of water system replacements and improvements required by the New York State Department of Health. The company plans to borrow approximately \$455,400 from the State Drinking Water Revolving Fund (SRF) and approximately \$182,700 from a private lender. The combined debt service to fund both loans would be \$57,237 per year. The company proposes to surcharge each customer \$477 per year or \$120 per quarter. Dutchess Estates serves approximately 120 customers and is located in the Town of Hyde Park, Dutchess County. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillong, 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-0722SA1)

Office of Real Property Services

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Training Requirements for New York City Assessors

I.D. No. RPS-27-06-00006-P

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

Proposed action: Addition of Subpart 188-8 to Title 9 NYCRR.

Statutory authority: Real Property Tax Law, art. 3, title 3 and section 202(1)(l)

Subject: Training requirements for New York City assessors.

Purpose: To establish a program of training, certification and minimum qualifications for New York City assessors.

Public hearing(s) will be held at: 2:00 p.m., July 24, 2006 at One Centre St., Rm. 2400, New York, NY.

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

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

Text of proposed rule: SUBPART 188-8

NEW YORK CITY ASSESSORS

Section 188-8.1 Certification requirements for New York City assessors, generally. (a) This subpart applies to all individuals who perform professional appraisal duties relating to the assessment of property for the real property tax. On or before April 1 each year ORPS will provide the Department of Citywide Administrative Services with a list of those agencies of the City government and the job titles within those agencies that are subject to the provisions of this subpart. Additions to or deletions from that list may be made at any time.

(b) Each assessor serving on the effective date of this subpart must attain certification by April 1, 2008.

(c) A State certified assessor must be recertified upon a reappointment where there has been an interruption of continuous service of at least four years.

Section 188-8.2 Minimum qualification standards for New York City assessors. (a) The minimum qualification standards for appointed assessors are as follows:

(1) (i) graduation from high school, or possession of an accredited high school equivalency diploma; and

(ii) two years of satisfactory full-time paid experience in an occupation involving the valuation of real property, such as assessor, appraiser, valuation data manager, real property appraisal aide or the like. Such experience shall be deemed satisfactory if it is demonstrated that the experience primarily was gained in the performance of one or more of the following tasks: collection and recording of property inventory data, preparation of comparable sales analysis reports, preparation of signed valuation or appraisal estimates or reports using cost, income or market data approaches to value. Mere listing of real property for potential sale, or preparation of asking prices for real estate for potential sale, using multi-

ple listing reports or other published asking prices is not qualifying experience; or

(2) graduation from an accredited two-year college and one year of the experience described in subparagraph (1)(ii) of this subdivision; or

(3) graduation from an accredited four-year college and six months of the experience described in subparagraph (1)(ii) of this subdivision; or

(4) certification by the State Board as a candidate for assessor.

(b) In evaluating the experience described in subparagraph (1)(ii) of subdivision (a), the following conditions shall apply:

(i) for the purpose of crediting full-time paid experience, a minimum of 30-hour per week shall be deemed as full-time employment;

(ii) three years of part-time paid experience as sole assessor or as chairman of the board of assessors shall be credited as one year of full-time paid experience, and five years of part-time paid experience as a member of a board of assessors shall be credited as one year of full-time paid experience. Additional paid part-time experience in excess of these amounts shall be credited proportionately;

(iii) volunteer experience in an assessor's office may be credited as paid experience to the extent that it includes tasks such as data collection; calculation of value estimates; preparation of preliminary valuation reports; providing routine assessment information to a computer center; public relations; and review of value estimates, computer output and exemption applications; and

(iv) in no case shall less than six months of the experience described in subparagraph (1)(ii) of subdivision (a) be acceptable.

Section 188-8.3 Basic course of training for New York City assessors.

(a) The basic course of training shall include the following components:

(1) assessment administration (New York City);

(2) fundamentals of data collection;

(3) fundamentals of real property appraisal;

(4) income approach to valuation;

(5) advanced income approach to valuation;

(6) ethics;

(7) fundamentals of mass appraisal; and

(8) computer assisted mass appraisal modeling.

(c) Successful completion of the basic course of training shall be demonstrated by fulfilling the requirements for all required components and passing all of the prescribed examinations for the components.

(d) An individual who has successfully completed a training session not conducted or approved by ORPS, which presented topics similar to those in one or more of the components of the basic course of training, may request that this session be accepted as satisfaction of such component or components. The individual must submit the same supporting material as required by section 188-2.8 of this Part for obtaining continuing education credit. In no event will any training be accepted that was successfully completed more than three years prior to the date that the assessor became subject to the provisions of this Subpart.

(e) If ORPS determines that the training session is not an acceptable substitute for successful completion of a component or components of the basic course of training, ORPS shall provide written notification of that determination to the individual. Such notice shall set forth the reasons for the determination and state that the person may request a review of such determination.

(f) An individual adversely affected by a determination may request a review within 15 days of such determination. Such request must be made in writing and be addressed to the executive director.

(g) The executive director shall provide the applicant with written notification of his or her affirmation or reversal of the initial determination, including the reasons for such decision.

(h) An individual shall have up to two opportunities through examinations to successfully complete a component of the basic course of training without attending classroom instruction. A failure of the examination or failing to attend an examination is considered an opportunity.

Section 188-8.4 Interim certification for New York City assessors. [reserved]

Section 188-8.5 Continuing education requirement for New York City assessors. [reserved]

Section 188-8.6 Reimbursement of expenses for New York City assessors. (a) Certain expenses incurred by an assessor in successfully completing a component of the basic course of training set forth in section 188-8.3 of this Subpart, or while attending a training course, conference or seminar with the approval of ORPS shall be a State charge subject to audit by the State Comptroller, subject to the following:

(1) The course or seminar and the expenses must be approved by ORPS.

(2) The assessor must successfully complete the course or seminar, as demonstrated by passing the examination for the course or seminar, or, if no such examination was offered, by proof of attendance at the course or seminar.

(b) Where the conditions in subdivision (a) of this section have been satisfied, reimbursement shall be in the same manner and to the same extent that employees of the State of New York who are members of the Professional, Scientific and Technical unit are reimbursed for travel expenses except as provided below:

(1) Reimbursement for non-overnight travel mileage shall be limited to a maximum of one hundred miles per day, unless either the component is not offered within fifty miles of the official station of the assessor, or ORPS approves attendance at a component offered beyond 50 miles where attendance is found by ORPS to be more practicable;

(2) Expenses for room and board shall be allowed if an assessor can demonstrate that commuting to and from the location of a component will create undue hardship or a component is not offered within 50 miles of the official station of the assessor;

(3) Tuition fees will be reimbursed at a rate that is usual and reasonable for that type of training;

(4) Reimbursement for completing components of the basic course of training for attaining certification as a State Certified Assessor and for satisfaction of continuing education requirements shall be made only upon claims submitted no later than 30 days following completion of such training. Submissions by mail shall be deemed to have been submitted when postmarked. Claims submitted more than 30 days following the completion of such training will be reviewed for possible payment on or before the first day of June of the succeeding fiscal year. If funds remain from the appropriation for training reimbursement in the fiscal year in which the assessor completed such training, claims will be paid in full or, if the remaining funds are insufficient, prorated.

(c) Requests for reimbursement shall be made on a State of New York standard voucher (AC92) and any other form required by the State Office.

(d) Reimbursement shall be dispersed as follows:

(1) Upon appropriation of an amount for reimbursement of expenses pursuant to this Part in the State Budget, this appropriation shall be divided into three allotments, an allotment of one-half of the total appropriation, to be referred to as the first allotment, an allotment of one-third of the total appropriation, to be referred to as the second allotment, and an allotment of one-sixth of the total appropriation, to be referred to as the third allotment.

(2) Reimbursement for successful completion of one or more components of the basic course of training shall be made in the full amount due under this Part as vouchers are received.

(3) Reimbursement for training completed between April 1 and July 31 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts due shall be totaled and compared to the first allotment minus all payments of reimbursement for basic training; this constitutes the net first allotment. If the total of possible reimbursement is equal to the net first allotment, the full amount due shall be paid for each voucher. If the total of possible reimbursement is less than the net first allotment, the full amount due shall be paid for each voucher and the remainder shall be added to the second allotment. If the total of possible reimbursement is more than the net first allotment, the total of possible reimbursement shall be divided into the net first allotment. The resulting fraction is the first proration factor. The first proration factor shall be applied to each continuing education voucher to determine the reimbursement payment to be made for each of these vouchers.

(4) Reimbursement for training completed between August 1 and November 30 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts shall be totaled and compared to the second allotment, minus all payments of reimbursement for basic training plus any addition resulting from paragraph (3); this constitutes the net second allotment. If the total of possible reimbursement is equal to or less than the net second allotment, the full amount shall be paid for each voucher and any remainder shall be added to the third allotment. If the total of possible reimbursement is more than the net second allotment, the total of possible reimbursement shall be divided into the net second allotment. The resulting fraction is the second proration factor. The second proration factor shall be applied to each continuing education voucher amount to determine the reimbursement payment to be made for each of these vouchers.

(5) Reimbursement for training completed between December 1 and March 31 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts shall be totaled and compared to the third allotment, minus all payments of reimbursement for basic training plus any addition resulting from paragraph (4); this constitutes the net third allotment. If the total of possible reimbursement is equal to or less than the net third allotment, the full amount shall be paid for each voucher. If the total of possible reimbursement is more than the net third allotment, the total of possible reimbursement shall be divided into the net third allotment. The resulting fraction is the third proration factor. The third proration factor shall be applied to each continuing education voucher amount to determine the reimbursement payment to be made for each of these vouchers.

(e) Whenever any training is deemed to satisfy the requirements of this subpart, for purposes of reimbursement pursuant to this section, the training shall be deemed to have been completed on the date upon which it is deemed to satisfy the appropriate training requirement. The local official receiving credit for the training shall be provided with the necessary voucher and information which must be returned completed within thirty days.

Text of proposed rule and any required statements and analyses may be obtained from: James J. O'Keeffe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 202(1)(l) of the Real Property Tax Law (RPTL) authorizes the State Board of Real Property Services to adopt such rules "as may be necessary for the exercise of its powers and the performance of its duties."

Title 3 of Article 3 of the RPTL requires assessors employed by New York City to obtain certification from the State Board of Real Property Services.

2. Legislative Objectives:

The training and certification of New York City assessors.

3. Needs and Benefits:

Title 3 of Article 3 of the Real Property Tax Law, as added by Chapter 139 of the Laws of 2005, requires the State Board of Real Property Services to establish, in rule, a program for the qualifications, training and certification of New York City assessors. The genesis of this bill was the recent scandal involving assessors in the Department of Finance. The Department had approximately 175 individuals serving as assessors who were valuing annually each of the City's almost one million parcels with minimal supervision. The allegation was that some assessors were systematically overvaluing parcels, particularly commercial buildings in Manhattan, and subsequently reducing those values in return for bribes.

Under Title 2 of Article 3, the State Board of Real Property Services has the responsibility for the training and certification of local assessment personnel outside of the assessing units of New York City, Nassau County, Buffalo, Rochester, Syracuse, Albany and Yonkers. This program entails the qualifications, certification and continuing education of the individuals holding 802 appointive assessor positions and 55 county directors of real property tax service agencies, the certification of 489 elective assessor positions, and the qualifications and certification of 94 candidates for assessor and 49 real property appraisers. The State Board prescribes the various standards and requirements for minimum qualifications, certification and continuing education. The Board is also authorized to enforce these requirements through proceedings to remove from office those not in compliance.

Under the present program, the qualifications of appointive assessors are submitted to the agency prior to the municipality making the appointment. If the agency approves the applicant's qualifications, the newly appointed assessor must obtain certification within three years. During that time the assessor must maintain an interim certification by making mandated progress toward certification. If an assessor is unable to obtain certification in the required time due to reasons beyond the assessor's control, that assessor may seek a temporary certificate to enable the assessor to continue in office until certified. Once certified, appointive assessors must satisfy continuing education requirements. Assessors can obtain reimbursement for necessary expenses incurred in complying with these training requirements.

The Final Report of the New York City Department of Finance and Department of Investigation Joint Task Force Charged with eliminating

Corruption in the Department of Finance's Real Property Assessment Unit (January 2004) contained a recommendation to "Require Assessors to Attain the Same Professional Credentials and Standards Required Throughout New York State" (IV[A], p.11). The recommendation included requiring the "State Certified Assessor- Advanced" designation issued by the New York State Office of Real Property Services (NYSORPS), which is not part of the mandated training program. Although this report may have been the genesis of this legislation, its recommendations are not incorporated directly.

Title 3 contains some but not all of the existing provisions for appointive assessors. New York City Assessors have to obtain certification by completing required training, passing a comprehensive examination or receive a waiver based upon a professional designation (§ 354[1][2][3]). These provisions are parallel to those in Title 2 (§ 318[1][2][3]). However, the time limit and interim certification provisions in section 318(1) have not been included. The effective date provides two years for current assessors to obtain certification. The drafters apparently recognized the need for time to attend required training but did not reflect this need in the new program. Certification may thus be a prerequisite to appointment. This is similar to the requirement for town and village justices, who must be trained before serving (Uniform Justice Court Act, § 105), rather than the existing assessor provisions that allow an assessor to serve for up to three years without having obtained certification.

Section 354(4) repeats the language in 318(4) concerning state reimbursement, including the phrase "including continuing education prescribed by the state board". However, the bill does not repeat the language in 310(5)(b) authorizing the State Board to prescribe a continuing education program. Given that the removal provisions of section 358 do not include failure to satisfy continuing education requirements as grounds for removal (c.f. § 322[1][f]), it may be that the reference to continuing education was unintentional and that the Board can not prescribe such a program.

It is unclear which City employees the bill encompasses. New section 352 would have the Board establish minimum qualifications for "(a) chief or inferior assessors and (b) other administrative positions having professional appraisal duties relating to the assessment of real property for purposes of taxation". However, the certification requirements only apply to assessors (§ 354) and candidates for assessor (§ 356). Even if provisions only apply to assessors, the position "city assessor" exists in three different City agencies – the Departments of Finance and Law and the Tax Commission. In addition, appraiser positions exist in departments other than Finance.

The draft rules avoid the question of which City employees are subject to the requirements by making this an annual determination (188-8.1[a]). This will allow ORPS to ensure regularly that the correct individuals are covered. ORPS would make the determination each April 1 and could change it at any time.

In the absence of an interim certification program in the statute, section 188-8.6 is reserved for the necessary provisions should the statute be amended. The rules are silent on whether new assessors have to be certified before appointment. If the statute is not amended, this provision would be implicit and could be added later. Similarly, in the absence of the authority to mandate continuing education, section 188-8.7 is reserved for the necessary provisions should the statute be amended.

The basic course of training consists of the following components:

- (1) assessment administration (New York City);
- (2) fundamentals of data collection;
- (3) fundamentals of real property appraisal;
- (4) income approach to valuation;
- (5) advanced income approach to valuation;
- (6) ethics;
- (7) fundamentals of mass appraisal; and
- (8) computer assisted mass appraisal modeling.

Training taken within three years of the requirements taking effect would be accepted (188-8.5[d]).

4. Costs: (a) To State government: For the current fiscal year, none. As the program is implemented, starting in 2006-07, there will be additional ORPS resources needed, although no estimate has been made. In addition, the funds for reimbursement to local officials for training expenses, \$350,000 for the current fiscal year, will have to be increased in 2006-07 to provide for the expenses of training New York City assessors.

(b) To local governments: The implementation of Title 3 by this proposal will result in lost productivity as New York City assessors take time from training as well as imposing reporting and recordkeeping requirements on the City. In addition, the City may absorb some of the costs of training assessors.

(c) To private regulated parties: None. There are no private regulated parties in this program.

(d) Basis of cost estimates: Past experience and the requirements of Title 3.

5. Local Government Mandates: Title 3 places the mandate on the City of having its assessors trained and certified, with the corollary loss of productivity and recordkeeping. This proposal implements that mandate.

6. Paperwork: Implementation of the program will require maintenance of over 125 training records by the New York State Office of Real Property Services and by the City.

7. Duplication: There are no comparable State or Federal requirements.

8. Alternatives: The proposal could have imposed the existing course of training, resulting in a course of training that is less responsive to the needs of the City. The proposal could have required training that is not as readily available. The proposal could have mandated the same reporting requirements on the City that other local governments face.

9. Federal Standards: There are no Federal regulations concerning this subject.

10. Compliance Schedule: None. Chapter 139 contains the requirement that those assessors currently employed must obtain certification by April 1, 2008. This requirement is not repeated in the proposal.

Regulatory Flexibility Analysis

The amendment proposed would not impose any adverse economic conditions or any reporting, recordkeeping or other compliance requirements on small businesses.

The rule will require New York City to provide information on the appointment of assessors and training they may be taking to satisfy the requirements of the proposal. In addition, the City may suffer a loss in productivity as approximately 150 employees attend approximately 35 hours of training over a two year period. Both of these effects are necessary given the mandate of Chapter 139 of the Laws of 2005, which added Title 3 to Article 3 of the Real Property Tax Law, to require State certification of New York City assessors.

However, the agency has attempted to mitigate the impact on the City. The proposal assures the only the appropriate individuals are subject to the requirements by making this an annual determination. The notice requirement for new assessors is less complicated than the existing requirement for other municipalities, which must submit qualifications of appointees to this agency prior to appointments (9 NYCRR 188-2.4[a]). The basic course of training has been tailored to the needs of the City rather than simply imposing the existing course in 9 NYCRR 188-2.6. Most of the training is available from the International Association of Assessing Officers. By requiring training that can be provided by professionals at centralized locations, the proposal further mitigates the impact on the City and its assessors. And finally, the proposal is the result of discussions with the City, discussions to which individual assessors have had input.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this rule making because the proposal only applies to New York City.

Job Impact Statement

A job impact statement is not required for this rule making because the amendment only concerns New York City civil servants and administration of a statutorily required program by New York City and the New York State Office of Real Property Services.

Department of State

EMERGENCY RULE MAKING

Manufactured Homes

I.D. No. DOS-27-06-00011-E

Filing No. 750

Filing date: June 20, 2006

Effective date: June 20, 2006

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

Action taken: Addition of Part 1210 to Title 19 NYCRR.

Statutory authority: L. 2005, ch. 729, section 4

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

Specific reasons underlying the finding of necessity: This rule is adopted as an emergency measure to preserve the general welfare and because time is of the essence. This rule implements the provisions of new article 21-B (Manufactured Homes) of the Executive Law, which was added by chapter 729 of the Laws of 2005, and which became effective on January 1, 2006. This rule establishes procedures for obtaining the manufacturer's warranty seals and installer's warranty seals required by article 21-B; establishes standards regarding the initial training, certification, and continuing education of manufacturers, retailers, installers, and mechanics of manufactured homes; establishes procedures for the resolution of disputes relating to manufactured homes; and otherwise implements the provisions article 21-B of the Executive Law. Adoption of this rule on an emergency basis preserves the general welfare by permitting the continuation of all aspects of the manufactured housing industry in this State without interruption.

Subject: Obtaining and attaching manufacturer's warranty seals and installer's warranty seals to manufactured homes; certification of manufacturers, retailers, installers, and mechanics of manufactured homes; and administrative procedures for resolution of disputes relating to the construction, installation, or servicing of manufactured homes.

Purpose: To implement art. 21-B of the Executive Law, as added by L. 2005, ch. 729.

Substance of emergency rule: Chapter 729 of the Laws of 2005 added Article 21-B (Manufactured Homes) of the Executive Law. This emergency rule has been adopted to implement the provisions of the new Article 21-B. This rule establishes procedures for obtaining and the manufacturer's warranty seals and installer's warranty seals which must be attached to manufactured homes. This rule establishes the qualifications for certification of manufacturers, retailers, installers, and mechanics of manufactured homes. This rule establishes administrative procedures for resolution of disputes relating to the construction, installation, or servicing of manufactured homes. This rule also establishes fees relating to warranty seals, certifications, approval of instructional providers and approval of courses.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 17, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: jball@dos.state.ny.us

Regulatory Impact Statement

1. STATUTORY AUTHORITY.

The statutory authority for this rule is section 4 of Chapter 729 of the Laws of 2005, which provides that the Department of State is authorized and empowered to take such steps, including the promulgation of rules and regulations, as may be necessary for the proper implementation of Article 21-B (Manufactured Homes) of the Executive Law on January 1, 2006. Article 21-B (Manufactured Homes) of the Executive Law was added by Chapter 729 of the Laws of 2005, and took effect on January 1, 2006. A rule similar to this rule was adopted on an emergency basis on December 22, 2005. That rule expired on March 21, 2006. A second rule similar to this rule was adopted on an emergency basis on March 22, 2006. That rule expired on June 19, 2006. This rule, which will be effective on the date of filing (June 20, 2006), implements Article 21-B.

2. LEGISLATIVE OBJECTIVES.

Article 21-B of the Executive Law was enacted for the purpose of ensuring that manufactured homes are installed and serviced in a professional manner; ensuring that disputes regarding the manufacture, installation, and servicing of manufactured homes be resolved fairly and expeditiously; providing a degree of security for the payment of legitimate claims; and otherwise implementing the provisions of the federal Manufactured Housing Improvement Act of 2000 (PL 106-569). The Manufactured Housing Improvement Act of 2000 requires States to enact requirements for the licensing or certification of installers of manufactured homes, training, dispute resolution, and other matters relating to manufactured homes. Article 21-B of the Executive Law requires manufacturers and installers to attach warranty seals to manufactured homes installed in this State, requires manufacturers, retailers, installers, and mechanics to be certified by the Department of State, and requires the Department of State to provide administrative procedures for the resolution of disputes.

The rule now being adopted by the Department of State establishes procedures for obtaining and attaching the warranty seals required by Article 21-B; establishes standards for certification as a manufacturer, retailer, installer, or mechanic of manufactured homes; establishes administrative dispute resolution procedures; and establishes fees.

3. NEEDS AND BENEFITS.

This rule establishes procedures regarding manufacturer's and installer's warranty seals. These procedures are necessary to implement the warranty seal provisions of Article 21-B. These provisions permit manufacturers and installers to obtain the warranty seals, specify the manner in which and place where the warranty seals are to be attached, establish the fees to be paid by manufacturers and installers for obtaining the warranty seals, and establish the maximum fees that can be charged by manufacturers and installers for attaching the warranty seals.

This rule establishes qualifications and procedures for obtaining certification as a manufacturer, retailer, installer, or mechanic. These qualifications and procedures are necessary to implement the certification provisions of Article 21-B. The qualifications established by this rule include minimum experience and education requirements for retailers, installers, and mechanics; initial training requirements for installers and mechanics; and continuing education requirements for all classes of certificate holders. By requiring certification, specifying minimum qualifications for certification, and specifying continuing education requirements, this rule will benefit purchasers of manufactured homes by helping to ensure that homes will be installed in a professional manner. In addition, this rule requires each certificate holder to file a deposit account control agreement evidencing the existence of a deposit account which is maintained with a financial institution and which is pledged to the Department of State, a letter of credit, or a surety bond (provided, however, that a person holding a limited certificate will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond if he or she is covered by his or her employer's deposit account control agreement, letter of credit, or surety bond; and provided further that this rule includes provisions that will permit a person or business entity who has applied for, but not yet obtained, a deposit account control agreement, letter of credit, or surety bond to obtain a temporary certificate under certain circumstances). These financial responsibility requirements will benefit owners of manufactured homes by providing a measure of assurance that legitimate claims relating to the delivered condition, installation, service, or construction of a manufactured home will be satisfied.

The rule establishes procedures for the resolution of disputes involving the delivered condition, installation, service or construction of manufactured homes. These procedures are necessary to implement the dispute resolution provisions of Article 21-B. The procedures established by this rule include an informal dispute resolution process and an administrative hearing process for disputes which cannot be resolved informally. These procedures will benefit manufacturers, retailers, installers, mechanics, lending entities, and manufactured home owners by permitting expeditious and cost-effective resolution of disputes.

The rule establishes fees, as required by Article 21-B. The fees will defray the cost of administering Article 21-B.

4. COSTS.

a. Cost to regulated parties for the implementation of and continuing compliance with this rule.

This rule will require manufacturers and installers to obtain warranty seals to be attached to manufactured homes. Manufacturers will pay \$125 per seal, and installers will pay \$35 per seal if they request 5 or fewer, or \$25 per seal if they request 6 or more. This rule will also permit manufacturers and installers to charge purchasers a fee for attaching such seals. The fee that manufacturers and installers will be permitted to charge for attaching the seals will cover their cost of obtaining the seals and provide an additional sum (between \$15 and \$25) to cover anticipated administrative expenses.

This rule will require manufacturers, retailers, installers, and mechanics to be certified by the Department of State. The fee for certification for a period of 2 years will be \$200 for manufacturers, retailers, and installers, and \$100 for mechanics. However, a person employed by a person who or a business entity which is certified may apply for a limited certificate, which is valid only while such person is acting within the scope of his or her employment by his or her certified employer. The fee for a limited certificate will be \$25 for the 2-year term of the limited certificate.

A certified party must also file a deposit account control agreement, letter of credit, or surety bond with the Department of State (provided, however, that person who holds a limited certificate will not be required to file his or her own deposit account control agreement, letter of credit, or

surety bond if he or she is covered by the deposit account control agreement, letter of credit, or surety bond filed by his or her employer). Based on discussions with a representative of the insurance industry, the Department of State estimates that the premiums to be paid for surety bonds having terms of 2 years will be between \$800 and \$1,200 for the \$50,000 surety bond to be filed by a manufacturer, between \$400 and \$600 for the \$25,000 surety bond to be filed by a retailer, approximately \$200 for the \$10,000 surety bond to be filed by an installer, and approximately \$200 for the \$5,000 surety bond to be filed by a mechanic. The Department of State estimates that the fee for obtaining a letter of credit will typically be 1% of the face amount of the letter of credit per year, subject to a minimum fee of \$100 per year; this indicates that the fee for a \$50,000 letter of credit will be \$500 per year (or \$1,000 for 2 years), the fee for a \$25,000 letter of credit will be \$250 per year (or \$500 for 2 years), the fee for a \$10,000 letter of credit will be \$100 per year (or \$200 for 2 years), and the fee for a \$5,000 letter of credit will be \$100 per year (or \$200 for 2 years).

A person certified as an installer will be required to complete 16 hours of initial training prior to certification, and a business entity certified as an installer will be required to employ at least one person who has completed such initial training and who is certified by the Department of State. Based on discussions with a representative of a private trade organization that currently provides instructional courses in the manufactured housing industry, the Department of State estimates that the fees that will be charged by instructional providers who provide such initial training will be between \$200 and \$300.

A person certified as a mechanic will be required to complete 6 hours of initial training prior to certification, and a business entity certified as a mechanic will be required to employ at least one person who has completed such initial training and who is certified by the Department of State. Based on discussions with a representative of a private trade organization that currently provides instructional courses in the manufactured housing industry, the Department of State estimates that the fees that will be charged by instructional providers who provide such initial training will be between \$100 and \$125.

A person certified as a manufacturer, retailer, installer, or mechanic will be required to complete 3 hours of continuing education every 2 years, and a business entity certified as a manufacturer, retailer, installer, or mechanic will be required to employ at least one person who has completed such continuing education and who is certified by the Department of State. Based on discussions with a representative of a private trade organization that currently provides instructional courses in the manufactured housing industry, the Department of State estimates that the fees that will be charged by instructional providers who provide such continuing education will be approximately \$50.

A private trade association or other entity applying for approval as an instructional provider will be required to pay \$100 once every 2 years. An approved instructional provider applying for approval of a course it wishes to provide will be required to pay \$50 plus \$5 for each student who takes the course.

b. Costs to the Department of State:

The Department of State anticipates that the cost to the Department of State to administer the programs contemplated by Article 21-B will be approximately \$490,000 per year. Those costs include the costs associated with the 5 employees that the Department of State anticipates it will need to administer the programs. The costs of administering Article 21-B are largely attributed to the statute and not significantly to this implementing rule.

c. Costs to other State agencies:

This rule does not impose any costs on other State agencies.

d. Cost to local governments:

This rule does not impose any costs on local governments.

5. PAPERWORK.

Under this rule, manufacturers and installers will be required to file written requests for warranty seals; installers will be required to file quarterly reports of installations preformed; manufacturers, retailers, installers, and mechanics will be required to file written applications for certification and for periodic renewal of certification; a private trade organization or other entity wishing to provide initial training or continuing education will be required to file a written application for approval as an instructional provider and for periodic renewals of such approval; approved instructional providers will be required to file written applications for approval or courses to be provided; and instructional providers will be required to file reports of each course presented. It is the intention of the Department of State to develop and implement request, application, and report forms, to

post such forms on the Department of State's web page, and otherwise to make such forms freely available to regulated parties.

6. LOCAL GOVERNMENT MANDATES.

This rule does not impose any duty on local governments. (However, as indicated in the Regulatory Flexibility Analysis, this rule does specify that no certificate of occupancy shall be issued for any manufactured home installed on or after January 1, 2006 unless the required warranty seals have been attached to the home; this provision will affect every local government that issues certificates of occupancy.)

7. DUPLICATION.

The Department of State is not aware of any relevant rule or other legal requirement of the State or Federal government which duplicates, overlaps or conflicts with this rule.

8. ALTERNATIVES.

The Department of State has not considered any significant alternatives to this rule.

9. FEDERAL STANDARDS.

The Department of State is not aware of any instance in which this rule exceeds any minimum standards of the federal government for the same or similar subject areas.

10. COMPLIANCE SCHEDULE.

Article 21-B became effective on January 1, 2006, and many of its provisions took effect on that date. However, Article 21-B does not require manufacturers, retailers, installers, and mechanics to be certified until July 1, 2006.

This rule can be complied with immediately. This rule permits manufacturers and installers to request warranty seals prior to July 1, 2006 even if they are not yet certified. Therefore, a manufacturer or installer need not wait until it has applied for and obtained certification before it can request warranty seals. This rule also establishes the qualifications for certification; these provisions provide regulated parties with the information necessary to apply for and obtain the required certification prior to July 1, 2006. This rule also includes transitional provisions, as required by section 3 of Chapter 729 of the Laws of 2005, that will permit installers and mechanics to obtain certification prior to completion of the initial training requirements that otherwise would apply.

Finally, it is possible that for a short period of time after certification will first be required (July 1, 2006), applicants for certification may experience a short delay in obtaining the required deposit account control agreement, letter of credit, or surety bond. To address this possibility, this rule includes provisions that will allow such an applicant to obtain a temporary certificate, provided that (1) the applicant satisfies all other qualification for certification, (2) the applicant has made a good faith application for a deposit account control agreement, letter of credit, or surety bond, (3) the application for the control agreement, letter of credit, or surety bond has not been denied, (4) the applicant believes, in good faith, that the application for the control agreement, letter of credit, or surety bond will be approved, and (5) the applicant provides to the Department of State such proof of the foregoing as may be requested by the Department of State. A temporary certificate will be valid for a period of not more than 90 days. No temporary certificate will be issued after September 30, 2006.

Regulatory Flexibility Analysis

1. EFFECT OF RULE.

This rule applies to all persons and all business entities who manufacture, sell, install, or service manufactured homes, including all small businesses that manufacturer, sell, install, or service manufactured homes. The Department of State estimates that this rule will apply to approximately 268 small businesses engaged in the retail selling of manufactured homes and approximately 100 small businesses engaged in the installation manufactured homes for buyers. This rule will also apply to small businesses that "service" (i.e., modify, alter or repair the structural systems of) manufactured homes; however, the Department of State is unable to determine at this time the number of small businesses that service manufactured homes. This rule will also apply to any small business that manufactures or produces manufactured homes. The Department of State estimates that this rule will apply to approximately 36 manufacturers; however, the Department of State believes that few, if any, of such manufacturers are small businesses.

This rule does not apply directly to local governments. However, this rule does specify that no certificate of occupancy shall be issued for any manufactured home installed on or after January 1, 2006 unless the required warranty seals have been attached to the home. This provision will affect every local government that issues certificates of occupancy.

2. COMPLIANCE REQUIREMENTS.

This rule requires manufacturers and installers of manufactured homes to obtain warranty seals from the Department of State, and to attach the warranty seals to manufactured homes that are installed on or after January 1, 2006. (The rule specifies certain situations in which a manufacturer's warranty seal is not required.) The seals are to be requested in writing, on a form to be supplied by or otherwise acceptable to the Department of State.

This rule requires installers to file quarterly reports with the Department of State specifying, with respect to each manufactured home installed by the installer during the reporting period covered by such report, the location where such manufactured home was installed, the owner of such manufactured home at the time of installation, the type or model of such manufactured home, the manufacturer of such manufactured home; and the written certification of the installer that the installation of such manufactured home meets the standards of the New York State Uniform Fire Prevention and Building Code. The quarterly reports are to be filed on forms provided by or otherwise acceptable to the Department of State.

This rule requires each person and each business entity that manufactures, sells, installs, or services manufactured homes to obtain certification from the Department of State. Applications for certification are to be in writing, on forms provided by or otherwise acceptable to the Department of State. The qualifications for obtaining and retaining certification are summarized as follows:

(a) Each certificate holder must file a deposit account control agreement evidencing the existence of a deposit account which is maintained with a financial institution and which is pledged to the Department of State, a letter of credit, or a surety bond. However, a person who is employed by a person or business entity which is certified may apply for a limited certificate, which is valid only while such person is acting within the scope of his or her employment by his or her certified employer. The holder of a limited certificate is not required to file a deposit account control agreement, letter of credit, or surety bond, provided that his or her employer has filed an acceptable deposit account control agreement, letter of credit, or surety bond. In addition, the Department of State has been advised that applicants for certification have experienced difficulty in obtaining surety bonds prior to the date on which certification will be required (July 1, 2006). Accordingly, this rule includes provisions that will allow applicants for certification to obtain temporary certificates, provided that the applicant is attempting, in good faith, to obtain the required deposit account control agreement, letter of credit, or surety bond, and provided that certain other conditions are satisfied. A temporary certificate will be valid for not more than 90 days.

(b) A certified manufacturer must be approved by the United States Department of Housing and Urban Development to construct manufactured homes.

(c) A person certified as a retailer, installer, or mechanic must have at least a high school education, or the equivalent. A business entity certified as a retailer, installer, or mechanic must employ at least one person who has at least a high school education, or the equivalent, and who is certified by the Department of State.

(d) A person certified as a retailer, installer, or mechanic must satisfy specified experience requirements prior to certification. A business entity certified as a retailer, installer, or mechanic must employ at least one person who satisfies the specified experience requirements and who is certified by the Department of State.

(e) A person certified as an installer or as a mechanic must satisfy specified initial training requirements prior to certification. (The rule includes transitional provisions which will permit a person who has not completed the initial training, but who otherwise qualifies for certification as an installer or mechanic, to obtain certification prior to completion of the initial training; such certification will be valid for a period of one year.) A business entity certified as an installer or mechanic must employ at least one person who has satisfied the specified initial training requirements and who is certified by the Department of State.

(f) A person certified as an installer or mechanic must pass a written examination prior to certification. (This rule includes provisions which permit a person certified or licensed as an installer or mechanic by another State to obtain certification in this State without taking the written examination, provided that the qualifications for licensure or certification in such other State are substantially similar to the standards for certification in this State, and provided further that such person satisfies all other requirements for certification in this State.) A business entity certified as an installer or mechanic must employ at least one person who has passed the written examination and who is certified by the Department of State.

(g) A person certified as a manufacturer, retailer, installer, or mechanic must satisfy specified continuing education requirements every 2 years. A

business entity certified as a manufacturer, retailer, installer, or mechanic must employ at least one person who satisfies the specified continuing education requirements and who is certified by the Department of State.

(h) Each certified business entity must employ at least one certified person.

(i) At least one person certified by the Department of State as an installer must be present at the home site during the installation of a manufactured home.

(j) At least one person certified by the Department of State as a mechanic must be present at the home site during the performance of any service.

(k) Any person or business entity owning or operating more than one manufacturing plant that manufactures, delivers, or sells manufactured homes in the State of New York shall be required to obtain a separate certification as a manufacturer for each such manufacturing plant.

(l) Any person or business entity owning or operating more than one retail sales location in the State of New York shall be required to obtain a separate certification as a retailer for each such retail sales location.

This rule requires any private trade association or other entity wishing to provide initial training courses or continuing education courses to apply to the Department of State for approval as an instructional provider. This rule requires approved instructional providers to apply to the Department of State for approval of each course it proposes to provide. All applications are to be submitted in writing, on forms provided by or otherwise acceptable to the Department of State. Instructional providers are required to keep records showing the date and location of each course presentation and the names and addresses of each student taking the course, and to file reports showing such information with the Department of State.

This rule provides that no governmental agency or department or other person or entity responsible for issuing certificates of occupancy in any jurisdiction shall issue a certificate of occupancy for any manufactured home installed in such jurisdiction at any time on or after January 1, 2006 unless the manufacturer's warranty seal required by this rule has been attached to such manufactured home (unless such manufacturer's warranty seal is not required by reason of an exception set forth in the rule), the installer's warranty seal required by this section has been attached to such manufactured home, and the governmental agency or department or other person or entity responsible for issuing certificates of occupancy has independently determined that such manufactured home has been installed in accordance with the applicable provisions of the New York State Uniform Fire Prevention and Building Code.

3. PROFESSIONAL SERVICES.

Small businesses are not likely to require professional services in order to comply with the reporting, record keeping and other requirements of this rule.

Local governments are not likely to require professional services in order to comply with the requirements of this rule.

4. COMPLIANCE COSTS.

Manufacturer's Warranty Seals. The cost of obtaining manufacturer's warranty seals will be \$125 per seal. A manufacturer will be permitted to charge up to \$150 for attaching each seal.

Installer's Warranty Seals. The cost of obtaining an installer's warranty seal will be \$35 per seal (if fewer than 6 are requested at one time) or \$25 per seal (if 6 or more are requested at one time). An installer will be permitted to charge up to \$50 for attaching each seal.

Certification as a Manufacturer. The initial cost of obtaining certification as a manufacturer will be \$200 for certification for 2 years, plus the cost of the surety bond or letter of credit. The Department of State estimates that the premium for a \$50,000 surety bond will be approximately \$800 to \$1,200 for 2 years, and that the fee for a \$50,000 letter of credit will be approximately \$500 per year (or \$1,000 for 2 years). Therefore, the Department of State estimates that the initial cost of obtaining certification as a manufacturer will be between \$1,000 and \$1,400. However, in the case of an applicant who files a deposit account control agreement, instead of a letter of credit or surety bond, the initial cost of obtaining certification as a manufacturer will be \$200 plus any costs associated with establishing and maintaining the deposit account evidenced by the deposit account control agreement. Further, a person applying for a limited certificate as a manufacturer will be required to pay \$25 for certification for 2 years, and will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the initial cost of obtaining a limited certificate as a manufacturer will be \$25.

A certified manufacturer will be required to renew such certification every 2 years, to renew the surety bond (if applicable) or letter of credit (if

applicable) every 2 years, and to take 3 hours of continuing education courses every 2 years. The fee for renewing the certification will be \$200 for 2 years. The Department of State estimates that the renewal premium for the surety bond will be approximately \$800 to \$1,200 for 2 years, the fee for renewing the letter of credit will be approximately \$500 per year (or \$1,000 for 2 years), and the fee to be paid to the instructional provider for the required continuing education courses will be approximately \$50. Therefore, the Department of State estimates that the cost of maintaining certification as a manufacturer will be between \$1,050 and \$1,450 every 2 years, or between \$525 and \$725 per year. However, in the case of a certified manufacturer who files a deposit account control agreement, instead of a letter of credit or surety bond, the cost of maintaining certification will include the cost of renewing the certificate (\$200 for 2 years), plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$250 every 2 years, or \$125 per year, plus any costs associated with maintaining the deposit account evidenced by the deposit account control agreement. Further, in the case of a person holding a limited certificate as a manufacturer, renewal fee will be \$25 for 2 years, and such person will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the cost of maintaining a limited certificate as a manufacturer will include the cost of renewing the certificate (\$25 for 2 years) plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$75 every 2 years, or \$37.50 per year.

Certification as a Retailer. The initial cost of obtaining certification as a retailer will be \$200 for certification for 2 years, plus the cost of the surety bond or letter of credit. The Department of State estimates that the premium for a \$25,000 bond will be approximately \$400 to \$600 for 2 years, and that the fee for a \$25,000 letter of credit will be approximately \$250 per year (or \$500 for 2 years). Therefore, the Department of State estimates that the initial cost of obtaining certification as a retailer will be between \$600 and \$800. However, in the case of an applicant who files a deposit account control agreement, instead of a letter of credit or surety bond, the initial cost of obtaining certification as a retailer will be \$200 plus any costs associated with establishing and maintaining the deposit account evidenced by the deposit account control agreement. Further, a person applying for a limited certificate as a retailer will be required to pay \$25 for certification for 2 years, and will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the initial cost of obtaining a limited certificate as a retailer will be \$25.

A certified retailer will be required to renew such certification every 2 years, to renew the surety bond (if applicable) or the letter of credit (if applicable) every 2 years, and to take 3 hours of continuing education courses every 2 years. The fee for renewing the certification will be \$200 for 2 years. The Department of State estimates that the renewal premium for the surety bond will be approximately \$400 to \$600 for 2 years, the fee for renewing the letter of credit will be approximately \$250 per year (or \$500 for 2 years), and the fee to be paid to the instructional provider for the required continuing education courses will be approximately \$50. Therefore, the Department of State estimates that the cost of maintaining certification as a retailer will be between \$650 and \$850 every 2 years, or between \$325 and \$425 per year. However, in the case of a certified retailer who files a deposit account control agreement, instead of a letter of credit or surety bond, the cost of maintaining certification will include the cost of renewing the certificate (\$200 for 2 years), plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$250 every 2 years, or \$125 per year, plus any costs associated with maintaining the deposit account evidenced by the deposit account control agreement. Further, in the case of a person holding a limited certificate as a retailer, renewal fee will be \$25 for 2 years, and such person will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the cost of maintaining a limited certificate as a retailer will include the cost of renewing the certificate (\$25 for 2 years) plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$75 every 2 years, or \$37.50 per year.

Certification as an Installer. The initial cost of obtaining certification as an installer will be \$200 for certification for 2 years, plus the cost of the surety bond or letter of credit, plus the cost of the required initial training. The Department of State estimates that the premium for a \$10,000 bond will be approximately \$200 for 2 years, the fee for a \$10,000 letter of credit will be approximately \$100 per year (or \$200 for 2 years), and the fee to be paid to the instructional provider for the required initial training courses will be between \$200 and \$300. Therefore, the Department of State esti-

mates that the initial cost of obtaining certification as an installer will be between \$600 and \$700. However, in the case of an applicant who files a deposit account control agreement, instead of a letter of credit or surety bond, the initial cost of obtaining certification as an installer will be \$200, plus the cost of obtaining the required initial training (estimated at \$200 to \$300), for a total of \$400 to \$500, plus any costs associated with establishing and maintaining the deposit account evidenced by the deposit account control agreement. Further, a person applying for a limited certificate as an installer will be required to pay \$25 for certification for 2 years, and will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the initial cost of obtaining a limited certificate as an installer will include the certification fee (\$25) plus the cost of obtaining the required initial training (estimated at \$200 to \$300), for a total of \$225 to \$325.

A certified installer will be required to renew such certification every 2 years, to renew the surety bond (if applicable) or letter of credit (if applicable) every 2 years, and to take 3 hours of continuing education courses every 2 years. The fee for renewing the certification will be \$200 for 2 years. The Department of State estimates that the renewal premium for the surety bond will be approximately \$200 for 2 years, the fee for renewing the letter of credit will be approximately \$100 per year (or \$200 for 2 years), and the fee to be paid to the instructional provider for the required continuing education courses will be approximately \$50. Therefore, the Department of State estimates that the cost of maintaining certification as an installer will be \$450 every 2 years, or \$225 per year. However, in the case of a certified installer who files a deposit account control agreement, instead of a letter of credit or surety bond, the cost of maintaining certification will include the cost of renewing the certificate (\$200 for 2 years), plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$250 every 2 years, or \$125 per year, plus any costs associated with maintaining the deposit account evidenced by the deposit account control agreement. Further, in the case of a person holding a limited certificate as an installer, renewal fee will be \$25 for 2 years, and such person will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the cost of maintaining a limited certificate as an installer will include the cost of renewing the certificate (\$25 for 2 years) plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$75 every 2 years, or \$37.50 per year.

Certification as a Mechanic. The initial cost of obtaining certification as a mechanic will be \$100 for certification for 2 years, plus the cost of the surety bond or letter of credit, plus the cost of the required initial training. The Department of State estimates that the premium for a \$5,000 surety bond will be approximately \$200 for 2 years, the fee for a \$5,000 letter of credit will be approximately \$100 per year (or \$200 for 2 years), and the fee to be paid to the instructional provider for the required initial training courses will be between \$100 and \$125. Therefore, the Department of State estimates that the initial cost of obtaining certification as a mechanic will be between \$400 and \$425. However, in the case of an applicant who files a deposit account control agreement, instead of a letter of credit or surety bond, the initial cost of obtaining certification as a mechanic will be \$100, plus the cost of obtaining the required initial training (estimated at \$100 to \$125), for a total of \$200 to \$225, plus any costs associated with establishing and maintaining the deposit account evidenced by the deposit account control agreement. Further, a person applying for a limited certificate as a mechanic will be required to pay \$25 for certification for 2 years, and will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the initial cost of obtaining a limited certificate as a mechanic will include the certification fee (\$25) plus the cost of obtaining the required initial training (estimated at \$100 to \$125), for a total of \$125 to \$150.

A certified mechanic will be required to renew such certification every 2 years, to renew the surety bond (if applicable) or letter of credit (if applicable) every 2 years, and to take 3 hours of continuing education courses every 2 years. The fee for renewing the certification will be \$100 for 2 years. The Department of State estimates that the renewal premium for the surety bond will be approximately \$200 for 2 years, the fee for renewing the letter of credit will be approximately \$100 per year (or \$200 for 2 years), and the fee to be paid to the instructional provider for the required continuing education courses will be approximately \$50. Therefore, the Department of State estimates that the cost of maintaining certification as a mechanic will be \$350 every 2 years, or \$175 per year. However, in the case of a certified mechanic who files a deposit account

control agreement, instead of a letter of credit or surety bond, the cost of maintaining certification will include the cost of renewing the certificate (\$100 for 2 years), plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$150 every 2 years, or \$75 per year, plus any costs associated with maintaining the deposit account evidenced by the deposit account control agreement. Further, in the case of a person holding a limited certificate as a mechanic, renewal fee will be \$25 for 2 years, and such person will not be required to file his or her own deposit account control agreement, letter of credit, or surety bond. Therefore, the Department of State estimates that the cost of maintaining a limited certificate as a mechanic will include the cost of renewing the certificate (\$25 for 2 years) plus the cost of the required continuing education courses (estimated to be \$50), for a total of \$75 every 2 years, or \$37.50 per year.

The foregoing compliance costs are not likely to vary significantly by reason of the size of the business. An installer who requests fewer than 6 installer's warranty seals at a time will be required to pay \$35 per seal, or \$10 per seal more than an installer who requests at least 6 warranty seals at a time. In addition, the premium for a surety bond or fee for a letter of credit may be dependent, in part, on the size of the business for which the bond is issued.

Local governments are not likely to incur any costs in complying with this rule.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

The Department of State will print the warranty seals required by this rule. The Department of State intends to prepare the application forms that will be required by this rule, and to post such forms on the Department's web page and otherwise make such forms freely available to the regulated parties. The Department of State believes that it will be economically and technologically feasible for small businesses to comply with this rule.

6. MINIMIZING ADVERSE IMPACT.

It appears that the Legislature intended that purchasers of manufactured homes be afforded the full measure of the consumer protections contemplated by Article 21-B without regard to the size of the businesses involved in the manufacture, sale, installation, or servicing of the home. Further, the Department of State is not aware of any information suggesting that compliance with this rule will be significantly more difficult for small businesses than for it will be for larger businesses. Accordingly, this rule makes no special provisions for small businesses.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

The Department of State has solicited comments from the manufactured home industry, including manufacturers, retailers, and installers, and from the insurance industry, and the Department of State will continue to solicit comments from those industries.

The Department of State will contact local code enforcement officials to inform them of Article 21-B and this rule, and the impact of Article 21-B and this rule on the installation of manufactured homes in this State.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule implements Article 21-B of the Executive Law. Both Article 21-B and this rule apply uniformly throughout the State, including all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The reporting, recordkeeping and other compliance requirements of this rule are described in paragraph 2 of the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Professional services are not likely to be required in rural areas in order to comply with such requirements.

3. COSTS.

An estimate of the initial capital costs and an estimate of the annual cost of complying with this rule are set forth in paragraph 4 of the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Such costs are not likely to vary significantly for different types of public and private entities in rural areas. An installer who requests fewer than 6 installer's warranty seals at a time will be required to pay \$35 per seal, or \$10 per seal more than an installer who requests at least 6 warranty seals at a time. In addition, the fee for a letter of credit or premium for a surety bond may be dependent, in part, on the location of the business for which the letter of credit or surety bond is issued.

4. MINIMIZING ADVERSE IMPACT.

It appears that the Legislature intended that purchasers of manufactured homes be afforded the full measure of the consumer protections contemplated by Article 21-B without regard to the location of the businesses

involved in the manufacture, sale, installation, or servicing of the home. Further, the Department of State is not aware of any information suggesting that compliance with this rule will be significantly more difficult for regulated parties located in rural areas than for it will be for regulated parties located in suburban or metropolitan areas. Accordingly, this rule makes no special provisions for regulated parties located in rural areas.

5. RURAL AREA PARTICIPATION.

The Department of State has solicited comments from the manufactured home industry, including manufacturers, retailers, and installers, and from the insurance industry, and the Department of State will continue to solicit comments from those industries, including representatives of those industries located in rural areas.

The Department of State will contact local code enforcement officials, including local code enforcement officials located in rural areas, to inform them of Article 21-B and this rule, and the impact of Article 21-B and this rule on the installation of manufactured homes in this State.

Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities.

This rule establishes the procedures for obtaining and attaching the manufacturer's warranty seal and installer's warranty seal required by Article 21-B of the Executive Law, the fees to be paid by the manufacturer and installer to obtain the warranty seals, and the maximum fees that may be charged to the customer for attaching the warranty seals to the manufactured home. The maximum fee that may be charged to a customer for attaching the required seals will be \$200. The typical delivered and installed cost of a manufactured home in this State is approximately \$70,000. Therefore, the cost of the warranty seals will be less than 0.3% of the cost of a home, and the statutory requirement that warranty seals be attached, as implemented by this rule, should not have a substantial impact on the market for manufactured homes or on jobs or employment opportunities in the manufactured home industry.

This rule also establishes procedures for determination of certain disputes regarding manufactured homes by the Department of State. Article 21-B directs the Department of State to establish such procedures. It is anticipated that by providing for administrative determination of disputes, this rule will reduce the litigation expenses for all parties involved in such disputes. Therefore, the statutory requirement that the Department of State provided for administrative resolution of disputes, as implemented by this rule, should not have a substantial impact on jobs or employment opportunities in the manufactured home industry.

This rule also established the qualifications for obtaining certification as a manufacturer, retailer, installer, or mechanic of manufactured homes. A person or business entity applying for certification will incur the following costs:

(1) Generally, the cost of obtaining a certification will be \$100 per year in the case of a manufacturer, retailer, and installer, and \$50 per year in the case of a mechanic. However, a person who is employed by a person who or a business entity which is certified may apply for a limited certification, which is valid only while such person is acting within the scope of his or her employment by his or her certified employer; the cost of obtaining such a limited certificate will be \$12.50 per year.

(2) Installers and mechanics may be required to pay fees to the instructional providers who present the initial training courses required for certification, and all certificate holders may be required to pay fees to the instructional providers who present the continuing education courses required to maintain certified status.

(3) Generally, each certificate holder will be required to file a deposit account control agreement, letter of credit, or surety bond. Those certificate holders who file a letter of credit will be required to pay fees to the financial institutions that issue such letters of credit, and those certificate holders who file a surety bond will be required to pay premiums to the insurance companies that issue such bonds. However, the holder of a limited certificate will not be required to file a deposit account control agreement, letter of credit, or surety bond, provided that his or her certified employer has filed an acceptable deposit account control agreement, letter of credit, or surety bond.

It is anticipated that the total cost of certification, instruction, and bonding will be relatively modest, particularly when these costs are spread over all the units manufactured by a certified manufacturer, sold by a certified retailer, installed by a certified installer, or serviced by a certified mechanic, during the course of a year. Therefore, the statutorily mandated certification process, as implemented by this rule, should not add a significant sum to the total cost of a manufactured home in this State, and should

not have a substantial impact on jobs or employment opportunities in the manufactured home industry.

NOTICE OF EXPIRATION

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

Apartment Information Vendors

I.D. No.	Proposed	Expiration Date
DOS-24-05-00003-P	June 15, 2005	June 15, 2006

Susquehanna River Basin Commission

INFORMATION NOTICE

SUSQUEHANNA RIVER BASIN COMMISSION NOTICE OF PROPOSED RULE MAKING

SUMMARY: This document contains extensive amendments to project regulations concerning standards and hearings/enforcement actions. Because revisions are too numerous to show within the original regulations, proposed parts 803, 804 and 805 are being published here in their entirety, with an explanation of changes in the SUPPLEMENTARY INFORMATION section below. These regulations provide the procedural and substantive rules for SRBC review and approval of water resources projects and the procedures governing hearings and enforcement actions. These amendments include additional due process safeguards, add new standards for projects, improve organizational structure, incorporate recently adopted policies and clarify language.

DATES: Comments on these proposed amendments may be submitted to the SRBC on or before September 1, 2006. The Commission has scheduled public hearings on the proposed rules as follows:

- August 8, 2006, 6:30 p.m. – Owego Treadway Inn, Owego, N.Y.
- August 10, 2006, 8:30 a.m. – PA Bureau of Topographic and Geologic Survey, Middletown, PA.
- August 10, 2006, 6:30 p.m. – Kings College, Snyder Room, Wilkes-Barre, Pa.

Those wishing to testify are asked to notify the Commission in advance if possible at the regular or electronic addresses given below.

ADDRESSES: Comments may be mailed to: Mr. Richard A. Cairo, Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391; rcairo@srbc.net.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel/ Secretary, 717-238-0423; Fax: 717-238-2436; e-mail: rcairo@srbc.net. Also, for further information on the proposed rule making action, visit the Commission's web site at www.srbc.net.

SUPPLEMENTARY INFORMATION:

Background

The SRBC adopted a final rule on May 11, 1995, published at 60 FR 31391, June 15, 1995 establishing: (1) the scope and procedures for review and approval of projects under Section 3.10 of the Susquehanna River Basin Compact, Pub. L. 91-575; 83 Stat. 1509 et seq. (the compact); (2) special standards under Section 3.4(2) of the compact governing water withdrawals and consumptive use of water; and (3) procedures for hearings and enforcement actions.

Need for Amendments

After 11 years of experience with these regulations, the SRBC has uncovered many provisions that require strengthening, reorganization and clarification. In addition, the Commission has since adopted several important policies relating to the management of the basin's water resources and the enforcement of these regulations. As a matter of sound legal practice, these policies need to be incorporated into the language of the regulations.

Highlights of Major Amendment

18 CFR PART 803 -- REVIEW AND APPROVAL OF PROJECTS

Subpart A -- General Provisions

1. Section 803.3 Definitions. – A definition for “change in ownership” has been included because of modifications proposed in Section 803.4, related to certain grandfathered uses or withdrawals.

2. Section 803.4 Projects requiring review and approval. – This section reorganizes and expands what projects require review and approval and whether any exemptions apply. In part, this section consolidates provisions currently contained in various sections of the existing regulations. A significant addition is that to the extent that a consumptive water use project involves a withdrawal from ground or surface water, the withdrawal will also be subject to review.

Additionally, the current 100,000 gallons per day (gpd) threshold for withdrawals has been expanded to include any combination of ground or surface water withdrawals exceeding that threshold. This section also will end the recognition of “pre-compact” or “grandfathered” consumptive uses or withdrawals upon a change of ownership, and will end the practice under existing Section 803.31 of allowing the transfer of project approvals when a change of ownership occurs.

Exceptions are contained in the definition of the term “change of ownership” for the transfer of projects involving corporate reorganizations, transfers to certain family members, and transfers of agricultural land for so long as it continues to be used for agricultural purposes. (The existing project review and approval requirements are currently suspended for projects involving agricultural water use and the Commission intends to continue the suspension as its member jurisdictions actively pursue alternative consumptive use compliance options for agricultural operations in cooperation with the Commission.)

Subpart B -- Application Procedure

3. Section 803.12 Constant-rate aquifer testing. – Requirements regarding constant-rate aquifer tests are set forth in a new section and expanded to incorporate a time limit for testing to occur.

4. Section 803.14 Contents of application. – This section is reorganized to include a comprehensive list of information that a project sponsor must provide when making application to the Commission.

5. Section 803.16 Completeness of application. – This section replaces Section 803.26 and sets out a procedure for dealing with incomplete project applications pursuant to existing Commission practice.

Subpart C -- Standards for Review and Approval

6. Section 803.21 General standards. – This section covers the criteria for approval of a project by the Commission. Also, in accordance with current policy, provisions are added to allow the Commission to suspend the processing of a project application if a signatory party or a political subdivision of a signatory party exercising lawful authority over the project has disapproved the project, and to suspend an approval itself if a project sponsor fails to maintain such approvals.

7. Section 803.22 Standards for consumptive uses of water. – This section replaces the current Section 803.42. Several changes are made, including the removal of a specific low flow criterion (Q7-10) and inclusion of an approval by rule provision for certain consumptive use projects that obtain their water from public water supplies. These types of projects would no longer have to be individually approved by the Commission.

8. Section 803.23 Standards for water withdrawals. – This section consolidates existing Sections 803.43 (Standards for ground-water withdrawals) and 803.44 (Standards for surface water withdrawals) into a single section covering standards for all withdrawals, and clarifies the conditions or limitations that can be imposed on withdrawals to avoid adverse impacts on the environment or other users. Application standards for constant-rate aquifer tests for proposed groundwater withdrawals have been moved to Section 803.12. Monitoring requirements are moved to new Section 803.30 (Monitoring), where details on measuring and recording, reporting, and monitoring methodology are set forth.

9. Section 803.24 Standards for diversions. – This section sets standards for the approval of diversions by incorporating a Commission policy applying to out-of-basin diversions of water and also sets standards for in-basin diversions. As permitted under the terms of Section 3.10 of the compact, this new section exempts “out-of-basin” diversions up to 20,000 gpd. In-basin diversions of any quantity continue to be subject to review and approval.

10. Section 803.25 Water conservation standards. – The water conservation standards currently set forth in Part 804, Subpart B, are moved to Section 803.25. While no substantive changes are being made now in these proposed revisions, the Commission considers water conservation to be a vital component of water resources management and will revisit these standards in the near future in close coordination with the member jurisdictions.

Subpart D -- Terms and Conditions of Approval

11. Section 803.30 Monitoring. – This section consolidates existing provisions and Commission practice related to monitoring, removes triennial water quality monitoring requirements, sets a daily quantity measure-

ment standard unless otherwise set by the Commission, certifies the accuracy of measurement devices every 5 years, sets quantity reporting as the requirement unless otherwise specified, and special reporting of violations and loss of measurement capabilities.

12. Section 803.31 Duration of approvals and renewals. – This section would be a modification of the existing Section 803.30. Approval durations are reduced to a general term of 15 years instead of 25 years, though exceptions for cause are provided. Other changes relate to the expiration and extension of approvals for uninitiated uses of water, the abandonment or discontinuance of a water use, and the renewal of expiring approvals.

13. Section 803.32 Reopening/modification. – The application process for reopening has been simplified for interested parties. Other changes address certain actions now currently imposed as docket conditions, such as:

- a. Modify or revoke docket approvals for failure to comply with docket conditions, and failure to obtain or maintain approvals from other federal, state, or local agencies;
- b. Require a project sponsor to provide a temporary source of water if interference occurs; and
- c. Reopen any approval upon its own motion to make corrective modifications.

14. Section 803.34 Emergencies. – This section expands the current Section 803.27, dealing with the issuance of emergency certificates by the Executive Director. It incorporates the details of existing Commission policy and details the procedure for obtaining an emergency certificate to protect the public health, safety, and welfare, or to avoid substantial and irreparable injury.

15. Section 803.35 Fees. – This section makes it clear that project sponsors have an affirmative duty under the Commission’s regulations to pay such fees as may be established by the Commission.

18 CFR PART 804 -- WATER WITHDRAWAL REGISTRATION

16. Section 804.2 Time limits. – The only substantive change in this part is the addition of language clarifying that compliance with a registration or reporting requirement, or both, of a member jurisdiction that is substantially equivalent to the Commission registration requirement shall be considered in compliance with the Commission requirement.

18 CFR PART 805 – HEARINGS/ENFORCEMENT ACTIONS

Subpart A -- Conduct of Hearings

17. Section 805.1 (a) Public hearings. – This section remains largely intact, with revisions to clarify the rules governing standard public hearings before the Commission on such matters as rulemaking, comprehensive plan additions, and project review.

18. Section 805.2 Administrative appeals. – This is a new section providing an administrative appeal procedure for persons aggrieved by any action or decision of the Commission or the Executive Director. Hearings under this section provide another administrative appeal option prior to an appeal to the United States District Court. Also included are provisions for stays and intervention of parties.

19. Section 805.3 Hearing on administrative appeal. – This section adds detailed procedures for hearings to be held on administrative appeals, currently contained in Section 805.2 for adjudicatory hearings. Included are the powers of the hearing officer, provisions for recording the hearing proceedings, provisions for staff and other expert testimony, provisions for the inclusion of written testimony, rules for assessing costs, and an in forma pauperis procedure.

Subpart B -- Compliance and Enforcement

20. Section 805.11 Duty to comply. – New section affirming the existing duty of any person to comply with any provision of the compact or rules, regulations, orders, approvals, and conditions of approval.

21. Section 805.12 Investigative powers. – This new section sets forth the powers of agents or employees of the Commission to inspect or investigate facilities to determine compliance with any provisions of the compact or the regulations of the Commission. These requirements are currently set forth as conditions in docket approvals. Owners and operators of facilities are also directed to provide true and accurate information as requested by the Commission and are subject to the “falsification to authorities” statutes of the member jurisdictions.

22. Section 805.13 Notice of Violation. – This section provides a procedure for the issuance of a Notice of Violation to an alleged violator of any rule, regulation, order, approval, or docket condition, consistent with current Commission practice.

23. Section 805.14 Orders. – This is a section explicitly stating the authority of both the Executive Director and the Commission to issue various orders, including requiring a project to cease and desist any action or activity to prevent harm and enforce the provisions of the compact,

regulations, docket conditions, or any rules or regulations of the Commission.

24. Section 805.15 Show cause proceeding. – This section establishes the basic procedural device for enforcement of Commission regulations and docket conditions through the imposition of penalties or other sanctions on violators pursuant to Section 15.17 of the compact. To insure the integrity of this process, provisions are included to separate adjudicatory and prosecutorial functions of the Commission. The provisions of this section also preserve the opportunity for the alleged violator to present testimony for consideration prior to action by the commissioners.

25. Section 805.18 Settlement by agreement. – Subparagraph (b) incorporates the standard language of all Commission settlement agreements that the Commission may reinstitute a civil penalty action if the violator fails to carry out any of the terms of the settlement agreement.

List of Subjects in 18 CFR Parts 803, 804, and 805 Administrative practice and procedure, Water resources.

Accordingly for the reasons set forth in the preamble, 18 CFR parts 803, 804, and 805 are proposed to be revised as follows:

PART 803—REVIEW AND APPROVAL OF PROJECTS

Subpart A -- General Provisions

Sec.

- 803.1 Scope.
- 803.2 Purposes.
- 803.3 Definitions.
- 803.4 Projects requiring review and approval.
- 803.5 Projects that may require review and approval.
- 803.6 Transferability of Project Approvals.
- 803.7 Concurrent project review by member jurisdictions.
- 803.8 Waiver/modification.
- Subpart B -- Application Procedure
- 803.10 Purpose of this subpart.
- 803.11 Preliminary consultations.
- 803.12 Constant-rate aquifer testing.
- 803.13 Submission of application.
- 803.14 Contents of application.
- 803.15 Notice of application.
- 803.16 Completeness of application.
- Subpart C -- Standards for Review and Approval
- 803.20 Purpose of this subpart.
- 803.21 General standards.
- 803.22 Standards for consumptive uses of water.
- 803.23 Standards for water withdrawals.
- 803.24 Standards for diversions.
- 803.25 Water conservation standards.
- Subpart D -- Terms and Conditions of Approval
- 803.30 Monitoring.
- 803.31 Duration of approvals and renewals.
- 803.32 Reopening/modification.
- 803.33 Interest on fees.
- 803.34 Emergencies.
- 803.35 Fees.

Authority: Secs. 3.4, 3.5 (5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

Subpart A--General Provisions

Section 803.1 Scope.

(a) This part establishes the scope and procedures for review and approval of projects under Section 3.10 of the Susquehanna River Basin Compact, Public Law 91-575, 84 Stat. 1509 et seq., (the compact) and establishes special standards under Section 3.4(2) of the compact governing water withdrawals and the consumptive use of water. The special standards established pursuant to Section 3.4(2) shall be applicable to all water withdrawals and consumptive uses in accordance with the terms of those standards, irrespective of whether such withdrawals and uses are also subject to project review under Section 3.10. This part, and every other part of 18 CFR Chapter VIII, shall also be incorporated into and made a part of the comprehensive plan.

(b) When projects subject to Commission review and approval are sponsored by governmental authorities, the Commission shall submit recommendations and findings to the sponsoring agency, which shall be included in any report submitted by such agency to its respective legislative body or to any committee thereof in connection with any request for authorization or appropriation therefor. The Commission review will ascertain the project’s compatibility with the objectives, goals, guidelines and criteria set forth in the comprehensive plan. If determined compatible, the said project will also be incorporated into the comprehensive plan, if so

required by the compact. For the purposes of avoiding conflicts of jurisdiction and of giving full effect to the Commission as a regional agency of the member jurisdictions, no expenditure or commitment shall be made by any governmental authority for or on account of the construction, acquisition or operation of any project or facility unless it first has been included by the Commission in the comprehensive plan.

(c) If any portion of this part, or any other part of 18 CFR Chapter VIII, shall, for any reason, be declared invalid by a court of competent jurisdiction, all remaining provisions shall remain in full force and effect.

(d) Except as otherwise stated in this part, this part shall be effective on _____.

(e) When any period of time is referred to in this part, such period in all cases shall be so computed as to exclude the first and include the last day of such period. Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the law of the United States, such day shall be omitted from the computation.

(f) Any forms or documents referenced in this part may be obtained from the Commission at 1721 North Front Street, Harrisburg, PA 17102-2391, or from the Commission's website at <http://www.srbc.net>.

Section 803.2 Purposes.

(a) The general purposes of this part are to advance the purposes of the compact and include, but are not limited to:

- (1) The promotion of interstate comity;
- (2) The conservation, utilization, development, management and control of water resources under comprehensive, multiple purpose planning; and
- (3) The direction, supervision and coordination of water resources efforts and programs of federal, state and local governments and of private enterprise.

(b) In addition, Sections 803.22, 803.23 and 803.24 of this part contain the following specific purposes: protection of public health, safety and welfare; stream quality control; economic development; protection of fisheries and aquatic habitat; recreation; dilution and abatement of pollution; the regulation of flows and supplies of ground and surface waters; the avoidance of conflicts among water users; the prevention of undue salinity; and protection of the Chesapeake Bay.

(c) The objective of all interpretation and construction of this part and all subsequent parts is to ascertain and effectuate the purposes and the intention of the Commission set out in this section. These regulations shall not be construed in such a way as to limit the authority of the Commission, the enforcement actions it may take, or the remedies it may prescribe.

Section 803.3 Definitions.

For purposes of Parts 803, 804 and 805, unless the context indicates otherwise, the words listed in this section are defined as follows:

Agricultural water use. A water use associated primarily with the raising of food, fiber or forage crops, trees, flowers, shrubs, turf, livestock and poultry. The term shall include aquaculture.

Application. A written request for action by the Commission including without limitation thereto a letter, referral by any agency of a member jurisdiction, or an official form prescribed by the Commission.

Basin. The area of drainage of the Susquehanna River and its tributaries into the Chesapeake Bay to the southern edge of the Pennsylvania Railroad bridge between Havre de Grace and Perryville, Maryland.

Change of Ownership. A change in ownership shall mean any transfer by sale or conveyance of the real or personal property comprising a project. A change of ownership shall not include:

- (1) A corporate reorganization of the following types:
 - (i) Where property is transferred to a corporation by one or more persons solely in exchange for stock or securities of the same corporation, provided that immediately after the exchange the same person or persons are in control of the transferee corporation, that is, they own 80 percent of the voting stock and 80 percent of all other stock of the corporation.
 - (ii) Where such transfer is merely a result of a change of the name, identity, internal corporate structure or place of organization and does not affect ownership and/or control.
- (2) Transfer of a project to the transferor's spouse or one or more lineal descendants, or any spouse of such lineal descendants, or to a corporation owned or controlled by the transferor, or the transferor's spouse or lineal descendants, or any spouse of such lineal descendants, for so long as the combined ownership interest of the transferor, the transferor's spouse and/or the transferor's lineal descendant(s) and their spouses, continues to be 51 percent or greater.
- (3) Transfer of land used primarily for the raising of food, fiber or forage crops, trees, flowers, shrubs, turf, livestock, poultry or aquaculture,

for so long as such agricultural use and its associated agricultural water use continues.

Commission. The Susquehanna River Basin Commission, as established in Article 2 of the compact, including its commissioners, officers, employees, or duly appointed agents or representatives.

Commissioner. Member or Alternate Member of the Susquehanna River Basin Commission as prescribed by Article 2 of the compact.

Compact. The Susquehanna River Basin Compact, P.L. 91-575; 84 Stat. 1509 et seq.

Comprehensive plan. The comprehensive plan prepared and adopted by the Commission pursuant to Articles 3 and 14 of the compact.

Consumptive use. The loss of water transferred through a manmade conveyance system or any integral part thereof (including such water that is purveyed through a public water supply or wastewater system), due to transpiration by vegetation, incorporation into products during their manufacture, evaporation, injection of water or wastewater into a subsurface formation from which it would not reasonably be available for future use in the basin, diversion from the basin, or any other process by which the water is not returned to the waters of the basin undiminished in quantity.

Diversion. The transfer of water into or out of the basin.

Executive Director. The chief executive officer of the Commission appointed pursuant to Article 15, Section 15.5, of the compact.

Facility. Any real or personal property, within or without the basin, and improvements thereof or thereon, and any and all rights of way, water, water rights, plants, structures, machinery, and equipment acquired, constructed, operated, or maintained for the beneficial use of water resources or related land uses or otherwise including, without limiting the generality of the foregoing, any and all things and appurtenances necessary, useful, or convenient for the control, collection, storage, withdrawal, diversion, release, treatment, transmission, sale, or exchange of water; or for navigation thereon, or the development and use of hydroelectric energy and power, and public recreational facilities; of the propagation of fish and wildlife; or to conserve and protect the water resources of the basin or any existing or future water supply source, or to facilitate any other uses of any of them.

Governmental authority. A federal or state government, or any political subdivision, public corporation, public authority, special purpose district, or agency thereof.

Groundwater. Water beneath the surface of the ground within a zone of saturation, whether or not flowing through known and definite channels or percolating through underground geologic formations, and regardless of whether the result of natural or artificial recharge. The term includes water contained in quarries, pits and underground mines having no significant surface water inflow, aquifers, underground water courses and other bodies of water below the surface of the earth. The term also includes a spring in which the water level is sufficiently lowered by pumping to eliminate the surface flow.

Member jurisdiction. The signatory parties as defined in the compact, comprised of the States of Maryland and New York, the Commonwealth of Pennsylvania, and the United States of America.

Member state. The States of Maryland and New York, and the Commonwealth of Pennsylvania.

Person. An individual, corporation, partnership, unincorporated association, and the like and shall have no gender and the singular shall include the plural. The term shall include a governmental authority and any other entity which is recognized by law as the subject of rights and obligations.

Pre-compact consumptive use. The maximum average daily quantity or volume of water consumptively used over any consecutive 30-day period prior to January 23, 1971.

Project. Any work, service, activity, or facility undertaken which is separately planned, financed or identified by the Commission, or any separate facility undertaken or to be undertaken by the Commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources which can be established and utilized independently, or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation.

Project sponsor. Any person who owns, operates or proposes to undertake a project. The singular shall include the plural.

Public water supply. A system, including facilities for collection, treatment, storage and distribution, that provides water to the public for human consumption, that:

- (1) Serves at least 15 service connections used by year-round residents of the area served by the system; or
- (2) Regularly serves at least 25 year-round residents.

Surface water. Water on the surface of the earth, including water in a perennial or intermittent watercourse, lake, reservoir, pond, spring, wet-

land, estuary, swamp or marsh, or diffused surface water, whether such body of water is natural or artificial.

Water or waters of the basin. Groundwater or surface water, or both, within the basin either before or after withdrawal.

Water resources. Includes all waters and related natural resources within the basin.

Withdrawal. A taking or removal of water from any source within the basin.

Section 803.4 Projects requiring review and approval.

Except for activities relating to site evaluation or as otherwise allowed under Section 803.34, no person shall undertake any of the following projects without prior review and approval by the Commission. The project sponsor shall submit an application in accordance with Subpart B and shall be subject to the applicable standards in Subpart C.

(a) Consumptive use of water. The consumptive water use projects described below shall require an application to be submitted in accordance with Section 803.12, and shall be subject to the standards set forth in Section 803.22, and, to the extent that it involves a withdrawal from groundwater or surface water, shall also be subject to the standards set forth in Section 803.23. Except to the extent that they involve the diversion of the waters of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section.

(1) Except for projects previously approved by the Commission for consumptive use and projects that existed prior to January 23, 1971, any project involving a consumptive water use of an average of 20,000 gallons per day (gpd) or more in any consecutive 30-day period.

(2) With respect to projects previously approved by the Commission for consumptive use, any project that will involve an increase in a consumptive use above that amount which was previously approved.

(3) Any project that will involve an increase in a consumptive use that existed prior to January 23, 1971, by an average of 20,000 gpd or more in any consecutive 30-day period.

(4) Any project that involves a consumptive use that will adversely affect the purposes outlined in Section 803.2 of this part.

(5) Any project involving a consumptive use of an average of 20,000 gpd or more in any 30-day period, and undergoing a change of ownership.

(b) Withdrawals. The projects described below shall require an application to be submitted in accordance with Section 803.12, and shall be subject to the standards set forth in Section 803.23. Hydroelectric projects, except to the extent that such projects involve a withdrawal, shall be exempt from the requirements of this section regarding withdrawals; provided, however, that nothing in this paragraph shall be construed as exempting hydroelectric projects from review and approval under any other category of project requiring review and approval as set forth in this section, Section 803.23, or 18 CFR Part 801.

(1) Except for projects previously approved by the Commission and projects existing prior to the dates specified in paragraph (4) below, any project withdrawing a consecutive 30-day average of 100,000 gpd or more from a groundwater or surface water source, or a combination of such sources.

(2) With respect to projects previously approved by the Commission, any project that increases a withdrawal above that amount which was previously approved and any project that will add a source or increase withdrawals from an existing source which did not require approval prior to _____.

(3) Any project which involves a withdrawal from a groundwater or surface water source and which is subject to the requirements of Subsection (a) hereof regarding consumptive use.

(4) With respect to groundwater projects in existence prior to July 13, 1978, and surface water projects in existence prior to November 11, 1995, any project that will increase its withdrawal from any source or combination of sources, by a consecutive 30-day average of 100,000 gpd or more, above that maximum consecutive 30-day amount which the project was withdrawing prior to the said applicable date.

(5) Any project involving a withdrawal of a consecutive 30-day average of 100,000 gpd or more, from either groundwater or surface water sources, or in combination from both, and undergoing a change of ownership.

(c) Diversions. The projects described below shall require an application to be submitted in accordance with Section 803.12, and shall be subject to the standards set forth in Section 803.24. The project sponsors of out-of-basin diversions shall also comply with all applicable requirements

of this part relating to consumptive uses and withdrawals. This requirement shall apply to diversions initiated on or after January 23, 1971.

(1) Any project involving the diversion of water into the basin and any project involving a diversion of an average of 20,000 gallons of water per day or more in any consecutive 30-day period out of the basin.

(2) With respect to diversions previously approved by the Commission, any project that will increase a diversion above that amount which was previously approved.

(3) Any project involving the diversion of water into the basin that existed prior to January 23, 1971, that will increase the diversion by any amount, and any project involving the diversion of water out of the basin that will increase the diversion an average of 20,000 gpd or more in any consecutive 30-day period.

(4) Any project involving the diversion of water into the basin and any project involving a diversion of an average of 20,000 gallons of water per day or more in any consecutive 30-day period out of the basin, and undergoing a change of ownership.

(d) Any project on or crossing the boundary between two member states.

(e) Any project in a member state having a significant effect on water resources in another member state.

(f) Any project which has been or is required to be included by the Commission in its comprehensive plan, or will have a significant effect upon the comprehensive plan.

(g) Any other project so determined by the commissioners or Executive Director pursuant to Section 803.5 or 18 CFR part 801. Such project sponsors shall be notified in writing by the Executive Director.

Section 803.5 Projects that may require review and approval.

(a) The following projects, if not otherwise requiring review and approval under Section 803.4, may be subject to Commission review and approval as determined by the Commission or the Executive Director:

(1) Projects that may affect interstate water quality.

(2) Projects within a member state that have the potential to affect waters within another member state. This includes, but is not limited to, projects which have the potential to alter the physical, biological, chemical or hydrological characteristics of water resources of interstate streams designated by the Commission under separate resolution.

(3) Projects that may have a significant effect upon the comprehensive plan.

(4) Projects not included in paragraphs (a)(1) through (a)(3) of this section, but which could have an adverse, adverse cumulative, or interstate effect on the water resources of the basin, provided that the project sponsor is notified in writing by the Executive Director.

(b) Determinations by the Executive Director may be appealed to the commissioners by filing an appeal with the Commission within 30 days after receipt of notice of such determination as set forth in part 805, Section 805.2.

Section 803.6 Transferability of project approvals.

(a) Existing Commission approvals of projects undergoing a change in ownership as defined in Section 803.3 of this part may not be transferred to the new project sponsor(s). Such project sponsor(s) shall submit an application for approval as required by Section 803.4(a)(5), (b)(5) or (c)(4) of this part, and may operate such project under the terms and conditions of the existing approval, pending action by the Commission on the application, provided such project sponsor satisfies the requirements of Section 803.13(b) of this part.

(b) Existing Commission approvals of projects excluded from the definition of change of ownership in Section 803.3 of this part may be transferred to the new project sponsor(s), provided such project sponsor(s) notify the Commission in advance of the transfer of such project approval, which notice shall be on a form and in a manner prescribed by the Commission and under which the project sponsor(s) certify their or its intention to comply with all terms and conditions of the transferred approval and assume all other associated obligations.

Section 803.7 Concurrent project review by member jurisdictions.

(a) The Commission recognizes that agencies of the member jurisdictions will exercise their review authority and evaluate many proposed projects in the basin. The Commission will adopt procedures to assure compatibility between jurisdictional review and Commission review.

(b) To avoid duplication of work and to cooperate with other government agencies, the Commission may develop agreements of understanding, in accordance with the procedures outlined in this part, with appropriate agencies of the member jurisdictions regarding joint review of projects. These agreements may provide for joint efforts by staff, delegation of authority by an agency or the Commission, or any other matter to support

cooperative review activities. Permits issued by a member jurisdiction agency shall be considered Commission approved if issued pursuant to an agreement of understanding with the Commission specifically providing therefor.

Section 803.8 Waiver/modification.

The Commission may, in its discretion, waive or modify any of the requirements of this or any other part of its regulations if the essential purposes set forth in Section 803.2 continue to be served.

Subpart B -- Application Procedure

Section 803.10 Purpose of this subpart.

The purpose of this subpart is to set forth procedures governing applications required by Sections 803.4, 803.5, and 18 CFR part 801.

Section 803.11 Preliminary consultations.

(a) Any project sponsor of a project that is or may be subject to the Commission's jurisdiction is encouraged, prior to making application for Commission review, to request a preliminary consultation with the Commission staff for an informal discussion of preliminary plans for the proposed project. To facilitate preliminary consultations, it is suggested that the project sponsor provide a general description of the proposed project, a map showing its location and, to the extent available, data concerning dimensions of any proposed structures, anticipated water needs, and the environmental impacts.

(b) Preliminary consultation shall be optional for the project sponsor (except with respect to aquifer test plans, see Section 803.12) and shall not relieve the sponsor from complying with the requirements of the compact or with this part.

Section 803.12 Constant-rate aquifer testing.

(a) A project sponsor submitting an application pursuant to Section 803.13 seeking approval to withdraw or increase a withdrawal of groundwater shall perform a constant-rate aquifer test prior to submission of such application.

(b) The project sponsor shall prepare a constant-rate aquifer test plan for prior review and approval by Commission staff before testing is undertaken.

(c) Unless otherwise specified, approval of a test plan is valid for two years from the date of approval.

(d) Approval of a test plan shall not be construed to limit the authority of the Commission to require additional testing or monitoring at any time (both before an approval and after).

Section 803.13 Submission of application.

(a) Project sponsors of projects subject to the review and approval of the Commission under Section 803.4 shall, prior to the time the project is undertaken, submit an application to the Commission.

(b) Project sponsors submitting an application for approval due to a change in ownership of a project as required by Section 803.4(a)(5), (b)(5) or (c)(4) of this part shall be permitted to continue operation of the project under an existing Commission approval pending action on the application by the Commission, provided that:

(1) On or before the date of transfer under which a change of ownership occurs, such project sponsor(s) certify an intention to comply with the terms and conditions of the existing Commission approval and assume all associated obligations, including the requirements of the Commission and the compact, which certification shall be on a form and in a manner prescribed by the Commission; and

(2) The application(s) required for approval are submitted to the Commission within ninety (90) days of the date of the transfer.

(c) To be deemed administratively complete, the application must include all information required and the applicable fee.

Section 803.14 Contents of application.

(a) Applications shall include, but not be limited to, the following information and, where applicable, shall be submitted on forms and in the manner prescribed by the Commission.

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Description of project and site in terms of:

(i) Project location.

(ii) Project purpose.

(iii) Proposed quantity of water to be withdrawn.

(iv) Proposed quantity of water to be consumed, if applicable.

(v) Constant-rate aquifer tests. The project sponsor shall provide the results of a constant-rate aquifer test with any application which includes a request for a groundwater withdrawal. The project sponsor shall obtain Commission approval of the test procedures prior to initiation of the constant-rate aquifer test.

(vi) Water use and availability.

(vii) All water sources and the date of initiation of each source.

(viii) Supporting studies, reports, and other information upon which assumptions and assertions have been based.

(ix) Plans for avoiding or mitigating for consumptive use.

(x) Copies of any correspondence with member jurisdiction agencies.

(3) Anticipated impact of the proposed project on:

(i) Surface water characteristics (quality, quantity, flow regimen, other hydrologic characteristics).

(ii) Threatened or endangered species and their habitats.

(iii) Existing water withdrawals.

(4) Project estimated completion date and estimated construction schedule.

(b) The Commission may also require the project sponsor to submit the following information related to the project, in addition to the information required in Subsection (a) of this section, as deemed necessary.

(1) Description of project and site in terms of:

(i) Engineering feasibility.

(ii) Ability of project sponsor to fund the project or action.

(iii) Identification and description of reasonable alternatives, the extent of their economic and technical investigation, and an assessment of their potential environmental impact. In the case of a proposed diversion, the project sponsor should include information that may be required by Section 803.25 or any policy of the Commission relating to diversions.

(iv) Compatibility of proposed project with existing and anticipated uses.

(v) Anticipated impact of the proposed project on:

(A) Flood damage potential considering the location of the project with respect to the flood plain and flood hazard zones.

(B) Recreation potential.

(C) Fish and wildlife (habitat quality, kind and number of species).

(D) Natural environment uses (scenic vistas, natural and manmade travel corridors, wild and wilderness areas, wild, scenic and recreation rivers).

(E) Site development considerations (geology, topography, soil characteristics, adjoining and nearby land uses, adequacy of site facilities).

(F) Historical, cultural and archaeological impacts.

(2) Governmental considerations:

(i) Need for governmental services or finances.

(ii) Commitment of government to provide services or finances.

(iii) Status of application with other governmental regulatory bodies.

(3) Any other information deemed necessary by the Commission.

(c) A report about the project prepared for any other purpose, or an application for approval prepared for submission to a member jurisdiction, may be accepted by the Commission provided the said report or application addresses all necessary items on the Commission's form or listed in this section, as appropriate.

Section 803.15 Notice of application.

(a) The project sponsor shall, no later than 10 days after submission of an application to the Commission, notify each municipality in which the project is located, the county planning agency of each county in which the project is located, and each contiguous property owner that an application has been submitted to the Commission. The project sponsor shall also publish at least once in a newspaper of general circulation serving the area in which the project is located, a notice of the submission of the application no later than 10 days after the date of submission. All notices required under this section shall contain a sufficient description of the project, its purpose, requested water withdrawal and consumptive use amounts, location and address, electronic mail address, and phone number of the Commission.

(b) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt for the municipal notification under (a) and a proof of publication for the newspaper notice required under (a). The project sponsor shall also provide certification on a form provided by the Commission that it has made such other notifications as required under paragraph (a) of this section, including a list of contiguous property owners notified under paragraph (a). Until these items are provided to the Commission, processing of the application will not proceed.

Section 803.16 Completeness of application.

(a) The Commission's staff shall review the application, and if necessary, request the project sponsor to provide any additional information that is deemed pertinent for proper evaluation of the project.

(b) An application deemed incomplete in accordance with Section 803.13 (b) will be returned to the project sponsor, who shall have 30 days to cure the administrative deficiencies. An application deemed technically

deficient may be returned to the project sponsor, who shall have a period of time prescribed by Commission staff to cure the technical deficiencies. Failure to cure either administrative or technical deficiencies within the prescribed time may result in termination of the application process and forfeiture of any fees submitted.

(c) The project sponsor has a duty to provide information reasonably necessary for the Commission's review of the application. If the project sponsor fails to respond to the Commission's request for additional information, the Commission may terminate the application process, close the file and so notify the project sponsor. The project sponsor may reapply without prejudice by submitting a new application and fee.

Subpart C -- Standards for Review and Approval

Section 803.20 Purpose of this subpart.

The purpose of this subpart is to set forth general standards that shall be used by the Commission to evaluate all projects subject to review and approval by the Commission pursuant to Section 803.4 and Section 803.5, and to establish special standards applicable to certain water withdrawals, consumptive uses and diversions. This subpart shall not be construed to limit the Commission's authority and scope of review. These standards are authorized under Sections 3.4(2), 3.4(8), 3.4(9), and 3.10 of the compact and are based upon, but not limited to, the goals, objectives, guidelines and criteria of the comprehensive plan.

Section 803.21 General standards.

(a) A project shall not be detrimental to the proper conservation, development, management, or control of the water resources of the basin.

(b) The Commission may modify and approve as modified, or may disapprove, a project if it determines that the project is not in the best interest of the conservation, development, management, or control of the basin's water resources, or is in conflict with the comprehensive plan.

(c) Disapprovals – other governmental jurisdictions.

(1) The Commission may suspend the review of any application under this part if the project is subject to the lawful jurisdiction of any member jurisdiction or any political subdivision thereof, and such member jurisdiction or political subdivision has disapproved or denied the project. Where such disapproval or denial is reversed on appeal, the appeal is final, and the project sponsor provides the Commission with a certified copy of the decision, the Commission shall resume its review of the application. Where, however, an application has been suspended hereunder for a period greater than three years, the Commission may terminate its review. Thereupon, the Commission shall notify the project sponsor of such termination and that the application fee paid by the project sponsor is forfeited. The project sponsor may reactivate the terminated docket by reapplying to the Commission, providing evidence of its receipt of all necessary governmental approvals and, at the discretion of the Commission, submitting new or updated information.

(2) The Commission may modify, suspend or revoke a previously granted approval if the project sponsor fails to obtain or maintain the approval of a member jurisdiction or political subdivision thereof having lawful jurisdiction over the project.

Section 803.22 Standards for consumptive uses of water.

(a) The project sponsors of all consumptive water uses subject to review and approval under Section 803.4 hereof shall comply with this section.

(b) Mitigation. All project sponsors whose consumptive use of water is subject to review and approval under Section 803.4 hereof shall mitigate such consumptive use. Except to the extent that the project involves the diversion of the waters out of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section. Mitigation may be provided by one, or a combination of the following:

(1) During low flow periods as may be designated by the Commission for consumptive use mitigation.

(i) Reduce withdrawal from the approved source(s), in an amount equal to or greater than the project's total consumptive use, and withdraw water from alternative surface water storage or aquifers or other underground storage chambers or facilities approved by the Commission, from which water can be withdrawn for a period of 90 days without impact to surface water flows.

(ii) Release water for flow augmentation, in an amount equal to the project's total consumptive use, from surface water storage or aquifers, or other underground storage chambers or facilities approved by the Commission, from which water can be withdrawn for a period of 90 days without impact to surface water flows.

(iii) Discontinue the project's consumptive use, except that reduction of project sponsor's consumptive use to less than 20,000 gpd during periods of low flow shall not constitute discontinuance.

(2) Use, as a source of consumptive use water, surface storage that is subject to maintenance of a conservation release acceptable to the Commission. In any case of failure to provide the specified conservation release, such project shall provide mitigation in accordance with paragraph (3), below for the calendar year in which such failure occurs, and the Commission will reevaluate the continued acceptability of the conservation release.

(3) Provide monetary payment to the Commission, for annual consumptive use, in an amount and manner prescribed by the Commission.

(4) Provide documentation to the Commission demonstrating that all requirements enumerated in the approval are satisfied within 90 days from the date of Commission action, unless specified otherwise. These items may include, but are not limited to:

(i) Installation of water conservation release structures.

(ii) Evaluation of water loss due to system leakage.

(iii) Installation of measuring devices.

(iv) Operational plans and/or designs.

(5) Implement other alternatives approved by the Commission.

(c) Determination of manner of mitigation. The Commission will, in its sole discretion, determine the acceptable manner of mitigation to be provided by project sponsors whose consumptive use of water is subject to review and approval. Such a determination will be made after considering the project's location, source characteristics, anticipated amount of consumptive use, proposed method of mitigation and their effects on the purposes set forth in Section 803.2 of this part, and any other pertinent factors. The Commission may modify, as appropriate, the manner of mitigation, including the magnitude and timing of any mitigating releases, required in a project approval.

(d) Quality of water released for mitigation. The physical, chemical and biological quality of water released for mitigation shall at all times meet the quality required for the purposes listed in Section 803.2, as applicable.

(e) Approval by rule for consumptive uses.

(1) Any project whose sole source of water for consumptive use is a public water supply withdrawal, may be approved under this subsection in accordance with the following, unless the Commission determines that the project cannot be adequately regulated under this approval by rule:

(i) Notification of Intent: No fewer than 90 days prior to construction or implementation of a project or increase above a previously approved quantity of consumptive use, the project sponsor shall:

(A) Submit a Notice of Intent (NOI) on forms prescribed by the Commission, and the applicable application fee, along with any required attachments.

(B) Send a copy of the NOI to the appropriate agencies of the member state, and to each municipality and county in which the project is located.

(ii) Within 10 days after submittal of an NOI under (i), submit to the Commission proof of publication in a newspaper of general circulation in the location of the project, a notice of intent to operate under this permit by rule, which contains a sufficient description of the project, its purposes and its location. This notice shall also contain the address, electronic mail address and telephone number of the Commission.

(2) Metering, daily use monitoring and quarterly reporting. The project sponsor shall comply with metering, daily use monitoring and quarterly reporting as specified in Section 803.30.

(3) Standard conditions. The standard conditions set forth in Section 803.21 above shall apply to projects approved by rule.

(4) Mitigation. The project sponsor shall comply with mitigation in accordance with Subsection 803.22(b)(2) or (b)(3).

(5) Compliance with other laws. The project sponsor shall obtain all necessary permits or approvals required for the project from other federal, state or local government agencies having jurisdiction over the project. The Commission reserves the right to modify, suspend or revoke any approval under this subsection if the project sponsor fails to obtain or maintain such approvals.

(6) The Commission will grant or deny approval to operate under this approval by rule and will notify the project sponsor of such determination, including the quantity of consumptive use approved.

(7) Approval by rule shall be effective upon written notification from the Commission to the project sponsor, shall expire 15 years from the date of such notification, shall be deemed to rescind any previous consumptive use approvals, and shall be nontransferable.

(8) The Commission may, on a case-by-case basis, revoke or suspend an approval by rule hereunder if it determines that the project sponsor is not in compliance with the approval by rule or to avoid adverse impacts to the water resources of the basin or otherwise protect public health, safety, welfare or water resources.

Section 803.23 Standards for water withdrawals.

(a) The project sponsors of all withdrawals subject to review and approval under Section 803.4 hereof shall comply with the following standards, in addition to those required pursuant to Section 803.21.

(b) Limitations on withdrawals.

(1) The Commission may limit withdrawals to the amount (quantity and rate) of water that is needed to meet the reasonably foreseeable needs of the project sponsor.

(2) The Commission may deny an application, limit or condition an approval to insure that the withdrawal will not cause adverse impacts to the water resources of the basin. The Commission may consider, without limitation, the following in its consideration of adverse impacts: lowering of groundwater or stream flow levels; rendering competing supplies unreliable; affecting other water uses; causing water quality degradation that may be injurious to any existing or potential water use; affecting fish, wildlife or other living resources or their habitat; causing permanent loss of aquifer storage capacity; or affecting low flow of perennial or intermittent streams.

(3) The Commission may impose limitations or conditions to mitigate impacts, including without limitation:

(i) Limit the quantity, timing or rate of withdrawal or level of drawdown.

(ii) Require the project sponsor to provide, at its own expense, an alternate water supply or other mitigating measures.

(iii) Require the project sponsor to implement and properly maintain special monitoring measures.

(iv) Require the project sponsor to implement and properly maintain stream flow protection measures.

(v) Require the project sponsor to develop and implement an operations plan acceptable to the Commission.

(4) The Commission may require the project sponsor to undertake the following, to insure its ability to meet its present or reasonably foreseeable water needs from available groundwater or surface water without limitation:

(i) Investigate additional sources or storage options to meet the demand of the project.

(ii) Submit a water resource development plan that shall include, without limitation, sufficient data to address any supply deficiencies, identify alternative water supply options, and support existing and proposed future withdrawals.

Section 803.24 Standards for diversions.

(a) The project sponsors of all diversions subject to review and approval under Section 803.4 hereof shall comply with the following standards.

(b) For projects involving out-of-basin diversions, the following requirements shall apply.

(1) Project sponsors shall:

(i) Demonstrate that they have made good faith efforts to develop and conserve sources of water within the importing basin, and have considered other reasonable alternatives to the diversion.

(ii) Adhere to all Commission rules, regulations or orders of any kind issued under the authority of the compact.

(iii) Comply with the general standards set forth in Section 801.3, Section 803.21, and Section 803.22, and the applicable requirements of this part relating to consumptive uses and withdrawals.

(2) In deciding whether to approve a proposed diversion out of the basin, the Commission shall also consider and the project sponsor shall provide information related to the following factors:

(i) Any adverse effects and cumulative adverse effects the project may have on the ability of the Susquehanna River Basin, or any portion thereof, to meet its own present and future water needs.

(ii) The location, amount, timing, purpose and duration of the proposed diversion and how the project will individually and cumulatively affect the flow of any impacted stream or river, and the freshwater inflow of the Chesapeake Bay, including the extent to which any diverted water is being returned to the basin or the bay.

(iii) Whether there is a reasonably foreseeable need for the quantity of water requested by the project sponsor and how that need is measured against reasonably foreseeable needs in the Susquehanna River Basin.

(iv) The amount and location of water being diverted to the Susquehanna River Basin from the importing basin.

(v) The proximity of the project to the Susquehanna River Basin.

(vi) The project sponsor's pre-compact member jurisdiction approvals to withdraw or divert the waters of the basin.

(vii) Historic reliance on sources within the Susquehanna River Basin.

(3) In deciding whether to approve a proposed diversion out of the basin, the Commission may also consider, but is not limited to, the factors set forth in paragraphs (i) through (v) of this subsection. The decision whether to consider the factors in this subsection and the amount of information required for such consideration, if undertaken, will depend upon the potential for the proposed diversion to have an adverse impact on the ability of the Susquehanna River Basin, or any portion thereof, to meet its own present and future needs.

(i) The impact of the diversion on economic development within the Susquehanna River Basin, the member states or the United States of America.

(ii) The cost and reliability of the diversion versus other alternatives, including certain external costs, such as impacts on the environment or water resources.

(iii) Any policy of the member jurisdictions relating to water resources, growth and development.

(iv) How the project will individually and cumulatively affect other environmental, social and recreational values.

(v) Any land use and natural resource planning being carried out in the importing basin.

(c) For projects involving into-basin diversions, the following requirements shall apply.

(1) Project sponsors shall:

(i) Provide information on the source, amount, and location of the waterbody being diverted to the Susquehanna River Basin from the importing basin.

(ii) Provide information on the water quality classification, if any, of the Susquehanna River Basin stream to which diverted water is being discharged and the discharge location or locations.

(iii) Demonstrate that they have applied for or received all applicable withdrawal or discharge permits or approvals related to the diversion, and must demonstrate that the diversion will not result in water quality degradation that may be injurious to any existing or potential ground or surface water use.

Section 803.25 Water conservation standards.

Any project sponsor whose project is subject to Commission approval under this part proposing to withdraw water either directly or indirectly (through another user) from ground or surface water sources, or both, shall comply with the following requirements:

(a) Public water supply. As circumstances warrant, a project sponsor of a public water supply shall:

(1) Reduce distribution system losses to a level not exceeding 20 percent of the gross withdrawal.

(2) Install meters for all users.

(3) Establish a program of water conservation that will:

(i) Require installation of water conservation devices, as applicable, by all classes of users.

(ii) Prepare and distribute literature to customers describing available water conservation techniques.

(iii) Implement a water pricing structure which encourages conservation.

(iv) Encourage water reuse.

(b) Industrial. Project sponsors who use water for industrial purposes shall:

(1) Designate a company representative to manage plant water use.

(2) Install meters or other suitable devices or utilize acceptable flow measuring methods for accurate determination of water use by various parts of the company operation.

(3) Install flow control devices which match the needs of the equipment being used for production.

(4) Evaluate and utilize applicable recirculation and reuse practices.

(c) Irrigation. Project sponsors who use water for irrigation purposes shall utilize irrigation systems properly designed for the sponsor's respective soil characteristics, topography and vegetation.

(d) Effective date. Notwithstanding the effective date for other portions of this part, this section shall apply to all ground and surface water withdrawals initiated on or after January 11, 1979.

Subpart D -- Terms and Conditions of Approval

Section 803.30 Monitoring.

The Commission, as part of the project review, shall evaluate the proposed methodology for monitoring consumptive uses, water withdrawals and mitigating flows, including flow metering devices, stream gages, and other facilities used to measure the withdrawals or consumptive use of the project or the rate of stream flow. If the Commission determines that additional flow measuring, metering or monitoring devices are required, these shall be provided at the expense of the project sponsor, installed in accordance with a schedule set by the Commission, be accurate to within 5 percent, and shall be subject to inspection by the Commission at any time.

(a) Project sponsors of projects that are approved under this part shall:

(1) Measure and record on a daily basis, or such other frequency as may be approved by the Commission, the quantity of all withdrawals, using meters or other methods approved by the Commission.

(2) Certify, at the time of installation and no less frequently than once every 5 years, the accuracy of all measuring devices and methods to within 5 percent of actual flow, unless specified otherwise by the Commission.

(3) Maintain metering or other approved methods so as to provide a continuous, accurate record of the withdrawal or consumptive use.

(4) Measure groundwater levels in all approved production wells, as specified by the Commission.

(5) Measure groundwater levels at additional monitoring locations, as specified by the Commission.

(6) Measure water levels in surface storage facilities, as specified by the Commission.

(7) Measure stream flows, passby flows or conservation releases, as specified by the Commission, using methods and at frequencies approved by the Commission.

(b) Reporting.

(1) Project sponsors whose projects are approved under this section shall report to the Commission on a quarterly basis on forms and in a manner prescribed by the Commission all information recorded under Subsection (a) above, unless otherwise specified by the Commission.

(2) Project sponsors whose projects are approved under this section shall report to the Commission:

(i) Violations of withdrawal limits and any conditions of approvals, within 5 days of such violation.

(ii) Loss of measuring or recording capabilities required under Subsection (a)(1) hereof, within 1 day after any such loss continues for 5 consecutive days.

Section 803.31 Duration of approvals and renewals.

(a) After _____, approvals issued under this part shall have a duration equal to the term of any accompanying member jurisdiction license or permit regulating the same subject matter, but not longer than 15 years. If there is no such accompanying license or permit, or if no term is specified in such accompanying license or permit, the duration of a Commission approval issued under this part shall be no longer than 15 years. A project approved by the Commission prior to May 11, 1995, which did not specify a duration, shall have a duration of 30 years commencing on the date of initial approval, except, if there is an accompanying member jurisdiction license or permit regulating the same subject matter and specifying a duration of no more than 25 years, then the duration of the Commission approval shall be equal to the duration of the initial member jurisdiction approval.

(b) Commission approval of a project shall expire 3 years from the date of such approval if the withdrawal, diversion or consumptive use has not been commenced, unless extended in writing by the Commission upon written request from the project sponsor submitted no later than 120 days prior to such expiration. The Commission may grant an extension, for a period not to exceed 2 years, only upon a determination that the delay is due to circumstances beyond the project sponsor's control and that there is a likelihood of project implementation within a reasonable period of time. The Commission may also attach conditions to the granting of such extensions, including modification of any terms of approval that the Commission may deem appropriate.

(c) If a withdrawal, diversion or consumptive use approved by the Commission for a project is discontinued for a period of 5 consecutive years, the approval shall be null and void, unless a waiver is granted in writing by the Commission, upon written request by the project sponsor demonstrating due cause, prior to the expiration of such period.

(d) If the Commission determines that a project has been abandoned, by evidence of nonuse for a period of time and under such circumstances that an abandonment may be inferred, the Commission may rescind the approval for such withdrawal, diversion or consumptive use.

(e) Project sponsors shall apply for renewal of an approval no later than one year prior to the expiration of such approval. Such applications for

renewal shall be submitted and reviewed in accordance with the same procedures and standards as for newly proposed projects. If a complete application is submitted in accordance with this requirement, the existing approval will be deemed extended until such time as the Commission renders a decision on the application unless the Commission notifies the project sponsor otherwise in writing.

Section 803.32 Reopening/modification.

(a) Once approved, the Commission, upon its own motion, or upon application of the project sponsor or any interested party, may at any time reopen any project docket and make additional orders that may be necessary to mitigate or avoid adverse impacts or to otherwise protect the public health, safety, and welfare or water resources. Whenever an application for reopening is filed by an interested party, the burden shall be upon that interested party to show, by a preponderance of the evidence, that a substantial adverse impact or a threat to the public health, safety and welfare or water resources exists that warrants reopening of the docket.

(b) If the project sponsor fails to comply with any term or condition of a docket approval, the commissioners may issue an order suspending, modifying or revoking its approval of the docket. The commissioners may also, in their discretion, suspend, modify or revoke a docket approval if the project sponsor fails to obtain or maintain other federal, state or local approvals.

(c) For any previously approved project where interference occurs, the Commission may require a project sponsor to provide a temporary source of potable water at its expense, pending a final determination of causation by the Commission.

(d) The Commission, upon its own motion, may at any time reopen any project docket and make additional corrective modifications that may be necessary.

Section 803.33 Interest on fees.

The Executive Director may establish interest to be paid on all overdue or outstanding fees of any nature that are payable to the Commission.

Section 803.34 Emergencies.

(a) Emergency certificates. The other requirements of these regulations notwithstanding, in the event of an emergency requiring immediate action to protect the public health, safety and welfare or to avoid substantial and irreparable injury to any person, property, or water resources when circumstances do not permit a review and determination in the regular course of the regulations in this part, the Executive Director, with the concurrence of the chairperson of the Commission and the commissioner from the affected member state, may issue an emergency certificate authorizing a project sponsor to take such action as the Executive Director may deem necessary and proper in the circumstances, pending review and determination by the Commission as otherwise required by this part.

(b) Notification and application. A project sponsor shall notify the Commission, prior to commencement of the project, that an emergency certificate is needed. If immediate action, as defined by this section, is required by a project sponsor and prior notice to the Commission is not possible, then the project sponsor must contact the Commission within one (1) business day of the action. Notification may be by certified mail, facsimile, telegram, mailgram, or other form of written communication. This notification must be followed within one (1) business day by submission of the following information:

(1) An emergency application form or copy of the state or federal emergency water use application if the project sponsor also is requesting emergency approval from either a state or federal agency.

(2) As a minimum, the application information shall contain:

(i) Contact information.

(ii) Justification for emergency action (purpose).

(iii) Location map and schematic of proposed project.

(iv) Desired term of emergency use.

(v) Source(s) of the water.

(vi) Quantity of water.

(vii) Flow measurement system (such as metering).

(viii) Use restrictions in effect (or planned).

(ix) Description of potential adverse impacts and mitigating measures.

(x) Appropriate fee.

(c) Emergency certificate issuance. The Executive Director shall:

(1) Review and act on the emergency request as expeditiously as possible upon receipt of all necessary information stipulated in Subsection (b)(2) above.

(2) With the concurrence of the chairperson of the Commission and the commissioner from the affected member state, issue an emergency certificate for a term not to extend beyond the next regular business meeting of the Commission.

(3) Include conditions in the emergency certificate which may include, without limitation, monitoring of withdrawal and/or consumptive use amounts, measurement devices, public notification, and reporting, to assure minimal adverse impacts to the environment and other users.

(d) Post approval. Actions following issuance of emergency certificates may include, but are not limited to, the following:

(1) The Commission may, by resolution, extend the term of the emergency certificate, upon presentation of a request from the project sponsor accompanied by appropriate evidence that the conditions causing the emergency persist.

(2) If the condition is expected to persist longer than the specified extended term, the project sponsor must submit an application to the Commission for applicable water withdrawal or consumptive use, or the emergency certificate will terminate as specified. If the project sponsor has a prior Commission approval for the project, the project sponsor must submit an application to modify the existing docket accordingly.

(e) Early termination. With the concurrence of the chairperson of the Commission and the commissioner from the affected member state, the Executive Director may terminate an emergency certificate earlier than the specified duration if it is determined that an emergency no longer exists and/or the certificate holder has not complied with one or more special conditions for the emergency withdrawal or consumptive water use.

(f) Restoration/mitigation. Project sponsors are responsible for any necessary restoration or mitigation of environmental damage or interference with another user that may occur as a result of the emergency action.

Section 803.35 Fees.

Project sponsors shall have an affirmative duty to pay such fees as established by the Commission.

PART 804—WATER WITHDRAWAL REGISTRATION

Sec.

804.1 Requirement.

804.2 Time limits.

804.3 Administrative agreements.

804.4 Effective date.

804.5 Definitions.

Authority: Secs. 3.4(2) and (9), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

Section 804.1 Requirement.

In addition to any other requirements of Commission regulations, and subject to the consent of the affected member state to this requirement, any person withdrawing or diverting in excess of an average of 10,000 gpd for any consecutive 30-day period, from ground or surface water sources, as defined in Part 803 of this chapter, shall register the amount of this withdrawal with the Commission and provide such other information as requested on forms prescribed by the Commission.

Section 804.2 Time limits.

(a) Except for agricultural water use projects, all registration forms shall be submitted within one year after May 11, 1995, or within six months of initiation of the water withdrawal or diversion, whichever is later; provided, however, that nothing in this section shall limit the responsibility of a project sponsor to apply for and obtain an approval as may be required under Part 803 of this chapter. All registered withdrawals shall register with the Commission within five years of their initial registration, and at five-year intervals thereafter, unless the withdrawal is sooner discontinued. Upon notice by the Executive Director, compliance with a registration or reporting requirement, or both, of a member state, that is substantially equivalent to this requirement shall be considered compliance with this requirement.

(b) Project sponsors whose existing agricultural water use projects (*i.e.*, projects coming into existence prior to March 31, 1997) withdraw or divert in excess of an average of 10,000 gpd for any consecutive 30-day period from a ground or surface water source shall register their use no later than March 31, 1997. Thereafter, project sponsors of new projects proposing to withdraw or divert in excess of 10,000 gpd for any consecutive 30-day period from a ground or surface water source shall be registered prior to project initiation.

Section 804.3 Administrative agreements.

The Commission may complete appropriate administrative agreements or informal arrangements to carry out this registration requirement through the offices of member jurisdictions. Forms developed by the Commission shall apprise registrants of any such agreements or arrangements, and provide appropriate instructions to complete and submit the form.

Section 804.4 Effective date.

This part shall be effective on May 11, 1995, and shall apply to all present and future withdrawals or diversions irrespective of when such withdrawals or diversions were initiated.

Section 804.5 Definitions.

Terms used in this part shall be defined as set forth in Section 803.3 of this chapter.

PART 805—HEARINGS/ENFORCEMENT ACTIONS

Subpart A -- Conduct of Hearings

Sec.

805.1 Public hearings.

805.2 Administrative appeals.

805.3 Hearing on administrative appeal.

805.4 Optional joint hearing.

Subpart B -- Compliance and Enforcement

805.10 Scope of subpart.

805.11 Duty to comply.

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805.13 Notice of Violation.

805.14 Orders.

805.15 Show cause proceeding.

805.16 Civil penalty criteria.

805.17 Enforcement of penalties/abatement or remedial orders.

805.18 Settlement by agreement.

Authority: Secs. 3.5 (9), 3.5 (5), 3.8, 3.10, and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

Subpart A -- Conduct of Hearings

Section 805.1 Public hearings.

(a) A public hearing shall be conducted in the following instances:

(1) Addition of projects or adoption of amendments to the comprehensive plan, except as otherwise provided by Section 14.1 of the compact.

(2) Rulemaking, except for corrective amendments.

(3) Consideration of projects, except projects approved pursuant to memoranda of understanding with member jurisdictions.

(4) Hearing requested by a member jurisdiction.

(5) As otherwise required by the compact or Commission regulations.

(b) A public hearing may be conducted by the Commission in any form or style chosen by the Commission when in the opinion of the Commission, a hearing is either appropriate or necessary to give adequate consideration to issues relating to public health, safety and welfare, or protection of the environment, or to gather additional information for the record or consider new information, or to decide factual disputes in connection with matters pending before the Commission.

(c) Notice of public hearing. At least 20 days before any public hearing required by the compact, notices stating the date, time, place and purpose of the hearing including issues of interest to the Commission shall be published at least once in a newspaper or newspapers of general circulation in the area affected. Occasions when public hearings are required by the compact include, but are not limited to, amendments to the comprehensive plan, drought emergency declarations, and review and approval of diversions. In all other cases, at least 10 days prior to the hearing, notice shall be posted at the office of the Commission (or on the Commission web site), mailed by first class mail to the parties who, to the Commission's knowledge, will participate in the hearing, and mailed by first class mail to persons, organizations and news media who have made requests to the Commission for notices of hearings or of a particular hearing. In the case of hearings held in connection with rulemaking, notices need only be forwarded to the directors of the New York Register, the Pennsylvania Bulletin, the Maryland Register, and the Federal Register, and it is sufficient that this notice appear only in the Federal Register at least 20 days prior to the hearing and in each individual state publication at least 10 days prior to any hearing scheduled in that state.

(d) Standard public hearing procedure.

(1) Hearings shall be open to the public. Participants to a public hearing shall be the project sponsor and the Commission staff. Participants may also be any person wishing to appear at the hearing and make an oral or written statement. Statements may favor or oppose the project/proposal, or may simply express a position without specifically favoring or opposing the project/proposal. Statements shall be made a part of the record of the hearing, and written statements may be received up to and including the last day on which the hearing is held, or within a reasonable time thereafter as may be specified by the presiding officer, which time shall be not less than 10 days nor more than 30 days, except that a longer time may be specified if requested by a participant.

(2) Participants (except the project sponsor and the Commission staff) are encouraged to file with the Commission at its headquarters written

notice of their intention to appear at the hearing. The notice should be filed at least three days prior to the opening of the hearing.

(e) Representative capacity. Participants wishing to be heard at a public hearing may appear in person or be represented by an attorney or other representative. A governmental authority may be represented by one of its officers, employees or by a designee of the governmental authority. Any individual intending to appear before the Commission in a representative capacity on behalf of a participant shall give the Commission written notice of the nature and extent of his/her authorization to represent the person on whose behalf he/she intends to appear.

(f) Description of project. When notice of a public hearing is issued, there shall be available for inspection at the Commission offices such plans, summaries, maps, statements, orders or other supporting documents which explain, detail, amplify, or otherwise describe the project the Commission is considering. Instructions on where and how the documents may be obtained will be included in the notice.

(g) Presiding officer. A public hearing shall be presided over by the Commission chair, the Executive Director, or any member or designee of the Commission. The presiding officer shall have full authority to control the conduct of the hearing and make a record of the same.

(h) Transcript. Whenever a project involving a diversion of water is the subject of a public hearing, and at all other times deemed necessary by the Commission or the Executive Director, a written transcript of the hearing shall be made. Other public hearings may be electronically recorded and a transcript made only if deemed necessary by the Executive Director or general counsel. A certified copy of the transcript and exhibits shall be available for review during business hours at the Commission's headquarters to anyone wishing to examine them. Persons wishing to obtain a copy of the transcript of any hearing shall make arrangements to obtain it directly from the recording stenographer at their expense.

(i) The Commission may conduct any public hearings in concert with any other agency of a member jurisdiction.

Section 805.2 Administrative appeals.

(a) A project sponsor or other person aggrieved by any action or decision of the Commission or Executive Director, may file a written appeal requesting a hearing. Such appeal shall be filed with the Commission within 30 days of that action or decision.

(b) The appeal shall identify the specific action or decision for which a hearing is requested, the date of the action or decision, the interest of the person requesting the hearing in the subject matter of the proposed hearing, and a summary statement setting forth the basis for objecting to or seeking review of the action or decision.

(c) Any request filed more than 30 days after an action or decision will be deemed untimely and such request for a hearing shall be considered denied unless upon due cause shown the Commission by unanimous vote otherwise directs. Receipt of requests for hearings, pursuant to this section, whether timely filed or not, shall be submitted by the Executive Director to the commissioners for their information.

(d) Hearings may be conducted by one or more members of the Commission, by the Executive Director, or by such other hearing officer as the Commission may designate.

(1) The petitioner or an intervenor may also request a stay of the action or decision giving rise to the appeal pending final disposition of the appeal, which stay may be granted or denied by the Executive Director after consultation with the Commission chair and the member from the affected jurisdiction.

(2) The request for a stay shall include:

(i) Affidavits setting forth facts upon which issuance of the stay may depend.

(ii) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted.

(iii) The citations of applicable legal authority, if any.

(3) In addition to the contents of the request itself, the Executive Director, in granting or denying the request for stay, will consider the following factors:

(i) Irreparable harm to the petitioner or intervenor.

(ii) The likelihood that the petitioner or intervenor will prevail on the merits.

(iii) The likelihood of injury to the public or other parties.

(e) The Commission shall grant the hearing request pursuant to this section if it determines that an adequate record with regard to the action or decision is not available, the case involves a determination by the Executive Director or staff which requires further action by the Commission, or that the Commission has found that an administrative review is necessary or desirable. If the Commission denies any request for a hearing in a

contested case, the party seeking such a hearing shall be limited to such remedies as may be provided by the compact or other applicable law or court rule.

(f) If administrative review is granted, the Commission shall refer the matter for hearing, to be held in accordance with Section 805.3, and appoint a hearing officer.

(g) Intervention.

(1) If a hearing is scheduled, a notice of intervention may be filed with the Commission by persons other than the petitioner no later than 10 days before the date of the hearing. The notice of intervention shall state the interest of the person filing such notice, and the specific grounds of objection to the action or decision or other grounds for appearance.

(2) Any person filing a notice of intervention whose legal rights may be affected by the decision rendered hereunder shall be deemed an interested party. Interested parties shall have the right to be represented by counsel, to present evidence and to examine and cross-examine witnesses. In addition to interested parties, any persons having information concerning the subject matter of any hearing scheduled hereunder for inclusion in the record may submit a verified written statement to the Commission. Any interested party may submit a request to examine or cross-examine any person who submits a written statement. In the absence of a request for examination of such person, all verified written statements submitted shall be included with the record and such statements may be relied upon to the extent determined by the Hearing Officer or the Commission.

(h) Notice of any hearing to be conducted pursuant to this section shall comply with the provisions of Section 15.4(b) of the compact relating to public notice unless otherwise directed by the Commission. In addition, both the petitioner and any intervenors shall provide notice of their filings under this section to the list of additional interested parties compiled by the Commission under Section 803.14(a).

(i) Where a request for an appeal is made, the 90-day appeal period set forth in Section 3.10(6) and federal reservation (o) of the compact shall not commence until the Commission has either denied the request for or taken final action on an administrative appeal.

Section 805.3 Hearing on administrative appeal.

(a) Unless otherwise agreed to by the Commission and the party requesting an administrative appeal under Section 805.2 above, the following procedures shall govern the conduct of hearing on an administrative appeal.

(b) Hearing procedure.

(1) The hearing officer shall have the power to rule upon offers of proof and the admissibility of evidence, to regulate the course of the hearing, to set the location or venue of the hearing, to hold conferences for the settlement or simplification of issues and the stipulation of facts, to determine the proper parties to the hearing, to determine the scope of any discovery procedures, to delineate the hearing issues to be adjudicated, and to take notice of judicially cognizable facts and general, technical, or scientific facts. The hearing officer may, with the consent of the parties, conduct all or part of the hearing or related proceedings by telephone conference call or other electronic means.

(2) The hearing officer shall cause each witness to be sworn or to make affirmation.

(3) Any party to a hearing shall have the right to present evidence, to examine and cross-examine witnesses, submit rebuttal evidence, and to present summation and argument.

(4) When necessary, in order to prevent undue prolongation of the hearing, the hearing officer may limit the number of times any witness may testify, the repetitious examination or cross-examination of witnesses, or the extent of corroborative or cumulative testimony.

(5) The hearing officer shall exclude irrelevant, immaterial or unduly repetitious evidence, but the parties shall not be bound by technical rules of evidence, and all relevant evidence of reasonably probative value may be received provided it shall be founded upon competent, material evidence which is substantial in view of the entire record.

(6) Any party may appear and be heard in person or be represented by an attorney at law who shall file an appearance with the Commission.

(7) Briefs and oral argument may be required by the hearing officer and may be permitted upon request made prior to the close of the hearing by any party. They shall be part of the record unless otherwise ordered by the presiding officer.

(8) The hearing officer may, as he/she deems appropriate, issue subpoenas in the name of the Commission requiring the appearance of witnesses or the production of books, papers, and other documentary evidence for such hearings.

(9) A record of the proceedings and evidence at each hearing shall be made by a qualified stenographer designated by the Executive Director. Where demanded by the petitioner, or any other person who is a party to the appeal proceedings, or where deemed necessary by the Hearing Officer, the testimony shall be transcribed. In those instances where a transcript of proceedings is made, two copies shall be delivered to the Commission. The petitioner or other persons who desire copies shall obtain them from the stenographer at such price as may be agreed upon by the stenographer and the person desiring the transcript.

(c) Staff and other expert testimony. The Executive Director shall arrange for the presentation of testimony by the Commission's technical staff and other experts, as he/she may deem necessary or desirable, to be incorporated in the record to support the administrative action, determination or decision which is the subject of the hearing.

(d) Written testimony. If the direct testimony of an expert witness is expected to be lengthy or of a complex, technical nature, the presiding officer may order that such direct testimony be submitted to the Commission in sworn, written form. Copies of said testimony shall be served upon all parties appearing at the hearing at least 10 days prior to said hearing. Such written testimony, however, shall not be admitted whenever the witness is not present and available for cross-examination at the hearing unless all parties have waived the right of cross-examination.

(e) Assessment of costs.

(1) Whenever a hearing is conducted, the costs thereof, as herein defined, shall be assessed by the presiding officer to the petitioner or such other party as the hearing officer deems equitable. For the purposes of this section, costs include all incremental costs incurred by the Commission, including, but not limited to, hearing officer and expert consultants reasonably necessary in the matter, stenographic record, rental of the hall and other related expenses.

(2) Upon the scheduling of a matter for hearing, the hearing officer shall furnish to the petitioner a reasonable estimate of the costs to be incurred under this section. The project sponsor may be required to furnish security for such costs either by cash deposit or by a surety bond of a corporate surety authorized to do business in a member state.

(3) A party to an appeal under this section who desires to proceed in forma pauperis shall submit an affidavit to the Commission requesting the same and showing in detail the assets possessed by the party, and other information indicating the reasons why that party is unable to pay costs incurred under this section or to give security for such costs. The Commission may grant or refuse the request based upon the contents of the affidavit or other factors, such as whether it believes the appeal or intervention is taken in good faith.

(f) Findings and report. The hearing officer shall prepare a report of his/her findings and recommendations based on the record of the hearing. The report shall be served by personal service or certified mail (return receipt requested) upon each party to the hearing or its counsel. Any party may file objections to the report. Such objections shall be filed with the Commission and served on all parties within 20 days after the service of the report. A brief shall be filed together with objections. Any replies to the objections shall be filed and served on all parties within 10 days of service of the objections. Prior to its decision on such objections, the Commission may grant a request for oral argument upon such filing.

(g) Action by the Commission. The Commission will act upon the findings and recommendations of the presiding officer pursuant to law. The determination of the Commission will be in writing and shall be filed in Commission records together with any transcript of the hearing, report of the hearing officer, objections thereto, and all plans, maps, exhibits and other papers, records or documents relating to the hearing.

Section 805.4 Optional joint hearing.

(a) The Commission may order any two or more public hearings involving a common or related question of law or fact to be consolidated for hearing on any or all the matters at issue in such hearings.

(b) Whenever designated by a department, agency or instrumentality of a member jurisdiction, and within any limitations prescribed by the designation, a hearing officer designated pursuant to Section 805.2 may also serve as a hearing officer, examiner or agent pursuant to such additional designation and may conduct joint hearings for the Commission and for such other department, agency or instrumentality. Pursuant to the additional designation, a hearing officer shall cause to be filed with the department, agency, or instrumentality making the designation, a certified copy of the transcript of the evidence taken before him and, if requested, of his findings and recommendations. Neither the hearing officer nor the Susquehanna River Basin Commission shall have or exercise any power or duty as a result of such additional designation to decide the merits of any matter

arising under the separate laws of a member jurisdiction (other than the compact).

Subpart B -- Compliance and Enforcement

Section 805.10 Scope of subpart.

This subpart shall be applicable where there is reason to believe that a person may have violated any provision of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission. The said person shall hereinafter be referred to as the alleged violator.

Section 805.11 Duty to comply.

It shall be the duty of any person to comply with any provision of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

Section 805.12 Investigative powers.

(a) The Commission or its agents or employees, at any reasonable time and upon presentation of appropriate credentials, may inspect or investigate any person or project to determine compliance with any provisions of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission. Such employees or agents are authorized to conduct tests or sampling; to take photographs; to perform measurements, surveys, and other tests; to inspect the methods of construction, operation, or maintenance; to inspect all measurement equipment; and to audit, examine, and copy books, papers, and records pertinent to any matter under investigation. Such employees or agents are authorized to take any other action necessary to assure that any project is constructed, operated and maintained in accordance with any provisions of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

(b) Any person shall allow authorized employees or agents of the Commission, without advance notice or a search warrant, at any reasonable time and upon presentation of appropriate credentials, and without delay, to have access to and to inspect all areas where a project is being constructed, operated, or maintained.

(c) Any person shall provide such information to the Commission as the Commission may deem necessary to determine compliance with any provisions of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission. The person submitting information to the Commission shall verify that it is true and accurate to the best of the knowledge, information, and belief of the person submitting such information. Any person who knowingly submits false information to the Commission shall be subject to civil penalties as provided in the compact and criminal penalties under the laws of the member jurisdictions relating to unsworn falsification to authorities.

Section 805.13 Notice of violation.

When the Executive Director or his/her designee issues a Notice of Violation (NOV) to an alleged violator, such NOV will:

(a) List the violations that are alleged to have occurred.

(b) State a date by which the alleged violator shall respond to the NOV.

Section 805.14 Orders.

(a) Whether or not an NOV has been issued, where exigent circumstances warrant, the Executive Director may issue an order directing an alleged violator to cease and desist any action or activity to the extent such action or activity constitutes an alleged violation, or may issue any other order related to the prevention of further violations, or the abatement or remediation of harm caused by the action or activity.

(b) If the project sponsor fails to comply with any term or condition of a docket approval, the commissioners may issue an order suspending, modifying or revoking approval of the docket. The commissioners may also, in their discretion, suspend, modify or revoke a docket approval if the project sponsor fails to obtain or maintain other federal, state or local approvals.

(c) The commissioners may issue such other orders as may be necessary to enforce any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

(d) It shall be the duty of any person to proceed diligently to comply with any order issued pursuant to this section.

Section 805.15 Show cause proceeding.

(a) The Executive Director may issue an order requiring an alleged violator to appear before the Commission and show cause why a penalty should not be assessed in accordance with the provisions of this chapter and Section 15.17 of the compact. The order to the alleged violator shall:

(1) Specify the nature and duration of violation(s) that is alleged to have occurred.

(2) Set forth the date and time on which, and the location where, the alleged violator shall appear before the Commission.

(3) Set forth any information to be submitted or produced by the alleged violator.

(4) Identify the limits of the civil penalty that will be recommended to the Commission.

(5) Name the individual(s) who has been appointed as the enforcement officer(s) in this matter pursuant to Subsection (b) immediately below.

(b) Simultaneous with the issuance of the order to show cause, the Executive Director shall designate a staff member(s) to act as prosecuting officer(s).

(c) In the proceeding before the Commission, the prosecuting officer(s) shall present the facts upon which the alleged violation is based and may call any witnesses and present any other supporting evidence.

(d) In the proceeding before the Commission, the alleged violator shall have the opportunity to present both oral and written testimony and information, call such witnesses and present such other evidence as may relate to the alleged violation(s).

(e) The Commission shall require witnesses to be sworn or make affirmation, documents to be certified or otherwise authenticated and statements to be verified. The Commission may also receive written submissions or oral presentations from any other persons as to whether a violation has occurred and any resulting adverse consequences.

(f) The prosecuting officer(s) shall recommend to the Commission the amount of the penalty to be imposed. Based upon the record presented to the Commission, the Commission shall determine whether a violation(s) has occurred that warrants the imposition of a penalty pursuant to Section 15.17 of the compact. If it is found that such a violation(s) has occurred, the Commission shall determine the amount of the penalty to be paid, in accordance with Section 805.16.

Section 805.16 Civil penalty criteria.

(a) In determining the amount of any civil penalty or any settlement of a violation, the Commission shall consider:

(1) Previous violations, if any, of any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions or any other requirements of the Commission.

(2) The intent of the alleged violator.

(3) The extent to which the violation caused adverse consequences to public health, safety and welfare or to water resources.

(4) The costs incurred by the Commission or any member jurisdiction relating to the failure to comply with any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions or any other requirements of the Commission.

(5) The extent to which the violator has cooperated with the Commission in correcting the violation and remediating any adverse consequences or harm that has resulted therefrom.

(6) The extent to which the failure to comply with any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions or any other requirements of the Commission was economically beneficial to the violator.

(7) The length of time over which the violation occurred and the amount of water used during that time period.

(b) The Commission retains the right to waive any penalty or reduce the amount of the penalty recommended by the prosecuting officer under Section 805.15(f) should it determine, after consideration of the factors in paragraph (a) of this section, that extenuating circumstances justify such action.

Section 805.17 Enforcement of penalties/abatement or remedial orders.

Any penalty imposed or abatement or remedial action ordered by the Commission or the Executive Director shall be paid or completed within such time period as shall be specified in the civil penalty assessment or order. The Executive Director and Commission counsel are authorized to take such additional action as may be necessary to assure compliance with this subpart. If a proceeding before a court becomes necessary, the penalty amount determined in accordance with Section 805.15(f) shall constitute the penalty amount recommended by the Commission to be fixed by the court pursuant to Section 15.17 of the compact.

Section 805.18 Settlement by agreement.

(a) An alleged violator may offer to settle an enforcement proceeding by agreement. The Executive Director shall submit to the Commission any offer of settlement proposed by an alleged violator. No settlement will be submitted to the Commission by the Executive Director unless the alleged violator has indicated, in writing, acceptance of the terms of the agreement and the intention to comply with all requirements of the settlement agree-

ment, including advance payment of any settlement amount or completion of any abatement or remedial action within the time period provided or both. If the Commission determines not to approve a settlement agreement, the Commission may proceed with an enforcement action in accordance with this subpart.

(b) In the event the violator fails to carry out any of the terms of the settlement agreement, the Commission may reinstitute a civil penalty action and any other applicable enforcement action against the alleged violator.