

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Ammonium Nitrate and Regulated Ammonium Nitrate Materials

**I.D. No.** AAM-09-06-00001-E

**Filing No.** 193

**Filing date:** Feb. 9, 2006

**Effective date:** Feb. 9, 2006

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

**Action taken:** Addition of Part 154 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18(6) and 146-f

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

**Specific reasons underlying the finding of necessity:** This emergency rule is necessary for the preservation of the public health, public safety and general welfare because it implements chapter 620 of the Laws of 2005, effective November 28, 2005, which requires the registration of persons and entities in New York State that sell, offer for sale or otherwise make available, ammonium nitrate or regulated ammonium nitrate materials. Ammonium nitrate is a common chemical compound used in fertilizer, but

which is also an explosive chemical used to make bombs such as those used in the 1993 World Trade Center and 1995 Oklahoma City bombings.

This rule, which has been developed in consultation with the State Office of Homeland Security, establishes the form for registering as a seller of ammonium nitrate and regulated ammonium nitrate materials, as defined in the rule. It also establishes the security requirements that must be taken by those required to register and the format for making and maintaining records of the sale of ammonium nitrate and regulated ammonium nitrate materials.

It is imperative that the requirements of chapter 620 of the Laws of 2005 for registration, security measures and recordkeeping be implemented immediately. The adoption of the emergency rule will make this possible.

**Subject:** Ammonium nitrate and regulated ammonium nitrate materials.

**Purpose:** To implement chapter 620 of the Laws of 2005 relating to ammonium nitrate and regulated ammonium nitrate materials.

**Text of emergency rule:** A new Part 154 is added to Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York to read as follows:

#### Part 154

#### AMMONIUM NITRATE SECURITY

154.1 Definitions. For the purposes of this Part the following terms shall have the following meanings:

a. "Ammonium nitrate" means chiefly the ammonium salt of nitric acid. It shall not contain less than thirty-three percent nitrogen, one-half of which is the ammonium form and one-half of which is the nitrate form.

b. "Regulated ammonium nitrate materials" shall mean fertilizer product in solid form, comprising a mixture of components, one of which is ammonium nitrate, in circumstances where the nitrogen content derived from ammonium nitrate is more than twenty-eight percent of the material by weight.

c. "Ammonium nitrate retailer" means any person or entity in this state that sells, offers for sale, or otherwise makes available, ammonium nitrate or regulated ammonium nitrate materials.

154.2 Registration. (a) No person or entity in this state shall sell, offer for sale or otherwise make available ammonium nitrate or ammonium nitrate materials unless registered annually with the commissioner. Application for registration shall be made by completing and submitting the following form to the commissioner, together with an annual registration fee of fifty dollars, provided, however, that retailers who pay fees under this article shall be exempt from such fee:

(See Appendix in this issue.)

(b) Every person or entity selling, offering for sale or otherwise making available ammonium nitrate or ammonium nitrate materials shall post and display at all times their registration certificate in a conspicuous place in the room where such business is carried on so that all persons visiting such place may readily see the same.

154.3 Security measures. Ammonium nitrate and regulated ammonium nitrate materials, while at all facilities whose owners and/or operators are required to be registered, shall be secured to provide reasonable protection against vandalism, theft or other unauthorized access. Such measures shall include, but not be limited to, ensuring that storage facilities are fenced or otherwise enclosed and locked when unattended and are inspected daily for signs of attempted entry, vandalism and structural integrity. An ongoing process of inventory control for ammonium nitrate and regulated ammonium nitrate materials stored at the facility shall be established and maintained.

154.4 Records. (a) Persons and entities required to be registered shall make and maintain, for a minimum of two years, a record in the following format for every sale of ammonium nitrate and regulated ammonium nitrate materials:

(See Appendix in this issue.)

(b) Forms of identification. Acceptable forms of identification are a valid driver's license or non-driver identification card issued by the New York State Commissioner of Motor Vehicles, the Federal Government, a state government, commonwealth, possession or territory of the United States or a provincial government of Canada; a valid passport of the United States or any other country; or valid United States military identification.

(c) Access to records. Persons and entities selling ammonium nitrate and regulated ammonium nitrate materials shall provide officers and employees of the New York State Department of Agriculture and Markets and the New York State Office of Homeland Security with access to records of such sales.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 9, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert Mungari, Director of Plant Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2087

#### Regulatory Impact Statement

##### 1. Statutory authority:

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

Section 146-f of the Agriculture and Markets Law provides that the Commissioner, in consultation with or upon the recommendation of, the Director of Homeland Security, may: set forth criteria for the registration of sellers of ammonium nitrate; suggest security measures; specify picture identification cards for purchaser identification; set forth additional records that must be maintained; and determine what regulated ammonium nitrate materials warrant regulation based on the potential explosive capacity of its ammonium nitrate content.

Section "3" of Chapter 620 of the Laws of 2005, by which Agriculture and Markets Law section 146-f was enacted, provides that any rules and regulations necessary to implement the provisions of the Act on its effective date are authorized and directed to be promulgated on or before such effective date.

##### 2. Legislative objectives:

The rule accords with the public policy objectives the Legislature sought to advance by enacting the above statutory authority in that it was developed in consultation with the State Office of Homeland Security and: sets forth criteria for the registration of sellers of ammonium nitrate; suggests security measures; specifies picture identification cards for purchaser identification; sets forth additional records that must be maintained; and determines what regulated ammonium nitrate materials warrant regulation based on the potential explosive capacity of its ammonium nitrate content.

##### 3. Needs and benefits:

This emergency rule is necessary for the preservation of the public health, public safety and general welfare because it implements Chapter 620 of the Laws of 2005, effective November 28, 2005 which requires the registration of persons and entities in New York State that sell, offer for sale or otherwise make available ammonium nitrate or regulated ammonium nitrate materials. Ammonium nitrate is a common chemical compound used in fertilizer, but which is also an explosive chemical used to make bombs such as those used in the 1993 World Trade Center and 1995 Oklahoma City bombings.

This rule, which has been developed in consultation with the State Office of Homeland Security, establishes the form for registering as a seller of ammonium nitrate and regulated ammonium nitrate materials, as defined in the rule. It also establishes the security measures that must be taken by those required to register and the format for making and maintaining records of the sale of ammonium nitrate and regulated ammonium nitrate materials.

It is imperative that the requirements of Chapter 620 of the Laws of 2005 for the registration, security measures and recordkeeping be implemented immediately. The adoption of this emergency rule will make this possible.

##### 4. Costs:

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

The costs to regulated parties of completing and submitting the registration form are expected to be minimal. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to the registrants who already hold commercial fertilizer licenses. Those licensees, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee.

The costs to regulated parties of completing and maintaining the record for the sale of ammonium nitrate and ammonium nitrate materials, as required by Chapter 620 of the Laws of 2005, is also expected to be minimal, given the fact that it can be executed as part of the sales transaction. The format for the record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by sellers. By listing the permissible types of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005.

It is anticipated that the cost of the security measures that must be taken by those required to be registered will vary with the size of the business and the extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandalism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. Daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already to be part of the business management practices of most sellers.

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

There will be no costs to local government or to the State, other than the cost to the Department. The cost to the Department, in addition to processing the registration forms and inspecting sellers for compliance with the recordkeeping and security measure requirements will depend upon the number of sellers required to be registered pursuant to Chapter 620 of the Laws of 2005. That number is currently unknown.

###### (c) Source:

Costs are based upon the Department's experience with similar registration and inspection programs.

##### 5. Local government mandates:

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

##### 6. Paperwork:

The rule establishes the form for persons who sell, offer for sale, or otherwise make available ammonium nitrate or regulated ammonium nitrate materials to use to register annually with the Department as required by Chapter 620 of the Laws of 2005.

The rule also establishes the format for the record of the sale of ammonium nitrate and regulated ammonium nitrate materials sellers are required to make and maintain for two years pursuant to Chapter 620 of the Laws of 2005.

##### 7. Duplication:

The rule does not duplicate, overlap or conflict with any other rule or other legal requirements of the State and federal governments.

##### 8. Alternatives:

The only alternative considered was to not establish the registration form and sales record format by regulation. That alternative was rejected in favor of establishing them by this rule so that the form could be formally adopted, published in the *State Register* and codified in 1 NYCRR. The remainder of the rule relates to security measures, types of identification cards, additional records and what type of regulated ammonium nitrate materials warrant regulation based on the potential explosive capacity of its ammonium nitrate content. These requirements were developed in consultation with the State Office of Homeland Security and were based on best practices in the industry and consultation with federal agencies knowledgeable about explosive materials.

##### 9. Federal standards:

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

##### 10. Compliance schedule:

The rule establishes a form for immediate use by those who sell, offer for sale or otherwise make available ammonium nitrate or regulated am-

monium nitrate materials to register with the Department, as required by Chapter 620 of the Laws of 2005.

It also establishes the format for the record of the sale of ammonium nitrate and regulated ammonium nitrate materials.

It is anticipated that sellers of these materials will be able to immediately register and begin making and maintaining records of sale. The Department has made mailings advising fertilizer dealers of the requirements of Chapter 620 of the Laws of 2005. Some of these dealers may sell ammonium nitrate and regulated ammonium nitrate materials. The majority of these sales will take place during the next growing season. It is also anticipated that sellers of these materials will be able to implement security measures to protect the inventories of ammonium nitrate they will acquire prior to the next growing season.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of the rule:

There are 9 persons or entities in New York State known to sell ammonium nitrate, the majority of which are small businesses. Since such sellers are not currently subject to registration, the actual number of small businesses that sell ammonium nitrate is not known.

##### 2. Compliance requirements:

Persons and entities in New York State that sell, offer for sale or otherwise make available ammonium nitrate or regulated ammonium nitrate materials are required by Chapter 620 of the Laws of 2005 to register annually with the Department for a fee of not more than \$50.00. Said Chapter also requires such persons and entities to make and maintain, for a minimum of two years, a record of those purchasing ammonium nitrate. This rule establishes the form and format for such registration and record-keeping. In addition, the rule requires that those selling ammonium nitrate display their registration certificate and take security measures to provide reasonable protection against vandalism, theft or other unauthorized access. They are also required to provide officers and employees of the New York State Department of Agriculture and Markets and the New York State Office of Homeland Security with access to the records of ammonium nitrate sales.

##### 3. Professional services:

None

##### 4. Compliance costs:

The costs to regulated parties of completing and submitting the registration form are expected to be minimal. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to the registrants who already hold commercial fertilizer licenses. Those licensees, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee.

The costs to regulated parties of completing and maintaining the record for the sale of ammonium nitrate and ammonium nitrate materials, as required by Chapter 620 of the Laws of 2005, is also expected to be minimal, given the fact that it can be executed as part of the sales transaction. The format for the record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by sellers. By listing the permissible types of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005.

It is anticipated that the cost of the security measures that must be taken by those required to register will vary with the size of the business and the extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandalism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. The cost of daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already be part of the business management practices of most sellers.

##### 5. Economic and technological feasibility:

Compliance with the rule is both economically and technologically feasible for the small businesses who sell, offer for sale, or otherwise make available ammonium nitrate materials. As discussed in 4 above, the registration and sale forms have been designed for ease of use by sellers of ammonium nitrate. The security measure that are required are similar to those that are anticipated to already be a part of the business management practices of most sellers.

##### 6. Minimizing adverse impact:

The rule is designed to minimize any adverse economic impact the rule may have on small businesses by closely following the requirements of Chapter 286 of the Laws of 2005 establishing registration forms that are designed for ease of use by sellers of ammonium nitrate. The registration form is similar to the form currently used in the licensing of commercial fertilizer dealers. The sales record form is designed for ease of use in the course of sales transactions involving ammonium nitrate. The approaches for minimizing adverse impact suggest in SAPA § 202b(1) and other similar approaches were considered.

##### 7. Small business and local government participation:

The Department has conducted outreach via mailings to the approximately 300 licensed commercial fertilizer distributors in New York State to advise them of Chapter 620 of the Laws of 2005 and of the fact that regulations would be proposed pursuant to that Chapter. The Department has also followed up by telephone with those known to handle ammonium nitrate. When the emergency rule is proposed for permanent adoption small businesses and other regulated parties will have an opportunity to participate in the rule making process.

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

##### 1. Types and estimated numbers in rural areas:

The 9 persons or entities in New York State known to sell ammonium nitrate are located throughout the rural areas of the State.

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

Persons and entities in New York State that sell, offer for sale or otherwise make available ammonium nitrate or regulated ammonium nitrate materials that are small businesses are not likely to need professional services to comply with the rule. The rule establishes the form to use to register with the Department as required by Chapter 620 of the Laws of 2005. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to registrants who already hold commercial fertilizer licenses. Those licensees, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee.

The rule also establishes the format for the record of the sale of ammonium nitrate and ammonium nitrate materials required by Chapter 620 of the Laws of 2005. The format for this record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by such sellers. By listing the permissible type of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005 that the identity of those purchasing ammonium nitrate and regulated ammonium nitrate materials be verified and recorded.

The requirements in the rule requiring security measures be taken to provide reasonable protection against vandalism, theft or other unauthorized access are those commonly in use by small businesses to protect their inventory.

It is not anticipated that professional services are likely to be needed in a rural area to comply with the proposed rule.

##### 3. Costs:

The costs to regulated parties of completing and submitting the registration form are expected to be minimal. The form is similar to that of the application for a license to distribute commercial fertilizer. As a result, the format of the ammonium nitrate registration form will be familiar to the registrants who already hold commercial fertilizer licenses. These licenses, since they already pay fees under Agriculture and Markets Law Article 10, are exempt from the fifty dollar annual ammonium nitrate registration fee. It is not anticipated there will be a variation in the cost for different types of public and private entities in rural areas.

The cost to regulated parties of completing and maintaining the record for the sale of ammonium nitrate and ammonium nitrate materials, as required by Chapter 620 of the Laws of 2005, is also expected to be minimal, given the fact that it can be executed as part of the sales transaction. The format of the record is designed to permit sellers of ammonium nitrate to record sale information by using check boxes where possible. It also organizes the information to be recorded in a sequence that will facilitate its use by sellers. By listing the permissible types of identification on the sale record, the rule is designed to assist sellers in meeting the requirements of Chapter 620 of the Laws of 2005. It is not anticipated that there will be a variation in such costs for different types of public and private entities in rural areas.

It is anticipated that the cost of the security measures that must be taken by those required to register will vary with the size of the business and the

extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandalism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. Daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already be part of the business management practices of most sellers.

#### 4. Minimizing adverse impact:

As set forth in "2" and "3" above, the rule is designed to minimize any adverse impact on rural areas, by making the forms established by the rule user friendly and directed and limited to that which is necessary to implement Chapter 620 of the Laws of 2005. The approaches suggested by SAPA § 202-bb(2) and other similar approaches were considered.

#### 5. Rural area participation:

The Department has conducted an outreach by mail to 300 licensed fertilizer dealers trying to determine those that sell ammonium nitrate. The Department will be proposing this emergency rule for permanent adoption. Through the notice and comment process of the Administrative Procedure Act, regulated parties will have the opportunity to participate in the rule making process. The adoption of the rule on an emergency basis was necessary to implement Chapter 620 of the Laws of 2005 by the effective date of November 28, 2005.

#### Job Impact Statement

##### 1. Nature of impact:

By providing for the protection of ammonium nitrate, while permitting its continued use as a fertilizer for agricultural and horticultural purposes, the rule will help preserve jobs and employment opportunities in those important economic sectors.

##### 2. Categories and numbers affected:

The number of persons employed by the 9 known sellers of ammonium nitrate is not known.

##### 3. Regions of adverse impact:

The sellers of ammonium nitrate and the agricultural and horticultural businesses that utilize ammonium nitrate as a fertilizer are located in the rural areas of the State. As noted in "1" above, the rule would have a positive impact on jobs and employment opportunities.

##### 4. Minimizing adverse impact:

The rule was designed to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities in that it will help keep fertilizer dealers that sell ammonium nitrate and their agricultural and horticultural customers in business. The rule was designed to minimize any adverse impact on sellers and customers by making the forms established by the rule easy to use and by limiting the rule to that which is necessary to implement Chapter 620 of the Laws of 2005.

emergency adoption of Part 402 of the Superintendent's Regulations on that date.

It has come to the attention of the Banking Department that many licensed budget planners utilize third party entities to assist them in distributing the monies of debtors to their creditors. Likewise, many applicants for a budget planning license have indicated in their application that they intend to conduct their budget planning activities in a similar fashion. This type of "outsourcing", in which an entity other than the licensee which has a contract for budget planning services with a debtor has access to or controls the monies of debtors, raises the possibility that those monies will not be sufficiently protected, as intended by the Legislature. The rule is necessary in order to provide protection to debtors when a third party "outsourcer" is used in the process of paying debtor funds to creditors of the debtors. Specifically, if the third party "outsourcer" is another budget planner licensed under Article 12-C of the New York Banking Law, the amount of that licensee's bond or assets placed on deposit, as the case may be, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not been properly distributed to their creditors, must be increased to reflect the additional amount of debtors' funds that it has access to or controls as a result of its "outsourcing" activities. However, if the licensed budget planner which utilizes another licensed budget planner as an "outsourcer" places assets on deposit pursuant to Section 580(4) of the Banking Law in an amount sufficient to cover the debtors' funds that the licensed "outsourcer" has access to or controls, then the licensed "outsourcer" would not be required to obtain a surety bond in a greater amount, or place additional assets on deposit to cover the additional amount of debtors' funds that it has access to or controls, as a result of its outsourcing activities. In such case, the monies of debtors would be fully protected by the original licensee's asset deposit.

If the third party "outsourcer" is not a licensed budget planner in New York State, the issue of the safety of the monies of the debtors becomes more paramount as an entity unregulated by and probably unknown to the Banking Department will have access to or control of the monies of debtors. In such case, unless the licensed budget planner places assets on deposit sufficient to cover the debtors' funds that the non-licensed "outsourcer" has access to or controls, the non-licensed "outsourcer" would be required to place assets on deposit sufficient to protect the monies of the debtors that it has access to or controls as a result of its "outsourcing" activities.

The rule also contains provisions relating to the contractual relationship between the licensed budget planner and the service provider, which give protection to debtors who may be adversely affected if the contract between the licensee and the service provider is terminated.

The primary legislative objective of Chapter 629 is to provide greater consumer protection to New York residents who contract with licensed budget planners for budget planning services. Accordingly, considering the foregoing, emergency adoption of this rule is necessary and appropriate.

**Subject:** Regulation of budget planning activities conducted by entities licensed under art. 12-C of the New York Banking Law.

**Purpose:** Set forth the regulatory requirements and standards of operation for entities licensed under art. 12-C of the New York Banking Law to conduct the business of budget planning when the licensees use the services of third party entities in making payments of debtor funds to creditors of the debtors.

#### Text of emergency rule:

##### PART 404

#### BUDGET PLANNERS/DELEGATION OF CERTAIN ACTIVITIES

(statutory authority: Banking Law, § 587)

##### § 404.1 Definitions.

For purposes of this Part:

(a) The term "debtor" shall mean an individual who enters into a contract with a licensee and is at that time a New York resident.

(b) The term "licensee" shall mean an entity licensed pursuant to Article 12-C of the New York Banking Law.

(c) The term "licensee service provider" shall mean an entity licensed pursuant to Article 12-C of the New York Banking Law that holds, or has access to, or can effectuate possession of, by any means, the monies of another licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include entities that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

(d) The term "non-licensee service provider" shall mean an entity that holds, or has access to, or can effectuate possession of, by any means, the

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## Banking Department

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### EMERGENCY RULE MAKING

#### Regulation of Budget Planning Activities

**I.D. No.** BNK-09-06-00010-E

**Filing No.** 197

**Filing date:** Feb. 14, 2006

**Effective date:** Feb. 16, 2006

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

**Action taken:** Addition of Part 404 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-C, section 587

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

**Specific reasons underlying the finding of necessity:** Chapter 629 of the laws of 2002, which became effective on April 7, 2003, made substantial changes to the conduct of the business of budget planning in this state. Amendments made to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law necessitated the

monies of a licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include entities that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

(e) The term "control party" shall mean with respect to a licensee, any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a licensee. With respect to a non-licensee service provider it shall mean any individual or entity that has a 10% or more ownership interest in the non-licensee service provider and/or any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a non-licensee service provider.

#### § 404.2 Explanatory note.

Section 580.4 of Article 12-C of the New York Banking Law requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, maintain certain assets on deposit, which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed by the licensee to the creditors of the debtors. In circumstances in which a licensee uses a licensee service provider or a non-licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of a licensee's debtors, the services of such service providers shall be subject to the terms and conditions set forth in sections 404.3, 404.4, 404.5 and 404.6 of this Part, in order to provide the consumer protections afforded to licensees' debtors as mandated under Article 12-C of the New York Banking Law.

In complying with these terms and conditions, a licensee that obtains a surety bond pursuant to Section 580.4 of the Banking Law and uses the services of a licensee service provider as described, is required to use a licensee service provider that either obtains a surety bond or maintains assets on deposit, in accordance with the provisions of Banking Law Section 580.4. Similarly, if the licensee obtains a surety bond and uses the services of a non-licensee service provider as described, the licensee is required to use a non-licensee service provider that maintains assets on deposit, in accordance with the provisions of Section 404.4(c)(2) of this Part.

If, however, a licensee elects to maintain assets on deposit pursuant to Banking Law Section 580.4 and uses the services of a licensee service provider or a non-licensee service provider as described, there is no requirement that the licensee service provider or the non-licensee service provider obtain a surety bond or maintain assets on deposit. The licensee service provider would, of course, be required to obtain a surety bond or maintain assets on deposit with respect to its own contracts with debtors for budget planning services, pursuant to Banking Law Section 580.4.

#### § 404.3 Servicing By a Licensee Service Provider.

(a) If a licensee seeks to utilize a licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of another licensee's debtors in contract with the licensee for budget planning services, or to distribute, or be in the chain of distribution of such monies to creditors of the licensee's debtors, the licensee shall give the Superintendent ten days written notice of its intention to do so.

(b) Notice to the Superintendent shall contain the following information:

(1) Name and address of the licensee service provider.

(2) A description of the services to be provided by the licensee service provider.

(3) A copy of the agreement or contract between the licensee and the licensee service provider with respect to the provision of any or all of the services described in section 404.3(a) of this Part.

(4) The highest daily amount of debtor funds of the licensee to be held by the licensee service provider, or to which access is given to the licensee service provider, or to which possession can be effectuated, by any means, by the licensee service provider, or which are distributed by the licensee service provider, or are in the chain of distribution, to the creditors of the licensee's debtors.

(c) Unless the licensee maintains assets on deposit in lieu of a surety bond, pursuant to Banking Law Section 580.4, the Superintendent, in his/her discretion, may require the licensee service provider to obtain a larger surety bond or maintain a greater amount of assets on deposit for the protection of debtors in accordance with the terms and conditions as set forth in Superintendent's Regulation Parts 402.5, 402.6 and 402.7 in connection with the services being provided by the licensee service provider to the licensee as described in section 404.3(a) of this Part.

(d) A licensee shall not use a licensee service provider until the licensee receives written notice from the Superintendent confirming that the Super-

intendent has received a copy of the licensee service provider's bond or asset deposit agreement, if required under Section 404.3(c) of this Part.

(e) Notwithstanding the provisions of Section 404.3(c) of this Part, if a licensee maintains a surety bond and seeks to utilize a licensee service provider, as defined in section 404.1(c) of this Part, the Superintendent, in his/her sole discretion, may permit the use of an alternate mechanism to the licensee service provider obtaining a larger surety bond or maintaining a greater amount of assets on deposit, consistent with the purposes of Section 580.4 of Article 12-C of New York's Banking Law and the requirements of this Part.

(f) If the use of an alternate mechanism pursuant to Section 404.3(e) of this Part is proposed by a licensee, the licensee must provide a description of the alternate mechanism and a copy of all applicable documents and records, as well as any other information requested by the Superintendent, in connection with obtaining and/or using the alternate mechanism, including all contracts/agreements pertaining or related thereto.

(g) If a licensee proposes the use of an alternate mechanism to a licensee service provider obtaining a larger surety bond or maintaining a greater amount of assets on deposit, pursuant to Section 404.3(e) of this Part, use of the alternate mechanism shall not be permitted until the licensee receives written notice from the Superintendent that he/she has no objection to such alternate mechanism.

#### § 404.4 Servicing By A Non-Licensee Service Provider.

(a) If a licensee seeks to utilize a non-licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of the licensee's debtors in contract with the licensee for budget planning services, or to distribute, or to be in the chain of distribution of such monies, to the creditors of the licensee's debtors, the licensee shall give the Superintendent ten days written notice of its intention to do so.

(b) Notice to the Superintendent shall contain the following information:

(1) Name and address of the non-licensee service provider.

(2) Name, address, social security number and resume of the officers and directors of the non-licensee service provider, any other individual(s) who supervises the daily operations of the non-licensee service provider and any persons having a 10% or more ownership interest, directly or indirectly, in the non-licensee service provider. If an individual(s) has a 10% or more ownership interest in the non-licensee service provider and such individual is not a control party of the licensee with whom the non-licensee service provider is in contract to provide the services described in section 404.4(a) of this Part, such individual shall provide an affidavit attesting to that fact.

(3) A description of the services to be provided to the licensee by the non-licensee service provider.

(4) A copy of the agreement or contract between the licensee and the non-licensee service provider with respect to the provision of any or all of the services described in section 404.4(a) of this Part.

(5) The highest daily amount of debtor funds to be held by the non-licensee service provider, or to which access is given to the non-licensee service provider, or to which possession can be effectuated, by any means, by the non-licensee service provider, or which are distributed by the non-licensee service provider, or are in the chain of distribution, to the creditors of the debtors.

(c) A licensee shall not use a non-licensee service provider for the services described in section 404.4(a) of this Part until:

(1) The non-licensee service provider gives the Superintendent or his/her authorized representative written authorization to examine all books, records, documents and materials, including those maintained in electronic form, as they relate to the debtors monies held by, or distributed by the non-licensee service provider to the creditors of the debtors, as the superintendent in his/her discretion deems necessary to protect the interests of the debtors. The cost of such examination shall be borne by the licensee in contract with the non-licensee service provider; and

(2) Unless the licensee maintains assets on deposit in lieu of a surety bond, pursuant to Banking Law Section 580.4, the non-licensee service provider shall maintain assets on deposit for the protection of the debtors whose monies it holds, or has access to, or can effectuate possession of, by any means, or which are distributed, or are in the chain of distribution, by the non-licensee service provider, to the creditors of the debtors. The maintenance of such assets shall be in accordance with the terms and conditions as set forth in Superintendent's Regulation Parts 402.6 and 402.7; and

(3) All information required in subdivision (b) of this section and a copy of the non-licensee service provider's asset deposit agreement, if required under Section 404.4(c)(2) of this Part, have been provided to the

Superintendent, and the licensee receives written notice from the Superintendent confirming that the Superintendent has received all such information.

(d) Notwithstanding the provisions of Section 404.4(c)(2) of this Part, if a licensee maintains a surety bond and seeks to utilize a non-licensee service provider, as defined in Section 404.1(d) of this Part, the Superintendent, in his/her sole discretion, may permit the use of an alternate mechanism to the non-licensee service provider maintaining assets on deposit, consistent with the purposes of Section 580.4 of Article 12-C of New York's Banking Law and the requirements of this Part.

(e) If the use of an alternate mechanism pursuant to Section 404.4(d) of this Part is proposed by a licensee, the licensee must provide a description of the alternate mechanism and a copy of all applicable documents and records, as well as any other information requested by the Superintendent, in connection with obtaining and/or using the alternate mechanism, including all contracts/agreements pertaining or related thereto.

(f) If a licensee proposes the use of an alternate mechanism to a non-licensee service provider maintaining assets on deposit pursuant to Section 404.4(d) of this Part, use of the alternate mechanism shall not be permitted until the licensee receives written notice from the Superintendent that he/she has no objection to such alternate mechanism.

#### § 404.5 Termination of Agreements or Contracts.

(a) Every agreement or contract between a licensee and a licensee service provider, or a non-licensee service provider, to hold, or have access to, or to effectuate possession of, by any means, the monies of the licensee's debtors in contract with the licensee for budget planning services, or to distribute, or be in the chain of distribution of such monies, to creditors of such debtors, shall provide that the agreement or contract shall not be terminated without at least 30 days written notice to the party against whom termination is being sought.

(b) A licensee shall immediately notify the Superintendent, in writing, of such termination, upon the sending of by the licensee, or upon the receipt by the licensee, of the notice of termination.

#### § 404.6 Compliance.

Compliance with this Part shall be required on or before May 18, 2004.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 14, 2006.

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Section 587 of Article 12-C of the New York Banking Law, as amended by chapter 629 of the laws of 2002, provides the statutory authority for the Superintendent to propose this rule with respect to entities licensed under Article 12-C of the Banking Law to conduct the business of budget planning. Provisions of chapter 629 include the enactment of amendments to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law that relate to the business of budget planning. Article 12-C of the New York Banking Law provides for the licensing and regulation of entities engaged in the business of budget planning. The business of budget planning is defined in Section 455 of Article 28-B of New York's General Business Law.

##### 2. Legislative Objective:

Entities that are licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning are authorized to enter into contracts with individuals ("Debtors") who seek to pay off their debts. The Debtors agree to pay sums of money periodically to the licensed budget planner. The licensed budget planner in turn uses the money received from the Debtors to pay the creditor(s) of the Debtors based on payment terms set forth in the contracts between the licensed budget planner and the Debtors. Debtors pay a fee to licensed budget planners for this service.

Typically, Debtors who enter into such contracts with licensed budget planners have incurred significant amounts of consumer debt primarily through credit-card financed purchases. The expansion of unsecured consumer credit to the general public has resulted in an explosion of consumer debt. This has created situations where credit has been extended to, and utilized by, individuals who, if not for the available credit, would have been unable to engage in such consumer spending based on their disposable income. Individuals who have no funds to repay such debts may only possibly resolve their financial problems by either seeking out personal bankruptcy or by looking to the services provided by credit counselors or

licensed budget planners. Debtors often have little ability to satisfy their creditors without the use of a structured payment plan negotiated with the creditors that may include some modification of the outstanding debt due to the creditor. Licensed budget planners perform an intermediary role between the Debtors and the creditors in negotiating a payment plan and in insuring that periodic payments are made to the creditors.

Under these circumstances the individuals in debt are often in dire economic circumstances. Consequently, they are potential targets of persons or entities that may seek to take advantage of them by accepting fees for the promise of services or programs that may not actually eliminate the debt.

The Legislature in amending various sections of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of entities engaged in the business of budget planning, did so generally to establish a more rigorous regulatory environment within which entities licensed under New York law may engage in the business of budget planning. The Legislature addressed, among other things, the inherent risks associated with the payment of Debtor funds to creditors when Debtors choose to have such payments made via the services of a licensed budget planner instead of paying their creditors directly. Specifically, as one way of increasing consumer protections for the Debtors who contract with licensed budget planners in order to pay the debts they owe to creditors, Article 12-C was amended to require licensed budget planners to obtain a surety bond or place assets on deposit, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not properly been paid to their creditors.

In addition to the amendments to Article 12-C of the New York Banking Law, amendments were also made to Article 28-B of the New York General Business Law in connection with the business of budget planning. Specifically, Section 455 of Article 28-B of the New York General Business Law requires a person or entity, wherever located, that enters into a contract for budget planning with an individual then resident in New York State, to first obtain a license from the Superintendent of Banks to conduct the business of budget planning. Such a license is obtained pursuant to Article 12-C of the New York Banking Law. Because of the requirement that out-of-state entities that contract with New York residents for budget planning services be licensed under the Banking Law, New York residents who partake of the budget planning services offered by the out-of-state entities will also be afforded the consumer protections that have been put in place under Article 12-C of the Banking Law.

The proposed New Part 404 sets forth a framework for the regulation of entities licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning, when such licensees use third party entities in distributing the monies of Debtors to creditors. New Part 404 was drafted in furtherance of the public policy objectives that the Legislature sought to advance in enacting the amendments to Article 12-C of the New York Banking Law, in particular, Section 580(4), by providing protection when third party entities are used in distributing Debtor monies to creditors.

##### 3. Needs and Benefits:

Proposed New Part 404 is needed to enable the Banking Department to carry out its existing supervisory and regulatory responsibilities with respect to entities licensed under Article 12-C of New York's Banking Law to conduct the business of budget planning. Specifically, when Banking Law Section 580(4) was recently enacted, it placed the requirement upon licensed budget planners to obtain a surety bond or place assets on deposit, the proceeds of which constitute a trust fund to reimburse payments made by Debtors that have not been properly paid to their creditors. Since the enactment of the legislation, members of the Banking Department staff have received numerous applications from prospective licensees. Extensive discussions were had at meetings and in telephone conversations with a number of the prospective licensees, as well as with current licensees, regarding the operations of their budget planning businesses. This was done in order to assess whether the business practices of the budget planning industry conformed to the consumer protections standards set forth in the new laws. The Department learned from many of the prospective and current licensees that with respect to the Debtors that they are in contract with for budget planning services, it is their practice to use third party entities in distributing the Debtors' monies to creditors. The third party entities that they contract with for such services are generally for-profit entities that are not, themselves, licensed to conduct the business of budget planning. However, one current licensee indicated that it uses the services of another New York State licensed budget planner in order to distribute Debtors' monies to creditors. The current and prospective licensees explained that it is necessary for them to use the services of third party

entities in this way primarily because they do not have the computerized technology, staffing, and budgetary resources to provide the critical services performed by the third party entities.

Nevertheless, this type of "outsourcing" to a third party entity, in which an entity other than the licensee which has a contract for budget planning services with a Debtor, holds, or has access to, or can effectuate possession of, by any means, the monies of a licensee's Debtors, or distribute, or is in the chain of distribution of such monies, to the creditors of such Debtors, raises the possibility that those monies will not be sufficiently protected, as intended by the Legislature when it put into law the bond/asset deposit requirement as set forth in Section 580(4) of New York's Banking Law.

The rule is proposed in order to accommodate the budget planning industry's operational need to use the third party entities in distributing Debtor funds to creditors. At the same time, the rule provides the consumer protections afforded by the recently enacted budget planning legislation as set forth in Banking Law Section 580(4). In particular, if the licensee uses a third party entity in distributing Debtor funds to creditors, and the licensee elects to place assets on deposit, which assets constitute a trust fund to reimburse payments made by Debtors if not properly paid to their creditors, the rule allows for the use of such a third party entity and places no additional bond/asset deposit requirements on the third party entity. If, on the other hand, the licensee elects to obtain a surety bond rather than place assets on deposit, the licensee may only use a third party entity in distributing Debtor funds if the third party entity places assets on deposit or obtains a surety bond, as the case may be.

Budget Planning is a regulated financial service in New York State. Therefore, it is the obligation of the Superintendent of Banks, as the State financial regulator, to establish a rule as proposed in accordance with the legislative intent to protect vulnerable consumers from entities that may operate without the necessary business standards required to appropriately provide budget planning services. It is the Banking Department's belief that the rule as proposed is necessary. It provides the mechanism by which the budget planning entities that are currently licensed, as well as those seeking to obtain such a license, can continue to operate using the services of third party entities in distributing Debtor funds to creditors. At the same time, the rule satisfies the legislative requirement as set forth in Banking Law Section 580(4) to provide certain protection to Debtors in contract with licensees, in cases where third party entities are used by the licensees in distributing Debtor funds to creditors.

#### 4. Costs:

(a) Costs to State Government: None.

Any and all additional examination costs that may be incurred by the Banking Department, as a result of the requirements of the rule imposed on the licensees that use third party entities in the distributing Debtor funds to creditors, will be borne by the licensees.

(b) Costs to Local Government: None.

(c) Costs to Regulated Entities:

The proposed rule allows licensees to use third party entities in distributing Debtor funds to creditors. In summary, Part 404 provides the following. If a licensee elects to maintain assets on deposit and utilizes the services of a third party entity in distributing Debtor funds to creditors, (whether or not the third party entity is, or is not, another budget planner licensed in New York) there is no requirement that the third party entity obtain a surety bond or place assets on deposit with respect to the business of the licensee that it is servicing. If a licensee elects to obtain a surety bond and utilizes the services of a third party entity in distributing Debtor funds, which entity is also a licensed budget planner in New York, the third party entity must either obtain a surety bond or maintain assets on deposit with respect to the business of the licensee that it is servicing. If the licensee elects to obtain a surety bond and utilizes the services of a third party entity in distributing Debtor funds, which entity is not a New York licensed budget planner, the third party entity must maintain assets on deposit with respect to the business of the licensee that it is service.

A licensee is likely to incur no costs if it uses a third party entity in distributing Debtor funds and elects to maintain assets on deposit, rather than a surety bond. The reason being, that a licensee has to purchase a surety bond, whereas, by placing assets on deposit, the licensee does not have to make such a purchase. Moreover, when assets are placed on deposit, the licensee has the ability to earn interest on the deposited funds.

It is possible, however, that in circumstances where a licensee may not have all, or part of, the necessary funds to place on deposit, that it could incur some costs in connection with borrowing funds for its required deposit. The Banking Department is unable to determine what the costs to the licensees would be under those circumstances since the cost of borrowing funds is typically dependent upon factors such as, the amount of the

borrowing and the financial condition of the entity doing the borrowing. Therefore, it is not possible to estimate, even in a general way, such borrowing costs. However, should costs be incurred to make the asset deposit, those costs will not outweigh the benefits derived by maintaining the assets on deposit should Debtor funds not be properly paid to creditors.

(d) Costs to the Banking Department for Implementation and Continued Administration of the Rule: The rule requires Banking Department staff to review contracts or agreements that licensees have entered into, or plan to enter into, regarding the licensees use of third party entities in distributing Debtor funds to creditors. This review is done in order to assess compliance with rule to ensure, that where third party entities are involved, the Debtors in contract with the licensees are afforded the consumer protections provided by the bond/asset deposit requirements of Section 580(4) of the New York Banking Law. The Banking Department expects that its costs to implement and administer the rule will be minimal.

#### 5. Local Government Mandates:

The proposed rule imposes no burdens on local governments.

#### 6. Paperwork:

The reporting requirements as set forth in the rule will enable the Banking Department to provide the necessary supervisory oversight of the licensees, in furtherance of the legislative objective to provide more consumer protections for debtors in contract with licensees for budget planning services.

Under the proposed rule, licensed budget planners will have to provide the Banking Department with the following information: a) the name and address of the third party entity used in distributing Debtor funds to creditors, b) a description of the services being provided by the third party entity, c) a copy of the agreement or contract entered into with the third party entity, d) information regarding the highest daily amount of Debtor funds that the third party entity will be providing services for under the contract or agreement, and e) information with respect to the termination of any such agreement or contract. All of this information is of the type that licensees using third party entities in distributing Debtor funds will have readily available to provide to the Banking Department.

#### 7. Duplication:

None.

#### 8. Alternatives:

(a) Proposal – As is previously discussed in the Legislative Objective Section contained herein, the recent amendments to Article 12-C, Section 580(4) of New York's Banking Law include the requirement that New York State licensed budget planners obtain a surety bond, or in lieu of such bond, place certain assets on deposit to be used to reimburse payments made by Debtors that have not been properly distributed to creditors.

Since the enactment of the legislation, Banking Department staff met with current and prospective licensees and learned that these businesses require the use of the services provided by third party entities in distributing Debtor funds. The rule was proposed keeping in mind both the legislative intent in enacting the bond/asset deposit requirements to provide increased consumer protection to New York residents in contract with licensees should their payments not be properly distributed to creditors, and the need that current and prospective licensees have in using the services of third party entities in distributing such payments. The rule allows licensees to use the services of third party entities in this way, and also provides the Debtors in contract with the licensee the consumer protections afforded under Section 580(4) of the Banking Law, as mandated by the Legislature.

(b) Do not propose the rule.

If this alternative were considered, the Banking Department would have to require that licensees not use the services of third party entities in distributing Debtor funds to creditors, in order to provide Debtors the consumer protections afforded under Section 580(4) of the Banking Law. This alternative is not feasible because, as many current and prospective licensees explained to the Banking Department, they need to use the services of the third party providers in distributing Debtor funds. The need results primarily because they do not have the computerized technology, staffing and budgetary resources to provide the critical services that they perform.

Under these circumstances, the Banking Department believes that if the rule was not proposed, licensed budget planners would have to be prohibited from using third party entities in distributing Debtor funds. This could be severely harmful to the budget planning industry, particularly since, the inability to use the third party entities may prevent the licensees from continuing to operate their businesses. Moreover, the inability to use the third party entities may prevent many prospective licensees from seeking a budget planning license in New York because they may not be able to

operate without the services of the third party entities. Accordingly, the proposed rule is needed not only to provide consumer protection to Debtors as mandated by Section 580(4) of the Banking Law, but also to prevent putting certain current licensees out of business, and to enable certain prospective licensees the opportunity to conduct the business of budget planning in New York.

9. Federal Standards:

None.

10. Compliance Schedule:

Compliance with the rule is required on or before May 18, 2004.

#### **Regulatory Flexibility Analysis**

The rule affects entities that are licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning. Section 579 of Article 12-C requires entities that conduct the business of budget planning to be Type B not-for-profit corporations under New York's Not-For-Profit Corporation Law. Under New York's Not-For-Profit Corporation Law, there can be no ownership interest in Type B not-for-profit corporations. Accordingly, there can be no ownership interest in budget planners licensed in New York.

No local governments are licensed to conduct the business of budget planning, and all of the budget planners currently licensed under Article 12-C of the New York Banking Law have less than 100 employees.

When the Legislature enacted the recent amendments to Article 12-C of the New York Banking Law, it established a more rigorous regulatory environment within which entities licensed under New York Law were to engage in the business of budget planning. This was done in order to provide increased consumer protection to New York residents that contract for budget planning services with licensees.

The recent amendments to Article 12-C of the New York Banking Law include the bonding/asset deposit requirements set forth under Section 580(4) of Article 12-C. In particular, Section 580(4) requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, maintain certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed to creditors.

In response to the legislation, members of the Banking Department staff met with and/or had conversations with current and prospective licensees. As is more fully described in the Regulatory Impact Statement, the Banking Department learned that many of the current and prospective licensees require the services of certain third party entities in distributing debtor funds to creditors. Accordingly, the rule was proposed in response to the industry need to use third party entities in this way. The rule is flexible in that it allows licensees to use the services of third party entities, who may be small business, in distributing debtor funds to creditors. At the same time, it provides the consumer protections afforded under Section 580(4) of the Banking Law, as mandated by the Legislature, to the debtors in contract with the licensees for budget planning services. The rule ensures that debtors' funds will be protected, as mandated by the statute, irrespective of which entity has control over and/or access to the funds.

Specifically, due to the servicing relationship between the licensee and the third party entities, when a licensee elects to use a third party entity in distributing debtors funds to creditors, under the proposed rule, the licensee can choose to either place assets on deposit, or obtain a surety bond. If the licensee places assets on deposit, there are no bond/asset deposit requirements placed on the third party entity. If the licensee elects to obtain a bond, the third party entity can either place assets on deposit or obtain a surety bond, as the case may be, with respect to the budget planning business of the licensee that it services.

Based on the dialogue that the Banking Department had with current and prospective licensees regarding their need to use third party entities in distributing debtor funds to creditors, it is not apparent, thus far, that the rule will impose any appreciable or substantial adverse impact on entities licensed under New York Law to conduct the business of budget planning.

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

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. The Legislature mandated under Section 580(4) of the New York Banking Law, that licensees obtain a surety bond or place certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly paid to creditors. In order to provide debtors with the consumer protections afforded under Section 580(4), the proposed rule allows licensees that use third party entities in distributing debtor funds to creditors to either place assets on deposit or obtain a surety bond. If the licensee elects to obtain the surety bond, it must only use the services of a third party entity that also places assets on

deposit or obtains a surety bond, as the case may be, in connection with the licensee's business that it is servicing. If the licensee elects to place assets on deposit, no bond/asset deposit requirements are placed on the third party entity.

There is nothing about the character and nature of the rules requirements that would make it difficult for, or prevent, licensed budget planners from complying with the rule based on a particular office location. Accordingly, it is unlikely that the rule would cause regulated parties to seek flexibility with respect to any part, or parts thereof, even if the regulated parties were located in a designated rural area as defined in New York State Executive Law Section 481(7).

To the extent that the rule, if adopted, may have any impact on rural areas, it has the ability to provide increased consumer protection to debtors residing in rural areas who enter into contracts with licensees for budget planning services, when such licensees use the services of third party entities in distributing debtors funds to creditors.

#### **Job Impact Statement**

The purpose of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of persons or entities engaged in the business of budget planning, is to ensure that budget planners operate in accordance with rigorous standards. Recent amendments to Article 12-C of New York Banking Law and Article 28-B of New York's General Business Law were adopted in connection with the business of budget planning to increase consumer protections for the clients of licensed budget planners.

In particular, Section 580(4) of Article 12-C of the New York Banking Law was recently amended in connection with budget planning in New York State. It requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, to maintain certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed to creditors.

As is explained in the Regulatory Impact Statement, it has come to the attention of the Banking Department that both current and prospective licensees require the services of third party entities in distributing debtors to creditors. The rule has been proposed in order to allow the licensees to continue using such third party entities in the operations of their businesses. At the same time, the rule provides the consumer protections afforded under Section 580(4) to debtors that contract with licensees for budget planning services when the licensees use third party entities in distributing the funds of the debtors to creditors.

Under the rule, if a licensee elects to use a third party entity in distributing debtor funds to creditors, a licensee can choose to either place certain assets on deposit or obtain a surety bond, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not been properly paid to creditors. If a licensee places assets on deposit, there is no bond/asset deposit requirement placed on the third party entity. If a licensee, instead, chooses to obtain a surety bond, the rule requires that the third party entity place certain assets on deposit, or obtain a surety bond, as the case may be, with respect to licensee's business that it services. Accordingly, based on the rule's requirements, it will have no impact on jobs in New York State.

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## Department of Environmental Conservation

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### NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

#### **Uniform Procedures**

**I.D. No.** ENV-31-05-00006-C

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

*The notice of proposed rule making*, I.D. No. ENV-31-05-00006-P was published in the *State Register* on August 3, 2005.

**Subject:** Uniform procedures.

**Purpose:** To clarify the permit application review process and incorporate relevant permit program requirements instituted by changes in regulations

or statutes of other programs subject to Uniform Procedures since the last amendments; eliminate discrepancies between the Uniform Procedures regulations and program regulations; and add the Permits for Discharge and Disposal of Radioactive Material to the Environment to those programs subject to Uniform Procedures.

**Substance of rule:** The proposed amendments to Part 621, Uniform Procedures, will change the order of the regulation to more closely follow the application review process, add needed definitions, clarify and update procedures for various programs that fall under the auspices of Uniform Procedures, clarify procedures for transferring a permit, clarify how to apply for variances, add several minor categories that will save applicants time and money without impacting the environment, clarify department and applicant responsibilities in various stages of the application review process, amend cross references to Part 621 that appear in Parts 622, 624, 663, 370 series and 380 series, and update addresses and telephone numbers of regional offices including FAX numbers and the department's website.

**Changes to rule:** No substantive changes.

**Expiration date:** September 29, 2006.

**Text of proposed rule and changes, if any, may be obtained from:** Charles B. Gardner, Department of Environmental Conservation, Division of Environmental Permits, 4th Fl., 625 Broadway, Albany, NY 12233, (518) 402-9154, e-mail: cbgarde@gw.dec.state.ny.us

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

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Hazardous Waste Manifest Program

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

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

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

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

**Subject:** Hazardous waste management regulations.

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

**Public hearing(s) will be held at:** 2:00 p.m., April 19, 2006 at Department of Environmental Conservation, 625 Broadway, Conference Rm. 919, Albany, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.dec.state.ny.us](http://www.dec.state.ny.us)):** Part 370 is amended to update incorporation by reference material and dates, revise the definitions for "designated treatment, storage or disposal facility" and "manifest", and add a definition for "Manifest tracking number".

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

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

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

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

generator must know how the waste is to be disposed and assure that the ultimate disposal method is provided on the manifest.

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

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

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

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

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

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

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

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

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

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

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

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

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

Distribution deadlines for copies of the manifests are changed. Generators have ten calendar days rather than five working days and TSD facilities have 10 calendar days rather than two working days to distribute manifest copies.

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

For the manifest form:

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

- In Item 13, Waste Codes, an additional State requirement is added:  
ITEM 13 - ADDITIONAL STATE REQUIREMENT If the receiving TSD facility is not providing a hazardous waste management code in item 19 that reflects the ultimate disposal method for the hazardous waste, the generator must provide a waste code to designate the ultimate disposal method of the waste using one of following State codes:

L = Landfill

B = Incineration, heat recovery, burning

T = Chemical, physical, or biological treatment

R = Material recovery of more than 75 percent of the total material.

If the receiving TSD facility uses hazardous waste report management method code for "storage, bulking, and/or transfer off-site - no treatment/recovery, fuel blending, or disposal at this site" in Item 19 of the manifest

form, and the generator has failed to provide the ultimate disposal method in Item 13, the ultimate disposal method is deemed landfill (L).

For the continuation sheet:

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

See Appendix in the back of this issue for the forms.

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

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

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

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

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

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

Requirements for analysis of received shipments are clarified.

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

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

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

**Text of proposed rule and any required statements and analyses may be obtained from:** Deborah L. Aldrich, Department of Environmental Conservation, 625 Broadway, 9th Fl., Albany, NY 12233-7250, (518) 402-8730, e-mail: hwregs@gw.dec.state.ny.us

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

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

#### Summary of Regulatory Impact Statement

##### 1. Statutory Authority

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

##### 2. Legislative Objective

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

##### 3. Needs and Benefits

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

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

#### State Initiated Changes

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

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

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

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

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

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

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

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

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

j) 372.3(b)(4)(ii): Transporters can now modify the manifest upon instruction by the generator, if the waste cannot be delivered to the desig-

nated TSDf or alternate TSDf. Previously, transporters were not allowed to modify the manifest. From a practical perspective, allowing the original manifest to continue with the shipment with modifications as needed, approved by the generator, is a much simpler and easier approach to implement.

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

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

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

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

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

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

#### 4. Costs

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

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

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

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

With regard to the State initiated changes to areas of the State regulations which are more stringent than federal regulations, it is projected that cost savings will be realized by larger facilities from postal savings. Mailing costs will also be saved for those facilities who stop mailing manifest copies to States who do not wish to receive them. Additional time to resolve discrepancies before mailing manifest copies will also result in decreased postage and labor.

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

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

#### 5. Local Government Mandates

No additional recordkeeping, reporting, or other requirements will be imposed on local governments by this rulemaking. To the extent that a local government may be a generator of hazardous waste, they may need to

make a copy of a manifest to mail to the state, rather than the existing method of using one of the copies provided as part of the form.

#### 6. Paperwork

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

#### 7. Duplication

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

#### 8. Alternatives

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

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

#### 9. Federal Standards

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

#### 10. Compliance Schedule

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

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The rule making does not place any additional burdens on small businesses or local governments (beyond the need to make a copy of each hazardous waste manifest for mailing purposes), create new regulatory programs, expand existing regulatory programs or increase the universe of regulatory requirements applicable to the regulated community beyond that which is already required by the federal regulations.

Accordingly, the number of small businesses and local governments affected by the rule making will not be more than those already affected by the existing regulations. Approximately 10,000 small businesses are affected by the hazardous waste regulations which range from dentists to auto maintenance facilities to manufacturers.

#### 2. Compliance Requirements

There are no new reporting, recordkeeping, or other compliance requirements for small quantity generators as a result of the rule making beyond that which is already required by the federal regulations other than the need to make a copy of each hazardous waste manifest for mailing purposes.

Because the manifest will now be a 6 part form not 8, the generator may need to make copies of the form to meet the requirement of mailing a copy to the state(s) involved. The State recognizes this to be an added burden for the generator. However, it is anticipated that for smaller generators, who may not have a copy machine on the premises, the company providing the hazardous waste transport service will assist in this regard. The vast majority of the small generators use full service companies for management of their hazardous waste which provide the manifests and assist the generators in meeting the associated regulatory requirements. If the generator’s hazardous waste service company does not provide the additional copy(ies), the increased amount of time allowed prior to mailing will provide a business which has limited access to a copy machine the time necessary to meet this requirement. The option of not requiring the form be mailed to the state is not acceptable to the department. Tracking of the initiation of a hazardous waste shipment is the backbone to the “cradle to grave” tracking the State completes for each hazardous waste shipment originating from the State or being delivered to a facility in the State. This tracking protects against midnight dumping of hazardous wastes along the

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

### 3. Professional Services

The quantity and types of service needed will remain close to the present level. The proposed rule making does not involve any major program changes, with regard to the scope of the program, which are not already mandated by federal regulation. The Department continues to operate a toll-free telephone number (800-462-6553) that small quantity generators can call for assistance and conducts a variety of education and outreach activities directed at small business.

### 4. Compliance Costs

Small businesses and local governments should not incur any additional costs, either initial capital costs or annual compliance costs, to comply with the rule making. The State will be providing free training on the new manifest form. New federal rule changes that impose additional requirements would be enforced by the USEPA even if New York State chose not to adopt them. Other changes will generally result in regulations that are less stringent than existing state regulations or clarify the regulations.

### 5. Economic and Technological Feasibility

As these rule changes either implement federal regulations to go into effect September 5, 2006, clarify regulatory text, or decrease the regulatory burden on small businesses and local governments, implementation of these rule changes will be economically and technologically feasible for small businesses and local governments.

### 6. Minimizing Adverse Impact

The amendments will not cause a significant economic burden to the small business community or local governments. In general, small businesses that generate hazardous wastes are already required to comply with the hazardous waste manifesting requirements. These modifications are intended to be less complex and less costly than the existing manifest program. Training on the new form will be offered by the State for free to assist the regulated community with the transition to a new form.

### 7. Small Business and Local Government Participation

On July 29, 2005, information on this rule making was mailed to over 7,000 people who had manifested hazardous waste in the previous year, as well as public interest groups, requesting public comment. Small businesses and local governments were included in this statewide outreach effort. Information is also available on the department's web site.

### **Rural Area Flexibility Analysis**

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

This rule will apply Statewide, to all 44 rural counties and 71 additional rural towns.

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

No additional reporting, recordkeeping, compliance requirements, or professional services will be imposed on local governments by this rule making, other than the need to make a copy of hazardous waste manifests for mailing purposes. The rule making modifies an existing program requiring tracking of shipments of hazardous waste which rural areas already have to comply with. Hazardous waste generators may wish to attend training on the use of the new form, but this will not be mandatory.

#### 3. Costs:

No local mandates will be created by this rule, nor will this rule impose any costs on rural areas. Economic impacts to existing rural area facilities which handle hazardous wastes are small since the proposed rule making modifies an existing program requiring tracking of shipments of hazardous waste which rural areas already have to comply with. Hazardous waste generators may wish to attend training on the use of the new form, but this will not be mandatory and will be offered free of charge by the Department. Conformance with these amendments should not result in substantial additional costs to the regulated community.

The Department is adopting USEPA'S March 5, 2005 and June 16, 2005 manifest program regulations without substantive change. USEPA projects that with the adoption of these amendments, the cost of regulatory conformance should decrease. These changes will increase consistency between New York State regulations and federal regulations, as Executive Order Number 2 encourages.

The USEPA identifies the federal manifest rule changes as not economically significant. They estimate a 4% to 5% burden hour reduction, producing a national total of \$12.7 to \$20.6 million savings in average annual paperwork burden reduction benefits.

Based on information regarding waste generation in the "The National Biennial RCRA Hazardous Waste Report (June 2001)" in which New York State is said to represent 13.18 percent of the total waste generators in

the United States, the cost savings in New York State is estimated to be \$1.67 million to \$2.72 million annually in average annual paperwork burden reduction benefits.

With regard to the changes for the more stringent areas of the State regulations, it is projected that cost savings for larger facilities, particularly TSDFs, will occur as these facilities can mail copies of their manifest forms to the State once a week rather than multiple mailings in a week. Mailing costs will also be saved for those facilities who stop mailing manifest copies to States who do not wish to receive them.

### 4. Minimizing Adverse Impact:

These regulations will not have any adverse impact in rural areas. These changes will increase consistency between New York State regulations and the federal regulations, as Executive Order Number 2 encourages. The proposed rule making principally adopts the USEPA manifest regulation amendments which rural areas already have to comply with as of September 5, 2005.

### 5. Rural Area Participation:

On July 29, 2005, information on this rule making was mailed to over 7,000 people who had manifested hazardous waste in the previous year, as well as public interest groups, requesting public comment. Rural areas were included in this statewide outreach effort. Information is also available on the department's web site.

### **Job Impact Statement**

A Job Impact Statement has not been prepared for this rule as it is not expected to create a substantial adverse impact on jobs and employment opportunities in New York State. The proposed rule is not expected to result in a decrease of more than one hundred full-time annual jobs and employment opportunities which would otherwise be available to the residents of the State in the next two years.

The United States Environmental Protection Agency (USEPA) continues to amend the federal hazardous waste management regulations to address existing and emerging issues relating to hazardous waste management. In order for New York State to maintain its authorization, the state's hazardous waste management regulations must not be less stringent or less broad than the federal regulations.

This rule making amends the Part 370 Series hazardous waste management regulations to incorporate mandated federal changes published in the March 4, 2005 and June 16, 2005 federal registers regarding the hazardous waste manifest program. The hazardous waste manifest program tracks shipments of hazardous waste from the point of generation to point of disposal. The hazardous waste manifest form is being revised and this revised form must be in use 18 months from the date of publication in the *Federal Register* (September 5, 2006). In addition, changes to other aspects of the State manifest program will be made. These changes affect a paper based tracking program for hazardous waste shipments and are not anticipated to impact jobs in New York State.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Standards for the Use of Credit Information

**I.D. No.** INS-09-06-00002-E

**Filing No.** 194

**Filing date:** Feb. 10, 2006

**Effective date:** Feb. 10, 2006

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

**Action taken:** Addition of Part 221 (Regulation 182) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201 and 301; and art. 28

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

**Specific reasons underlying the finding of necessity:** Article 28 of the Insurance Law, which goes into effect on April 23, 2005, requires an insurer that uses credit information to underwrite or rate risks for personal lines insurance to comply with certain requirements and limitations. Chapter 215 of the Laws of 2004, which enacted Article 28, requires the

Superintendent to promulgate regulations necessary to effectuate the provisions of Article 28.

It is essential that this regulation be promulgated on an emergency basis to assure that consumers are afforded certain protections with respect to the use of credit information by an insurer in connection with personal lines insurance. Therefore, it is essential that insurers be made aware of the limitations upon and requirements for the use of credit information in the underwriting and rating of personal lines insurance as soon as possible. Insurers that use such information are required to file scoring models (or other scoring processes) with the Superintendent. Insurers must be given sufficient time to review the requirements with respect to such filings prior to the date Article 28 becomes effective.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Standards for the use of credit information to underwrite and rate personal lines insurance.

**Purpose:** To establish limitations upon, and requirements for, the permissible use of credit information by insurers to underwrite and rate risks for personal lines insurance business.

**Substance of emergency rule:** Section 221.0 provides that Chapter 215 of the Laws of 2004 added new Article 28 to the Insurance Law. Article 28 establishes limitations upon, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite or rate risks for personal lines insurance business.

Section 221.1 provides that this regulation applies to the use of credit information to underwrite and rate personal lines insurance policies applied for, or renewed, on or after April 23, 2005. It also provides that this regulation or Article 28 will not alter the requirements or limitations contained in the Insurance Law, Title 11 of the NYCRR, or the rules of the New York Automobile Insurance Plan or the New York Property Insurance Underwriting Association.

Section 221.2 provides definitions applicable to the regulation.

Section 221.3 provides prohibitions on the use of credit information and permissible use of credit information.

Section 221.4 provides the requirements for obtaining current credit information.

Section 221.5 provides standards for the disclosure of the use of credit information in the underwriting and rating of personal lines insurance policies.

Section 221.6 provides standards for notification when an insurer takes an adverse action based upon credit information.

Section 221.7 provides for dispute resolution and error correction if it is determined that the credit information used by an insurer to underwrite or rate a current insured was incorrect or incomplete.

Section 221.8 provides standards for the filing of credit scoring models (or other scoring processes) and revisions thereto, to the superintendent.

Section 221.9 provides standards for filings by the insurer.

Section 221.10 provides that an insurer that uses credit information in the underwriting and rating of personal lines insurance is required to complete and submit to the superintendent an Insurer Credit Information Compliance Certification. The Insurer Credit Information Compliance Certification shall be in a form prescribed by the superintendent.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 10, 2006.

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

#### **Regulatory Impact Statement**

1. Statutory authority: Sections 201 and 301 of the Insurance Law, and Article 28 of the Insurance Law, as enacted by Chapter 215 of the Laws of 2004. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law and to prescribe forms or otherwise make regulations. Article 28, as enacted by Chapter 215 of the Laws of 2004, establishes limitations upon, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite and rate risks for personal lines insurance business. Further, the Superintendent is directed to provide, by regulation, rules governing the use of credit information.

2. Legislative objectives: The Legislature, in enacting Chapter 215 of the Laws of 2004, wanted to assure that consumers are afforded certain protections with respect to the use of credit information for personal lines insurance. The Superintendent was directed to promulgate a regulation to

establish limitations on, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite and rate risks for personal lines insurance business.

3. Needs and benefits: Most insurers currently use credit information in the underwriting and initial tier placement of consumers for personal lines insurance. The purpose of this regulation is to establish rules to implement the provisions of Article 28. In accordance with Article 28, the regulation establishes and clarifies limitations upon, and requirements for, the permissible use of credit information by insurers doing business in New York State to assure that consumers are afforded certain protections when credit information is used to underwrite and rate risks for personal lines insurance business. The regulation clarifies prohibited and permitted uses of credit information in the underwriting and rating of personal lines insurance. The regulation sets forth whose credit information can be used, the form of the disclosure of the use of credit information and when the disclosure must be provided. The regulation sets forth standards for the notification when an insurer takes an adverse action based upon credit information. The regulation also requires an insurer to take corrective action within thirty days after it receives notice that the insured has obtained a determination pursuant to the process for dispute resolution and error correction under the federal Fair Credit Reporting Act that the credit information used by the insurer was incorrect or incomplete. The regulation also establishes rules for, and provides guidance to, insurers when filing their credit information requirements with the Superintendent.

4. Costs: This rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. This rule does not impose additional costs upon insurers. If an insurance producer or other entity has been designated by the insurer to issue disclosure notices and adverse action notices, the insurance producer or other entity will incur additional costs in producing and mailing these documents. However, the designation of an insurance producer or other entity for this purpose is optional, not mandatory, on the part of the insurer and presumably such arrangements will be subject to a contractual agreement between an insurer and its insurance producer(s) or other entities and will be used when it has an overall cost benefit. The notification requirements and submission of filings are required by the statute and the regulation is only implementing the statutory requirement.

5. Local government mandates: None.

6. Paperwork: Paperwork associated with the submission of a filing by an insurer should already be in place. The insurer is required to complete an Insurer Credit Information Compliance Certification for the scoring model (or other scoring processes) filing and any filing of revisions thereto. Also, the insurer is required to maintain records that the disclosures of the use of credit information and adverse action notifications have been provided to the consumer. Where an insurance producer or other entity has been designated by the insurer to issue disclosure notices and adverse action notices, the insurance producers or other entities will incur additional paperwork necessary to insure that the insurer is in compliance with the notice and record retention requirements.

7. Duplication: None.

8. Alternatives: In developing this rule, the Department reviewed the National Conference of Insurance Legislators (NCOIL) model for the use of credit information in personal insurance and various provisions of the Federal and Fair Credit Reporting Act and the Department did outreach with trade associations, consumer groups, and a third party modeler.

There are several provisions of the rule for which alternatives were considered by the Department, as follows.

An insurer who chooses to consider, for any given program of insurance, an absence of credit information or an inability to calculate an insurance score to underwrite or rate risks must choose one of the three options specified in Section 2803(e) of the law to apply to all of the consumers in that program of insurance who have no credit information or whose insurance score cannot be calculated. The three options have been incorporated into the rule. The language used in Section 221.3(a)(5)(iii) of the rule clarifies the parameters of the third option which requires that a filing be made with, and be subject to the prior approval of, the Superintendent, with respect to an individual consumer. An alternative that has been suggested by some insurers is to permit such a filing to be made for a class of insureds. The Department considered this approach but rejected it because the law contemplates that such filing be made as to "the consumer" and not to a class of consumers. To further demonstrate the intention of the law not to treat all insureds who have no credit information or an insurance score as a class, Section 2802(d) prohibits an insurer from taking an adverse action against a consumer solely because he or she does not have a credit card account. Clearly, such insureds would fall into a "class" of

insureds that could be defined as having an absence of credit information or an inability to calculate an insurance score but such a class would be violative of Section 2802(d) of the law.

Section 2802(g) of the law gives an insured, where an insurer has chosen to use credit information the right to request, not more often than once every 36 months, that the insurer re-underwrite and re-rate the policy based upon a current credit report or insurance score. Section 221.4(b)(1) of the rule requires that the insurer make any necessary adjustments including moving the insured to the appropriate tier, effective as of the date of the updated report or score. An alternative that has been suggested by the industry is that the insurer be permitted to delay implementation of the re-underwriting and re-rating until the next policy renewal date. The Department considered this approach but rejected it because the law does not provide that re-underwriting and re-rating can be delayed until some future date. It is clear that the Legislative intent was that the remedy be implemented as soon as possible in order to immediately provide the insured with an opportunity to get a lower premium based on current credit information. Some insurers indicated they might have problems with updating credit information mid-term. In order for them to avoid any problems, insurers are not precluded from choosing to automatically re-run credit scores every 36 months or more frequently, without the insured or the insured agent's request, to determine if the insured is eligible for a lower premium, more favorably priced tier, or placement with an affiliate of the insurer at a lower rate. It is noted that the NCOIL model differs from Article 28 of the Insurance Law in that the model requires that the insurer re-underwrite and re-rate the policy based upon a current credit report or insurance score no later than every 36 months and, if requested, on every renewal date.

Sections 221.4 and 221.7 of the rule require that an insurer, when re-underwriting or re-rating an insured based upon corrected, completed or updated credit information, consider not only whether the insured qualifies for placement in a lower-priced tier within the company, but also whether the insured qualifies for placement in an affiliate of the insurer at a lower rate (*i.e.*, if the affiliate would write the policy). In addition, when determining the amount of the refund due based on the correct credit information, Section 221.7 of the rule requires that the refund be calculated based on the appropriate tier/affiliate the insured would have been written in (assuming that the affiliate is still in the group and is still writing this business) if the insurer had used the correct credit information. This approach recognizes that when an insured applies for insurance from one company within a group of affiliated insurers, it is actually often applying to more than one company in the group. The alternatives the Department considered would have been to require re-underwriting and re-rating based only upon the filed rates and underwriting rules of the current insurer. The Department rejected this because where there is a group of affiliated insurers that includes insurers that do not have tiers the insureds of such insurers would not be able to benefit from a refund. Such a result would render the required statutory remedies for the use of incorrect or outdated credit information meaningless. Even where affiliate insurers each have more than one tier, the insured will not fully benefit by the re-rating and re-underwriting unless the insurer considers its affiliates' tiers as well. The Department believes that this approach is consistent with the law, which makes reference to the relationship between insurers and their affiliates in underwriting and rating. For example, under Section 2802(b) of the law, a placement with an affiliate on the basis of credit information does not constitute a denial of coverage.

Insurers operate in many different organizational structures. A trade association has expressed concern that some of these organizational structures may make it infeasible or inequitable for an insurer to offer a coverage with an affiliate and comply with Sections 221.4 and 221.7 of the proposed rule. Another trade organization commented that the language "substantially equivalent coverage" should be deleted from those sections since a "holding company may designate certain of its companies for designated functional business. For example, consider method of distribution – some companies may be exclusively intended for direct internet business while others are for individuals." These concerns were considered and are specifically addressed in the rule.

For example, an insurer within the group uses agents but it has an affiliate that is a direct writer. The applicant applies for insurance and is placed with the insurer that uses agents. Upon re-underwriting and re-rating the insured, Sections 221.4 and 221.7 of the proposed rule would not require the direct writer affiliate to offer the insured coverage. These sections were intended to address insurer-group underwriting where an applicant that applies for insurance with one insurer is also considered for coverage with other insurers within the group without the need to apply

separately to each insurer. Under the example, the insured would not have to be offered coverage with the direct writer since the direct writer is not a part of the group underwriting done with the insurer that uses agents. Further, the direct writer requires the applicant to apply directly with that company. Sections 221.4 and 221.7 reflect clarifications suggested by the industry of the intent of the proposed rule.

The use of "substantially equivalent coverage" in this context contemplates that there may be some differences in the policy forms used by affiliates, but only where the insured is eligible for placement with an affiliate pursuant to Sections 221.4 and 221.7. However, even in such case, if the affiliate does not have a policy form that offers "substantially equivalent coverage", then that affiliate is not required to offer the insured a new policy.

Some insurers use credit information as an underwriting factor for initial tier or company placement. A trade association expressed concern that the use of the tier or company placement as an underwriting factor upon renewal would be considered to be using credit information upon renewal even if the insurer does not look at the insured's credit score upon renewal. The trade association suggested adding language similar to Section 2802(c) of the Insurance Law which states "nothing in this section shall be construed to prohibit an insurer from considering an insured's tier placement pursuant to Section 2349 of this chapter or placement with a company within a group of affiliated companies in conjunction with factors other than credit information as part of its renewal process." The proposed rule effectuates the provisions of Article 28 of the Insurance Law and does not supersede the provisions in the law. The proposed rule is not meant to restate every provision of the law and the Department believes that the proposed rule is clear in the permissible uses of credit information. For example consider the following situation:

- a) an insurer group consisting of two companies at two different rate levels which uses various factors in underwriting applicants,
- b) the two groups of applicants, A and B, both have the same underwriting characteristics except that those in group A have "excellent" credit scores and are placed in the company with the lower rate level, and those in group B have "poor" credit scores and are placed in the company with the higher rate level, and
- c) upon renewal, insureds in groups A and B remain in their respective companies with credit scores no longer being reviewed (except upon request as permitted by statute and regulation).

Under this example:

1. if the insurer group takes no rate action, the fact that insureds in group B pay higher rates than insureds in group A upon renewal does not violate Article 28 or the Regulation.
2. if the insurer group does make rate level adjustments to either of these companies, the Department would not consider such actions to be inconsistent with Article 28 or the Regulation provided such adjustments were based on the loss, expense and investment income experience, as set forth in the standards for rates in Article 23 of the Insurance Law.

Similarly, where one insurer has more than one tier and uses credit as one of the underwriting factors in the initial tier placement within the tiers, the fact that the insureds in one tier pay more than the other would not violate Article 28 or the Regulation. Furthermore, if the insurer makes rate level adjustments to any of its tiers, the Department would not consider such adjustments to be inconsistent with Article 28 or the Regulation provided such adjustments were based on the loss, expense and investment income experience of the tier(s), as set forth in the standards for rates in Article 23 of the Insurance Law.

Section 221.8(f) requires a third party that files scoring models on behalf of many insurers to provide the Department with certain information that would identify which insurer is using which scoring model. The Department also originally required the third party to provide the Superintendent with the name of each insurer's contact person and the person's telephone number. A trade association commented that such requirements would establish procedures that could lead to some confusion. The identification of the insurers and the scoring model they are using would assist the Department in evaluating the insurance company's decision on which version they choose to use. However upon further evaluation, the requirement for providing the contact person and the person's telephone number has been deleted from the rule as the third party may not necessarily have this information and the Department has this information from other sources.

The Department also considered some suggestions made by a consumer group. However, most of the suggestions conflict with the statute. For example, the consumer group wanted to amend the Regulation to require that all filed scoring models include loss experience to justify the

use of credit information. The statute clearly does not require such information if scoring models are only used in initial underwriting.

The consumer group commented that when re-underwriting and re-rating the policy based upon new, updated or corrected credit information, the rate adjustment should be the "lowest rate possible" among all affiliates and tiers and not simply a "lower rate." Sections 221.4(b)(2) and 221.7(b)(2) states that the insured is eligible for placement in an affiliate at a lower rate in accordance with the affiliates' current underwriting rules. The insurer will have to follow its underwriting rules to determine which company to place the insured. An insurer cannot arbitrarily place an insured in a higher premium company if the insured is also eligible to be placed in a company with lower premiums if everything else remains the same. The purpose of the underwriting rules is to provide guidelines so that insureds with similar characteristics are placed in the same company.

The consumer group commented about disclosures regarding that not all insurers use credit information and that the insureds may wish to consider other options. The Department considers this to be more appropriately addressed in the Department's Consumer Guide to Automobile Insurance (Guide). The Department will add reference to insurers' use of credit information for the next updated version of the Guide.

The rule requires the submission of an Insurer Credit Information Compliance Certification for the scoring model (or other scoring processes) filing and any filing of revisions thereto. This will facilitate the review of the filings and enhance compliance with the statute and rule. The alternative of not requiring an Insurer Credit Information Compliance Certification was considered and rejected because it would provide the Department less assurance that insurers are complying with the law and increase the time needed to review scoring model filings and might result in the need for more market conduct reviews.

9. Federal standards: The provisions of the federal Fair Credit Reporting Act referred to in Article 28 of the Insurance Law are also referred to in the regulation.

10. Compliance schedule: The effective date of the enabling legislation, Chapter 215 of the Laws of 2004, is April 23, 2005. Pursuant to the law, insurers are required to file their scoring models (or other scoring processes) with the Superintendent. The Regulation further provides that on or after August 15, 2005 insurers shall file their scoring models (or other scoring processes) at least 45 days prior to use.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed to property/casualty insurance companies licensed to do business in New York State, none of which fall within the definition of "small business".

The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized property/casualty insurers and believes that none of them would fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none which are independently owned and have under 100 employees.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

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

1. Types and estimated numbers of rural areas: This rule applies to property/casualty insurers licensed to do business in New York State. The insurers do business in every county in this state including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: There are requirements for the insurer under certain circumstances to provide written disclosure of the use of credit information and adverse action notifications when an adverse action has been taken. Also, the insurer is required to maintain records that the disclosures of the use of credit information and adverse action notifications have been provided to the consumer. Where an insurance producer or other entity has been designated by the insurer to issue disclosure notices and adverse action notices, the insurance producers or other entities will incur additional paperwork necessary to insure that the insurer is in compliance with the notice and record retention requirements.

3. Costs: Regulated persons under these regulations are insurers. Insurance producers or other entities may be designated by the insurer to issue disclosure notices and adverse notices, in which case the producer or other entity will incur costs in producing and mailing these documents. How-

ever, the designation of a producer or other entity for this purpose is optional, not mandatory, on the part of the insurer and presumably such arrangements will be subject to a contractual agreement and will be used when it has an overall cost benefit. The submission of filings and notification requirements are required by the statute and the regulation is only implementing the statutory requirement. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State. This rule does not impose any additional burden on persons located in rural areas, and the Insurance Department does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: This agency action appeared as a proposal in the Insurance Department's January 2005 Regulatory Agenda.

#### **Job Impact Statement**

This rule should not have any adverse impact on jobs and employment opportunities in this state since it merely implements the provisions of Article 28 of the Insurance Law. The rule sets forth standards that the insurers must follow when using credit information for underwriting and rating purposes. The rule also sets forth guidelines that insurers must follow when submitting filings to the Superintendent.

## **EMERGENCY RULE MAKING**

### **Physicians and Surgeons Professional Insurance Merit Rating Plans**

**I.D. No.** INS-09-06-00003-E

**Filing No.** 195

**Filing date:** Feb. 10, 2006

**Effective date:** Feb. 10, 2006

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

**Action taken:** Amendment of Part 152 (Regulation 124) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301 and 2343(d) and (e); and L. 2002, ch. 1, part A, section 42 as amd. by L. 2002, ch. 82, part J, section 16 and L. 2005, ch. 420

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

**Specific reasons underlying the finding of necessity:** Section 42 of Part A of Chapter 1 of the Laws of 2002, requires that any physician, surgeon or dentist who wants to participate in the excess medical malpractice insurance program established by the Legislature in 1986 must participate in a proactive risk management course. Section 42 authorized the Superintendent to promulgate regulations that provide for the establishment and administration of such plans. Section 42, as originally enacted on January 25, 2002, established an effective date of July 1, 2003 for participation in these courses. However, on May 29, 2002, Section 16 of Part J of Chapter 82 of the Laws of 2002 was enacted and the effective date was amended to July 1, 2002. Chapter 420 of the Laws of 2005 was enacted and amended the requirement for taking the follow-up course for eligibility in the excess medical malpractice insurance program from once every year to once every two years.

It is essential that this amendment be promulgated on an emergency basis so that insurers are made aware of the requirements for proactive risk management courses and have the courses in place as soon as possible. Insureds must be able to avail themselves of these courses as soon as possible so that they may participate in the excess medical malpractice insurance program. This is especially important for those insureds who are presently insured in the excess medical malpractice insurance program. It is vital that their insurance be maintained on a continuous basis not only for their financial protection but also to preserve the rights of claimants who suffer injury as a result of medical malpractice. In order for their insurance to be maintained on a continuous basis, the insureds must be informed of the time frame when these courses must be completed.

For the reasons cited above, this amendment is being promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Physicians and surgeons professional insurance merit rating plans.

**Purpose:** To establish guidelines and requirements for medical malpractice merit rating plans and risk management plans.

**Substance of emergency rule:** Section 152.1 is amended by adding paragraph (e) which details the statutory authority for proactive risk management programs.

Section 152.2 is amended by adding definitions for the terms physician, excess medical malpractice program and insurer.

Section 152.6 contains the standards for risk management programs in which insureds participate in order to receive premium credits. This section is amended to provide that these courses may be offered in an internet-based format.

Section 152.7 is amended by specifying how risk management programs, provided in an internet-based format, may be implemented.

Section 152.8 is renumbered to be Section 152.12 and a new Section 152.8 is added to provide the standards for proactive risk management programs which are provided for insureds who wish to qualify for the excess medical malpractice insurance programs established by the Legislature.

A new Section 152.9 is added to provide eligibility requirements for participation in the excess medical malpractice insurance program.

A new Section 152.10 is added to provide coordination of the excess medical malpractice risk management courses with risk management courses that are offered for the purpose of providing premium credits.

A new Section 152.11 is added to provide guidelines for insurers in implementing risk management programs administered for insureds who wish to qualify for participation in the excess medical malpractice insurance program established by the Legislature.

Section 152.12 is amended to provide requirements for insurers conducting audits of insureds or for insureds to conduct self-review surveys. A new provision is added requiring insurers to report, by territory and medical specialty, the number of insureds participating in risk management programs who qualify for the excess medical malpractice insurance program.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 10, 2006.

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

#### **Regulatory Impact Statement**

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law, and to effectuate any power granted under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2343(d) provides that the Superintendent shall, by regulation, establish a merit rating plan for physicians professional liability insurance. Section 2343(e) provides that the Superintendent may approve malpractice insurance premium reductions for insured physicians who successfully complete an approved risk management course, subject to standards prescribed by the Superintendent by regulation. Section 42 of Part A of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 and Chapter 420 of the Laws of 2005, requires that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature in 1986 participate in a proactive risk management program. Section 42 authorizes the Superintendent to promulgate regulations which provide for the establishment and administration of these risk management courses.

2. Legislative objectives: The objective of Section 2343(d) was the establishment, by the Superintendent, by regulation, of a merit rating plan for physicians professional liability insurance that was reasonable and not unfairly discriminatory, inequitable, violative of public policy or contrary to the best interests of the people of New York. The regulation was to include reasonable standards to be applied to merit rating plans submitted by insurers for approval by the Superintendent. Those standards are to be used to arrive at premium rates, surcharges and discounts based on an evaluation of the insured, geographical areas, specialties of practice, past and prospective loss and expense experience for medical malpractice insurance and any other factors deemed relevant in a system of merit rating.

The objective of Section 2343(e) was to permit insurers to provide premium credits for successful completion of risk management programs approved by the Superintendent.

The objective of Section 42 of Part A of the Laws of 2002 was to require that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature participate in a proactive risk management program.

An effective risk management program would provide insureds with an overview of the causes of malpractice claims, emphasize communication skills and improved patient rapport skills, and focus on improving procedures. This should reduce the frequency and severity of medical malpractice claims. The intent of this amendment is to effectuate that objective.

3. Needs and benefits: The first amendment to Part 152 established standards under which risk management programs may be approved by the Superintendent. Successful completion of approved risk management programs permitted credits to be applied to physicians professional liability programs.

At the time that amendment was promulgated, all risk management courses were conducted in a classroom setting in a lecture format. Since that time, advances in technology have made Internet-based home study courses available in an array of disciplines. Insurers have requested that they be permitted to take advantage of this technology and offer Internet-based risk management courses to their medical malpractice insureds. Offering Internet-based risk management courses will allow insureds increased flexibility in participating in these courses. This may result in more insureds completing the courses, which should ultimately translate into better patient care and reductions in the incidence and cost of medical malpractice claims.

The enactment of Section 42 of Part A of Chapter 1 of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 and Chapter 420 of the Laws of 2005 requires that, as of July 1, 2002, physicians, surgeons and dentists participate in a proactive risk management program in order to be eligible to participate in the excess medical malpractice insurance program established by the Legislature.

4. Costs: This rule imposes no compliance costs upon state or local governments.

There are no additional costs imposed upon regulated parties by the provisions of this amendment since, for the purposes of obtaining a premium credit, insurers are not required to offer risk management courses to their insureds, and those that offer risk management courses will not be required to include an Internet-based version. However, if they do offer these courses, these provisions offer regulated parties another option in offering risk management courses to their insureds. It is likely that it is more cost effective to offer Internet-based risk management courses to insureds in addition to, or in place of risk management courses in the lecture format. Courses conducted in a lecture format entail costs of hiring instructors, printing course materials and renting physical settings that can accommodate, and are convenient to, as many insureds that are eligible to attend.

In addition, insured physicians taking the Internet-based courses would not incur any transportation expenses that are associated with attending lecture format risk management courses. Furthermore, physicians would not have to schedule time away from their practice since these courses could be taken on line at virtually any time.

While insurers will incur additional costs when offering proactive risk management programs for the purpose of insurer eligibility in the excess medical malpractice insurance program, the statute provides that these costs will be reimbursed from funds available pursuant to Section 51 of Part A of Chapter 1 of the Laws of 2002. Reimbursement will be made according to procedures to be established by the Superintendent.

Although insurers have offered risk management programs, for the purpose of obtaining premium credits, for almost ten years, there are additional requirements specified in Section 42 of Chapter 1 of the Laws of 2002 for proactive risk management courses.

In order to satisfy the statutory requirement that these courses be proactive, insurers will also be required to conduct risk management audit at least once every two years, either by the insurer or by a self-review survey completed by the insured. There will be costs associated with developing the audit procedure, training people to conduct the audits, visiting insureds' practice settings to do the audit and implementing any necessary follow-up procedures after the results of the audit are analyzed.

These new requirements must be incorporated into the course and the course must be submitted to the superintendent for approval.

In addition, Section 42 requires that, in order for a dentist to participate in the excess medical malpractice program, he or she must participate in a proactive risk management program. Dental malpractice insurance carriers will incur costs necessary to set up proactive risk management courses, since up to this point the requirements of this Part with respect to risk management courses set up for purposes of premium credits did not apply to them.

Although the statute does not permit insurers to assess any fees against insureds for participating in these courses, insureds may have to schedule

time away from their practice to participate in these risk management courses. However, it should be noted that participation in a proactive risk management course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, it is anticipated that completion of the excess medical malpractice risk management program will allow an insured physician to receive credit for Category 1 continuing medical education.

5. Local government mandates: This rule does not impose any mandates on local government.

6. Paperwork: There are paperwork requirements imposed by the provisions of the amendment on insurers with respect to offering an internet based risk management course. An insurer that decides to offer an Internet-based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an Internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a location where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to develop new procedures for the purposes of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork burden should be minimal since insurers are already required to submit similar statistics regarding other risk management courses.

7. Duplication: This amendment will not duplicate any existing federal or state law.

8. Alternatives: The alternative of not permitting Internet-based risk management courses to be offered by insurers is not a viable alternative. The Department is of the opinion that technological advances in this area should be made available to insurers and insureds. By permitting the availability of these types of courses, it is expected that more insured physicians will be able to take these courses and the benefits of risk management will improve the quality of care provided to their patients.

Consideration was given to permitting insurers to provide non-Internet-based home study courses to their insureds. However, the Department is of the opinion that such home study courses do not afford insurers the ability to properly monitor the effectiveness of the course and to verify that the insured physician is actually taking the course as do other formats. Currently, when offering a risk management course in the lecture format, attendance must be taken of participants both before and after the lecture and admittance to the course is closed at a certain time after the start of the course. With Internet-based risk management courses, the insured physician will be required to affirm that they have read the content of the course, taken any quizzes and completed the required project. In addition, insureds will be given an individual password to use and the length of time spent on the Internet taking the course can be tracked by the insurer.

Since the proactive risk management course is required by statute, the Department could not consider the alternative of not implementing it. Although an internet based format is not directly addressed in the mandatory statute, the rule provides for this option in order to provide flexibility to both insurers and physicians, surgeons and dentists who must take such courses to qualify for the excess medical malpractice insurance coverage and to maintain consistency between the risk management credit course which is voluntary, and the course that must be taken by all insureds wishing to qualify for the excess medical malpractice insurance program.

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

10. Compliance schedule: The provisions of this amendment will apply immediately. As required by statute, insurers must have a proactive risk management course available for their insureds in order for insureds to participate in the excess medical malpractice insurance program. It is expected that insurers will be able to comply with the new provisions in a

relatively short period of time since most medical malpractice insurers already have had other risk management programs approved by the superintendent. In order to facilitate compliance with this statute, extensive discussions have been held by the Department with the major medical malpractice insurers in this state and the Medical Society of the State of New York so that the content of the course relative to excess management will be consistent from course to course and also qualify for continuing medical education credit.

Since the offering of risk management courses for the purpose of premium credits is optional for insurers, there is no compliance schedule with respect to the offering of these courses in an internet-based format. An insurer may offer an internet-based risk management course to its insureds as soon as the Department determines that the course is in compliance with the provisions of this Part.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed to property/casualty insurance companies licensed to do business in New York State and self-insurers, none of which fall within the definition of "small business".

The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized property/casualty insurers and determined that none of them would fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees. Self-insurers typically have to be large enough to have the financial ability to self insure losses and the Department has never been provided information to indicate that any of the self-insurers are small businesses.

This rule will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

Although they are not regulated parties, this part affects physicians, surgeons and dentists, some of whom may be considered small businesses as they are required to attend proactive risk management courses if they wish to be eligible to participate in the excess medical malpractice insurance program. This may entail scheduling time away from their medical practice in order to participate in these courses. However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, by providing insurers with the option of offering risk management programs in an internet-based format, physicians should be able to save time and money by taking these courses in their home or office at a time convenient to them as opposed to attending these courses when conducted in a lecture format.

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

1. Types and estimated number of rural areas: Insurers and self-insurers covered by this regulation do business in every county in this state, including rural areas as defined under Section 102 (1) of the State Administrative Procedure Act. Other affected parties, such as physicians, surgeons and dentists, conduct their practices throughout the state.

2. Reporting, recordkeeping and other compliance requirements: There are paperwork requirements imposed by the provisions of this amendment on insurers with respect to offering an internet-based risk management course. An insurer that decides to offer an internet-based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a setting where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to develop new procedures for the purpose of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork should have a minimal impact since insurers are already required to submit similar statistics regarding other risk management courses.

3. Costs: This rule imposes no compliance costs upon state or local governments.

It is not expected that insurers would incur undue expenses in offering internet-based risk management courses to their insureds for the purpose of obtaining premium credits. In fact, it is likely that it is more cost effective to offer internet-based risk management courses to insureds in addition to, or in place of, risk management courses in the lecture format.

Insureds would not be unduly affected by participating in internet-based risk management courses and would probably incur time and financial savings since they would be able to take these courses in their home or office at a time convenient to them.

Insurers will incur additional costs when offering proactive risk management programs to insureds for the purpose of eligibility in the excess medical malpractice insurance program. However, the statute provides that their costs will be reimbursed from statutory funds according to procedures to be established by the Superintendent. Insurers must offer these courses, and on a biennial basis, conduct risk management audits or have insureds conduct self-audits. These new requirements are statutorily mandated, but should not impose any undue hardships for insurers.

However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

It should also be noted that portions of the excess medical malpractice risk management programs will be reviewed by the Medical Society of the State of New York for qualification as Category 1 of continuing medical education credit. Therefore, an insured who successfully completes this course will qualify both for continuing medical education and for participation in the excess medical malpractice insurance program.

4. Minimizing adverse impact: The regulation applies to regulated parties that do business throughout New York State and does not impose any adverse impact on rural areas. Permitting insurers to offer risk management courses in an internet-based format should benefit insureds in rural areas through savings of time and money. Instead of traveling to central locations throughout the state to attend these courses in a lecture format, they can take the courses on computers in their home or office at a time convenient to them.

5. Rural area participation: The Department met extensively with the major medical malpractice insurers in New York State to solicit their opinions on the subject of proactive risk management programs. The Department also solicited input from the Medical Society of the State of New York in order that these courses would qualify for continuing medical education credit. Their comments were taken into account in developing the provisions of this Part.

#### **Job Impact Statement**

This rule should not have any adverse impact on jobs and employment opportunities in this State since it merely sets forth guidelines that medical malpractice insurers must follow when developing statutorily prescribed proactive risk management programs that must be submitted to the Superintendent for approval. It also permits insurers to offer risk management courses in an internet-based format.

## Office of Mental Retardation and Developmental Disabilities

### EMERGENCY RULE MAKING

#### **Enrollment and Appeals in Medicare Prescription Drug Plans**

**I.D. No.** MRD-09-06-00004-E

**Filing No.** 196

**Filing date:** Feb. 13, 2006

**Effective date:** Feb. 13, 2006

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

**Action taken:** Addition of Subpart 635-11 and amendment of section 635-99.1 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07(a), (c), 13.09(b) and 13.15(a)

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

**Specific reasons underlying the finding of necessity:** Since January 1, 2006 Medicare beneficiaries have been able to have their prescription drugs paid for under Medicare Part D. Certain individuals with both Medicare and Medicaid benefits, known as dually eligible persons, were automatically enrolled in Medicare Part D effective January 1, 2006. Unlike Medicaid and traditional Medicare, Part D benefits are paid not by the government, but by private companies, known as prescription drug plans. In order to receive these benefits, a person must enroll in a prescription drug plan.

In New York there are many prescription drug plans for persons to choose from. However, each plan has its own formulary (a list of drugs the plan covers), participating pharmacies and other features. Formularies, participating pharmacies and other features vary from plan to plan.

Persons who are already dually eligible have been automatically enrolled in a prescription drug plan, and persons who will become dually eligible in the future will be automatically enrolled in a plan. In all cases, assignment to a particular plan is done on a random basis. A person could be enrolled in a plan that is not right for him or her. For example, the plan could not cover the medications he or she needs, or could use a pharmacy that is not convenient for the person. In order to be in a plan that is better for the individual, the person has to change plans.

Beginning on November 15, 2005, Medicare beneficiaries could enroll in prescription drug plans, and persons who are dual eligible could change plans. Moreover, plans have exceptions and appeals processes whereby people can request additional coverage and benefits. OMRDD does not know how many people it serves are eligible for only Medicare. However, there are approximately 39,500 dual eligible persons to whom this regulation applies.

This regulation authorizes certain people to make enrollment and exceptions and appeals decisions for consumers receiving services from OMRDD or from an OMRDD regulated provider. Without the regulation, these parties cannot enroll consumers in a prescription drug plan, change plans for consumers or request that plans cover additional drugs for a consumer. Consumers would be left without a prescription drug plan or, if dually eligible, could be enrolled in plans that do not meet their needs. Consumers also could be unable to request coverage for drugs not on a plan's formulary. Consumers would then have to pay for their prescriptions themselves or, in the case of consumers living in residential facilities certified by OMRDD, the operator of the residential facility would have to pay for the prescriptions. The regulation needs to be effective immediately so that enrollment changes, initial enrollments, and other actions related to a Medicare Part D prescription drug plan can take place for these consumers.

**Subject:** Enrollment and appeals in Medicare prescription drug plans.

**Purpose:** To identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

**Text of emergency rule:** Add new Subpart 635-11 as follows:

*Subpart 635-11 Enrollment in a Medicare prescription drug plan.  
Section 635-11.1 Applicability and definitions.*

(a) This subpart sets forth rules concerning who can enroll beneficiaries in a Medicare Part D prescription drug plan or in a Medicare Advantage Plan with prescription drug coverage, and who can pursue grievances, complaints, exceptions and appeals in such plans. These rules only concern beneficiaries who receive services which are operated, certified, authorized or funded by OMRDD.

(b) Definitions. As used in this subpart:

(1) "Act in the Part D review process" means doing any of the following within the Part D program:

(i) filing a grievance;

(ii) submitting a complaint to the quality improvement organization;

(iii) requesting and obtaining a coverage determination (including exception requests and requests for expedited procedures); and

(iv) filing and requesting appeals and dealing with any part of the appeals process.

(2) "Enroll and enrollment" means enrollment in a PDP and disenrollment from a PDP.

(3) "Party" means someone or an entity or organization.

(4) "PDP" means a prescription drug plan offered under the Medicare Part D program or a Medicare Advantage Plan that provides prescription drug coverage offered under the Medicare Part D program.

Section 635-11.2 Enrollment and reviews for persons residing in a residential facility operated or certified by OMRDD or a family care home.

(a) If a person has the ability to choose a PDP, the person may enroll himself or herself in a PDP or appoint another party to enroll him or her. If a person has the ability to act in the Part D review process, the person may act in the Part D review process for himself or herself or appoint another party to act in the Part D review process for him or her.

(b) If a person lacks the ability to choose a PDP, but has a guardian lawfully empowered to enroll him or her in a PDP, the guardian may enroll the person in a PDP or appoint another party to enroll the person. If a person lacks the ability to act in the Part D review process, but has a guardian lawfully empowered to act in the Part D review process for the person, the guardian may act in the Part D review process or may appoint another party to act in the Part D review process for the person.

(c) If a person is a minor and does not have a guardian lawfully empowered to enroll him or her in a PDP or to act in the Part D review process, a parent may enroll him or her or act in the Part D review process for the person, or may appoint another party to enroll or act in the Part D review process for him or her.

(d) In all other situations, the chief executive officer (CEO) (see section 635-99.1) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may enroll the person or act in the Part D review process. The CEO or designee may also enroll the person or act in the Part D review process when any party specified in subdivisions (a) - (c) of this section who would otherwise enroll or act in the Part D review process is unwilling or unavailable.

(1) If a CEO or designee enrolls a person, he or she shall give written notice of such enrollment to the person's correspondent or advocate, and the person's Medicaid service coordinator.

(2) Process to request a different PDP.

(i) A correspondent or advocate may request that the person be enrolled in a different PDP. Such request must be in writing.

(ii) The agency or sponsoring agency shall consider the request and, if it agrees with the request, the CEO or designee shall enroll the person in the PDP requested and notify the advocate or correspondent of the enrollment.

(iii) If the agency or sponsoring agency does not agree with the request, the agency or sponsoring agency shall notify the correspondent or advocate in writing of the disagreement. The notice shall also inform the advocate or correspondent that he or she may appeal in writing to the DDSO Director.

(iv) If the advocate or correspondent appeals in writing to the DDSO Director, the DDSO Director shall review the request and relevant information and shall decide whether to enroll the person in a different PDP. Such decision shall be in writing and shall be sent to the correspondent or advocate and agency or sponsoring agency.

(v) While a request is being considered, the person shall remain enrolled in the PDP selected by the CEO or designee, or in a PDP in which the person is subsequently enrolled by the CEO or designee.

(3) Notwithstanding any other provision of this Title, if the person enrolls in a PDP (or a parent, guardian or appointee enrolls him or her) and the CEO or designee notifies the person, guardian, parent or ap-

pointee of the agency or sponsoring agency of the objection to the selection of the PDP, the agency or sponsoring agency is not fiscally responsible for any excess costs that may be incurred, as a result of the selection of the PDP, compared to the costs of the PDP that would have been selected by the CEO or designee. The agency or sponsoring agency's written notification of the objection must inform the person, guardian, parent or appointee that the excess costs are not the responsibility of the agency or sponsoring agency and that the person, guardian, parent or appointee (whoever completed the enrollment) is responsible for the additional costs. Receipt of the written notification must be documented.

Section 635-11.3 Enrollment and reviews for persons not residing in a residential facility or a family care home.

(a) If a person has the ability to choose a PDP, the person may enroll himself or herself in a PDP or appoint another party to enroll him or her. If a person has the ability to act in the Part D review process, the person may act in the Part D review process for himself or herself or appoint another party to act in the Part D review process for him or her.

(b) If a person lacks the ability to choose a PDP, but has a guardian lawfully empowered to enroll him or her in a PDP, the guardian may enroll the person in a PDP or appoint another party to enroll the person. If a person lacks the ability to act in the Part D review process, but has a guardian lawfully empowered to act in the Part D review process for the person, the guardian may act in the Part D review process or appoint another party to act in the Part D review process for the person.

(c) If the person is a minor and does not have a guardian lawfully empowered to enroll him or her in a PDP or to act in the Part D review process, a parent may enroll the person or act in the Part D review process, or may appoint another party to enroll the person or act in the Part D review process.

(d) In all other situations, or if any party specified in subdivisions (a) - (c) of this section who would otherwise enroll the person or act in the Part D review process is unwilling or unavailable, any of the following parties may enroll the person, act in the Part D review process or appoint another party to act in the Part D review process:

(1) an actively involved: spouse, parent, adult child, adult sibling, adult family member or friend, an advocate or correspondent; or

(2) if none of the above are willing and available, the CEO (or designee) of the agency providing service coordination for the person.

Section 635-11.4 Other responsibilities and rights of agencies and sponsoring agencies regarding enrollment and reviews.

(a) No CEO, officer, designee or employee of an agency or sponsoring agency shall solicit, accept or receive from a PDP, pharmacy or contractor of a PDP or pharmacy, for personal use or benefit (other than for the personal use or benefit of the person being enrolled), any payment, discount or other remuneration in consideration of, or as a result of, enrolling the person in a PDP.

(b) No CEO, officer, designee or employee of an agency or sponsoring agency shall charge, accept or receive payment from the person, family or anyone else for enrolling the person in a PDP, for providing advice and assistance in choosing a PDP or for acting for the person in the Part D review process.

(c) When a CEO or designee is authorized to act by this section or appointed to act in the Part D review process for a person, the CEO or designee may appoint a party outside of the agency to act in the Part D review process for the person.

(d) When a CEO or designee enrolls a person he or she shall choose a PDP based on the best interests of the person.

Revisions to § 635-99.1 Glossary

(c) Agency. The ["agent" or] "operator" of a facility, program or service operated, [or] certified, authorized, or funded through contract by OMRDD. In the case of State-operated facilities, the [B/]DDSO is considered to be the "agency". [Certified] [f]Family care providers are not to be considered an agency (also see "agency, sponsoring").

(e) Agency, sponsoring. The administrator of one or more family care homes. In the case of family care homes operated under State auspice, the [B/]DDSO is considered to be the sponsoring agency.

Note: The following definitions are moved to the proper place in alphabetical order and the rest of the subdivisions renumbered accordingly.

(n) [B/] DDSO. The Developmental Disabilities Services Office is [T] the local administrative unit[, responsible to the Division of Program Operations of OMRDD, that has major responsibility for the planning and development of community, residential and other program services. The B/ DDSO is responsible for coordinating the service delivery system within a particular service area, planning with community and provider agencies,

and ensuring that specific placement of individuals and program plans and provider training programs are implemented. In New York City this unit is called the Borough Developmental Services Office (BDSO); elsewhere in the State it is called the Developmental Disabilities Services Office (DDSO).] of OMRDD. The governing body of the DDSO is the central office administration of OMRDD. The DDSO director is its chief executive officer.

( ) *Officer, chief executive. Someone designated by the governing body (see section 635-99.1) with overall and ultimate responsibility for the operation of services certified, authorized or funded through contract by OMRDD, or his or her other designee for specific responsibilities and/or equipment as specified in written agency/facility policy. In a DDSO, this party is referred to as the director.*

**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 May 13, 2006.

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

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

a. Section 13.07(a) of the Mental Hygiene Law gives OMRDD responsibility for assuring the development of comprehensive plans, programs and services in the areas of prevention, care, treatment, habilitation, rehabilitation, vocational and other education and training of persons with mental retardation and developmental disabilities.

b. Section 13.07(c) of the Mental Hygiene Law gives OMRDD responsibility for seeing that persons with mental retardation and developmental disabilities are provided with services, including care and treatment; that such services are of high quality and effectiveness and that the personal and civil rights of persons receiving such services are protected. This section of the law also requires that the services provided seek to promote and attain independence, inclusion, individuality and productivity for persons with mental retardation and developmental disabilities.

c. Section 13.09(b) of the Mental Hygiene Law requires the Commissioner of OMRDD to adopt rules and regulations necessary and proper to implement any matter under his jurisdiction.

d. Section 13.15(a) of the Mental Hygiene Law requires the Commissioner to establish, develop, coordinate and conduct programs and services of prevention, care, treatment, rehabilitation and training for the benefit of persons with mental retardation and developmental disabilities. This section also requires the Commissioner to take all actions necessary, desirable or proper to implement the purposes of the Mental Hygiene Law and to carry out the purposes and objectives of OMRDD within available funding.

2. Legislative objectives: The emergency amendments further the legislative objectives embodied in sections 13.07(a), 13.07(c), 13.09(b) and 13.15(a) of the New York State Mental Hygiene Law by authorizing parties other than guardians to act on behalf of the many adult consumers served by OMRDD who do not have the capacity to make decisions about the Medicare prescription drug benefit and who do not have guardians. The emergency amendments also authorize other parties to pursue appeals and other reviews for these consumers, so that their rights in a prescription drug plan will be protected.

3. Needs and benefits: The new Medicare prescription drug program began January 1, 2006. This program is also known as Medicare Part D. Persons who are in Part D have their prescription drugs paid for through private insurance plans, known as prescription drug plans. Persons who have Medicare must enroll in a prescription drug plan in order to receive this benefit. However, persons who have Medicare and Medicaid are automatically enrolled in a plan. These persons are known as dual eligible persons.

Dual eligible persons were and will continue to be randomly assigned to a prescription drug plan as new persons become eligible for the benefit. The formularies (lists of drugs each plan covers), participating pharmacies and other services can vary from plan to plan, so that the plan to which a

beneficiary is randomly assigned may not be the one best suited to that person's needs.

Unlike Medicare-only beneficiaries, dual eligible persons can change prescription drug plans at any time. From November 15 to December 31, 2005, dual eligible persons could change plans as often as they want. Since January 1, 2006, dual eligible persons can change plans once a month.

Prescription drug plans are required to have review processes. These will allow persons to, for example, complain about the plan, request payment for a drug not on the plan's formulary, request a lower co-pay for a drug in a higher payment tier and appeal from any decision of the plan that is not what the beneficiary requested.

Federal regulations and policy state that only certain persons can make decisions about what prescription drug plan to choose and about pursuing a review: the beneficiary, someone appointed by the beneficiary or someone whom state law authorizes to act on behalf of a beneficiary. Federal guidelines cite guardians as an example of those whom state law authorizes to act for a beneficiary.

There are approximately 39,500 consumers who are dually eligible and who receive services from OMRDD or from an OMRDD regulated provider. Many of these consumers are adults, do not have the capacity to make decisions about the Medicare prescription drug benefit and do not have guardians. OMRDD developed this regulation to help these consumers. These regulations serve as state law which will authorize other people to act on behalf of these consumers, so that they can be enrolled in the prescription drug plan that is right for them. These regulations also serve as state law which will authorize other people to pursue appeals and other reviews for these consumers, so that their rights in a prescription drug plan will be protected.

Specifically, if the person is over 18, without the ability to decide, does not have a guardian and lives in a residential facility, the agency operating the residence can make the decisions. The executive director of the agency has this decision making authority, but he or she can also designate someone else in the agency to make these decisions. If a guardian or parent is supposed to make the decisions, but is unwilling or unavailable, the CEO or designee of the residential agency decides.

For adult consumers living at home or on their own who do not have the ability to make decisions about Part D, and who do not have a guardian, any of the following can make Part D decisions: an actively involved spouse, parent, adult child, adult sibling, adult family member, adult friend, advocate or correspondent. If none of these people are available or willing, the CEO (or designee) of the Medicaid Service Coordination agency can choose.

4. Costs: OMRDD considers the emergency amendments to be cost neutral. These emergency amendments may result in some cost savings.

a. Costs to Regulated Parties: No new costs are projected to be incurred by the regulated parties due to the implementation and ongoing compliance with emergency amendments. The emergency amendments may result in cost savings because those consumers receiving services from OMRDD who are affected by the emergency amendments (or members of their families) will not have to seek guardianship to participate in a prescription drug plan or to switch to a more cost effective plan. In addition, the provider of residential services may experience some cost savings because the plan in which the dual eligible consumer is auto-enrolled may result in higher costs to the provider than the plan in which the consumer is enrolled through the mechanisms established by this regulation. Providers are responsible for the costs of all necessary medications that are not covered by a prescription drug plan or some other mechanism.

b. Costs to the Agency, the State and Local Governments: There are no costs to local governmental units or any other special districts. New York State may also experience savings as a provider of state-operated residences (see above). Additionally, New York State and its local governments may experience a savings in the cost of court operations since the emergency amendments make the guardianship process unnecessary for many consumers.

5. Local government mandates: There are no new mandates on local governmental units or any other special districts.

6. Paperwork: There are minimal new paperwork requirements resulting from the regulations. If the residential agency chooses to enroll residents the agency is required to notify the advocate or correspondent of the resident. On the other hand, paperwork associated with seeking guardianship and making guardianship decisions is avoided, if guardianship is necessary only to facilitate enrollment in a Medicare prescription drug plan. Paperwork necessary to enroll beneficiaries and act in the Part D review process would be necessary regardless of the promulgation of these regulations.

To facilitate enrollment processes, OMRDD has developed new forms that can be used to appoint someone to enroll the beneficiary. These optional forms can assist consumers, guardians, parents and others who seek to appoint someone else, and are available on the OMRDD website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

7. Duplication: None.

8. Alternatives: If OMRDD did not promulgate the emergency amendments, consumers receiving OMRDD services who are eligible for Medicare only, without the ability to choose a plan and without a guardian would be unable to participate in the Medicare Part D program. Consumers who are dually eligible and without the ability to choose the plan and without a guardian would be unable to move from plans that did not meet their needs, and possibly have to pay for medicines out-of-pocket (or have their residential providers incur such expenses), and have to pursue time-consuming exceptions and appeals that could be avoided by simply switching plans. For some consumers, even the most suitable will not cover all medications they need, and consumers in those plans will need to pursue coverage determinations, exceptions and appeals. Without this regulation, adult consumers without guardians who do not have the ability to pursue coverage determinations, exceptions and appeals would be unable to do so.

9. Federal standards: The emergency amendments do exceed any minimum standards of the Federal government.

10. Compliance schedule: OMRDD filed a similar emergency regulation on November 15, 2005 to coincide with the beginning of the Medicare Part D enrollment period. The following provisions of the new emergency regulation differ from the provisions of the previous emergency:

- Subdivision 635-11.2(a) was changed to reflect that some persons may have the ability to enroll in a prescription drug plan, but not the ability to act in the Part D review process, or vice versa. A concern was raised that the previous emergency regulation could have been misinterpreted to suggest no distinction in the ability to accomplish these disparate tasks.

- Subdivision 635-11.2(b) was changed in a similar manner.

- Subdivision 635-11.3(a) was changed in a similar manner.

- Subdivision 635-11.3(b) was changed in a similar manner.

OMRDD intends to finalize the emergency amendments as quickly as allowed by the requirements of SAPA.

**Regulatory Flexibility Analysis**

1. Effect on small businesses: These emergency amendments apply to providers of OMRDD residential services and/or providers of Medicaid Service Coordination (MSC), both State-operated and voluntary-operated.

OMRDD has determined, through a review of the certified cost reports, that the voluntary not-for-profit organizations which operate the facilities or provide MSC employ fewer than 100 employees at the discrete certified or authorized sites, and would, therefore, be classified as small businesses.

The emergency amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not cause undue hardship to small businesses due to increased costs for additional services or increased compliance requirements. The amendments result in no new costs for these entities.

2. Compliance requirements: The emergency amendments require the regulated parties to notify the consumer's advocate (if applicable) and the correspondent (if applicable) of the plan when the CEO of an agency operating a certified residence or his or her designee enrolls the consumer in a prescription plan.

3. Professional services: No additional professional services are required as a result of these emergency amendments. The amendments will have no impact on the professional service needs of the local government.

4. Compliance costs: There are no costs to local governments or small businesses.

5. Economic and technological feasibility: The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: These emergency amendments impose no adverse economic impact on local governments or small businesses.

7. Small business and local government participation: OMRDD convened several task forces and committees concerning the implementation of the new Federal Medicare Part D benefit, including a work group that had as one of its specific charges the development of the emergency amendments. Membership of the various groups included providers of services, both State and voluntary-operated, provider association representatives, family members of consumers and other advocates for persons with mental retardation and developmental disabilities. Several of the task forces, committees and sub-committees will continue to meet to oversee the Part D implementation throughout 2006.

Presentations and ongoing discussions have occurred with the Commissioner's Advisory Council on Family Care and the Statewide Committee on Family Support Services and also with the Part D task force (mentioned above) that helped develop this regulation. A series of informational mailings and frequent e-mail updates regarding Part D generally have been sent to affected providers beginning in June 2005. OMRDD promulgated a similar emergency regulation on November 15, 2005 and sent an informational mailing about the regulations to affected parties. OMRDD has also posted relevant information on its website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

OMRDD has received only positive feedback on the amendments from providers of services, both voluntary and state-operated and family members of consumers since similar amendments first became effective on November 15, 2005.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for the emergency amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The emergency amendments identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

**Job Impact Statement**

A Job Impact Statement is not submitted because the amendment will not have an adverse impact on existing jobs or employment opportunities. The emergency amendments identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

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## Department of Motor Vehicles

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**NOTICE OF WITHDRAWAL**

**Inspection Stickers**

**I.D. No.** MTV-04-06-00003-W

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

**Action taken:** Notice of proposed rule making, I.D. No. MTV-04-06-00003-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on January 25, 2006.

**Subject:** Inspection stickers.

**Reason(s) for withdrawal of the proposed rule:** Objection filed to the regulation.

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## Public Service Commission

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**NOTICE OF ADOPTION**

**Reliability Rules of the New York State Reliability Council and the Criteria of the Northeast Power Coordinating Council**

**I.D. No.** PSC-41-05-00030-A

**Filing date:** Feb. 9, 2006

**Effective date:** Feb. 9, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, adopted an order in Case 05-E-1180, regarding the current reliability rules of the New York State Reliability Council and the criteria of the Northeast Power Coordinating Council.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 65(1), 66(1) and (2)

**Subject:** Approval of the current reliability rules of the New York State Reliability Council.

**Purpose:** To approve the current reliability rules of the New York State Reliability Council.

**Substance of final rule:** The Commission adopted the current Reliability Rules (Version 15, dated December 10, 2005) established by the New York Reliability Council in their entirety.

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

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

**Assessment of Public Comment**

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

(05-E-1180SA1)

### NOTICE OF ADOPTION

#### Modification of Long-Term Indebtedness by Chautauqua Utilities, Inc.

**I.D. No.** PSC-48-05-00011-A

**Filing date:** Feb. 9, 2006

**Effective date:** Feb. 9, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, adopted an order in Case 04-G-0576 approving the petition of Chautauqua Utilities, Inc. (CUI) for authority to modify certain terms of its indebtedness.

**Statutory authority:** Public Service Law, sections 4(1) and 69

**Subject:** Request of CUI for modification of long-term indebtedness approval.

**Purpose:** To approve CUI's request for modification of long-term indebtedness.

**Substance of final rule:** The Commission approved a petition filed by Chautauqua Utilities, Inc. (CUI) seeking authority to extend the deadline for executing the promissory note with the Chautauqua County Industrial Development Agency and the New York Job Development Authority through September 30, 2006 and approve an increase in the promissory note with the Manufacturers and Traders Trust Company from \$340,000 to \$350,000, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(04-G-0576SA2)

### NOTICE OF ADOPTION

#### Submetering of Electricity by REHC 5, LLC

**I.D. No.** PSC-49-05-00021-A

**Filing date:** Feb. 10, 2006

**Effective date:** Feb. 10, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, adopted an order in Case 05-E-1439, approving the petition filed by REHC 5, LLC Riverwalk Properties to submeter electricity at 15 S. Main St., Jamestown, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1) and 67(1)

**Subject:** Petition for the submetering of electricity.

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**Purpose:** To approve the request of REHC 5, LLC Riverwalk Properties to submeter electricity at 15 S. Main St., Jamestown, NY.

**Substance of final rule:** The Commission approved a request by REHC 5, LLC Riverwalk Properties to submeter electricity at 15 South Main Street, Jamestown, New York, located in the territory of the Jamestown Board of Public Utilities.

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

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

**Assessment of Public Comment**

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

(05-E-1439SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by 505 Greenwich Condominium

**I.D. No.** PSC-49-05-00022-A

**Filing date:** Feb. 8, 2006

**Effective date:** Feb. 8, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, adopted an order in Case 05-E-1440, approving the petition filed by 505 Greenwich Condominium to submeter electricity at 505 Greenwich St., New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To approve the request of 505 Greenwich Condominium to submeter electricity at 505 Greenwich St., New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

**Substance of final rule:** The Commission approved a request by 505 Greenwich Condominium to submeter electricity at 505 Greenwich Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

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

(05-E-1440SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by America Metering and Planning Services, Inc.

**I.D. No.** PSC-49-05-00023-A

**Filing date:** Feb. 13, 2006

**Effective date:** Feb. 13, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, adopted an order in Case 05-E-1441, approving the petition filed by American Metering & Planning Services, Inc., to submeter electricity for the 70 Washington Street Project at 164 Atlantic Ave., New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To approve the request of American Metering & Planning Services, Inc. to submeter electricity for the 70 Washington Street Project at 164 Atlantic Ave., New York, NY.

**Substance of final rule:** The Commission approved a request by American Metering & Planning Services, Inc. to submeter electricity for the 70 Washington Street Project at 164 Atlantic Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-1441SA1)

**NOTICE OF ADOPTION**

**Debt Financing by NRG Energy, Inc.**

**I.D. No.** PSC-50-05-00010-A

**Filing date:** Feb. 10, 2006

**Effective date:** Feb. 10, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, adopted an order approving the petition filed by NRG Energy, Inc. for approval of its issuance of debt facilities in an aggregate amount not to exceed \$10 billion.

**Statutory authority:** Public Service Law, section 69

**Subject:** Approval of financing of no more than \$10 billion to support corporate financial arrangements.

**Purpose:** To approve the financing of no more than \$10 billion to support corporate financial arrangements.

**Substance of final rule:** The Commission approved NRG Energy, Inc's request for approval of its issuance of debt facilities in an aggregate amount not to exceed \$10 billion, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-1528SA1)

**NOTICE OF ADOPTION**

**Rule No. 11—Service Lines by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-51-05-00013-A

**Filing date:** Feb. 8, 2006

**Effective date:** Feb. 8, 2006

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

**Action taken:** The commission, on Feb. 8, 2006, approved the tariff filing by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 219.

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

**Subject:** Service lines—Rule No. 11.

**Purpose:** To eliminate the reference which provides that if a customer has not taken service within 90 days of the date the gas service was available

then the customer would be required to pay the entire cost of providing, placing and constructing the service.

**Substance of final rule:** The Commission approved Niagara Mohawk Power Corporation's request to eliminate the specific 90 day reference in its Rule No. 11 which provides that if a customer has not taken service within 90 days of the date the gas service was available or the date on which the customer requested service to commence, whichever is later, that the customer shall pay the entire cost of providing, placing and constructing the service.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-G-1525SA1)

**PROPOSED RULE MAKING HEARING(S) SCHEDULED**

**Electric Rates and Service by New York State Electric & Gas Corporation**

**I.D. No.** PSC-09-06-00006-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 or modify, in whole or in part, a proposal filed by New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its schedules for electric service—P.S.C. Nos. 120 and 121. The effective date of the filing has been suspended through Aug. 26, 2006.

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

**Subject:** Electric rates and service.

**Purpose:** To consider, among other things, NYSEG's proposal for the continuation of the commodity options program and the provision of a surcredit on customers' bills for pass back of some of the asset sale gain account.

**Public hearing(s) will be held at:** 10:00 a.m., March 22, 2006 at Public Service Commission, Three Empire State Plaza, 3rd Floor Hearing Rm., Albany, NY.

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

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

**Substance of proposed rule:** On September 30, 2005, New York State Electric & Gas Corporation (NYSEG) filed proposed tariff amendments for the continuation of the commodity options program and to establish tariff provisions for a surcredit on customers' bills to return \$23.7 million from the company's Asset Sale Gain Account from September 1, 2006 through December 31, 2006. The Commission may approve, reject or modify, in whole or in part, NYSEG's proposed tariff revisions.

**Text of proposed rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

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

**Public comment will be received until:** five days after the last scheduled public hearing.

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-1222SA1)

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Major Rate Case by New York State Electric & Gas Corporation I.D. No. PSC-09-06-00008-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 whether to approve or reject or modify, in whole or in part, a proposal filed by New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its schedules for electric service—P.S.C. Nos. 119, 120 and 121. The effective date of the filing has been suspended through June 26, 2006.

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

**Subject:** Major rate case.

**Purpose:** To consider, among other things, NYSEG's proposal to increase its delivery rates by about \$91.5 million or 15 percent and the reduction of the non-bypassable charge through the acceleration of the benefits from two expiring non-utility generation contracts.

**Public hearing(s) will be held at:** 10:00 a.m., March 22, 2006 at Public Service Commission, Three Empire State Plaza, 3rd Floor Hearing Rm., Albany, NY.

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

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

**Substance of proposed rule:** On November 18, 2005, New York State Electric & Gas Corporation (NYSEG) filed proposed tariff amendments to increase its delivery rates by about \$91.5 million or 15% and for the reduction in the non-bypassable charge through acceleration of the benefits from two expiring non-utility generation contracts. The Commission may approve, reject or modify, in whole or in part, NYSEG's proposed tariff revisions.

**Text of proposed rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

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

**Public comment will be received until:** five days after the last scheduled public hearing.

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

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

(05-E-1222SA2)

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

#### Reliability Rules, Measurement and Compliance Elements of the New York State Reliability Council

I.D. No. PSC-09-06-00005-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 adopt, in whole or in part, proposed changes to the reliability rules, measurements, and compliance elements of the New York State Reliability Council.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 65(1) and 66(1) and (2)

**Subject:** Reliability rules, measurements, and compliance elements of the New York State Reliability Council.

**Purpose:** To consider adopting in whole or in part proposed changes to the reliability rules, measurements, and compliance elements of the New York State Reliability Council.

**Substance of proposed rule:** By Order issued February 9, 2006 in Case 05-E-1180, the New York Public Service Commission adopted the current

reliability rules of the New York State Reliability Council (NYSRC). The Commission is considering adopting, in whole or in part, proposed changes to the reliability rules, measurements, and compliance elements now under review by the NYSRC. These include rule E-R9 and measurement E-M8; rules G-R1, G-R2, and G-R3 and measurements G-M1, G-M2, G-M3, and G-M4; rule C-R2 and measurement C-M5; measurement E-M7; measurement F-M4; and the compliance elements for measurements I-M5 and I-M6.

The Commission may accept, reject, or modify any proposals relating to these matters.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, 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.

(05-E-1180SA2)

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

#### Transfer of Ownership Interests by Nine Mile Point Nuclear Station LLP and Long Island Lighting Company d/b/a Long Island Power Authority

I.D. No. PSC-09-06-00007-P

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

**Proposed action:** The commission is considering a petition from Nine Mile Point Nuclear Station LLP and Long Island Lighting Company d/b/a Long Island Power Authority requesting approval of the transfer of ownership interests in a waterworks system located in the Town of Scriba to the Town of Scriba.

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

**Subject:** Transfer of ownership interests in a waterworks system located in the Town of Scriba to the Town of Scriba.

**Purpose:** To approve the transfer of ownership interests in a waterworks system located in the Town of Scriba to the Town of Scriba.

**Substance of proposed rule:** The Commission is considering a petition from Nine Mile Point Nuclear Station LLP and Long Island Company d/b/a Long Island Power Authority requesting approval of the transfer of ownership interests in a waterworks system located in the Town of Scriba to the Town of Scriba. The Commission may adopt, modify or reject, in whole or in part, the relief requested.

**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. Brilling, 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-0185SA1)