

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.

Banking Department

NOTICE OF ADOPTION

Authority for Mergers between Banks and Trust Companies and Nonbank Affiliates

I.D. No. BNK-08-06-00004-A
Filing No. 713
Filing date: June 7, 2006
Effective date: June 28, 2006

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

Action taken: Addition of section 6.9 to Title 3 NYCRR.

Statutory authority: Banking Law, sections 14 and 14-g

Subject: Authority for mergers between banks and trust companies and nonbank affiliates.

Purpose: To give New York State chartered banks and trust companies parity with national banks in mergers with nonbank affiliates.

Text or summary was published in the notice of proposed rule making, I.D. No. BNK-08-06-00004-P, Issue of February 22, 2006.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

Department of Correctional Services

NOTICE OF ADOPTION

Inmate Grievance Program

I.D. No. COR-13-06-00013-A
Filing No. 719
Filing date: June 13, 2006
Effective date: July 1, 2006

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

Action taken: Repeal of Part 701 and adoption of new Part 701 to Title 7 NYCRR.

Statutory authority: Correction Law, sections 112 and 139

Subject: Inmate Grievance Program.

Purpose: To update procedures which provide for resolution of inmate grievances pursuant to Correction Law, section 139.

Substance of final rule: The Department seeks to repeal Part 701 and adopt a new Part 701 to Title 7, NYCRR.

The proposed text has been amended and restructured throughout for clarity and simplicity, to eliminate ambiguity, and to closely fit the format of the corresponding Departmental Directive which is the resource used by staff and inmates within facilities. Such changes have not altered the policies, procedures or intent of the program.

Changes of substance have been made as follows:

1. Time frames at every procedural level have been extended to ensure that both inmates and Department staff have adequate time to resolve grievances. Time frames are now expressed in calendar days instead of working days for ease of tracking. The time limit for an inmate to file a grievance after an alleged occurrence has been extended from 14 to 21 calendar days. The time allotted the IGRC for resolution of a grievance or to conduct a hearing has been extended from 7 working days to 16 calendar days. Time given an inmate to appeal to the superintendent or to CORC has been extended from 4 working to 7 calendar days. The time for the superintendent to respond to grievance appeals has been extended from 10 working to 20 calendar days; time to respond to grievances alleging harassment or unlawful discrimination has been extended from 12 working days to 25 calendar days. Time for the CORC to answer an appeal has been extended from 20 working to 30 calendar days.

2. Revisions to the text at 701.3(e) attempt to clarify the interplay between the grievance mechanism and any other existing formal or informal means of problem resolution: with respect to a decision or disposition of a program unit with a separate appeal mechanism which extends review to outside the facility, it is only the decision rendered during that process which is not grievable while all other aspects of the other program, and its implementation, remain grievable.

3. Amendments at 701.4(b)(4) and 701.4(g)(2) give inmate representatives and clerks some assurance of returning to their former job assignments upon leaving positions with the IGP: "Representatives who are unseated will return to their former job assignments whenever feasible. However, leave of absence from a former job assignment may not exceed seven months" and "At the conclusion of their IGP assignments, clerks will be reinstated to their former job assignments whenever feasible. Clerks may be reasonably assured of reinstatement for a period of twelve (12) months."

4. New text added at 701.4(c)(3)(ii) further safeguards an IGRC representative from inadvertent transfer: "To identify an inmate as an IGRC representative and alert any reader that this inmate may not be transferred without a due process hearing, a conspicuous non-permanent marker shall be attached to or provided for:

- (a) the guidance and counseling unit folder;
- (b) the inmate records coordinator's office folder/card; and
- (c) the disciplinary office."

5. New text at 701.5(c)(4) affords a grievant an expanded appeal opportunity in any case of non-implementation where the grievance decision requires some action. "If a decision (of the superintendent requiring action) is not implemented within 45 days, the grievant may appeal to CORC citing lack of implementation as a mitigating circumstance."

6. New text at 701.6(g) provides an inmate an opportunity to request an exception to the time limit at any stage of the grievance mechanism and sets forth criteria for granting exceptions, however "[a]n exception to the time limit may not be granted more than 45 days after an alleged occurrence" or "more than 45 days after the date of the [IGRC or superintendent's] decision unless the late appeal asserts a failure to implement the decision." This change encourages an inmate to accept the responsibility to address his/her concerns in a timely fashion. Timely resolution of grievances is in the interest of both the inmate and the Department.

7. Amendments at 701.6(h) implement new, simple procedures for an inmate to appeal if he or she is transferred to another facility while the grievance is being processed. "Any response to a grievance filed by an inmate who has been transferred shall be mailed directly to that inmate, via privileged correspondence, at his/her new facility or location. An inmate transferred to another facility may continue an appeal of any grievance." Appeals were previously limited to grievances identified as "departmental." Section 701.6(i) provides for the automatic appeal of any grievance filed by an inmate who is released from custody while the grievance is being processed.

8. Amendments at 701.6(k) provide clarification regarding confidentiality and the access to grievance records. "Any requests for grievance documents by the grievant or any direct party may be addressed through the freedom of information law (FOIL) as outlined in Part 5 of this Title." "Grievance files shall be preserved the current year plus the previous four calendar years."

9. New section 701.10 describes an already existing expedited procedure for the review of grievances alleging violation of department policy regarding strip searches or strip frisks. This has been in place to assist the Department in management of this sensitive process and responding to complaints. This procedure closely parallels the expedited procedure in place for grievances alleging harassment.

10. References to the department's office of affirmative action have been changed to its new name, the office of diversity management.

11. Lastly, to support the use and responsiveness of the program, the following have been added: "Note: If an inmate is unsure whether an issue is grievable, he/she should file a grievance and the question will be decided through the grievance process." (at 701.3(e)); and "If a grievant does not receive a copy of the written notice of receipt within 45 days of filing an appeal (to CORC), the grievant should contact the IGP supervisor in writing to confirm that the appeal was filed and transmitted to CORC." (at 701.5(d)(3)(i)).

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 701.3(e)(2), 701.4(a), (a)(1), 701.5(c)(3)(ii), 701.6(g), (i)(1), (2), (k)(3), 701.7(c)(1), 701.8(c) and 701.10(c).

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, 1220 Washington Avenue, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

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

A typographic error appears in the first sentence of section 701.3(e)(2) in the proposed text and is corrected as follows:

(2) An individual decision or disposition of the temporary release committee, time allowance committee, family reunion program [and]or media review committee is not grievable.

Typographic errors appear in sections 701.4(a) and 701.4(a)(1) of the proposed text: the word "nonvoting" is changed to "non-voting" in the three instances where it appears.

A copy error is corrected at section 701.5(c)(3)(ii). All time frames in the proposed text were converted from "working" days to "calendar" days; hence "working" is to be deleted as follows:

(i) Institutional issue. If a matter concerns an institutional issue, the superintendent shall render a decision on the grievance and transmit said decision, with reasons stated, to the grievant, the grievance clerk, and direct party, if any, within twenty (20) calendar [working] days from the time the appeal was received.

The comments correctly point out that the language of section 701.6(g) is unclear. Accordingly, 701.6(g)(1)(i)(a) and (b) are revised by addition of the phrase "if the request was made," as follows:

(a) The IGP supervisor may grant an exception to the time limit for filing a grievance based on mitigating circumstances (e.g., timely attempts to resolve a complaint informally by the inmate, etc.). An exception to the time limit may not be granted *if the request was made* more than 45 days after an alleged occurrence.

(b) The IGP supervisor may grant an exception to the time limit for filing an appeal of an IGRC or superintendent's decision based on mitigating circumstances (e.g. failure to implement action required by the IGRC or superintendent's decision within 45 days, etc.). An exception to the time limit may not be granted *if the request was made* more than 45 days after the date of the decision unless the late appeal asserts a failure to implement the decision.

A citation error appears at the end of section 701.6(i)(1) in the proposed text. "701.5(a)(5)" is corrected to "701.5(b)(4)."

A citation error appears in section 701.6(i)(2) in the proposed text. The citation in the second sentence is corrected so that it reads as follows: "The superintendent shall make a recommendation in the case of any departmental grievance (as defined in section 701.5(c)(3)(i)) and forward it to the IGP supervisor."

(1) For clarity, section 701.6(k)(3) is amended as follows: "Grievance files shall be preserved for the current *calendar* year, plus the previous four calendar years."

A punctuation error appears in section 701.7(c)(1) of the proposed text. A period was missing to mark the end of the third sentence which reads "Staff noting problems or requests for assistance shall report them to the IGP supervisor."

A citation error appears in section 701.8(c) of the proposed text. The reference to "section II" is corrected to "section 701.2."

A citation error appears in section 701.10(c) of the proposed text. The reference to "section II" is corrected to "section 701.2."

These changes are minor and do not alter the intent or context of the text. These do not necessitate revision to the previously published RIS, RAFA, RFA or JIS.

Assessment of Public Comment

Two prisoner legal service agencies offered specific comments concerning the proposed amendments and general criticism about the grievance program. Comments pertaining to specific ongoing federal litigation will not be addressed in this assessment.

Comment

The proposed changes to the time limits seem designed for DOCS' administrative convenience rather than fairness to prisoners. It is suggested that 180 days is an appropriate deadline for grievances because failure to exhaust administrative remedies may be used to preclude otherwise valid claims. If DOCS is not prepared to extend the deadline to that extent, it should nevertheless extend it for a period of several months, long enough to allow prisoners to recover from physically or psychologically traumatic experiences, and to allow them to educate themselves about their legal rights, including obtaining advice from agencies that do not have the staff and resources to provide immediate responses to all complaints. Prisoners should also be given at least three weeks to appeal to muster the necessary resources, and to undertake any necessary research.

Response

1. These amendments extend the time frame by 50% for filing of a grievance. The conversion from work days to calendar days did extend the time frames at each of the procedural levels somewhat, but not necessarily for the convenience of the Department, rather, to ensure appropriate time is given for complete and thorough investigations. The Department does not believe that further extension of the IGP timeframes is warranted because

many grievances involve mundane matters that can best be investigated while memories are fresh and while records are readily available, and it is important that matters like harassment grievances in particular are filed and forwarded to the Superintendent in a timely fashion. In any event, exceptions to the time limit are routinely granted for short delays. When circumstances warrant, exceptions may be granted for longer delays.

2. The conversion to weekdays for all time limits helps avoid confusion by grievants and staff alike.

3. It is not necessary for a grievant to conduct research or gather resources before submitting an appeal.

4. Furthermore, contingencies such as transfers, court appearances and the like are accounted for by permitting extensions to the time limits at every level based upon mitigating circumstances.

5. Finally, neither a grievance nor an appeal should attempt to set forth specific legal theories or claims. Rather, the grievance should focus on the event, or the policy, regulation, procedure or rule that is the source of the grievance. All a grievant need do is object intelligibly to some asserted shortcoming, without being so vague as to preclude DOCS from taking appropriate measures to resolve the complaint internally.

Comment

DOCS should promulgate guidelines to determine whether "mitigating circumstances" exist. The example provided in the proposed regulation is confusing. Examples of "mitigating circumstances" might include misunderstanding of the grievance procedure by the inmate or staff, dismissal of a lawsuit, fear of retaliation, sexual abuse resulting in trauma, transfer or placement in SHU, discovering new information, or failing to implement a favorable grievance decision. The comments also question the need for a time limit for granting extensions.

Response

1. The Department does not believe it necessary or helpful to articulate more precise guidelines for determining whether mitigating circumstances exist since all such decisions are fact-specific. Nevertheless, the inmate has the option to file a separate grievance if denied permission to file a late grievance and the right to appeal that grievance to CORC. The Department also notes that providing a list of generally accepted mitigating circumstances might result in the failure to accept other legitimate reasons for delay in filing.

2. A time limit for granting extensions is necessary to ensure the timely review of grievances. The grievance process is simply not equipped to investigate complaints about matters pertaining to the day-to-day operation of a correctional facility that have long since passed. It is worth noting, however, that many of the grievances addressed by the IGP do not pertain to a specific event and thus are not subject to any time limit for resolution so long as the grievant continues to be personally affected by the issue in the complaint.

3. The comments correctly point out that the language of 701.6(g) is unclear. Accordingly, 701.6(g)(1)(i) is revised by inclusion of the phrase "if the request was made" as follows:

(a) The IGP supervisor may grant an exception to the time limit for filing a grievance based on mitigating circumstances (e.g., timely attempts to resolve a complaint informally by the inmate, etc.). An exception to the time limit may not be granted if the request was made more than 45 days after an alleged occurrence.

(b) The IGP supervisor may grant an exception to the time limit for filing an appeal of an IGRC or superintendent's decision based on mitigating circumstances (e.g. failure to implement action required by the IGRC or superintendent's decision within 45 days, etc.). An exception to the time limit may not be granted if the request was made more than 45 days after the date of the decision unless the late appeal asserts a failure to implement the decision.

Comment

The proposed revision to 701.3(e) is perhaps an attempt to differentiate between grievable and non-grievable matters. However, the proposed revision has merely "given some cosmetic treatment" to the language with no significant changes. The comments point to the elimination of introductory language when a grievance is dismissed as non-grievable, stating that the grievant "will be directed to the appropriate mechanism whereby he/she can seek the solution requested." They further assert that "the Department's position is a confusing morass."

Response

1. The revisions make it clear that only the individual decisions or dispositions of the programs with their own appeal mechanisms, and those specifically listed, are not grievable.

2. The Department has further addressed this concern by providing that "If an inmate is unsure whether an issue is grievable, he/she should file a

grievance and the question will be decided through the grievance process in accordance with section 701.5, below."

3. The requirement that the IGRC refer the grievant to appropriate existing mechanisms upon dismissal of a grievance is articulated at 701.5(b)(4)(ii).

Comment

While establishment of an enforcement procedure or mechanism for non-implementation of a CORC decision is a positive step, the CORC appeal process does not appear to be an appropriate or particularly efficacious means. Non-compliance complaints could be directed simultaneously to the IGRC and CORC. Furthermore, appeals to CORC based on failure to implement or act upon a favorable decision by the Superintendent should be limited to the implementation issue and should not empower CORC to reverse the Superintendent's decision. The process should also apply to failure to implement IGRC decisions. Failure to implement a favorable decision should be included as an example of a mitigating circumstance. It will not always be clear to an inmate when he or she is faced with failure to implement as opposed to ordinary delays in prison functions.

Response

1. CORC is the appropriate body to enforce a favorable Superintendent's decision requiring some action. However, CORC must be fully empowered to review the grievance.

2. The process does not apply to failure to implement "IGRC decisions" because the IGRC is not empowered to make decisions which require superintendent or central office action. In any grievance requiring superintendent or central office action, the IGRC may only make recommendations which are automatically referred to the superintendent.

3. Failure to implement a favorable decision is listed as an example of a mitigating circumstance where applicable.

4. The rule establishes a 45 day implementation period, authorizing an appeal if the favorable decision is not implemented in that time.

Comment

The grievance complaint form is not included in the proposed amendment. The grievance form should be revised to reference, as mitigating circumstances, exceptions to the time limit for filing or appealing. The current grievance form lacks information about how to appeal.

Response

1. The grievance form was not included in the regulation as the Department does not deem it necessary to publish this optional complaint form in the regulation. The form is provided for the sake of convenience and does not constitute a Rule under the State Administrative Procedure Act.

2. The comments regarding noting the exceptions to the time frames will be considered upon revision of the complaint form. However, the Department is concerned that placing too much emphasis on the possibility of obtaining an exception to the time limit will draw an inmate's focus away from the time limit for filing a grievance or appeal.

3. Information on how to appeal is printed on the IGRC Response form and on the Superintendent's Decision form.

Comment

The provisions concerning appeal when the prisoner receives no decision should be revised to provide that an appeal from the lack of a decision can be made at any time after the decision is due.

Response

1. In most cases when the inmate claims he/she did not receive any decision, Department records indicate a decision was sent or that the inmate never filed the grievance.

2. Rather, the inmate should contact the IGP Supervisor if he/she does not receive a timely response and, if a grievance was filed but no decision has been issued, appeal in a timely fashion. If no grievance was filed, the inmate may request an exception to the time limit to file a late grievance.

Comment

An inmate who has a complaint about the processing of a grievance should be permitted to appeal to the next level and not have to file a new grievance regarding such processing. All grievances submitted should be accepted, filed, and given a grievance number. Dismissals or determinations that a grievance is non-grievable should be appealable. Inmates should be advised to fix curable defects.

Response

1. The current mechanism has been very well received. The current mechanism develops a full record concerning the issue of whether the grievance was properly dismissed or whether an exception to the time limit was properly denied.

2. CORC decisions addressing the processing of grievances provide guidance for future similar circumstances.

Comment

The regulations should be amended to provide that if a prisoner files a grievance in the wrong prison, DOCS should accept it, log it, and send it to the IGP clerk at the right prison, with a copy to the prisoner.

Response

1. The Department believes that the 2004 amendment at section 701.7(a)(1) has reduced confusion and the risk of both lost grievances and delayed investigations.

2. The commenter's suggestion would duplicate work, create records that suggest a grievance was filed and never appealed, and increase the likelihood of lost grievances.

Comment

Referring to the procedures regarding harassment and discrimination grievances, this entire aspect of the DOCS grievance policy should be overhauled so that if such a complaint is received by any DOCS employee, the prisoner's obligation is deemed complete. The process is not confidential and DOCS should acknowledge that direct complaints to the Inspector General or the Superintendent are acceptable alternatives to the grievance process.

The proposed revision does nothing to address its serious deficiencies. Prisoners who have been subjected to serious misconduct by staff very frequently do not file grievances; instead, they write to the Inspector General, the Superintendent, or to other officials whom they think may have authority to address their problems. Thus the requirement that, for exhaustion purposes, all harassment complaints be filed as grievances serves no useful substantive purpose either for DOCS or the inmate; it serves only to create a procedural requirement for prisoners to miss and thereby lose their rights.

Response

1. The filing of harassment and discrimination grievances serves a number of important administrative functions. First and foremost, the appeal mechanism provides an essential tool for the Department's Central Office to monitor facility-wide or systemic problems and can help identify issues that require policy revision or system-wide change. It ensures that: the grievance complaint is logged and accounted for in the IGP semi-annual and annual reports; that the Superintendent receives the complaint in a timely manner; and that the complaint is forwarded to the appropriate investigative branch. It also provides the inmate with documentation that he/she complained about the matter. The Department does not want to discourage inmates from utilizing the other problem resolution methods mentioned in the comments. However, it is important that these methods are used in addition to the filing of a grievance for the previously stated reasons and also because the Department has no other formal means of tracking statistical information in connection with such issues.

2. Unlike the grievance process, letters to the Superintendent or the Inspector General result only in consideration of an individual complaint. In contrast, the grievance system provides for tracking such complaints on a facility-wide and system-wide basis and therefore enables administrators to look beyond the individual case to ensure uniformity and determine if systemic changes are warranted.

Comment

There should be a comprehensive, clear, and brief explanation delivered to all prisoners of what prisoners must do to exhaust administrative remedies to DOCS' satisfaction.

Response

The Department's regulation is a comprehensive document, designed to implement Correction Law § 139 and to provide step-by-step guidance to all those who are responsible for the administration of the program. As such, it contains far more detail than is necessary to guide an inmate in the pursuit of a grievance. It is DOCS' intention to draft a short, simple summary describing the Inmate Grievance Program processes and to make that summary available in inmate libraries and grievance offices. Moreover, publications for the benefit of inmate populations which are a standard part of the Department's law library collections, such as *Pro Se* and *A Jailhouse Lawyer's Manual*, routinely provide explanatory information on issues such as this.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Presumptive Release Program

I.D. No. COR-26-06-00009-P

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

Proposed action: Addition of Part 2200 to Title 7 NYCRR.

Statutory authority: Correction Law, sections 112 and 806

Subject: Presumptive release program for non-violent inmates.

Purpose: To provide the structure for presumptive release determinations.

Text of proposed rule:

Chapter XXII

Presumptive Release Program For Nonviolent Inmates

PART 2200

PRESUMPTIVE RELEASE PROGRAM FOR NONVIOLENT INMATES

(Statutory Authority: Correction Law §§ 112, 806)

PART

2200 Presumptive Release Program For Nonviolent Inmates

§ 2200.1 Purpose

This Part sets forth the policies and procedures governing the presumptive release program for nonviolent inmates whereby eligible inmates who satisfy all statutory, program and disciplinary criteria may be released to parole supervision without the necessity of a personal appearance before, and a grant of parole by, the board of parole.

§ 2200.2 Background

An inmate eligible for presumptive release may be released to parole supervision at the expiration of the minimum sentence, or earlier at the expiration of five-sixths of the minimum sentence if the inmate also qualifies for merit time as set forth in Part 280 of this Title and as outlined in section 2200.4, below. Pursuant to Executive Law section 259-g, the conditions of release for any inmate granted presumptive release shall be fixed by the board of parole. Any otherwise eligible inmate who is not granted presumptive release to parole for any reason shall appear before the board of parole for discretionary parole release consideration at the regularly scheduled time, or as soon thereafter as is practicable.

§ 2200.3 Eligibility

(a) An inmate must satisfy all criteria set forth in subdivisions (b) through (g) of this section to be eligible for presumptive release.

(b) Crime, sentence, commitment and prior history criteria. An inmate cannot presently be serving a sentence for, nor previously have been convicted of, any of the following crimes, or an attempt or conspiracy to commit any of the following crimes:

- (1) an A-I felony;*
- (2) a violent felony offense;*
- (3) manslaughter in the second degree;*
- (4) vehicular manslaughter in the first or second degree;*
- (5) criminally negligent homicide;*
- (6) incest;*
- (7) an offense defined in article 130 of the penal law (sex offense);*
- (8) an offense defined in article 263 of the penal law (use of a child in a sex performance);*

(9) a hate crime as defined in article 485 of the penal law;

(10) an act of terrorism as defined in article 490 of the penal law; or

(11) aggravated harassment of an employee by an inmate; or

(12) any out-of-state conviction which has all of the essential elements of any of the offenses listed in paragraphs (1) through (10) above.

(c) Disciplinary record criteria: An inmate must not commit any serious disciplinary infraction. A serious disciplinary infraction shall be identified as behavior which results in criminal or disciplinary sanctions as follows:

(1) any conviction for a State or Federal crime that was committed after the inmate was committed to the Department of Correctional Services;

(2) a finding made under Part 253, except as noted, or 254 of this Title of violation of any of the following rules as described in section 270.2 of this Title:

(i) 1.00 --Penal Law Offenses;

(ii) 100.10 -- assault on inmate;

(iii) 100.11 -- assault on staff;

(iv) 100.12 -- assault on other;

(v) 101.10 --sex offense;

(vi) 101.20 -- lewd exposure;

(vii) 104.10 -- rioting;

(viii) 105.12 --unauthorized organization;

(ix) 108.10 -- escape;

(x) 108.15 -- abscondance;

(xi) 113.10 -- weapon;

(xii) 113.13 -- alcohol;

(xiii) 113.24 -- drug use;

(xiv) 113.25 -- drug possession;

- (xv) 117.10 -- explosives;
- (xvi) 118.10 -- arson;
- (xvii) 118.22 -- unhygienic act (under Part 254 only); or
- (xviii) 180.14 -- urinalysis violation;

(3) receipt of disciplinary sanctions under Part 253 or 254 of this Title which total 60 or more days of SHU and/or keeplock; or

(4) receipt of any recommended loss of good time as a disciplinary sanction under Part 254 of this title.

(d) Frivolous lawsuit. An inmate must not have filed an action, proceeding or claim against a State agency, officer or employee that was found to be frivolous pursuant to section 8303 of the Civil Practice Law and Rules, or rule 11 of the Federal Rules of Civil Procedure.

(e) Alien status. A foreign-born inmate who is subject to deportation or exclusion and potentially eligible for a conditional parole pursuant to section 259-i(2)(d) of the executive law, is not eligible for presumptive release consideration.

(f) Program criteria.

(1) An inmate must successfully participate in the assigned program(s) and/or work assignment(s) and be awarded a certificate of earned eligibility pursuant to Part 2100 of this Title.

(2) An inmate shall not be eligible for presumptive release if the inmate

(i) entered the shock incarceration program but failed to successfully complete the program for any reason other than an intervening circumstance beyond the control of the inmate, or

(ii) was a participant in the temporary release program but was removed for any reason other than an intervening circumstance beyond the control of the inmate.

(g) Outstanding warrants, detainers, commitments and open charges.

(1) An inmate is not eligible for presumptive release if the inmate's file reveals any of the following:

- (i) an out-of-state or Federal felony warrant;
- (ii) a felony arrest warrant for a crime which is not barred by the statute of limitations as provided by Criminal Procedure Law section 30.10;

(iii) a violation of probation warrant where the sentence of probation was imposed for a felony;

(iv) a concurrent and/or consecutive commitment to a local N.Y.S. jurisdiction for a definite sentence that will have to be served in local custody;

(v) a concurrent and/or consecutive out-of-state or federal commitment, or

(vi) an open felony charge in New York State.

(2) If there is a warrant or an indication of a warrant as described in (i), (ii) or (iii) above, the correction counselor must initiate correspondence to the warrant issuing authority or agency to determine the status of the warrant and whether any charge is still outstanding. If no response is received to official departmental communication within thirty days of the request, it will be construed that the warrant in question is no longer active and is not a bar to the inmate's presumptive release.

(3) If there is an indication of an open felony charge in New York State which is not barred by the statute of limitations as provided by Criminal Procedure Law section 30.10, the correction counselor must initiate correspondence to the charging authority to determine the status of the charge. If no response is received to official departmental communication within thirty days of the request, it will be construed that the charge in question is no longer active and is not a bar to the inmate's presumptive release.

§ 2200.4 Effect on Minimum Period of Sentence

(a) An inmate otherwise eligible for presumptive release may be released after five-sixths of the minimum term if the inmate also satisfies the program criteria set forth in section 280.2(d) of this Title.

(b) An inmate identified in subdivision (a), above, who is serving a sentence for any Class A-II through Class E drug offense may earn supplemental merit time in the amount of an additional one-sixth of the minimum period of the sentence imposed for the drug felony if he or she has either:

(1) completed two or more of the four possible merit program objectives listed in section 280.2(d) of this Title:

- (i) earned a general equivalency diploma (G.E.D.);
- (ii) received an alcohol and substance abuse treatment certificate;
- (iii) received a vocational trade certificate following at least six months of programming in that program; or

(iv) performed 400 hours or more of service as part of a community work crew/outside assignment; or

(2) completed one of the four and also successfully maintained employment in a work release program or other continuous temporary release program for a period of not less than three months.

§ 2200.5 Procedure

(a) Presumptive release reviews.

(1) The records of an inmate eligible for presumptive release under the criteria set forth in section 2200.3 of this Part shall be reviewed by facility guidance staff prior to his or her presumptive release merit eligibility date or presumptive release initial parole eligibility date.

(2) The inmate's program history and record will be reviewed by a senior counselor, deputy superintendent for programs, and superintendent, or their respective designees to identify any inmate whose behavior, subsequent to commitment to the department, may be regarded as inconsistent with the intent of Correction Law section 803(1)(d), Correction Law section 805 and public safety. Factors which will be viewed negatively include:

- (i) evidence of escape or attempted escape; and
- (ii) refusal to participate in the shock incarceration program.

(3) The following additional factors, if present, must be noted and taken into consideration by the Commissioner's designee in the review of the inmate for presumptive release:

(i) any recommendation from the sentencing court and/or the district attorney in response to the letter from the division of parole, pursuant to Executive Law Section 259-i, requesting a position on the possible release of the inmate to parole;

(ii) any statement made to the board of parole by the crime victim or victim's representative, pursuant to Executive Law Section 259-i;

(iii) any letter received from a sentencing court or district attorney expressing a position on the inmate's potential eligibility for, or participation in, any other department program;

(iv) whether the inmate has been designated as a central monitoring case (CMC) pursuant to Part 1000 of this Title; or

(v) any order of protection. If there is or was during the current term of incarceration an active order of protection, the correction counselor must attempt to obtain all available information, including, but not limited to:

(a) the identification of the court which issued the order, the date the order was originally issued and whether there have been any extensions or modifications;

(b) the relationship to the inmate of the person or persons covered by the order;

(c) whether the inmate has ever violated or attempted to violate the order, and

(d) whether the order was in any manner related to an incident of domestic violence.

(b) Presumptive release determination.

(1) Presumptive release determinations shall be made by the commissioner or designee after central office review.

(2) The decision of the commissioner or designee to grant or withhold a presumptive release allowance is final, except as provided in paragraph (4) of this subdivision.

(3) The presumptive release determination notice shall be delivered to the inmate approximately one week following the commissioner or designee review.

(4) A presumptive release allowance may be revoked at any time prior to an inmate's release on parole if the inmate commits a serious disciplinary infraction, as defined in section 2200.3(c) above, fails to continue to perform and pursue his or her assigned program plan or earned eligibility plan or if information that would have affected the central office review subsequently comes to light and indicates that the parole release decision can best be made after an appearance by the inmate before the board of parole.

§ 2200.5 Effect of the Presumptive Release Determination.

(a) Any inmate who is granted a presumptive merit allowance may be released to parole supervision at a date computed by subtracting the merit time allowance from his or her parole eligibility date.

(b) Any inmate who is granted a presumptive initial earned eligibility certificate may be released to parole supervision at the expiration of the minimum sentence.

(c) If presumptive merit allowance is denied by the commissioner or designee, either due to the nature and circumstances of the crime, or due to the inmate's prior history, character or background, or due to one or more questions raised in the inmate's file, such denial represents a determination that the parole release decision can best be made following the individual's appearance before the Board of Parole. Therefore, the inmate

will not be eligible for presumptive release consideration at any subsequent time. The presumptive release denial is not an indictment one way or the other as to the inmate's suitability for possible release on parole.

Text of proposed rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, 1220 Washington Avenue, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority:

Section 112 of the Correction Law assigns to the commissioner of correction the powers and duties of management and control of correctional facilities and the inmates confined therein. New section 806 of the Correction Law requires the commissioner to promulgate rules and regulations for the granting, withholding, cancellation and rescission of presumptive release determinations.

Legislative Objective:

By vesting the commissioner with this rule making authority, the legislature intended the commissioner to provide the structure for presumptive release determinations, ensuring that only those inmates who satisfied both the eligibility criteria and intent of the presumptive release statute would be released to parole supervision without the necessity of a personal appearance before, and a grant of parole by, the board of parole.

Needs and Benefits:

The legislation authorizing presumptive, Correction Law Section 806, provides an additional incentive for inmates to maintain good behavior and complete appropriate program assignments. The intent of "presumptive release" is to allow inmates who are serving sentences for certain nonviolent crimes and who have no history of violence, to be released to parole supervision without the necessity of a parole board appearance, provided that they have maintained positive disciplinary and program records and have not filed frivolous lawsuits.

Eligible inmates may either be released at their merit time date if they have otherwise satisfied the merit time criteria set forth in Correction Law Section 803, or at their parole eligibility date if they meet all other criteria and have received a certificate of earned eligibility pursuant to Correction Law Section 805. Inmates who are approved for presumptive release will have their release programs prepared by parole staff in the same manner as if such inmates were being conditionally released. Any inmate who is considered for presumptive release but not approved for any reason, shall appear before the board of parole in the normal course or as soon thereafter as can be arranged.

This initiative follows the pattern set by the earned eligibility and merit time statutes and is expected to enhance inmate perception that good behavior and program participation can increase the probability of ensure parole release at the earliest opportunity.

Costs:

- a. To State government: None.
- b. To local governments: None. The proposed amendment does not apply to local governments.
- c. Costs to private regulated parties: None. The proposed amendment does not apply to private regulated parties.
- d. Costs to the regulating agency for implementation and continued administration of the rule:

(i) Initial expenses: None. All processing can be accomplished with existing personnel and resources.

(ii) Annual cost: None additional.

Paperwork:

- a. New reporting or application forms: None.
- b. Additions to existing reporting or application forms: None.
- c. New or additional recordkeeping that will be required of the regulated party to comply with the rule or prove compliance with the rule: None.

Local Government Mandates:

There are no new mandates imposed upon local governments by this proposal. The proposed amendment does not apply to local governments.

Duplication:

This proposed amendment does not duplicate any existing State or Federal requirement.

Alternatives:

This rule implements Correction Law Section 806 which provides a fairly comprehensive structure for making presumptive release determina-

tions since it builds on the established mechanisms for earned eligibility and merit time determinations. Accordingly, alternative considerations are limited to a definition of "serious disciplinary infraction" and a framework for exercise of the commissioner's discretion where "such release may not be consistent with the safety of the community or the welfare of the inmate." The definition of "serious disciplinary infraction" mirrors that in use for merit time determinations. The definition has worked well for merit time determinations, and thus no alternative was considered. The statutory grant of discretion to the commissioner has led to establishment of procedures for consideration of program failures in the shock incarceration program and temporary release program, the existence of outstanding warrants, commitments and open charges, recommendations and statements from judicial and prosecutorial authorities and victims, central monitoring case status (per 7 NYCRR Part 1000), and orders of protection – as detailed in sections 2200.3(f) and (g) and 2200.4. The Department has concluded that all elements which may contribute to the exercise of logical discretion have been included.

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This proposal merely implements new section 806 of Correction Law, whereby eligible inmates who satisfy all statutory, program and disciplinary criteria may be released to parole supervision without the necessity of a personal appearance before, and a grant of parole by, the board of parole.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal merely implements new section 806 of Correction Law, whereby eligible inmates who satisfy all statutory, program and disciplinary criteria may be released to parole supervision without the necessity of a personal appearance before, and a grant of parole by, the board of parole.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely implements new section 806 of Correction Law, whereby eligible inmates who satisfy all statutory, program and disciplinary criteria may be released to parole supervision without the necessity of a personal appearance before, and a grant of parole by, the board of parole.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Removal from Temporary Release

I.D. No. COR-26-06-00010-P

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

Proposed action: Amendment of section 1904.2 of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Removal from temporary release.

Purpose: To require an inmate's appearance at a temporary release committee hearing after a disciplinary hearing has been sustained.

Text of proposed rule: Subdivisions (h) through (k) and (m) through (o) of section 1904.2 are hereby repealed and the remaining subdivisions (l), (p), (q) and (r) re-lettered to (h) through (k) respectively.

Subdivision (h) of section 1904.2, re-lettered from (l), is amended as follows:

(h) When [an inmate has not had a disciplinary hearing sustained, or] the temporary release committee is reviewing an inmate's appropriateness for continued participation in a temporary release program, the temporary release committee shall conduct a full hearing to ensure that the inmate has been afforded due process. The following procedures are to be followed:

(1) An inmate should be provided with a notice of specific reasons for the referral at least 24 hours prior to the temporary release committee meeting. A non-English speaking inmate who cannot read and understand

English must be given a translated notice and a translator shall be present at the hearing.

(2) The inmate shall [may] make a personal appearance before a temporary release committee unless he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals. [when the inmate is no longer available in the facility, it is required that the temporary release committee chairperson at the receiving facility meet with the inmate.]

(3) An electronic recording of the entire hearing shall be made.

(4) An opportunity for an inmate to request an inmate assistant if the inmate is illiterate, non-English speaking, the issues are complex[, or] the inmate is "keeplocked" or in SHU and unable to prepare a defense, or the inmate is sensorially disabled (in which case the inmate will be provided reasonable accommodations including, but not limited to, the provision of a qualified sign language interpreter for a deaf and hard of hearing inmate who uses sign language to communicate).

(5) An opportunity for the inmate to call witnesses and to proffer questions to be asked of witnesses called.

(6) An opportunity to reply and produce documentary evidence.

(7) A written statement setting forth the decision and the evidence relied on, following the superintendent's review of the temporary release committee's recommendation. A non-English speaking inmate who cannot read and understand English must be given a translated statement.

(8) Form 4187 must then be completed and a copy kept on file.

Text of proposed rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, 1220 Washington Avenue, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority:

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

Section 851(2) of the Correction Law requires the commissioner to promulgate regulations to give direction to the temporary release committees at each facility.

Legislative Objective:

The legislature intended that the commissioner promulgate regulations setting forth the conditions under which an inmate may be removed from the temporary release program, and fair and equitable procedures for such removal.

Needs and Benefits:

State appellate courts continue to hold that inmates who are being removed from temporary release are not entitled to a full hearing before a temporary release committee where an underlying disciplinary hearing has already been sustained. Hall v. Zenzen, 20 A.D.3d. 840, 798 N.Y.S.2d 801(2005). Notwithstanding, the department has decided to require the inmate's presence in all temporary release committee revocation proceedings, at this time, due to the current unsettled nature of this issue among the federal courts in the State.

Repealed subdivisions (h) through (k) described the procedure to be followed when a disciplinary hearing against an inmate who has been approved for temporary release is sustained. This procedure specified that it was not necessary for an inmate to be present at the temporary release committee meeting if he or she had been transferred to another facility.

Repealed subdivisions (m) through (o) described the procedure to be followed for conducting a temporary release committee hearing in the case of an inmate transferred to another facility after programmatic or non-disciplinary violations.

The effect of these repeals and the amendments to the re-lettered subdivision (h), formerly (l), is that the Department will process in the same way all referrals to the temporary release committee, whether they originate from programmatic or disciplinary violations, and whether or not the inmate has been transferred to another facility. Accordingly, the inmate

will be present at the temporary release committee hearing unless, as specified in amended paragraph (h)(2) "he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals."

Furthermore, the amendments to subdivision (h) at paragraphs (1), (4) and (7) acknowledge in the regulation the already established practice of making reasonable accommodations during the course of a temporary release committee hearing for inmates facing language or physical barriers. In addition, due process is extended or clarified at paragraph (5) by allowing an inmate to "proffer questions to be asked of witnesses called," at paragraph (6) allowing production of "documentary" evidence and at paragraph (7) by specifying that a translated statement of the final written decision will be given to a non-English speaking inmate.

The Department has concluded that these changes will ensure uniform processing of all inmates who are referred to the temporary release committee for removal for any reason and in any location.

Costs:

a. To State government: None anticipated.

b. To local governments: None. The proposed amendment does not apply to local governments.

c. Costs to private regulated parties: None. The proposed amendment does not apply to private regulated parties.

d. Costs to the regulating agency for implementation and continued administration of the rule:

(i) Initial expenses: None.

(ii) Annual cost: None.

e. The assessment that this proposal will generate no new costs has been made by department officials experienced in the operations of the temporary release program.

Paperwork:

a. New reporting or application forms: None.

b. Additions to existing reporting or application forms: None.

c. New or addition recordkeeping that will be required of the regulated party to comply with the rule or prove compliance with the rule: None.

Local Government Mandates:

There are no new mandates imposed upon local governments by this proposal. The proposed amendment does not apply to local governments.

Duplication:

This proposed amendment does not duplicate any existing State or Federal requirement.

Alternatives:

The alternative would be to leave the existing regulations governing temporary release removals undisturbed. While State appellate courts continue to hold that inmates are not entitled to a full hearing before a temporary release committee where an underlying disciplinary hearing has already been sustained, Hall v. Zenzen, 20 A.D.3d. 840, 798 N.Y.S.2d 801(2005), the alternative was rejected due to the current unsettled nature of the issue among the federal courts in this State.

Federal Standards:

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

Compliance Schedule:

The Department of Correctional Services is expected to achieve compliance with the proposed rule immediately.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This merely requires an inmate's appearance at a temporary release committee hearing after a disciplinary hearing has been sustained.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal merely requires an inmate's appearance at a temporary release committee hearing after a disciplinary hearing has been sustained.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely requires an inmate's appearance at a temporary release committee hearing after a disciplinary hearing has been sustained.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Sexual Assault Forensic Examiner (SAFE) Programs

I.D. No. HLT-26-06-00003-P

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

Proposed action: Amendment of sections 405.9 and 405.19 and addition of Part 722 to Title 10 NYCRR.

Statutory authority: Public Health Law, art. 6A and sections 2805-1, 2805-i, 2803(2) and 2805-p

Subject: Sexual assault forensic examiner (SAFE) programs.

Purpose: To update existing requirements for the care and treatment of sexual assault survivors.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The proposed regulatory changes update existing requirements for the care and treatment of sexual assault survivors and add a new Part 722 to establish standards and processes for the Department of Health (DOH or Department) hospital-based Sexual Assault Forensic Examiner (SAFE) program designation. Operational standards will be incorporated and identified as standards that programs must agree to meet as a condition of designation and continued recognition.

New Part 722 defines operational standards and processes a program must meet for Department designation as a hospital-based SAFE program. Programs must agree to meet these standards as a condition of designation and continued recognition.

Section 405.9(c) is being amended to clarify every hospital's responsibility to provide treatment to sexual assault survivors as well as to maintain evidence.

Section 405.19(c)(4) is being amended to provide an appropriate cross-reference to section 405.9(c).

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

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

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

Regulatory Impact Statement

Statutory Authority:

These regulations are authorized pursuant to the passage of the Sexual Assault Reform Act (SARA), Chapter 1 of the Laws of 2000, which amends Public Health Law ("PHL") section 2805-i. In accordance with SARA, section 2805-i (4-b)(a) of the PHL, as amended, authorizes the Commissioner, to "with the consent of the directors of interested hospitals in the state and in conjunction with the commissioner of the division of criminal justice services, designate hospitals in the state as the sites of a twenty-four hour sexual assault forensic examiner (SAFE) program." The hospital sites "shall be designated in urban, suburban and rural areas to give as many state residents as possible ready access to the sexual assault forensic examiner program."

Section 2803(2) of the PHL authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner, to effectuate the provisions and purposes of Article 28.

Legislative Objectives:

A primary legislative objective of Article 28 of PHL is "the protection and promotion of the health of the inhabitants of this state." PHL section 2800 provides, inter alia, that "the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services..." Subdivision (5) of PHL section 2805-i, as amended, authorizes the Commissioner to promulgate such rules and regulations as may be necessary and proper to carry out effectively the provisions of this section regarding the designation of hospital-based sexual assault forensic examiner pro-

grams. These regulatory standards will promote quality medical and forensic care to survivors of rape and sexual assault in the hospital setting.

Needs and Benefits:

The Department has established regulatory standards to promote quality care for survivors of rape and sexual assault in hospitals throughout the state as set forth in:

Section 405.9 – Establishment of hospital-based protocols and the maintenance of sexual offense evidence.

Section 405.19 – Emergency Services.

The above regulations are amended to clarify every hospital's responsibility for the treatment of survivors as well as for the maintenance of evidence. This clarification is supported by Chapter 504 of the Laws of 1994.

Every hospital in New York State must ensure that all survivors of rape or sexual assault who present at the hospital are provided with care that is consistent with current standards of practice. In addition to maintaining evidence collection, hospitals are expected to maintain current protocols regarding the care of patients reporting sexual assault, provide survivors with appropriate assessment, treatment and referrals, provide emotional support, and minimize the potential for further trauma. Hospital staff are also expected to discuss with the survivor the option of reporting the offense to the police, offer to provide and provide if requested, prophylaxis against pregnancy, sexually transmitted diseases, hepatitis B and HIV, as appropriate, and reasonably assure the survivor an appropriate and safe discharge. Additionally, all hospitals shall advise patients of the availability of services provided by local rape crisis or victim assistance organizations and contact such an organization when an alleged sexual offense victim seeks treatment so that a representative may offer services to the survivor.

Further, a new Part 722 is being added to define operational standards and process for SAFE designation. Hospitals interested in becoming DOH-approved SAFE programs must agree to meet these standards as a condition of designation and continued recognition.

To enhance access to and the quality of care to survivors of sexual assault, the Department implemented a hospital-based twenty-four hour sexual assault forensic examiner (SAFE) program. This designation reflects the hospital's intention to comply with DOH requirements and provide more comprehensive services to survivors. These services include providing consistent and compassionate state of the art medical care and providing forensic examinations in private settings by specially trained DOH-certified sexual assault forensic examiners.

There have been significant changes pertaining to the care and treatment of the survivors of sexual assault. Only in recent years have health care facilities begun to recognize their responsibility to have trained staff available to provide specialized services for survivors of sexual assault. Hospitals now recognize the importance of having knowledgeable staff to conduct sexual assault examinations, gather forensic evidence, and work with the survivors to enable the recovery process to begin.

SAFE program philosophy is based upon the belief that providing a specialized standard of medical care and evidence collection to survivors of sexual assault will support recovery and prevent further injury or illness arising from victimization, and may increase the successful prosecution of sex offenders for survivors who choose to report the crime to law enforcement. In a journal review conducted by the Division of Criminal Justice Services ("DCJS") and reported in an unpublished Report on New York State Sexual Assault Examiner Programs (June 2002), SAFE programs are credited with significantly improving medical-forensic treatment of sexual assault survivors.

Anecdotal claims of programs' success in increasing survivor use of aftercare services, improving reporting rates and facilitating successful prosecution, are found throughout the literature as well. The confidential and sensitive nature of sexual assault can make it difficult to contact survivors directly for their perceptions of the services they received from SAFE programs. In an effort to obtain information about the efficacy of the program, DCJS surveyed thirty prosecutors (with a response from 22 or 73%) and 33 rape crisis advocate programs (with a response from 25 or 76%) for

- (1) their perceptions of the quality and effectiveness of SAFE services,
- (2) the quality of forensic evidence collected by SAFE practitioners in comparison to non-SAFE practitioners, and
- (3) the effects, if any, of those differences upon the prosecution of sexual assault cases and the survivors' use of aftercare.

Of the prosecutors who were able to distinguish SAFE from non-SAFE cases, almost 90% of the 22 responders indicated they were very satisfied with SAFE programs and view them as valuable in achieving successful

outcomes in sexual assault cases. Advocates also rated SAFE hospital medical treatment and quality of forensic evidence collection as superior to the treatment and quality of evidence by and from non-SAFE hospitals. They also consider SAFEs more knowledgeable, competent, more experienced and better equipped than non-SAFE medical providers.

Hospitals wishing to provide more comprehensive services to survivors may seek and obtain DOH designation as SAFE programs under new Part 722. The DOH-approved SAFE program will involve an interdisciplinary collaborative effort involving the SAFE program, a rape crisis center, law enforcement, the prosecutor's office and other appropriate community service agencies. These organizations will provide a coordinated response that not only effectively meets the needs of the sexual assault survivor, but also improves the overall community response to sexual assault.

In reviewing applications from interested hospitals, the Department is required by law to consider specific criteria when designating hospital SAFE programs, including the following:

- (1) location,
- (2) capacity to coordinate services for survivors,
- (3) accessibility for disabled survivors,
- (4) existing services for survivors,
- (5) capacity to collect uniform data, and
- (6) compliance with applicable Federal and State laws and regulations and standards established in the NYS Protocol for the Acute Care of the Adult Patient Reporting Sexual Assault (as currently posted on the DOH website at www.health.state.ny.us/nysdoh/sexual_assault/index.htm).

The implementation of DOH-approved hospital-based SAFE programs will result in greater access to more appropriate levels of care for survivors of sexual assault and strengthen the relationships between the SAFE programs and others who serve this population.

Failure to adopt these regulations will negatively impact the ability of the Department to comply with SARA as well as to improve the care and treatment of the survivor of rape and sexual assault.

Costs:

Costs for the Implementation of and Compliance with the Regulations to Regulated Entities:

There should not be a negative fiscal impact on hospitals. Although there was no appropriation of funds for hospitals in SARA, currently all hospitals are required to provide medical services to all patients presenting at their hospitals, including survivors of sexual assault. Many hospitals across the state already have SAFE examiners. The regulations will merely establish quality standards for SAFE programs that will result in improved outcomes of treatment for survivors.

There are also data collection requirements, which will be helpful to the SAFE programs in evaluating their services to the community. A designation as a DOH-approved SAFE program will recognize that such a hospital is able to provide the highest level of care to survivors, including the on-site provision of HIV prophylaxis and emergency contraception; and with the interdisciplinary collaboration required in the response to sexual assault, may result in a positive perception by the community.

Seeking DOH designation as a SAFE program is voluntary. Depending on the level of services currently offered, there may be some additional costs to the hospitals, but a hospital need not seek the designation if its administrator feels that doing so would compromise the hospital financially.

The expansion of section 405.9(c) of this Title clarifies treatment standards that all hospitals should be using in the care of survivors of sexual assault and therefore, no additional expense should be incurred.

Costs to State and Local Governments:

There will be no additional costs to State or local governments. Costs to the Department of Health:

The cost of designating hospitals will be absorbed by the Department using existing resources. The statewide designation process will be carried out on a continuous basis, with interested hospitals applying at their discretion. It is expected that the submission of applications will be staggered and not pose an undue burden on staff.

Paperwork:

Hospitals interested in becoming sites of DOH-approved SAFE programs will need to complete a survey describing their ability to meet required standards. These hospitals will also be required to maintain and submit data related to their activities in a format prescribed by the Department. This data will enable the SAFE program to document the extent of the problem of sexual assault and the level of service it provides, determine the cost of the service and provide information for program planning, quality improvement, and evaluation purposes. The data will be submitted

periodically for use in program monitoring and public health and criminal justice planning.

Local Government Mandates:

These amendments do not impose any new program, services, duties or responsibilities upon any county, city, town, village, school district, fire district, or other special district.

Duplication:

These regulations do not duplicate any other State or Federal law or regulation.

Alternatives:

Significant effort has been made by the Bureau of Women's Health (BWH) to obtain meaningful input into this process by stakeholders and other interested parties. A workgroup comprised of experts involved with the prevention, care, treatment and intervention of crises precipitated by the crimes of rape and sexual assault was convened to advise the Department about the impact of designating hospital-based SAFE programs in NYS. This group was comprised of rape crisis service providers and advocates, sexual assault examiners (nurses and physicians), forensic pathologists, the NYS Police, representatives from the Crime Victims Board and DCJS, The Greater NY Hospital Association, emergency department physicians, and various representatives from DOH, including the Office of Health Systems Management and the Division of Legal Affairs and BWH. Based on the input received from the workgroup, the Department developed standards for hospital-based SAFE programs, sexual assault examiners and individuals who wish to provide training to sexual assault examiners. These standards and SARA form the basis for the proposed regulations.

The concept of designating DOH-approved hospital-based SAFE programs throughout NYS has the strong support of health care and victim service providers and rape crisis and victim advocates. The proposed regulations reflect the highest standard of care for survivors of sexual assault.

Federal Requirement:

At present, the Federal Government does not have any minimum standards for this area of injury prevention and public health. There are no Federal requirements in place for this area.

The DOH-approved hospital-based SAFE program will help New York meet Healthy People 2010 injury prevention goals established by the U.S. Department of Health and Human Services.

Compliance Schedule:

The proposed regulation will become effective upon publication of a Notice of Adoption in the State Register. Since applications will be accepted continuously and designation is voluntary, hospitals that do not wish to become DOH-approved SAFE Programs will not need to comply with the proposed regulation. Compliance schedules for those hospitals seeking DOH approval will be set in accordance with the date on which the application is received.

Regulatory Flexibility Analysis

Pursuant to section 202-b of the State Administrative Procedure Act, a Regulatory Flexibility Analysis is not required. These amendments will more clearly define the standards by which all hospitals shall care for sexual assault survivors and assist DOH and interested hospitals in the establishment and maintenance of the NYS DOH-approved SAFE Program. These programs will promote high quality medical and nursing care to the survivors of sexual assault and the techniques involved in evidence collection on a statewide basis. New Part 722 will also promote hospital-community collaboration by requiring that DOH-approved SAFE programs form an inter-disciplinary task force to assess community need and increase awareness about sexual assault and its prevention, to assist with outreach and education efforts and provide follow-up services for sexual assault survivors.

New Part 722 and the amendments to Part 405 of this Title will not impose an adverse economic impact on small businesses or local governments in New York State and will not impose any additional record keeping, reporting or other compliance requirements except in hospitals seeking designation as SAFE programs.

Rural Area Flexibility Analysis

Pursuant to section 202-bb of the State Administrative Procedure Act, a Rural Area Flexibility Analysis is not required. These amendments will assist in clarifying the treatment standards all hospitals are to use when caring for survivors of sexual assault, and will define the processes for the implementation and maintenance of a state wide DOH-approved hospital-based SAFE program. This program will be beneficial to rural areas as it will increase access to high quality care by sexual assault patients. The Department is required to designate facilities not only in the urban and

suburban areas, but in the rural areas of New York State as well. Applying for approval as a SAFE program is, however, voluntary on the part of all hospitals. The proposed regulation and regulatory amendments will have no negative impact on any affected parties. The proposed rules will not impose an adverse economic impact on rural areas in New York State and will not impose any additional record keeping, reporting or other compliance requirements on rural areas except in hospitals voluntarily seeking this designation.

Job Impact Statement

A Job Impact Statement is not included because the regulations will not have a substantial adverse impact on jobs and employment opportunities. In fact, enhanced employment opportunities at hospitals designated as DOH-approved SAFE programs may exist. These hospitals may increase staff in areas of training, clinical expertise, outreach, and quality improvement since they are willing to provide enhanced services for survivors and the community.

Department of Labor

NOTICE OF ADOPTION

Public Employees Occupational Safety and Health Standards

I.D. No. LAB-13-06-00016-A

Filing No. 717

Filing date: June 9, 2006

Effective date: June 28, 2006

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

Action taken: Amendment of section 800.3 of Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a4(a)

Subject: Public employees occupational safety and health standards.

Purpose: To incorporate by reference into New York State Occupational Safety and Health Standards, those safety and health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of Jan. 18, 2006.

Text or summary was published in the notice of proposed rule making, I.D. No. LAB-13-06-00016-P, Issue of March 29, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Diane Wallace Wehner, Department of Labor, Counsel's Office, State Campus, Bldg. 12, Rm. 509, Albany, NY 12240, (518) 457-4380, e-mail: diane.wehner@labor.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Office of Mental Health

EMERGENCY RULE MAKING

Criminal History Record Review

I.D. No. OMH-26-06-00002-E

Filing No. 716

Filing date: June 8, 2006

Effective date: June 8, 2006

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

Action taken: Addition of Part 550 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.35 and Executive Law, section 845-b(h)(12)

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

Specific reasons underlying the finding of necessity: This regulation is needed to implement OMH's statutory duty to facilitate requests for criminal background record checks, which are required by law as of 4/1/05. This law is intended to protect mental health clients from risk of abuse or being victims of criminal activity. The regulations are necessary to implement the law as of its effective date so that we can fulfill our statutory imposed duty of ensuring the health, safety, and welfare of clients are not unreasonably placed at risk.

Subject: Criminal history record review of certain prospective employees and volunteers of providers of mental health services, and natural operators of such providers, licensed or otherwise approved by OMH.

Purpose: To require prospective employees and volunteers of providers of mental health services who will have regular and substantial unrestricted or unsupervised physical contact with clients, and natural person operators of providers of services, to undergo criminal history record checks.

Substance of emergency rule: Chapter 643 of the Laws of 2003, as amended by Chapter 575 of the Laws of 2004, imposed the requirement of criminal history record checks on each prospective operator, employee, or volunteer of certain mental health treatment providers who will have regular and substantial unsupervised or unrestricted physical contact with the clients of such providers. The purpose of this legislation was to enable providers of services for persons with mental illness to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received from individuals seeking employment or volunteering their services.

The legislation requires the Office of Mental Health to promulgate regulations that establish standards and procedures for the criminal history record checks contemplated in the statute. Accordingly, these regulations would establish provisions governing the procedures by which fingerprints will be obtained, and outlining the requirements and responsibilities on both the part of the Office and providers of services with regard to this process.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 5, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Julie Anne Rodak, Director, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: colejar@omh.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 31.35 of the Mental Hygiene Law provides that each provider of mental health services subject to its requirements must request, through the Office of Mental Health, a criminal history background check for each prospective operator, employee, or volunteer of such provider of services.

Subdivision (12) of Section 845-b of the Executive Law requires the Office of Mental Health to promulgate rules and regulations necessary to implement criminal history information requests.

2. Legislative Objectives:

Chapter 643 of the Laws of 2003 established a requirement for certain providers of mental health services to obtain criminal background checks of prospective employees and volunteers who would have regular and substantial unsupervised or unrestricted contact with clients of such provider. Chapter 575 of the Laws of 2004 amended this law and required the Office of Mental Health to promulgate any rules or regulations necessary to implement the provisions of Section 31.35 of the Mental Hygiene Law. These regulations are intended to fulfill this requirement.

3. Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of employees and volunteers in mental health programs are dedicated, compassionate workers who provide quality care, there are cases where criminal activity and patient abuse take place at the very programs that are intended to help persons with mental illness seek recovery. While this proposal will not eliminate all instances of abuse in mental health programs it will eliminate many of the opportunities for individuals with a criminal record to be alone with those

most at risk. Pursuant to Chapter 575 of the laws of 2004, this proposal requires providers of mental health services, including those that are licensed, who contract with, or who are otherwise approved by the Office of Mental Health, to request the Office to obtain criminal history information from the Division of Criminal Justice Services concerning each prospective employee or volunteer who will have regular and substantial unsupervised or unrestricted contact with the providers clients. Prospective licensed operators of mental health services will be required to have a criminal background check through this process as well.

Each provider subject to these requirements must designate one or more "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective employee or volunteer who will have regular, unsupervised client contact can be permanently hired or retained, he or she must consent to having his/her fingerprints taken and a criminal history check performed. The fingerprints will be taken by an Office of Mental Health- designated fingerprinting entity and sent to the Office, who will then submit them to the Division of Criminal Justice Services. The Division will provide criminal history information for each person back to the Office. Prospective licensed operators of mental health services must follow the same process.

The Office of Mental Health will then review the information and will advise the provider whether or not the applicant has a criminal history, and, if so, whether the criminal history is of such a nature that the person cannot be hired or retained, (e.g., the person has a felony conviction for a sex offense or a violent felony). In some cases, a person may have a criminal background that does not rise to the level where the Office will require employment of the person to be terminated. The proposed regulations allow the provider to obtain sufficient information to enable it to make its own determination as to whether or not to employ or retain such person. There will also be instances in which the criminal history information reveals an arrest or felony charges without a final disposition. In those cases, the Office will, in accordance with Chapter 575, hold the application in abeyance until the charge is resolved.

Before the Office can advise a provider that it intends to require that the employee or volunteer be terminated or not hired/retained, the proposal carries forth the statutory requirement of affording the individual an opportunity to explain, in writing, why his or her application should not be denied. If the Office nonetheless maintains its determination to advise the provider to terminate the employee or volunteer, the provider must notify the person that this criminal history information is the basis for the denial of employment or service.

The proposed regulation establishes certain responsibilities of providers in implementing the criminal record review required by Chapter 575. For example, a provider must notify the Office when an individual for whom a criminal history has been sought is no longer subject to such check. Providers must also ensure that prospective employees or volunteers who will be subject to the criminal background check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division of Criminal Justice Services.

4. Costs:

The proposed regulations implement a system that will require providers of services licensed, funded, or approved by the Office of Mental Health to obtain all information from a prospective employee or volunteer necessary for the purpose of initiating a criminal history record check. While the statute does not require all new employees to be fingerprinted, for purposes of systems design, the Office has estimated that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10,514 full time equivalent employees, and 2,390 full time equivalent volunteers. The Office has created a Criminal History Information Tracking System (CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, it intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. There is also a statutory fee of \$75 to obtain a criminal history record check from the Division of Criminal Justice Services; however, this amount will be fully borne by the Office of Mental Health. At an estimated number of 15,000 fingerprint requests per year, annual cost of this fee for the Office is approximately \$1,125,000.00.

Estimated start-up costs to the Office of Mental Health, which include the purchase of LiveScan technology and supporting equipment, activities, and systems, and staffing costs, are approximately \$900,000.

5. Local Government Mandates:

The required criminal history record check is a statutory requirement, which does not impose any new or additional duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork:

In order to assist providers in fulfilling their responsibilities in implementing Chapter 575 of the Laws of 2004, the Office has created a Criminal History Information Tracking System (CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, and the system is designed to generate the two forms mandated in the statute (an informed consent form and a request form), it intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Aside from record retention requirements necessary for monitoring compliance, the regulatory amendment will not require providers of service to furnish additional information, reports, records, or data.

7. Duplication:

The regulatory amendment does not duplicate existing State or federal requirements. It should be noted that the Office of Mental Retardation and Developmental Disabilities (OMRDD) has a similar statutory requirement and is promulgating its own regulations on this subject, as required via Chapter 575. In terms of technology, OMR and OMRDD hope to integrate systems at a later date to arrive at a single technology solution. In anticipation of that effort, OMRDD and OMH have selected the same vendor, which was already under contract to provide a LiveScan solution for a joint project between other state agencies. To facilitate future integration, a common, consistent hardware and software platform was purchased by OMH and OMRDD. Preliminary discussions to identify a partnership strategy with OMRDD have begun.

8. Alternatives:

The only alternative to the regulatory amendments which was considered was inaction, which is not advisable as the Office of Mental Health is required by Chapter 575 of the Laws of 2004 to promulgate implementing regulations.

9. Federal Standards:

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

10. Compliance Schedule:

The Office of Mental Health filed a similar emergency regulation on April 1, 2005 to implement Chapter 575 of the Laws of 2004, which became effective on that date. The Office intends to finalize the proposed amendments within the time frames provided in the State Administrative Procedure Act.

Regulatory Flexibility Analysis

1. Effect of Rule:

A total of roughly 720 agencies operate mental health programs that are licensed or funded by the Office of Mental Health (OMH) in New York State would be subject to this regulation, some of which would be considered "small businesses." In addition, local governments that operate mental health service providers subject to approval or authorization of OMH will be required to comply with the statute and these regulations. While Chapter 575 of the Laws of 2004 does not require all new employees to be fingerprinted (only those prospective employees or volunteers who will have "regular and substantial unsupervised or unrestricted contact with clients"), for purposes of systems design, the Office has estimated that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10,514 full time equivalent employees, and 2,390 full time equivalent volunteers, statewide.

2. Compliance Requirements:

Providers of service that are subject to these requirements must, by statute, request criminal history information concerning prospective employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record information must be obtained through the Office of Mental Health, which will pay the \$75 fee to the Division of Criminal Justice Services for each history requested. Providers of service must inform prospective employees and volunteers of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees/volunteers cannot be hired before a determination is received from the Office of Mental Health about whether or not the application must be denied, providers can give temporary approval to prospective

employees and permit them to work so long as they do not have unsupervised contact with clients.

3. Professional Services:

No additional professional services will be required by small businesses or local governments to comply with this rule.

4. Compliance Costs:

The direct cost of \$75 per criminal history record check request will be absorbed by the Office of Mental Health.

5. Economic and Technological Feasibility:

The Office has created a Criminal History Information Tracking System (CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, it intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. This technology will be accessible through existing computer networks. There may be a very small number of providers that do not have any computer from which they can access this technology; OMH will work with those providers either to identify a way to obtain such access or identify another alternative.

6. Minimizing Adverse Impact:

Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, OMH has developed its compliance plan with the goal of minimizing adverse impact of compliance to the greatest extent possible. The Criminal History Information Tracking System is one example of a strategy intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Furthermore, OMH has endeavored to maximize its capability to have fingerprints taken electronically, through a system called LIVE SCAN. LIVE SCAN is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process.

Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. The card would then need to be mailed to the Division of Criminal Justice Services by OMH. However, before OMH could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into OMH databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint card is difficult to read.

With LIVE SCAN, a scanner and laptop computer are used rather than an ink pad and a paper card. Rather than rolling his fingers in ink, a person would lay his hand on top of a scanner screen. A real-time fingerprint preview is provided, so the person taking the print would know the quality of the print is acceptable before it can be sent to the Division of Criminal Justice Services. The information would then be automatically transmitted to the Division, eliminating the need to mail cards anywhere. Thus, the turnaround time for processing criminal history information is significantly less than under the "ink and roll" method.

While OMH's implementation plans will accommodate the ability to accept some fingerprints through the "ink and roll" method, our strategy is designed to utilize the LIVE SCAN technology to the greatest extent possible as of April 1, 2005.

7. Small Business and Local Government Participation:

The Office of Mental Health (OMH) reached out to affected parties by posting information about Chapter 575 of the Laws of 2004 on its website in January and February, coupled with informational letters to the field. The draft regulations were widely shared (via posting on our website) and comments solicited from all affected parties. Informational briefings were provided regionally to trade groups. Per statute, the regulations will be reviewed by members of the Mental Health Services Council.

Rural Area Flexibility Analysis

1. Effect of Rule:

A total of roughly 720 agencies operate mental health programs that are licensed or funded by the Office of Mental Health (OMH) in New York State would be subject to this regulation, some of which are located in rural areas. While Chapter 575 of the Laws of 2004 does not require all new employees to be fingerprinted (only those prospective employees or volunteers who will have "regular and substantial unsupervised or unrestricted contact with clients"), for purposes of systems design, the Office has estimated that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10,514 full time equivalent employees, and 2,390 full time equivalent volunteers, statewide.

2. Reporting, Recordkeeping, and other Compliance Requirements:

Providers of service that are subject to these requirements, including those in rural areas, must, by statute, request criminal history information concerning prospective employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record information must be obtained through the Office of Mental Health, which will pay the \$75 fee to the Division of Criminal Justice Services for each history requested. Providers of service must inform prospective employees and volunteers of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees/volunteers cannot be hired before a determination is received from the Office of Mental Health about whether or not the application must be denied, providers can give temporary approval to prospective employees and permit them to work so long as they do not have unsupervised contact with clients.

3. Costs:

The direct cost of \$75 per criminal history record check request will be absorbed by the Office of Mental Health.

4. Minimizing Adverse Impact:

Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, OMH has developed its compliance plan with the goal of minimizing adverse impact of compliance to the greatest extent possible. The Criminal History Information Tracking System (CHITS) is one example of a strategy intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Furthermore, OMH has endeavored to maximize its capability to have fingerprints taken electronically, through a system called LIVE SCAN. LIVE SCAN is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process.

Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. The card would then need to be mailed to the Division of Criminal Justice Services by OMH. However, before OMH could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into OMH databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint card is difficult to read.

With LIVE SCAN, a scanner and laptop computer are used rather than an ink pad and a paper card. Rather than rolling his fingers in ink, a person would lay his hand on top of a scanner screen. A real-time fingerprint preview is provided, so the person taking the print would know the quality of the print is acceptable before it can be sent to the Division of Criminal Justice Services. The information would then be automatically transmitted to the Division, eliminating the need to mail cards anywhere. Thus, the turnaround time for processing criminal history information is significantly less than under the "ink and roll" method.

While OMH's implementation plans will accommodate the ability to accept some fingerprints through the "ink and roll" method, particularly in rural areas where access to State-operated LIVE SCAN machines may be more difficult, our strategy is designed to utilize the LIVE SCAN technology to the greatest extent possible as of April 1, 2005.

5. Rural Area Participation:

The Office of Mental Health (OMH) reached out to affected parties by posting information about Chapter 575 of the Laws of 2004 on its website in January and February, coupled with informational letters that were mailed to affected parties in the field. The draft regulations were widely shared (via posting on our website) and comments solicited from all affected parties. Informational briefings were provided regionally to trade groups. Per statute, the regulations will be reviewed by members of the Mental Health Services Council.

Job Impact Statement

A Job Impact statement is not necessary for this filing. Proposed 14 NYCRR Part 550 should not have any adverse impact on the existing employees and volunteers of providers of mental health services as it applies only to future prospective employees and volunteers. It is anticipated that the number of all future prospective employees/volunteers of mental health providers of services who have regular and substantial unsupervised or unrestricted physical contact with clients will be reduced to the degree that the criminal history record check reveals a criminal record barring employment.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Revision of an Incorporation by Reference

I.D. No. MRD-17-06-00005-A

Filing No. 718

Filing date: June 13, 2006

Effective date: June 28, 2006

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

Action taken: Amendment of sections 606.4, 635-6.4 and 635-6.6 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), and 16.00

Subject: Revision of an incorporation by reference.

Purpose: To update an incorporation by reference to reflect the 2004 edition of the Estimated Useful Lives of Depreciable Hospital Assets.

Text or summary was published in the notice of proposed rule making, I.D. No. MRD-17-06-00005-P, Issue of April 26, 2006.

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

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

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

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Sprint Communications Company L.P. and Newport Telephone Company

I.D. No. PSC-26-06-00005-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Sprint Communications Company L.P. and Newport Telephone Company for approval of an interconnection agreement executed on May 4, 2006.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Sprint Communications Company L.P. and Newport Telephone Company have reached a negotiated agreement whereby Sprint Communications Company L.P. and Newport Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange

Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

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

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

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

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

(06-C-0561SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Citizens Telecommunications Company of New York, Inc. and Verizon Wireless

I.D. No. PSC-26-06-00006-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Citizens Telecommunications Company of New York, Inc. and Verizon Wireless for approval of an interconnection agreement executed on Jan. 1, 2006.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Citizens Telecommunications Company of New York, Inc. and Verizon Wireless have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc. and Verizon Wireless will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until January 1, 2007, or as extended.

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

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

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

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

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

(06-C-0657SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Waiver of Certain Application Requirements by New York Regional Interconnect, Inc.

I.D. No. PSC-26-06-00007-P

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

Proposed action: The Public Service Commission is considering whether to grant or deny (in whole or in part) a motion by New York Regional Interconnect Inc. (NYRI) for waiver of certain application requirements.

Statutory authority: Public Service Law, sections 4(1), 20(1) and 122(1)(f)

Subject: Request by NYRI for waiver of certain application requirements.

Purpose: To consider NYRI's motion in connection with its application seeking authorization of the construction and operation of an electric transmission facility.

Substance of proposed rule: In a motion accompanying an application filed May 31, 2006, New York Regional Interconnect Inc. (NYRI) seeks a waiver of a certain application requirements. NYRI's application (in an adjudicatory proceeding) seeks a Certificate of Environmental Compatibility and Public Need authorizing the construction and operation of an electric transmission facility between the Edic Substation in the Town of Marcy, New York, owned and operated by National Grid, and the Rock Tavern substation in the Town of New Windsor, New York, owned and operated by Central Hudson Gas & Electric Company, Inc. In the rule making aspect of this proceeding, NYRI specifically requests waiver of the following otherwise applicable provisions of 16 NYCRR: (1) Section 86.3(a)(1)(ii), Mapping to Show Where Permanent Clearing or Other Changes to Topography, Vegetation and Man-made Structures Is Necessary; (2) Section 86.3(a)(1)(iii), Archaeological, Geological, Historical or Scenic Areas Within Three Miles of the Right-of-Way; (3) Section 86.3(a)(2)(ii) and (a)(2)(iv), New York State Department of Transportation Maps; (4) Section 86.3(b)(1)(ii)-(iv) and (b)(2), Aerial Photographs; (5) Section 86.5(b)(6), Regarding Use Of Explosives; and (6) Section 86.6(b) and (c), Design Drawings.

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

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

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

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

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

(06-T-0650SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges by Crystal Water Supply Company, Inc.

I.D. No. PSC-26-06-00008-P

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

Proposed action: The Public Service Commission is considering tariff revisions filed by Crystal Water Supply Company, Inc. to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 1—Water, to become effective Oct. 1, 2006.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-b(1), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To change Crystal Water Supply Company, Inc. metered rate to a flat rate.

Substance of proposed rule: On June 8, 2006, Crystal Water Supply Company, Inc. (Crystal Water or the company) electronically filed its tariff schedule, P.S.C. No. 1—Water, to become effective October 1, 2006. In addition, Crystal Water requests to change from a metered rate of \$50 per quarter plus a usage rate of \$2.71 per 1,000 gallons for residential service to a flat fee rate of \$240 per annum. The company cites reasons for its request as difficulty accessing meters since the homeowners are not permanent residents, meter failures due to clogging, and unjustifiable bills to individual homeowners for water provided to common areas. The company also proposes to charge a flat rate of \$240 per annum to a recently constructed clubhouse until its usage can be ascertained through the instal-

lation of a meter. Crystal Water's tariff, along with its proposed changes, is now available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) located under Commission Documents. The company provides water service to approximately 151 seasonal customers in the town of Thompson, Sullivan 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. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-W-0653SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

Post-Race Blood Gas Testing Procedures for Thoroughbred and Harness Race Horses

I.D. No. RWB-26-06-00001-E

Filing No. 715

Filing date: June 8, 2006

Effective date: June 8, 2006

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

Action taken: Addition of sections 4038.18(f), 4043.8-4043.13, 4109.7(f) and 4120.13-4120.18 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305 and 902

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

Specific reasons underlying the finding of necessity: In January 2005, the U.S. Justice Department arrested a New York-licensed thoroughbred trainer and a prominent New York-licensed harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

The board has determined that pre-race testing for excess TCO₂ is a reliable method of detecting excess TCO₂ in a racehorse. Such pre-race testing is currently utilized in Illinois and Canada. It is imperative that the board test for excess TCO₂ using the most reliable method available. It has determined that pre-race testing for excess TCO₂ is the most reliable method of testing for "milkshaking."

Subject: Post-race blood gas testing procedures for thoroughbred and harness race horses to detect excess levels of total carbon dioxide (TCO₂) and prescribed penalties for excess levels of TCO₂ and procedures for voidable claims.

Purpose: To detect and deter the prohibited practice known as "milkshaking."

Substance of emergency rule: 4043.8(a) Establishes method of testing thoroughbred racehorses to detect excess levels of total carbon dioxide (TCO2) using a Clinical Auto Analyzer, establishes the threshold for excess TCO2 at 37 millimoles per liter, and 39 millimoles for horses that have been administered furosemide.

4043.8(b) Establishes penalties for excess TCO2 violations in a thoroughbred race horse ranging from a 60-day license suspension and \$1,000 fine to a maximum 60-day license suspension with a \$5,000 fine with a possible one-year Board-imposed license suspension. Includes provision for purse redistribution in case of a positive excess TCO2 test.

4043.8(c) Establishes procedures for stewards to grant relief in cases where excess TCO2 levels are found, to allow a thoroughbred horse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO2 levels in a horse.

4043.8(d) Establishes that any person participating in the thoroughbred racehorse blood gas testing or thoroughbred racehorse guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4043.8(e) Establishes minimum standards for guarded quarantine of a thoroughbred race horse at a race track operated by a track association.

4043.9(a) Establishes a post-race blood gas-testing program for thoroughbred race horses, and pre-race guarded quarantine procedures and requirements for thoroughbred horses that have been tested and found to have excess TCO2 levels.

4043.9(b) Establishes pre-race guarded quarantine for horses under the care of a trainer who has been found to have had a horse under his care and custody that was tested and found to have excess TCO2 levels in the previous 12 months.

4043.9(c) Establishes pre-race guarded quarantine requirements for a thoroughbred horse that has been tested and found to have excess TCO2 levels.

4043.10 Establishes punishment for failure to cooperate in the thoroughbred post race gas-testing program.

4038.18 Allows claimants in a claiming race to void a claim on a thoroughbred horse that is subsequently found to have excess TCO2 levels.

4120.13(a) Establishes method of testing harness racehorses to detect excess levels of total carbon dioxide (TCO2) using a Clinical Auto Analyzer, establishes the threshold for excess TCO2 at 37 millimoles per liter, and 39 millimoles for horses that have been administered furosemide.

4120.13(b) Establishes penalties for excess TCO2 violations in a harness racehorse ranging from a 60-day license suspension and \$1,000 fine to a maximum one-year license suspension with a \$5,000 fine with a possible one-year Board-imposed suspension. Includes provision for purse redistribution in case of a positive excess TCO2 test.

4120.13(c) Establishes procedures for judges to grant relief in cases where excess TCO2 levels are found, to allow a harness racehorse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO2 levels in a horse.

4120.13(d) Establishes that any person participating in the harness racehorse blood gas testing or thoroughbred guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4120.13(e) Establishes minimum standards for guarded quarantine of a harness racehorse at a race track operated by a track association.

4120.14(a) Establishes a post-race blood gas-testing program for harness racehorses, and pre-race guarded quarantine procedures and requirements for harness racehorses that have been tested and found to have excess TCO2 levels.

4120.14(b) Establishes pre-race guarded quarantine for harness racehorses under the care of a trainer who has been found to have had a harness racehorse under his care and custody that was tested and found to have excess TCO2 levels in the previous 12 months.

4120.14(c) Establishes pre-race guarded quarantine requirements for a harness racehorse that has been tested and found to have excess TCO2 levels.

4120.15 Establishes punishment for failure to cooperate in the harness post race gas testing program.

4109.7(f) Allows claimants in a claiming race to void a claim on a harness racehorse that is subsequently found to have excess TCO2 levels.

4043.11(a) Establishes method of pre-race testing of thoroughbred racehorses to detect excess levels of total carbon dioxide (TCO2) using a Clinical Auto Analyzer, establishes the threshold for excess TCO2 at 37 millimoles per liter in non-furosemide horses and 39 millimoles in horses on furosemide.

4043.11(b) Establishes penalties for excess TCO2 violations in a thoroughbred race horse ranging from a 60-day license suspension and \$1,000 fine to a maximum 60-day license suspension with a \$5,000 fine with a

possible one-year board-imposed license suspension. Includes provision for purse redistribution in case of a positive excess TCO2 test.

4043.11(c) Establishes procedures for stewards to grant relief in cases where excess TCO2 levels are found, to allow a thoroughbred horse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO2 levels in a horse.

4043.11(d) Establishes that any person participating in the thoroughbred racehorse pre-race blood gas testing or thoroughbred racehorse guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4043.11(e) Establishes minimum standards for guarded quarantine of a thoroughbred race horse at a race track operated by a track association.

4043.12(a) Establishes a pre-race blood gas-testing program for thoroughbred race horses, and pre-race guarded quarantine procedures and requirements for thoroughbred horses that have been tested and found to have excess TCO2 levels.

4043.12(b) Establishes pre-race guarded quarantine for horses under the care of a trainer who has been found to have had a horse under his care and custody that was tested and found to have excess TCO2 levels in the previous 12 months.

4043.12(c) Establishes pre-race guarded quarantine requirements for a thoroughbred horse that has been tested and found to have excess TCO2 levels.

4043.13 Establishes punishment for failure to cooperate in the thoroughbred pre-race gas-testing program.

4120.16(a) Establishes method of pre-race testing harness racehorses to detect excess levels of total carbon dioxide (TCO2) using a Clinical Auto Analyzer, establishes the threshold for excess TCO2 at 37 millimoles per liter in non-furosemide horses and 39 millimoles in horses on furosemide.

4120.16(b) Establishes penalties for excess TCO2 violations in a harness racehorse ranging from a 60-day license suspension and \$1,000 fine to a maximum one-year license suspension with a \$5,000 fine with a possible one-year board-imposed suspension. Includes provision for purse redistribution in case of a positive excess TCO2 test.

4120.16(c) Establishes procedures for judges to grant relief in cases where excess TCO2 levels are found, to allow a harness racehorse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO2 levels in a horse.

4120.16(d) Establishes that any person participating in the harness racehorse blood gas testing or thoroughbred guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4120.16(e) Establishes minimum standards for guarded quarantine of a harness racehorse at a race track operated by a track association.

4120.17(a) Establishes a pre-race blood gas-testing program for harness racehorses, and pre-race guarded quarantine procedures and requirements for harness racehorses that have been tested and found to have excess TCO2 levels.

4120.17(b) Establishes pre-race guarded quarantine for harness racehorses under the care of a trainer who has been found to have had a harness racehorse under his care and custody that was tested and found to have excess TCO2 levels in the previous 12 months.

4120.17(c) Establishes pre-race guarded quarantine requirements for a harness racehorse that has been tested and found to have excess TCO2 levels.

4120.18 Establishes punishment for failure to cooperate in the harness pre-race gas testing program.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 3, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: Info@racing.state.ny.us

Regulatory Impact Statement

(a) Statutory authority. Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301 and 305.

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

(c) Needs and benefits. This rule making is necessary to assure the public's confidence and continue the high degree of integrity in racing at the pari-mutuel betting tracks. Through pre-race and post-race testing, this rule making will detect and deter the administration of alkali agents to

thoroughbred racehorses and harness racehorses for the purpose of affecting the performance of such horse during a pari-mutuel wagering race.

The administration of alkali agents into a racehorse is commonly known as "milkshaking," where a person administers a mixture of sodium bicarbonate, sugar and water to a horse prior to a race mitigate the effects of lactic acid on the horse's muscles during the race, thereby gaining an advantage. Lactic acid is a naturally occurring byproduct of intense muscular exercise in mammals, and the accumulation of lactic acid in such muscles causes fatigue. Some people associated with racehorses believe that the administration of an alkaline substance, such as bicarbonate of soda, can neutralize the effect of lactic acid in a horse's muscles. This has resulted in the use of alkalizing agents, or "milkshakes" which are administered to a racehorse in an attempt to alter the performance of the horse. Based on this belief, people have administered milkshakes to racehorses on the day of a race with the intent to gain a racing advantage.

This rule making is necessary to establish empirical standards and testing procedures for the enforcement of Board Rule 4043.3(d) and Board Rule 4120.3(d), which apply to thoroughbred and harness racehorses respectively and state "No person shall, attempt to, or cause, solicit, request, or conspire with another or others to . . . administer a mixture of bicarbonate of soda and sugar in any of their forms in any manner to a horse within 24 hours of a racing program at which such horse is programmed to race. It shall be the trainer's responsibility to prevent such administration."

Horses that have received an alkalizing agent will exhibit elevated levels of TCO₂ over and above normal levels. This rule making will establish the ion selective electrode method with a clinical auto analyzer as a standard means of detecting elevated TCO₂ in horses. The rule will establish a TCO₂ threshold of 37 millimoles per liter for horses who have not been administered furosemide (Lasix) prior to a race, and 39 millimoles for horses that have been administered furosemide prior to a race.

In January 2005, the U.S. Justice Department arrested a New York licensed thoroughbred trainer and a prominent New York harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

This rule making will benefit thoroughbred and harness racing by ensuring the betting public that horses that compete in pari-mutuel races have not been tampered with through the administration of alkali agents, thereby ensuring that no extraordinary advantage has been given to the horse through prohibited substances.

(d) Costs.

(i) Thoroughbred horse owners may be subject to the cost of a pre-race guarded quarantine imposed upon any single horse found to have excess TCO₂ levels that has not been determined to be physiologically normal for such horse. The licensed track association sponsoring the race is responsible for making available a pre-race quarantine stall, and for maintaining an access log system in either paper or electronic form. The length of time for such quarantine shall be determined by the stewards or judges, and will have an impact on the cost of guarded quarantine. The cost of a paper log is approximately \$10 retail for a ring binder and 500 pages of paper. The cost of an electronic record, such as a personal computer or laptop computer, starts at \$400 in ordinary retail stores.

(ii) There are no costs imposed upon the Racing and Wagering Board, the state or local government because the TCO₂ testing program will be implemented utilizing the Board's existing medication testing program, personnel and facilities.

(iii) The Board cannot fully provide a statement of costs the trainers for pre-race guarded quarantine because the actual cost of establishing a pre-race guarded quarantine varies greatly from location to location in New York State, and the physical characteristics of the buildings within which a horse of quarantined. All horses that race at a New York State thoroughbred or harness racetrack are currently afforded stable space for free, so the only added cost that can be expected will be the cost of a guard. A pre-race guarded quarantine may require one guard per horse, or one guard for many horses, depending upon the access points that need to be controlled for an effective guarded quarantine. The Board's rule making requires that the subject horse is kept in an area where access to the subject horse is restricted to authorized licensed trainers, owners and veterinarians as sub-

mitted by the owner, that guards maintain a record of all licensed persons who have had access to the horse while in guarded quarantine, along with the time and purpose of the visit. In addition to the distinctive limitations that the guarded quarantine barn will have upon the cost, the wages of a guard varies depending upon the racetrack itself. According to track representatives, the hourly cost of guard may range from \$7 per hour up to \$20 per hour, depending on the individual racetrack, experience required for the specific duties (e.g. a stable guard who is responsible for surveillance only compared to a quarantine supervisor who is responsible for also identifying illegal paraphernalia, treatments or procedures) and local pay scale. The minimum time that a horse is to be quarantined is six hours, and the maximum time for quarantine is 72 hours.

(e) Paperwork. Owners of any horse that has been found to have an excess levels of TCO₂ will be required to submit a letter to the steward or judge of the track where the subject horse is to race, stating that the subject horse has a normally elevated level of TCO₂. Such a letter is necessary for a horse to continue racing while under a guarded quarantine. Track associations will be required to maintain access logs, either paper or electronic, for a period of 90 days after the guarded quarantine period.

(f) Local government mandates. This rule making will not impose any program, service, duty, or responsibility upon any county, city, town, village, school district fire district or other special district.

(g) Duplication. Since the New York State Racing & Wagering Board is the exclusively responsible for the regulation of pari-mutuel wagering activities in New York State, there are no other relevant rules or other legal requirements of the state or federal government regarding total carbon dioxide testing of thoroughbred racehorses and harness racehorses in New York State.

(h) Alternative approaches. The Board did not consider any other significant alternatives because no other significant alternates are available. The rule making is based upon an established TCO₂ testing program already adopted and in use by the New Jersey Racing Commission. The testing procedure included in this rule making is the only TCO₂ test that has been reviewed and declared reliable by a state court, in this case, the New Jersey Supreme Court recognized the reliability of the Beckman test generally and as applied by the New Jersey Racing Commission (Campbell v. New Jersey Racing Commission, New Jersey Supreme Court, 169 N.J. 579, 781 A.2d 1035, October 11, 2001.)

The TCO₂ threshold levels in this rule are supported by findings of the Canadian Pari-Mutual Agency, which are published "Effects of Sampling and Analysis Times and Furosemide Administration on TCO₂ Concentrations in Standardbred and Thoroughbred Horses." This paper was presented at the 13th International Conference of Racing Analysts and Veterinarians in Cambridge, U.K., in 2000 and published in the Conference Proceedings. The data in this study supports the thresholds of 37 mmol/L (non-furosemide) and 39 mmol/L (furosemide) which has been adopted in both Canada and Australia.

(i) Federal standards. There are no federal standards applicable to the subject area of state-regulated parimutuel wagering activity.

(j) Compliance schedule. The practice known as "milkshaking" of horses in already prohibited by rule under 9E NYCRR 4043.3 for thoroughbred racehorses and 9E NYCRR 4120.3 for harness racehorses. All of the provisions of this rule making shall be effective immediately upon filing with the Department of State.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment would expand the existing medication testing rules to include a test for alkalizing agents in thoroughbred and harness race horses. This testing will utilize the current framework for post-race testing. The pre-race testing component will merely require that a veterinarian take a few minutes to obtain a blood sample from a horse, which is a routine procedure and imposes no new burden upon regulated parties. These amendments do not impact upon State Administrative Procedure Act section 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above, because the Board rules has existing rules for post-racing testing for the presence of performance altering drugs and other substances.

Department of State

NOTICE OF ADOPTION

Uniform Standards of Professional Appraisal Practice

I.D. No. DOS-17-06-00004-A

Filing No. 720

Filing date: June 13, 2006

Effective date: July 1, 2006

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

Action taken: Amendment of section 1106.1 of Title 19 NYCRR.

Statutory authority: Executive Law, section 160-d(1)(d)

Subject: Uniform Standards of Professional Appraisal Practice.

Purpose: To adopt the 2006 edition of the Uniform Standards of Professional Appraisal Practice.

Text of final rule: Section 1106.1 (Appraisal Standards) of Title 19 of the NYCRR is amended to read as follows:

§ 1106.1 Appraisal standards.

(a) Every appraisal assignment shall be conducted and communicated in accordance with the following provisions and standards set forth in the [2005] 2006 edition of the Uniform Standards of Professional Appraisal Practice:

- (1) Definitions;
 - (2) Preamble;
 - (3) Ethics rule;
 - (4) Competency rule;
 - (5) Departure rule;
 - (6) Jurisdictional exception rule;
 - (7) Supplemental standard rule;
 - (8) Standard 1—Real Property Appraisal, Development;
 - (9) Standard 2—Real Property Appraisal, Reporting;
 - (10) Standard 3—Real Property and Personal Property Appraisal Review, Development and Reporting;
 - (11) Standard 4—Real Property Appraisal Consulting, Development;
 - (12) Standard 5—Real Property Appraisal Consulting, Reporting;
- and
- (13) Standard 6—Mass Appraisal, Development and Reporting.

(b) The [2005] 2006 edition of the Uniform Standards of Professional Appraisal Practice is published by the Appraisal Foundation, which is authorized by the United States Congress as the source of appraisal standards. Copies may be obtained from:

The Appraisal Foundation
 1029 Vermont Avenue, NW, Suite 900
 Washington D.C. 20005
 tel: 202-347-7722
 www.appraisalfoundation.org

The [2005] 2006 edition of the Uniform Standards of Professional Appraisal Practice can be viewed, downloaded and printed from <http://www.appraisalfoundation.org/html/USPAP2006/toc.htm>

Copies are also available for inspection and copying at the following offices of the Department of State:

Division of Licensing Services
 N.Y.S. Department of State
 84 Holland Avenue
 Albany NY 12208
 tel: 518-473-2728

Division of Licensing Services
 N.Y.S. Department of State
 65 Court Street
 Buffalo NY 14202
 tel: 716-847-7110

Division of Licensing Services
 N.Y.S. Department of State
 123 William St.
 New York NY 10038
 tel: 212-417-5747

Division of Licensing Services
 N.Y.S. Department of State
 250 Veterans Memorial Highway

Hauppauge NY 11788

tel: 631-952-6579

Final rule as compared with last published rule: Nonsubstantive changes were made in section 1106.1(b).

Text of rule and any required statements and analyses may be obtained from: Nathan A. Hamm, Office of Counsel, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740

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

This Notice of Adoption contains a nonsubstantial revision in the text of Section 1106.1(b). This revisions merely changes the address of the Buffalo New York office of the Department of State to its current location. This revision does not necessitate that a revised Regulatory Impact Statement, revised Regulatory Flexibility Analysis for Small Businesses and Local Governments, revised Rural Area Flexibility Analysis, or revised Job Impact Statement be issued.

Assessment of Public Comment

The agency received no public comment.

Department of Transportation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Payment of Moving and Related Expenses to Displaced Persons Vacating Property

I.D. No. TRN-26-06-00004-P

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

Proposed action: This is a consensus rule making to repeal Part 101 and add a new Part 101 to Title 17 NYCRR.

Statutory authority: Highway Law, sections 29, 30, 85 and 347; Transportation Law, sections 14(18) and 228; and Canal Law, section 40

Subject: Payment of moving and related expenses to displaced persons vacating property acquired by the Commissioner of Transportation by eminent domain.

Purpose: To clarify and conform State regulations to Federal regulations with respect to payment of relocation assistance benefits to displaced persons for consistency in application of moving expense allowances.

Text of proposed rule: Part 101 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby repealed and a new Part 101 is added to read as follows:

PART 101

PAYMENTS TO AN OWNER OR TENANT OF RESIDENTIAL PROPERTY OR COMMERCIAL PROPERTY UPON THEIR APPLICATION FOR ALLOWANCE OF MOVING EXPENSES IN VACATING PROPERTY ACQUIRED BY THE COMMISSIONER OF TRANSPORTATION, FOR SUPPLEMENTAL RELOCATION PAYMENTS, FOR INCREASED INTEREST COSTS AND FOR CLOSING COSTS

Section 101.1 Purpose.

The purpose of this part is to promulgate rules in accordance with the following objectives:

(a) To ensure that owners of real property to be acquired for either State, Federal or federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in State, Federal, and federally-assisted land acquisition programs;

(b) To ensure that persons displaced as a direct result of either State, Federal, or federally-assisted projects are treated fairly, consistently, and equitably so that such displaced persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and

(c) To ensure that State and Federal Agencies implement these regulations in a manner that is efficient and cost effective.

Section 101.2 General.

The Commissioner of Transportation adopts Sections 24.1 through 24.9 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.3 Appeals.

(a) The provisions included in this section shall apply to all displaced persons who express dissatisfaction with the determination of the New York State Department of Transportation ("the Department") of eligibility or reimbursement for moving expenses, replacement housing payments or other incidental and/or litigation costs connected with the property owner's conveyance of title of the acquired property to the State. At the request of the displaced person, the Department shall permit the person to inspect and copy all material pertinent to that person's appeal, except that materials which are classified as confidential, shall be subject to such reasonable conditions as the Department may impose.

(b) If the displaced person is not satisfied with the Department's determination, the person may, within 18 months of vacating or six months after final award, request an informal conference to contest the determination. Upon request, such a conference shall be scheduled in the Department's regional office and conducted by the Department's Regional Real Estate Supervisor. The displaced person may have representation at such conference. After all relevant information has been analyzed, the Department's Regional Real Estate Supervisor shall promptly notify the displaced person of the decision in writing. The written notice shall include an adequate explanation of the claim and describe how the decision is supported.

(c) In the event the displaced person is not satisfied with the results achieved at the Department's regional level, an appeal to the Director of the Department's Main Office Real Estate (the "Director") may be taken within 60 days of the written notice referred to in subdivision (b) above. The Director shall then make an independent determination according to the data submitted by the displaced person and the Department's Regional Real Estate Supervisor. The determination of the Director shall be made in writing to the displaced person, or representative, and shall include an explanation of how it is supported.

(d) In the event the displaced person is not satisfied with the results achieved at the level of the Director, a written request for a formal hearing must be made to said Director within 60 days of receiving the Director's decision. A formal hearing will be conducted by a hearing officer designated by the Commissioner of the Department (the "Commissioner" or the "Commissioner of Transportation"), to be held at a time and place to be determined by the hearing officer. Minutes of the proceedings shall be taken. Based upon all of the evidence produced at the hearing, the hearing officer shall make a recommendation to the Commissioner who shall then make a final determination regarding the claim. If the matter is still contested, the displaced person may then seek appropriate judicial review.

(e) In addition to the provisions of this Section, the Commissioner of Transportation adopts Section 24.10 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.4 General Relocation Requirements.

The Commissioner of Transportation adopts Sections 24.201 through 24.209 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.5 Payments for Moving and Related Expenses.

(a) The Commissioner of Transportation adopts Sections 24.301 and 24.303 through 24.306 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

(b) The Commissioner of Transportation adopts Section 24.302 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length with the following additional provision that the Department may pay such other amounts consistent with Federal reimbursement rates if the Commissioner determines such amounts to be appropriate for use by the Department.

Section 101.6 Replacement Housing Payments.

The Commissioner of Transportation adopts Sections 24.401 through 24.404 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.7 Mobile Homes.

The Commissioner of Transportation adopts Sections 24.501 through 24.503 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.8 Certification.

The Commissioner of Transportation adopts Sections 24.601 through 24.603 and Appendices A and B of Part 24 of Title 49 of the Code of

Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.9 Hardship Cases.

(a) Notwithstanding any other provisions contained in this Part, in hardship cases, the Commissioner may make advance payments in anticipation of a displaced person's actually moving or actually purchasing or renting and occupying decent, safe and sanitary replacement housing. The Commissioner may authorize the advance payment of the amount determined to represent reasonable and necessary moving expenses or the amount of the approved replacement housing payment deemed necessary to purchase or rent decent, safe and sanitary replacement housing. In the case of a replacement housing payment, payment shall be made only if there is a signed contract for the purchase of a replacement housing property or, in the case of a replacement rental unit, if there is a signed lease or some other firm commitment. In both instances, the proposed replacement housing shall be inspected prior to payment to determine whether it is decent, safe and sanitary.

(b) When the Commissioner determines that an unusual or hardship situation exists and it is determined to be in the public interest to do so, the Commissioner may authorize relocation payments even though the strict requirements of eligibility and reimbursement specified in this Part are not met.

Section 101.10 Incorporation by Reference.

The provisions of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the booklet entitled Code of Federal Regulations, Title 49, Part 24, revised as of October 1, 2005, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The regulations incorporated by reference may be examined at the Office of the Department of State, 41 State Street, Albany, NY 12231, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation, Office of Counsel or Main Office Real Estate, 50 Wolf Road, Albany, NY 12232. They may also be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

Text of proposed rule and any required statements and analyses may be obtained from: Anne E. Flowers, Director, Acquisitions Management Bureau, Department of Transportation, POD 41, 50 Wolf Rd., Albany, NY 12232, (518) 457-9642, e-mail: AFlowers@dot.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority: Subdivision 10 of Section 30 of the Highway Law authorizes the Commissioner of Transportation to establish, and from time to time amend, rules and regulations authorizing the payment of actual reasonable and necessary moving expenses of occupants of property who must be relocated as a result of the acquisition of such property by eminent domain by the Department of Transportation for a highway project. Subdivision 12 of Section 30 of the Highway Law authorizes the Commissioner of Transportation to establish, and from time to time amend, rules and regulations providing for supplemental relocation payments or replacement housing. Section 85 of the Highway Law authorizes, empowers and directs the Commissioner of Transportation to perform such acts as are necessary to comply with federal-aid highway and transportation acts and the rules and regulations promulgated by the federal government thereunder.

Subdivision 18 of Section 14 of the Transportation Law authorizes the Commissioner of Transportation to make and prescribe rules and regulations in relation to the discharge of the Commissioner's functions, powers and duties and those of the Department of Transportation.

2. Legislative Objectives: The proposed amendment adds the requirement that the number of occupants occupying habitable rooms for sleeping purposes is not to exceed the number permitted by local housing codes; provides that advisory assistance may be provided to unlawful occupants not displaced; revises utility costs to include electricity, gas and other heating and cooking fuels; adds the definition of "mobile home", increases maximum reimbursement for searching fees; adds refundable security and utility deposits to the list of ineligible moving and related expenses; adds professional home inspection, certification of structural soundness, and termite inspection as eligible incidental expenses; and otherwise clarifies and conforms State regulations to federal regulations relating to relocation

assistance as a result of the acquisition of property by eminent domain by the Department of Transportation for a highway project. Conforms such provisions with the Code of Federal Regulations.

3. Needs and Benefits: These regulations are needed in order to safeguard Federal funding to the State Department of Transportation for highway projects and to conform State regulations with Federal regulations.

The Federal Highway Administration revised Part 24 of Title 49 Code of Federal Regulations. We are making changes to Section 101 of Title 17 to conform State Regulations by incorporating by reference various provisions of Federal regulations to facilitate uniformity with respect to the payment of relocation assistance benefits to displaced persons.

4. Costs:

(a) Cost to State Government: There should be no increased costs associated with the ceilings being eliminated on certain categories of re-establishment expenses because the total for the re-establishment expenses is still limited to \$10,000 and most displacees' re-establishment expenses exceed that amount. Accordingly the Department usually pays the maximum amount for re-establishment expenses and this will continue to be the maximum under the revised rule.

(b) Cost to Local Governments: None.

(c) Cost to Private Parties: None. Only benefits are provided by the proposed amendments, however, there may be instances where certain displaced persons are made ineligible for such benefits.

(d) Cost to Department of Transportation: These costs are the same as those set forth in paragraph (a) above.

5. Paperwork: No additional paperwork is required to implement these amendments. Existing payment application forms will be modified to include a statement of residency.

6. Local Government Mandates: None.

7. Duplication: The regulation incorporates by reference the federal regulations on the same subject; and its purpose is to bring State regulations into conformance with federal regulations.

8. Alternative Approaches: No other alternatives were considered in that the purpose of the proposal is to bring relocation benefits provided to displacees of Department highway projects into uniformity with those benefits mandated by federal regulations.

9. Federal Standards: Does not exceed federal regulations.

10. Compliance Schedule: Achievable immediately upon adoption of rule.

Consensus Rule Making Determination

Currently, the Federal Regulations and schedules must be applied to all Federal and Federally-assisted projects while State Regulations apply to State projects which can lead to a disparity in treatment with respect to similarly situated displaced persons. The incorporation of these Federal Regulations will ensure that owners of real property to be acquired for either State, Federal or Federally-assisted projects are treated fairly, consistently, and equitably and will facilitate uniformity with respect to the payment of relocation assistance benefits to such displaced persons.

Job Impact Statement

This rule conforms State regulations to Federal regulations relating to relocation assistance benefits that are available to displacees to be relocated as a result of a Department of Transportation highway project. It is determined that the rule will have no impact on jobs and employment opportunities.