

RULE MAKING ACTIVITIES

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

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

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

Banking Department

EMERGENCY RULE MAKING

Maximum Fee Charged by Licensed Check Cashers

I.D. No. BNK-12-06-00003-E

Filing No. 259

Filing date: March 2, 2006

Effective date: March 5, 2006

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

Action taken: Amendment of section 400.12 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 371 and 372

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

Specific reasons underlying the finding of necessity: The licensed check cashing industry is subject to a maximum fee cap (hereafter “cap”) that can be charged for the cashing of checks, drafts and money orders (hereafter “checks”) for customers who are natural persons, as set by regulations of the Superintendent and as required pursuant to section 372 of the Banking Law. Section 400.12, 3 NYCRR, provides for annual adjustment of the cap based upon the increase in regional Consumer Price Index for all urban consumers (CPI-U). In February 2005, the Department first imposed a general assessment upon licensed check cashers to cover the Department’s annual cost to supervise the industry for the state fiscal

year 2005-06, and the Department will continue to impose such an assessment in future years. The Department has determined that the additional burden of this expense upon the industry is not adequately accounted for in the annual CPI-U adjustment of the cap. A significant portion (approximately 21 percent) of the licensed check cashing businesses are small businesses that operated with financial losses in 2004, both with and without the assessment expense included in their total expenses for 2004. Many of these businesses serve urban neighborhoods and demographic groupings that do not maintain banking relationships and would not necessarily use other licensed check cashers. A significant portion of the check cashing business is conducted in the first quarter of the calendar year. In order not to cause further assessment-based losses for the industry that may cause a number of such businesses to close their locations and leave groups and neighborhoods inadequately served, it is necessary that the rule be adopted quickly.

Subject: Maximum fee charged by licensed check cashers for cashing checks, drafts or money orders made payable to natural persons.

Purpose: To increase the base maximum percentum fee that may be charged by licensed check cashers against the face amount of a check, draft or money order, in order to account for the licensees’ increased costs caused by the department’s initial imposition of a general assessment fee in 2005 upon such licensees to cover the department’s cost of the licensees’ regulatory supervision.

Text of emergency rule: Amend section 400.12 of Part 400, 3 NYCRR, as follows:

§ 400.12 Fees.

(a) The licensee shall be permitted to charge or collect a fee for cashing a check, draft or money order not to exceed [(a)] (i) 1.5 percentum of the amount of the check, draft or money order; *provided, however, effective January 1, 2006, such percentum of the amount of the check, draft or money order shall be increased by an additional 0.03 percentum in addition to any increase that shall have been heretofore or hereafter made pursuant to subdivision (b) of this section and such additional 0.03 percentum shall not itself be subject to any increase pursuant to subdivision (b) of this section, or [(b)] (ii) \$1, whichever is greater.*

(b) Effective January 1, 2005, and annually thereafter, the maximum percentum fee specified in subdivision (a) of this section, shall be increased by a percentum amount, based upon an increase in the consumer price index for the New York—Northern N.J.—Long Island, NY—NJ—CT—PA area for all urban consumers (CPI-U), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor for the calendar year preceding the year in which such increase is made compared to such annual CPI-U for the year prior to such preceding year. The maximum percentum fee that may be charged or collected for cashing a check, draft or money order pursuant to this section in effect at such time shall be multiplied by such computed percentum amount and the result added to such maximum percentum fee. The resulting sum shall be the revised maximum percentum fee, which shall be posted upon the internet site of the Banking Department (www.banking.state.ny.us) by the superintendent not later than 45 days following the public release of such annual index by the U.S. Department of Labor. Such revised maximum percentum fee shall be calculated and posted to the nearest one-hundredth of a percentum. Such revised maximum percentum fee shall be effective not later than 45 days after the superintendent shall have notified the Majority Leader of the Senate, the Speaker of the Assembly, and the chairperson of the Senate and Assembly Committees on Banks of his/her intention to change the maximum percentum fee pursuant to the provisions of section 372.3 of the Banking Law and shall continue in effect until revised and increased in the

next succeeding year based upon an increase in such annual index. If such CPI-U does not increase in any one year, the maximum percentum fee in effect during the year in which the index does not increase shall remain unchanged in the next succeeding year. Nothing herein shall be deemed to prohibit the superintendent from setting, by regulation, a different maximum percentum fee at any time where the superintendent shall find that such a fee is necessary and appropriate to protect the public interest and to promote the stability of the check cashing industry for the purpose of meeting the needs of the communities that are served by check cashers. No maximum fee shall apply to the charging of fees by licensees for the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons.

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 30, 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 372(1) requires that the Superintendent of Banks prescribe the maximum fees that may be charged for cashing a check, draft or money order (hereafter "check"). Pursuant to section 400.12 of Title 3 NYCRR, the Superintendent has established a maximum percentage amount that each check casher may charge against the face amount of the check made payable to a natural person (hereafter "personal" check).

2. Legislative objectives. When imposing certain economic restrictions upon the conduct of business by check cashers pursuant to Chapter 546 of the laws of 1994, the Legislature stated as a matter of legislative intent that ". . . check cashers provide important and vital services to New York citizens; that the business of check cashers shall be supervised and regulated through the banking department in such a manner as to maintain consumer confidence in such business and protect the public interest; that the licensing of check cashers shall be determined in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote the stability of the check cashing business for the purpose of meeting the needs of the communities that are served by check cashers."

3. Needs and benefits. The setting of a maximum fee is in keeping with legislative intent in that it provides essentially for a fixed percentage return per personal check, thus promoting the stability of the check cashing industry by providing the industry with a reasonable return on equity. However, by limiting the amount of such fees, it serves to maintain the public confidence by preventing excessive fees particularly where the availability of alternate check cashing facilities may be limited.

The Superintendent has determined that the maximum fee adjustment promulgated pursuant to this rule making is necessary because the annual CPI adjustment of the maximum fee did not and will not account for the significant increase in expenses of check cashers attributable to the imposition of the Department's general assessment upon non-bank licensees, which commenced in 2005.

4. Costs. The rule imposes no additional costs or regulatory burden upon regulated parties, the Banking Department or other state agencies, or any other unit of government. Though the increase in the base maximum percentage amount will increase the fee cost to the consumer, the percentum adjustment is 3 basis points, which is three-hundredths of one percent of the base percentage maximum fee charge or three cents per \$100 of the face amount of a check.

5. Local government mandates. The rule imposes no mandates or costs upon local governments. The regulatory provisions apply only to licensed entities, and such entities are private business enterprises, and not governmental entities, whether local, state or national.

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

7. Duplication. None.

8. Alternatives. Section 400.12 provides that the Superintendent may modify the maximum percentum fee at any time by regulation, if he or she finds that the adjustment is necessary and appropriate to protect the public interest and promote the stability of the industry in order to meet the needs of the communities served by the check cashing industry. The Department has determined by its industry analysis that the annual fee rate adjustment mechanism will not account for such cost increases, thus necessitating this rule making.

The Department could have determined not to increase the maximum permissible fee, notwithstanding the cost increases experienced by the check cashing industry as a result of the initial imposition of annual general assessment charges. However, it concluded that failure to grant such an increase would increase the potential for industry instability resulting from the significant increase in unanticipated expenses resulting from the assessment, which could in turn affect the ability of the industry to meet the needs of the communities it serves.

The Department also considered whether to use a percentum adjustment to the maximum fee cap other than that set forth in the regulation. The Department analyzed the most current data for the industry, which included check volume, dollar amount volume, number of licensed entities, and current and anticipated general assessment charges, and determined that a three basis point adjustment of the maximum cap was justified.

9. Federal standards. There are no federal standards that apply to the setting of fees for the check cashing industry. The federal government does not license check cashers or directly regulate the primary transaction activity of check cashers.

10. Compliance schedule. None. Though licensees are not required to set their fee charges at the maximum percentum fee rate, the check cashing industry is expected to adopt the maximum percentum fee upon the date the increased percentum fee rate becomes effective.

Regulatory Flexibility Analysis

1. Effect of rule: The check cashing industry serves those areas and populations not traditionally served by banking institutions, which generally are immigrant and first-generation communities or communities demonstrating lower socio-economic conditions. Residents in such communities tend not to be accustomed or inclined to maintain customer account relationships with banking institutions. In short, absent the maintenance of an account relationship with a banking institution, members of these communities have virtually no source to cash payroll, government benefit, or other types of personal checks other than check cashers or retail vendors where they make purchases.

Because Section 372(1) of the Banking Law requires the Superintendent to regulate the fees that the industry may charge, the industry cannot unilaterally set fees beyond the maximum rates set by the Superintendent's regulations. Thus, if a licensee incurs additional and unforeseen expenses or desires to increase the business's profit margin, it is impossible to increase the business's revenue derived from cashing checks under the existing regulatory structure, all other factors remaining the same, unless the mix of commercial (i.e., checks made payable to other than natural persons) and personal checks cashed changes, or the dollar volume of the checks cashed, the number of checks cashed, or both increases. Because of this situation, the Superintendent promulgated a rule in 2004 (see New York State Register BNK-10-04-00001; effective 6-23-04) which established a mechanism for the annual adjustment of the maximum percentum rate based upon the annual change in the regional urban consumer price index (CPI-U), thus permitting automatic adjustment of the rate to account for normal inflationary increases. That rule making, however, also expressly stated that the Superintendent could subsequently modify the maximum percentum fee at any time by regulation, if she finds that the adjustment is necessary and appropriate to protect the public interest and promote the stability of the industry in order to meet the needs of the communities served by the check cashing industry.

In July 2005, the Financial Services Centers of New York ("FSNY") requested a three basis point increase of the maximum percentum fee rate from 1.55 to 1.58 to account for the increased costs resulting from the Department's imposition of a general assessment upon the check cashing industry. All non-bank financial services industries licensed and regulated by the Department were first subjected to an annual general assessment commencing in 2005, the purpose of which was to recoup the Department's costs of supervising regulated financial services businesses.

The Superintendent determined, based upon the Department's analysis of industry, that the expenses incurred by the industry as the result of the imposition of the Department's annual general assessment would not be recouped by the 2004 annual CPI-U fee adjustment which increased the maximum percentum fee from 1.5 to 1.55. The Department's Research and Technical Assistance (RATA) Division concluded that such specialized cost increases are not well reflected by a generalized index and as such the magnitude of the cost increase experienced does represent a legitimate rationale to support a rate review.

The initial annual general assessment charged licensed check cashers as the basis to compute the first quarterly billing in February 2005 was determined to be for \$3,487,660. This amount was subsequently increased

as the Department refined its general assessment allocations to the non-bank entities it regulates to \$3,982,618. The only assessment paid heretofore by the regulated non-bank entities has been examination expenses when such entities were specifically examined. Thus, the check cashing industry reported assessment increases for individual companies of 300% to 3,500%. Non-bank licensed entities also pay annual licensing fees.

The initial review of the industry data indicated that a four, rather than three, basis point adjustment of the percentum fee cap was necessary for the industry to recover its costs due to the general assessment. However, a subsequent analysis, based upon revised and updated industry data, indicates that a three basis point adjustment is sufficient, with such adjustment commencing January 1, 2006. The revised and updated data included a substitution of reported 2004 industry data for 2003 data which became available following the initial analysis. It is noted that the growth in check cashing dollar volume, even as the number of checks cashed declined, is in part attributable to the ability now of existing licensed check cashers to cash commercial checks. These checks are not subject to the percentum fee cap. Thus, the Department determined that the final dollar volume of checks cashed upon which to base any increase in percentum fee cap should be \$15.2 billion contrasted to a general assessment charge, commencing 2005, of \$3.9 million, or a rounded up increase of the fee cap of three basis points. It is estimated that the three basis point adjustment will generate sufficient incremental income to mitigate the impact of the general assessment.

Finally, pursuant to this rule making, the three basis point adjustment will be annually added to the CPI adjusted percentum fee cap, and it will not itself be subject to any annual CPI adjustment. The Superintendent determined that marginal or incremental increases in the Department's general assessment allocation, due to annual inflationary factors affecting the Department's budget, should be sufficiently accounted for by the annual CPI adjustment. Further, increased check dollar volume, which reflects normal growth in the expansion of wages and income, and also any possible increase in the volume of checks cashed, offsets annual inflationary cost increases experienced by the industry. It is also noted, due the initial regulation of commercial check cashers in 2004, that the number of licensees will increase in the near future, and this will cause a reduction in the amount of the general assessment expense allocated to the currently licensed check cashers.

In summary, the Superintendent's determination that such a fee increase is appropriate is based upon: (1) the small amount of the percentum increase; (2) the potential for industry instability resulting from a significant increase in unanticipated expenses (i.e., Department's general assessment); (3) the estimated range of industry profitability projected for 2005; (4) the limitation that a fee cap imposes on the industry to meet unanticipated increased operating costs (this type of regulatory "price" control generally is not applied to the charges for services and products set by other industry groups regulated by the Department); and (5) the modest increased costs consumers will face given in particular that the three basis point increase will not be inflated by the annual CPI adjustment in the future.

2. Compliance requirements: There are no additional compliance requirements necessitated by this rule making other than the need for licensed check cashers to alter their signage to reflect the new fees, if they decide to adjust their current percentum fee rates.

3. Professional services: No professional services would be required as a result of this rule making.

4. Compliance costs: There are no compliance costs associated with this rule making other than those that may be associated with modification of their signage to reflect any new fee rates.

5. Economic and technological feasibility: There are no economic or technological feasibility problems caused by this rule making.

6. Minimizing adverse economic impact: This rule making has no adverse impact upon affected regulated entities, and, in fact, it will have a positive economic impact in that it will permit licensees to increase operating revenue sufficient to recoup the additional costs caused by the Department's imposition of an annual general assessment fee.

7. Small business participation and local government participation: There are 217 licensed check cashing businesses and 908 facilities of such businesses that will be affected by this regulatory action. This fee increase and annual adjustment mechanism is supported by the industry and imposes no additional regulatory burden upon the regulated parties. No participation by local government is necessitated by this rule making.

Rural Area Flexibility Analysis

The rule making will impose no additional costs on businesses or units of government located in rural areas of the state. Virtually all licensed check

cashing facilities are located in metropolitan areas of the state, particularly the New York City metropolitan area. To the extent any licensed facilities are located in rural areas, they will realize the same benefits attributed to the rule making.

Job Impact Statement

This regulatory amendment will impose no adverse effect upon regulated parties or upon other businesses in this state. It is presumed that the regulatory amendment will benefit the regulated parties.

Department of Civil Service

NOTICE OF ADOPTION

Public Access to Records

I.D. No. CVS-01-06-00004-A

Filing No. 263

Filing date: March 3, 2006

Effective date: March 22, 2006

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

Action taken: Amendment of section 80.3 of Title 4 NYCRR.

Statutory authority: Public Officers Law, section 87

Subject: Public access to records.

Purpose: To conform regulations of the Department of Civil Service (President's Regulations) to non-discretionary statutory provisions contained in subdivisions (3) and (4) of section 89 of the Public Officer's Law (Freedom of Information Law).

Text of final rule: Pursuant to the authority vested in me by section 87 of the Public Officer's Law, I hereby adopt the following:

RESOLVED, That Part 80 of the Regulations of the Department of Civil Service (President's Regulations), Public Access to Records, be and hereby is amended as follows:

1. by amending subdivision (a) of section 80.3 to read as follows:

a) The records access officer of the Department of Civil Service is the public relations officer of the department unless otherwise designated by the president. The records access officer shall have the duty of coordinating the response of the department to public requests for access to records. Upon receipt of a *request* [an application], the records access officer will [note on it the suggested access and] forward copies of the *request* [application] to the appropriate personnel within the department to search for the records requested, maintaining one copy of *the request* [each application] for his or her files. Thereafter, the records access officer shall [assure that personnel]:

1) Upon locating the records requested:

(i) Make such records promptly available for inspection; or,

(ii) Deny access to the records in whole or in part and explain in writing the reasons for such denial.

2) Upon failure to locate the records requested, certify that:

(i) The Department of Civil Service does not maintain such records; or

(ii) The Department of Civil Service maintains such records, but after a diligent search, they cannot be found; or,

(iii) The information supplied by the applicant is not sufficiently detailed to enable the department to determine whether or not it maintains such records.

3) Upon request for copies of records: Make a copy available upon payment [or offer to pay] of any fees established in accordance with section 80.7 of this Part or any other duly established fees. The department in its discretion may permit the requester to copy records where it would not administratively inconvenience the department or unduly restrict the use of such records.

4) If the department does not provide or deny access to the record sought within five days of receipt of a request, *the records access officer* [we] shall *within such five day period*, furnish a written acknowledgement of receipt of the request and a statement of the approximate date when the request will be granted or denied, *which date shall be reasonable under the circumstances of the request*. [If access to records is neither granted nor denied within 10 business days after the date of acknowledgement of

receipt of a request, the request may be construed as a denial of access that may be appealed.] *If the records access officer determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the records access officer shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 80.3(a)(4).

Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6203, e-mail: shirley.laplante@cs.state.ny.us

Job Impact Statement

The rule as adopted contains nonsubstantial revisions. These revisions do not necessitate that a revised Job Impact Statement be issued.

Assessment of Public Comment

The Agency received no public comment.

Board of Commissioners of Pilots

NOTICE OF ADOPTION

Mandatory Retirement Age for Licensed Pilots

I.D. No. COP-49-05-00005-A

Filing No. 258

Filing date: March 2, 2006

Effective date: March 22, 2006

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

Action taken: Amendment of section 52.5 of Title 21 NYCRR.

Statutory authority: Navigation Law, section 95

Subject: Mandatory retirement age for licensed pilots.

Purpose: To allow fit licensed pilots attaining age 65 to renew their licenses until age 70.

Text or summary was published in the notice of proposed rule making, I.D. No. COP-49-05-00005-P, Issue of December 7, 2005.

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

Text of rule and any required statements and analyses may be obtained from: Robert Pouch, Executive Director, Board of Commissioners of Pilots, 17 Battery Place, New York, NY 10004, (212) 425-5027, e-mail: RPouch@aol.com

Assessment of Public Comment

The agency received no public comment.

Department of Correctional Services

EMERGENCY RULE MAKING

Packages and Articles Sent or Brought to Institutions

I.D. No. COR-12-06-00002-E

Filing No. 257

Filing date: March 1, 2006

Effective date: March 1, 2006

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

Action taken: Repeal of Part 724 and addition of new Part 724 to Title 7 NYCRR.

Statutory authority: Correction Law, section 112

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

Specific reasons underlying the finding of necessity: Packages have represented a window through which inmates and their external sources have attempted to transmit contraband items such as drugs, money and articles which can be used as or converted to weapons. Because of technological advances, seemingly innocuous consumer items may conceal sinister capabilities, and advances in packaging have sometimes aided in disguising and concealing dangerous products. When such items are successfully smuggled into a correctional facility, they become an instant threat to the safety and security of staff, inmates, visitors, volunteers and the public at large.

Accordingly, the Department has concluded that it must have the capability of making immediate changes to the list of items allowed to be received via packages. For this reason, the listing, previously presented at section 724.4 of this regulation, has been removed. The listing, which has always been printed as part of the Department's internal directive #4911, "Packages and Articles Sent or Brought to Institutions," will henceforth be viewable on the Department's website and, as before, posted in facilities and available to inmates at facility libraries. The department will be able, thereby, to quickly alter the list whenever it becomes evident that an item presents a security risk. Likewise, public access to the up-to-date list will help to minimize the likelihood that someone might purchase and send to an inmate an article that would not be allowed.

Concurrently, the remainder of Part 724 is amended to reflect procedures designed to enhance security, guard against abuse of package privileges and prevent importation of contraband into correctional facilities.

In view of the potential harm to public safety which may arise from abuse of inmate package privileges, the Department has concluded that this rule should be implemented on an emergency basis.

Subject: Packages and articles sent or brought to institutions.

Purpose: To update procedures consistent with security needs.

Substance of emergency rule: This Part formerly consisted of four sections, 724.1 through 724.4. It now consists of five sections with the addition of a new section 724.2 on applicability, identifying which inmates and facilities may receive packages in accordance with this Part.

Section 724.3, "Policy" (formerly 724.2), has been greatly expanded. New material is summarized as follows:

- Subdivision (a).
 - Paragraph (3) restricts received articles to those which will be for the inmate's personal use and will not cause the inmate to exceed in-cell limits;
 - Paragraph (4) defines the value of an article as the actual purchase price, excluding tax, shipping or handling costs;
 - Paragraphs (5) and (6) clarify procedures for disposition of previously received package items which subsequently become disallowed;
 - Paragraph (7) specifies that the department is not responsible for articles damaged in shipping or received in spoiled condition;
 - Paragraph (8) provides for a record of return-to-sender transactions.
- Subdivision (b).
 - Paragraphs (1) through (4) specify search procedures, including a procedure for handling items of religious significance;
 - Paragraphs (5) and (6) define contraband and articles not permitted and include procedures for disposition;

- Paragraph (7) prohibits alteration of items once received;
- Paragraph (8) provides for review and disposition of items withheld by staff because of non-conformance with specifications.

Subdivision (d).

- Paragraph (1) adds procedures for disposition of packages not having return addresses;

- Paragraph (2) expands procedures for sending a package out of a facility at an inmate's request.

Subdivision (e) – limits receipt of art and handicraft supplies.

Subdivision (f) – explains procedures for handling packages brought by visitors.

Subdivision (g).

- Paragraph (2) requires that a received article valued at over \$20 must be accompanied by a receipt or bill;

- Paragraph (4) establishes special watch procedures to guard against importation of contraband in packages addressed to inmates who have been identified with contraband or drug-related misbehavior;

Subdivision (h).

- Paragraph (2) specifies that an inmate who orders a package while under a "loss of package" disciplinary disposition must pay to have it returned to sender.

Subdivision (i) provides for disposition of packages received for inmates in SHU.

Subdivision (j) provides for processing and forwarding or disposition of packages received for inmates who have been transferred or are temporarily away from a facility.

Section 724.4, "Local permits" (formerly 724.3), has not changed except for the following addition at paragraph (5): "If a permit is revoked, the article will be confiscated and disposed of at the inmate's expense in accordance with the departmental directive on inmate personal property limits."

Section 724.5, "Listing of approved items" (formerly 724.4, "Allowable Items") is completely changed. The department will no longer list items in this regulation because of the necessity of making changes as security needs require and on an expeditious basis. The new section is printed here in its entirety.

§ 724.5 Listing of approved items.

(a) The department shall promulgate a detailed listing of items approved for receipt by inmates through facility package rooms. This listing shall be appended to the departmental directive #4911, "Packages and Articles Sent or Brought to Institutions," made available to inmates in all facility libraries, posted in all facility package rooms and visiting rooms, and posted on the department's website at www.docs.state.ny.us/directives/4911.pdf

(b) This listing only identifies items which may be received through the package room and sets forth the conditions and restrictions for receipt of those items; this listing is not a comprehensive list of all items that an inmate may be authorized to possess.

(c) This list will be periodically updated and amended, consistent with the needs of the department.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 29, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objective:

By vesting the commissioner with this rule making authority, the legislature intended the commissioner to determine if inmates may receive packages from family members and other outside sources and, if allowed, to implement procedures to ensure that the privilege is not abused.

Needs and Benefits:

Inmates have long enjoyed the privileges of receiving packages from family and visitors and of ordering consumer goods from a list of approved articles. Packages, however, have represented a window through which inmates and their external sources have attempted to obtain contraband

items such as drugs, money and articles which can be used or converted to weapons. Needless to say, when such items are successfully smuggled in, they become an instant threat to the safety and security of staff, inmates, visitors, volunteers and the public at large.

The Department has preserved these privileges despite the increasing sophistication of those who would attempt to smuggle contraband via packages. Because of technological advances, seemingly innocuous consumer items may conceal sinister capabilities, and advances in packaging have sometimes aided in disguising and concealing dangerous products.

Accordingly, the Department has concluded that it must have the capability of making immediate changes to the list of items allowed to be received via packages. For this reason, the listing, which has always been presented at section 724.4, has been removed and is being published in more rapidly changeable venues, including posting at the Department's website. The department will be able, thereby, to quickly alter the list whenever it becomes evident that an item presents a security risk. Likewise, public access to the up-to-date list will help to minimize the likelihood that someone might purchase and send to an inmate an article that would not be allowed.

The remaining text has been thoroughly overhauled to ensure that package privileges are maintained for most inmates and that all related procedures serve the department's security interests. These detailed policies and procedures are currently implemented at department facilities and are posted and available to inmates.

Significant changes from the repealed text include: addition of a section on applicability, clarifying which inmates and facilities may receive packages in accordance with this Part; restriction of received articles to those which will be for the inmate's personal use and will not cause the inmate to exceed in-cell limits; clarification of procedures for disposition of disallowed items; enhanced package-related recordkeeping; clarification of package and item search procedures; definitions of contraband and articles not permitted; a procedure for review of items withheld by staff because of non-conformance with specifications; procedures for sending packages out of a facility; procedures for handling packages brought with visitors; special watch procedures to guard against importation of contraband; procedures for handling packages for inmates in special housing units and for inmates who have been transferred or are temporarily away from a facility.

Costs:

a. To State government: None.

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

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

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

(i) Initial expenses: None.

(ii) Annual cost: None.

Paperwork:

a. New reporting or application forms: None.

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

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

Local Government Mandates:

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

Duplication:

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

Alternatives:

The department has considered eliminating package privileges or severely restricting the number and circumstances under which packages may be received by inmates. It has concluded that such privileges represent a significant connection between inmates and their families and friends and, as such, have rehabilitative and quality-of-life value. As explained under "Needs and Benefits," the chosen course of action intends to maintain package privileges for most inmates while strengthening the procedures designed to ensure that these privileges are not abused and do not compromise security.

No other alternatives have been proposed or considered.

Federal Standards:

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

Compliance Schedule:

The Department of Correctional Services is in compliance with this proposed rule.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This merely updates policy and procedures for receiving, handling, searching and disposing of packages and articles received by inmates correctional facilities.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This merely updates policy and procedures for receiving, handling, searching and disposing of packages and articles received by inmates correctional facilities.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This merely updates policy and procedures for receiving, handling, searching and disposing of packages and articles received by inmates correctional facilities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Merit Time

I.D. No. COR-12-06-00005-P

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

Proposed action: Amendment of sections 280.1, 280.2(a)(2), (b)(2) and (d); renumbering of sections 280.3 and 280.4 to 280.4 and 280.5, respectively; addition of new section 280.3; and amendment of renumbered section 280.4(a)(2) of Title 7 NYCRR.

Statutory authority: Correction Law, sections 112, 803 and 805

Subject: Merit time.

Purpose: To ensure that only those inmates who satisfy both the eligibility criteria and intent of the merit time and earned eligibility statutes benefit from merit time reductions.

Text of proposed rule: Section 280.1 is amended as follows:

Inmates serving [indeterminate] sentences for certain nonviolent crimes may receive merit time allowances against [the minimum terms of] their sentences provided they have achieved certain significant programmatic objectives, have not committed any serious disciplinary infractions and have not filed any frivolous lawsuits. [The merit time allowance is one-third of the minimum term or period imposed by the court for an inmate convicted of an A-1 felony under article 220 of the Penal Law and one-sixth of the minimum term or period imposed by the court for an inmate convicted of any other offense.] *In the case of a determinate sentence, [T]he merit eligibility date is the parole eligibility date minus the merit time allowance as outlined in section 280.3, below. In the case of a determinate sentence, the merit eligibility date is five-sevenths of the imposed term, as outlined in section 280.3.* When granted, merit time allowances enable inmates to appear before the Board of Parole for possible release on parole on their merit eligibility dates. A merit time allowance is a privilege to be earned by the inmate and no inmate has the right to demand or require that any such allowance be granted. This Subchapter sets forth the policy and procedures for granting and withholding merit time allowances.

Paragraph (2) of subdivision (a) of section 280.2 is amended as follows:

(2) An inmate cannot be presently serving a sentence for any of the following or any attempt thereof:

- (i) manslaughter in the second degree;
- (ii) vehicular manslaughter in the first or second degree;
- (iii) criminally negligent homicide;
- (iv) incest;
- (v) any offense defined in article 130 of the Penal Law (sex offenses); [or]
- (vi) any offense defined in article 263 of the Penal Law (use of a child in a sex performance); [; or]
- (vii) *aggravated harassment of an employee by an inmate.*

Paragraph (4) of subdivision (a) of section 280.2 is amended as follows:

- (4) An inmate must be serving[.] a sentence of one year or more.
 - (i) an indeterminate sentence with a minimum term in excess of one year; and

(ii) no determinate sentence.]

Subparagraph (xvii) of paragraph (2) of subdivision (b) of section 280.2 is amended as follows:

(xvii) 118.22 - unhygienic act (*under Part 254 only*);

Subdivision (d) of section 280.2 is restructured into paragraphs (1) and (2) and amended as follows:

(d) Program criteria.

(1) An inmate must:

(i) successfully perform and pursue his or her most recently assigned earned eligibility plan or program plan; and

(ii) subsequent to the date of that most recently earned eligibility plan or program plan, undertake and complete one of the following:

(a) earn a general equivalency diploma (G.E.D.);

(b) receive an alcohol and substance abuse treatment certificate;

(c) receive a vocational trade certificate following at least six months of programming in that program; or

(d) perform 400 hours or more of service as part of a community work crew/outside assignment.

Note: An earned eligibility plan is a work and treatment program applicable to an inmate serving a minimum term of not more than [six] *eight* years developed under the Earned Eligibility Program. A program plan refers to a work and treatment program applicable to an inmate serving a minimum term exceeding [six] *eight* years. In either case, the individualized program plan is created by the department's guidance staff in consultation with the inmate during classification, assessment or intake interviews. It may be modified during later reviews as necessary.

(2) *An inmate shall not be eligible for merit time if the inmate*

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

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

(iii) *was temporarily placed in a relapse program.*

Add the following new section 280.3 and re-number existing sections 280.3 and 280.4 to 280.4 and 280.5, respectively:

280.3 *Effect on the sentence.*

(a) *Indeterminate sentences.*

(1) *The merit time allowance is one-third of the minimum term or period imposed by the court for an inmate convicted of an A-1 felony under Article 220 of the Penal Law and one-sixth of the minimum term or period imposed by the court for an inmate convicted of any other eligible offense.*

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

(i) *completed two or more of the four possible merit program objectives listed in section 280.2(d)(1)(ii), above; or*

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

(b) *Determinate sentences. The merit time allowance is an additional one-seventh of the determinate term imposed by the court for an eligible offense.*

Paragraph (2) of subdivision (a) of re-numbered section 280.4 is amended as follows:

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

(i) evidence of escape or attempted escape[d;]

(ii) failure, as an approved participant in the Temporary Release Program, to comply with the temporary release memorandum of agreement; and

(iii) refusal to participate [or failure to successfully participate] in the Shock Incarceration Program.

Text of proposed rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

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

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

Regulatory Impact Statement

Statutory Authority:
Section 112 of the Correction Law assigns to the commissioner of correction the powers and duties of management and control of correctional facilities and the inmates confined therein.

Section 803.3 of the Correction Law requires the commissioner to promulgate rules and regulations for the granting, withholding, forfeiture, cancellation and restoration of merit time allowances authorized under section 803.1(d) of the Correction Law.

Chapter 738 of the Laws of 2004 and Chapter 644 of the Laws of 2005 amend section 803.1(d), authorizing an additional or supplemental merit time allowance for certain qualified inmates.

Section 805 of the Correction Law establishes the “earned eligibility program” and, as revised by Chapter 62 of the Laws of 2003, now sets the minimum term of confinement for eligibility at not more than eight years.

Legislative Objective:
By vesting the commissioner with this rule making authority, the legislature intended the commissioner to implement the statutory requirements and provide the structure for discretionary determinations, ensuring that only those inmates who satisfied both the eligibility criteria and intent of the merit time and earned eligibility statutes would benefit from early release.

Needs and Benefits:
Merit time allowances provide a significant incentive for inmates to fulfill program plans and to maintain good behavior, both of which may be expected to contribute to rehabilitation.

The amendments at 280.1 and 280.2(a) merely reflect changes in Correction Law, Section 803 extending the allowance to inmates with determinate sentences and adding aggravated harassment of an employee by an inmate to the list of disqualifying offenses, and to Correction Law, section 805 extending earned eligibility applicability to inmates with minimum terms of eight years.

The amendment at section 280.2(b)(2)(xvii) is considered necessary because only those unhygienic acts that would merit hearing under Part 254 are considered serious enough to render an inmate automatically ineligible for merit time consideration.

The changes to the “note” at section 280.2(d)(1) referring to the applicable eight year minimum term for the earned eligibility program, and an inmate’s related program plan, correspond with the 2003 revision of Correction Law, Section 805.

The addition of the new paragraph (2) at section 280.2(d) renders ineligible those who have entered but failed to complete or comply with requirements of the shock incarceration or temporary release programs for reasons other than those beyond their control. This represents an exercise of the commissioner’s discretionary authority under section 803 of the Correction Law and is intended to strengthen incentives for inmates to sincerely apply themselves when granted the opportunities to participate in those programs. For clarification, entry into a relapse program represents an admission of non-compliance with the terms of temporary release as described in 7 NYCRR 1904.3.

The addition of the new section 280.3 briefly outlines the effects of the merit time allowance as applicable to qualified inmates serving indeterminate and determinate sentences, and, at 280.3(a)(2) incorporates the additional merit allowance authorized by Chapter 644 of the Laws of 2005.

The change of paragraph (2) at renumbered section 280.4(a) coincides with the change to 280.2(d)(2) described above. Previously, failure to comply with the rules of temporary release and failure to successfully complete in the shock incarceration program were to be “viewed negatively” during the review of the inmate’s program history and record. Now such failures will render an inmate ineligible for merit time consideration.

- Costs:**
- a. To State government: None.
 - b. To local governments: None. The proposed amendment does not apply to local governments.
 - c. Costs to private regulated parties: None. The proposed amendment does not apply to private regulated parties.
 - d. Costs to the regulating agency for implementation and continued administration of the rule:
 - (i) Initial expenses: None.
 - (ii) Annual cost: None.
- Paperwork:**
- a. New reporting or application forms: None.
 - b. Additions to existing reporting or application forms: None.

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

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

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

Alternatives:
No other alternatives have arisen for consideration. The alternative of doing nothing is regarded as unacceptable because the Department wishes to strengthen incentives for successful participation in or completion of temporary release programs and the shock incarceration program. The changes at 280.2(d)(2) and renumbered 280.4(a)(2) serve this purpose and are consistent with the Department’s emphasis on program achievement as a basis for merit time awards. The changes at sections 281 and 282(a) merely reflect changes in Correction Law, section 803 and 805.

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

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

Regulatory Flexibility Analysis
A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This proposal is merely to ensure that only those inmates who satisfy both the eligibility criteria and intent of the merit time and earned eligibility statutes benefit from merit time reductions of their minimum terms.

Rural Area Flexibility Analysis
A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal is merely to ensure that only those inmates who satisfy both the eligibility criteria and intent of the merit time and earned eligibility statutes benefit from merit time reductions of their minimum terms.

Job Impact Statement
A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal is merely to ensure that only those inmates who satisfy both the eligibility criteria and intent of the merit time and earned eligibility statutes benefit from merit time reductions of their minimum terms.

Division of Criminal Justice Services

NOTICE OF ADOPTION

State DNA Databank

I.D. No. CJS-03-06-00014-A

Filing No. 271

Filing date: March 7, 2006

Effective date: March 22, 2006

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

Action taken: Amendment of sections 6192.1, 6192.3 and 6193.4 of Title 9 NYCRR.

Statutory authority: Executive Law, sections 837(13), 995-b and 995-c

Subject: State DNA databank.

Purpose: To establish a subject index within the State DNA databank.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. CJS-03-06-00014-EP, Issue of Jan. 18, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Mark Bonacquist, Division of Criminal Justice Services, Four Tower Place, Albany, NY 12203, (518) 457-8413

Assessment of Public Comment

The agency received no public comment.

Deferred Compensation Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Deferred Compensation Plans

I.D. No. DCB-12-06-00008-P

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

Proposed action: This is a consensus rule making to amend sections 9000.2, 9002.2, 9003.1, 9003.5, 9004.1 and 9003.6 of Title 9 NYCRR.

Statutory authority: State Finance Law, section 5; L. 1982, ch. 547

Subject: Deferred compensation plans.

Purpose: To ease the administrative burden on local governments that operate Internal Revenue Code ("IRC") section 457 deferred compensation plans under the New York State Deferred Compensation Board's (the "board") model plan document by providing for a more efficient document filing process; provide that a financial organization selected through a competitive selection process be permitted to manage the assets of a deferred compensation plan's stable income fund by investing in guaranteed investment contracts, purchasing book value wrap contracts, and allocating the assets of a fund between or among other financial organizations selected by the board or deferred compensation committee, as applicable; permit a deferred compensation committee to contract with a firm of public accountants selected through a request for proposals undertaken by the local employer that sponsors the deferred compensation plan provided that specific requirements are met; and further clarify that a contractor to a deferred compensation plan may not use information obtained in providing services to the plan to solicit or induce participants to invest in or purchase any product offered by that contractor outside of the plan.

Text of proposed rule: Subdivision (c) of section 9002.2 is amended to read as follows:

(c) No amendment may be made to a model plan other than an authorized amendment promulgated by the Board; provided, however, that notwithstanding any other provision hereof, the requirements of the preceding sentence shall be effective as of January 1, 1997 and shall not affect the validity of any amendment to a model plan which was duly adopted in accordance with the then-effective requirements of this section 9002.2 prior to January 1, 1997. Any amendment to a model plan made by the local employer which maintains such model plan shall require the same proof and procedures contained in subdivisions (a) and (b) of this section. *Where one or more of the documents and materials required by subdivision (a) of this section contains identical information as submitted on the most recent filing of such documents and materials, a local employer that has adopted an amendment authorized by the Board may submit an affidavit, on a form provided by the Board, attesting that the documents and materials required by subdivision (a) of this section have not changed since the local government last submitted such documents and materials. In the event that one or more of the documents or materials required by subdivision (a) of this section has changed, such documents and materials are required to be submitted at the same time the affidavit is submitted to the president.*

Paragraphs (5) through (11) and (12) through (15) of subdivision (b) of section 9000.2 are renumbered paragraphs (6) through (12) and (14) through (17), respectively, and new paragraphs (5), (13) and (18) are added to read as follows:

(5) *Guaranteed investment contract means a contract with an insurance company or a bank that guarantees a specific rate of return on the invested capital over the life of the contract and for the return of such invested capital and interest to the plan on one or more dates specified in the contract.*

(13) *Stable income fund means, with respect to a plan, an investment option available to participants in the plan that seeks to provide book-value accounting, stability of principal and a low volatility total return.*

(18) *Wrap contract means a contract with a financial organization that provides for book-value accounting with respect to a designated portion of the assets of a stable income fund but that does not give the financial organization issuing the contract day-to-day investment authority with respect to such assets. Such term includes participating, non-participating and hybrid wrap contracts.*

Subdivision (c) of section 9003.5 is amended to read as follows:

(c) Neither the Board nor any deferred compensation committee may permit, nor enter into an agreement that permits, a trustee, financial organization, independent consultant, administrative service agency or any other person to select one or more other trustees, administrative service agencies, firms of certified public accountants, independent consultants, or financial organizations to provide services in respect of a plan. Notwithstanding the previous sentence, this section 9003.5(c) shall not prohibit the Board or any deferred compensation committee from entering into an agreement with

(1) *a financial organization selected and retained by the Board or a deferred compensation committee, as applicable, in accordance with this Subtitle, that provides for self-directed investment services through a mutual fund or brokerage "window" arrangement sponsored by such financial organization with respect to a plan, provided that such self-directed investment services shall not be the sole investment alternative provided under a plan and that the Board and the deferred compensation committee shall establish clear guidelines regarding participants' access to, and level of participation in, such self-directed investment services*

(2) *a financial organization selected and retained by the Board or a deferred compensation committee, as applicable, in accordance with this Subtitle, to manage the stable income fund of such plan which authorizes such financial organization to engage in one or more of the following fund management activities with respect to the assets of a stable income fund:*

(i) *the investment of the assets of the stable income fund in one or more guaranteed investment contracts, provided, however, that such guaranteed investment contract shall not exceed five years in duration;*

(ii) *the purchase of one or more wrap contracts with respect to the assets of the stable income fund; or,*

(iii) *the periodic allocation of the assets of the stable income fund between or among two or more other financial organizations selected and retained by the Board or deferred compensation committee, as applicable, in accordance with this Subtitle, provided that, in each case,*

(i) *the written agreement between the Board or deferred compensation committee, as applicable, and the financial organization, expressly authorizes the applicable fund management activities and states that the financial organization is a fiduciary to the plan with respect to the fund management activities so authorized;*

(ii) *any such fund management activity is undertaken by the financial organization in accordance with reasonable practices of the financial organization applicable to its clients generally, and the financial organization receives no fee or other consideration from any person (other than the plan) related to such fund management activity;*

(iii) *the guaranteed investment contract or wrap contract, as applicable, imposes no penalties or surrender charges for the transfer of assets or responsibilities on expiration of the contract or agreement;*

(iv) *the trustee of the plan continues to be the owner on behalf of the plan of all of the assets of the stable income fund; and,*

(v) *any such fund management activity complies with the criteria for selection and reporting of section 9003.3 of this Subtitle and the then effective investment policies and guidelines of the Board or deferred compensation committee, as applicable, related to the stable income fund.*

A financial organization engaged in the management activities described in paragraph (2) of this section 9003.5(c) shall do so in accordance with the procedures of this paragraph (2) and with other provisions of this Subtitle to the extent such other provisions are incorporated into this paragraph (2).

Section 9003.1 of the Rules and Regulations is amended to make the existing undesignated paragraph, paragraph (a) and inserting a new paragraph (b) to read as follows:

(b) *Notwithstanding section 9003.1(a) of this Subtitle, a committee may contract with a firm of certified public accountants selected as a result of a competitive proposal undertaken by the local employer that expressly included in the scope of services an audit of the deferred compensation plan sponsored by the local government to be conducted in compliance with section 9005.1 of this Subtitle. The competitive request for proposals*

must be in general compliance with section 9003.2 of this Subtitle, except for the requirement of notice in the State Register. The committee must adhere to the criteria contained in section 9003.3 of this Subtitle in the selection of such auditor made pursuant to this paragraph (b). A firm of certified public accountants selected by a committee pursuant to this paragraph (b) shall be subject to the provisions of section 9003.5 of this Subtitle. The firm of certified public accountants may be the same firm that is under contract with the local employer for other auditing services of the local employer.

Section 9004.1 is amended to read as follows:

Section 9004.1 Provisions. No trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency nor any of their agents shall use information obtained by reason of its appointment in respect of a plan as a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency to solicit or otherwise induce any person to invest in, purchase, utilize or act in any other manner regarding any products or services made available by such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency [other than as expressly permitted by the agreement entered into between the Board or deferred compensation committee and such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency in connection with the plan]. Educational materials designed to acquaint employees with the benefits of such plan may be provided by a financial organization or administrative service agency upon prior approval by the Board or deferred compensation committee, as applicable. All information obtained in connection with any services performed or proposed to be performed in respect of a plan shall be confidential and used exclusively for purposes relating to such plan and expressly contemplated by an agreement entered into with the Board or deferred compensation committee, as applicable, in accordance with the requirements of this Subtitle. Neither the Board nor any deferred compensation committee shall enter into any agreement in respect of a plan with a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency which permits the use of any information obtained by reason of appointment as a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency to solicit or otherwise induce any person to invest in, purchase, utilize or act in any other manner regarding any products or services made available by such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency for any purpose not directly related to the administration of the plan and the investment of plan assets in accordance with the requirements of this Subtitle.

Section 9003.6 is amended to read as follows:

9003.6 Acknowledgment. Except as otherwise provided in this section 9003.6, each trustee, independent consultant, administrative service agency and financial organization so appointed shall acknowledge in writing that it is a fiduciary with respect to all administrative or investment matters for which it has assumed responsibility with respect to a plan. Notwithstanding the foregoing, no such fiduciary acknowledgment shall be required pursuant to this section 9003.6 from a financial organization (i) which issues a guaranteed investment contract [is an insurance company solely by reason of the assumption of responsibility for the investment of amounts under a plan in an insurance company general account pursuant to the terms of a contract under which the repayment of all amounts invested plus accrued interest are guaranteed], or (ii) which is the manager of an open-ended investment company registered under the Investment Company Act of 1940, as now in effect or as hereinafter amended, solely by reason of the investment, upon the specific direction of a trustee, another financial organization, the Board, a deferred compensation committee or an administrative service agency acting in accordance with the terms of the plan to implement the investment directions of one or more participants, of amounts held under the plan in shares of such open-ended investment company.

Text of proposed rule and any required statements and analyses may be obtained from: Julian M. Regan, Deferred Compensation Board, Empire State Plaza Station, P.O. Box 2103, Albany, NY 12220-2103, (518) 473-6619, e-mail: jregan@nysdcp.com

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

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

Consensus Rule Making Determination

Please be advised that the New York State Deferred Compensation Board (the "Board") is submitting the enclosed Notice of Proposed Rule Making

as a consensus rule making based on the Board's determination that no person is likely to object to the rule as written.

Job Impact Statement

The proposed Rule would not have a negative impact on jobs or employment opportunities, since the Rule would simply ease administrative burdens on such entities that administer retirement and pension benefit plans.

Department of Environmental Conservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Harvest and Possession of Marine Crustaceans

I.D. No. ENV-12-06-00007-P

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

Proposed action: Amendment of Part 44 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0329 and 13-0331

Subject: Harvest and possession of marine crustaceans in New York waters.

Purpose: To manage the harvest and possession of marine crustaceans to conform with Fishery Management Plans (FMPs), Federal regulations, and safe navigation.

Substance of proposed rule (Full text is posted at the following State website: www.dec.state.ny.us): The text of this proposed rule making, which amends 6 NYCRR Part 44, "Lobsters and Crabs," makes the following regulatory changes: increases the circular vent size on lobster pots; clarifies lobster trap tag regulations and conforms them with criteria established in the Atlantic States Marine Fisheries Commission Fishery Management Plan for American Lobster; establishes criteria for authorizing a lobster permit holder to tend another permit holder's gear in the event of a "temporary emergency"; revises the reporting requirements to include lobster bait gillnet permit holders; revises regulations to allow horseshoe crabs harvested for bio-medical purposes to be sold as bait; establishes criteria to close areas to commercial horseshoe crab harvest; establishes regulations for marking crab pots; restricts the placement of lobster and crab traps/pots in relation to designated navigation channels; establishes and clarifies regulations on the construction of escape panels in crab and lobster pots; and establishes minimum size limits for blue crabs.

Text of proposed rule and any required statements and analyses may be obtained from: Kim McKown, Department of Environmental Conservation, 205 North Bellemeade Rd., East Setauket, NY 11733, (631) 444-0454, e-mail: kamckown@gw.dec.state.ny.us

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

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

Additional matter required by statute: Pursuant to article 8 of the Environmental Conservation Law, a negative declaration has been prepared and is on file with the Department of Environmental Conservation.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) Section 13-0329 authorizes the Department of Environmental Conservation (DEC or Department) to establish the following for American lobster by regulation: manner of marking pots, definition of "temporary emergency" for hauling pots, requirements for escape panels and vents, trap tag program, and Atlantic States Marine Fisheries Commission (ASMFC) conservation measures. Environmental Conservation Law (ECL) Section 13-0331 authorizes the Department to establish by regulation, size limits, catch and possession limits, open and closed seasons, closed areas, restrictions on the manner of taking and landings, requirements for permits and eligibility, recordkeeping requirements, requirements on amount and type of fishing effort and gear, and requirements for transportation, possession and sale for crabs of any kind, including horseshoe crabs.

Section 13-0342 of the ECL authorizes the Department to establish by regulation, reporting of catch, effort, area fished, gear used, by-catch, and volume and value of product purchased from fisherman, by holders of all categories of commercial food fish, lobster, and crab fishing and landings licenses, marine and coastal district food fish and Crustacea dealers and shippers licenses.

Section 11-0303 of the ECL provides general regulatory authority which among other things provides for "the efficient management of the fish and wildlife of the state." Section 13-0105 of the ECL requires that the Department be guided by the recommendations of the Marine Resources Advisory Council (MRAC) and endeavor to incorporate the Council's recommendations into the final rule making if they are found to be consistent with the state's marine fisheries conservation and management policies and with federal and interstate Fishery Management Plans (FMPs).

2. Legislative objectives:

Sections 13-0329 and 13-0331 of the ECL were enacted to help promote and support management of lobster and crab fisheries in New York's waters. Regulatory authority in these sections address fisheries management and mortality reduction for lobsters and crabs. Section 13-0342 of the ECL authorizes the Department to require reporting of catch, effort, area fished and gear used among other provisions.

3. Needs and benefits:

The proposed regulations address the need to:

a) manage the harvest of marine crustacean resources in New York to ensure consistency with Interstate Fishery Management Plans for each species;

b) ensure that management regulations are consistent with the status and needs of marine crustacean stocks to maintain healthy and sustainable fisheries;

c) restrict mortality on stocks of marine crustacean, while allowing for appropriate use;

d) clarify compliance requirements and definitions to ensure effective enforcement of Department regulations;

e) develop gear requirements which will decrease conflicts with other user groups.

Specific major changes to the regulations include the following:

(1) Increase the circular vent size on lobster pots. Currently, New York is not in compliance with the ASMFC American Lobster Fishery Management Plan (FMP) circular vent requirement. The proposed action will bring New York's regulations into compliance with ASMFC.

(2) Clarify the lobster trap tag regulations and link them with criteria established in the ASMFC American Lobster FMP. These changes will help permit holders understand and comply with the trap tag regulations, and will also keep New York in compliance with the ASMFC American Lobster FMP.

(3) Establish criteria for authorizing a lobster permit holder to tend another permit holder's gear in the event of a "temporary emergency." ECL 13-0329(6) directs the Department to set up these criteria.

(4) Revise reporting requirements to include lobster bait gillnet permit holders. The proposed action clarifies reporting requirements and ensures that all harvest of marine resources are reported.

(5) Revise regulations to allow horseshoe crabs harvested for biomedical purposes to be sold as bait. This action responds to requests for flexibility from industry and will also decrease horseshoe crab mortality.

(6) Establish criteria to close areas to commercial horseshoe crab harvest. This action responds to concern about declines in shorebird populations, in particular red knot, and potential decrease in food availability due to horseshoe crab harvest. It is also a response to decrease user conflicts, particularly in public recreation and education areas.

(7) Develop regulations for marking crab pots. Marking requirements for crab pots provides for the identification of gear and will help prevent vandalism. It will assure that whoever is hauling the gear is the person to whom the gear belongs. Marking is of benefit to both crab permit holders and law enforcement agents. Buoying is optional, and will have the same benefit as pot marking. Where buoys are used, they must be visible during the day and night and use sinking line to decrease conflicts and increase safety with the boating public.

(8) Restrict the placement of lobster and crab pots in relation to designated navigation channels. The proposed action is designed to decrease conflicts and increase safety with the boating public.

(9) Establish or clarify regulations on the construction of escape panels in crab and lobster pots. The proposed action will ensure that lost pots will not continue to kill marine organisms.

(10) Establish regulations on the use of terrapin excluder devices in crab pots. The proposed action will decrease mortality of Diamondback

Terrapin in areas where the Department is concerned about their population status.

(11) Establish minimum size limits for blue crabs. The proposed size limits are consistent with our neighboring state, New Jersey, and similar to other east coast states. A minimum size will decrease the harvest of immature blue crabs and may allow more blue crabs to reach maturity and have a chance to reproduce.

4. Costs:

(a) Cost to State government:

The cost to state government is primarily that affecting the Department, and is described under section (d).

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There may be minor costs associated with complying with gear modifications for lobster and crab permit holders. Lobster permit holders in lobster management area (LMA) 4 who use circular vents will need to replace them, and lobster permit holders may need to modify the design of escape panels on their traps. The change in vent size is a requirement to stay in compliance with the ASMFC American Lobster FMP, and the change in the escape panel is designed to decrease mortality by ensuring that marine organisms can escape from lost pots.

Crab permit holders will incur minor costs associated with marking pots. Compliance costs will be larger for those permit holders who want to buoy their pots and need to replace buoys or lines. These regulations are designed to decrease the incidents of boats becoming entangled in crab pot lines and markers. Crab permit holders may incur costs associated with putting escape panels in crab pots. Escape panels are important to decrease mortality by ensuring that marine organisms can escape lost pots. Minor costs will also be incurred to purchase turtle excluder devices if the Department determines they are needed. Work conducted in Louisiana found there was no decrease in the catch of legal size blue crab when turtle excluder devices were used, so there likely will not be costs associated with a decrease in harvest.

There may be a costs associated with loss of harvest or increased travel time if closed areas are instituted for horseshoe crab harvesting. Areas would be closed if the site has documented use by both shorebirds and horseshoe crabs or if public recreation or environmental education sites feel there is a user conflict.

There will be short term costs to blue crab harvesters associated with the implementation of minimum sizes. The minimum sizes included in these regulations are the same as New Jersey, and similar to many other east coast states. These sizes are recommended to decrease the harvest of immature crabs.

Failure to take these appropriate actions to protect our natural resources could cause the decline or collapse of a stock which would have a severe adverse effect on the commercial and recreational fisheries for that species as well as the supporting industries. Moreover, if the state fails to implement actions needed to comply with the requirements of interstate FMPs, the ASMFC will find New York in non-compliance with such FMP. Under the Atlantic Coastal Fisheries Conservation and Management Act, such a non-compliance determination will lead to a complete federal closure of the fishery in question in New York, with severe economic consequences to the state. In addition, failure to take appropriate actions for gear marking will continue conflicts with the boating public and may cause safety issues.

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

The Department will incur limited costs associated with both the implementation and administration of these rules. The implementation costs will be associated with the public notification and final adoption of these regulations, and costs relating to the expense of updating informational materials and notifying commercial and recreational harvesters, and support industries of the new rules. There will also be costs associated with enforcement of these new regulations.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

There should be little additional paperwork to license holders. Section 44.7 (a) requires lobster bait gill net permit holders to file monthly reports, but they should already be filing harvest reports and reporting on their bait harvest in compliance with their lobster.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

The following significant alternatives, by issue, have been considered and rejected:

- (1) Circular Vent size.
 - (a) No action
- (2) Clarify the lobster trap tag regulations.
 - (a) No action
- (3) Develop criteria for determining a temporary emergency for gear tending.
 - (a) No action
- (4) Revise reporting requirements for lobster bait gill-net permit holders.
 - (a) No action
- (5) Revise regulations on the disposition of horseshoe crabs harvested for bio-medical purposes.
 - (a) No action
- (6) Develop criteria to close areas to horseshoe crab harvest.
 - (a) No action
- (b) Alternate management measures: A total moratorium on the harvest of horseshoe crab.
 - (7) Regulations for marking crab pots.
 - (a) No action
 - (8) Pot and buoy restrictions in navigation channels.
 - (a) No action
 - (9) Regulations on the construction of escape panels.
 - (a) No action
 - (10) Regulations on terrapin excluder devices in crab pots.
 - (a) No action
 - (b) Alternate management measure: Require turtle excluder devices on all crab pots.
 - (11) Develop minimum size limits for blue crabs.
 - (a) No action
 - (b) Alternate management measure: Institute a 5 inch minimum size on hard shell blue crabs.

9. Federal standards:

These amendments to Part 44 are in compliance with the ASMFC FMPs for American lobster and horseshoe crab. There is no ASMFC or Federal FMP for blue crab.

10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via the Department's website, of the changes to the regulations. Immediate compliance will be required if, after the public comment period, the proposed regulations are adopted by the Department. The exceptions are the gear changes which will take effect June 1, 2006.

Regulatory Flexibility Analysis

1. Effect of the regulations:

Small businesses affected by the proposed regulations will include commercial lobster and crab license holders. There were 513 commercial lobster license holders and 611 crab license holders in New York during 2004. Three hundred sixteen crab license holders also held horseshoe crab permits. Most commercial harvesters holding lobster and crab licenses are self-employed. None, however, are expected to lose their jobs as a result of the proposed changes.

There are no local governments involved in the commercial or recreational crustacean harvesting business, nor do any participate in the purchase, sale, storage or transport of marine crustaceans. The only effect the regulations may have on local governments is that it provides them with the opportunity to work with the Department to close areas to horseshoe crab harvest if needed.

2. Compliance requirements:

Under the proposed rule, commercial lobster and crab license holders may need to modify their gear if it does not meet the proposed requirements. Lobster circular vent size is increased for lobster management area (LMA) 4, escape panels may need to be modified or installed in lobster and crab traps/pots, buoys and lines may need to be modified for crab pots, and crab pots in certain areas may be required to have terrapin excluder devices installed.

Commercial lobster and crab license holders may need to modify the areas where they harvest the resource. The proposed regulations stipulate that lobster and crab traps/pots can not be set within 25 feet of designated navigation channels, and areas that meet specified criteria may be closed to horseshoe crab harvest.

The proposed regulations also require adherence to minimum size limits for blue crabs.

In addition, under the proposed rule, all lobster bait gillnet permit holders will be required to complete and file a Vessel trip Report (VTR) summarizing their catch and effort for each trip.

3. Professional services:

None.

4. Compliance costs:

Minor costs will be associated with complying with the proposed gear modification regulations. Commercial lobster license holders who fish LMA 4 will need to replace circular vents if they are smaller than two and five-eighths inches in diameter. Estimated cost per vent is \$0.29, or \$0.58 per trap since two circular vents are required in each trap. Examining the 2004 lobster harvest reports, only 11% of lobster license holders reported fishing in LMA4. Of the 11%, 50% reported on vents, and only 18% of those used circular vents. Thus, approximately 10 to 20 commercial lobster license holders may need to replace vents.

Minor costs are associated with modifying escape panels in the lobster fishery. Escape panels are already required on lobster traps; the proposed regulations specify how those escape panels must be constructed. An unknown number of commercial lobster license holders may need to modify the escape panels on their traps for minimal cost. Escape panels are not currently required on crab pots, though some license holders may have installed escape panels voluntarily. An unknown number of commercial crab license holder will need to install escape panels on their crab pots. Estimated costs for installing escape panels would be \$0.45 for wire and hog rings.

The proposed regulations require crab pots to be marked. The cost of marking the pot is dependent on the type of marking used, but should be less than \$0.25 per pot. Crab harvesters who choose to mark their gear on the surface may incur costs associated with purchasing new buoys and lines if their current gear does not meet the proposed regulations. Buoys cost approximately \$1.35 a piece, while sinking line would cost approximately \$0.12 per foot. If an area is deemed critical for diamondback terrapin, crab license holders may be required to install terrapin excluder devices which cost approximately \$0.50 a piece.

Commercial lobster and crab license holders may incur increased travel costs in association with gear restrictions near designated navigation channels, and potential closed areas for horseshoe crab permit holders.

Compliance with minimum sizes for blue crabs may take the form of lost income in the short term.

There should be no additional costs associated with reporting for lobster bait gillnet license holders since they should be reporting their lobster harvest on Vessel Trip reports already.

5. Minimizing adverse impact:

Gear modification impacts can be minimized by license holders doing the work themselves rather than having it done by the manufacturer.

While there is no way to eliminate the short term losses in harvest of blue crabs due to minimum sizes, the regulations are designed to rebuild blue crab stocks. The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including wholesale and retail outlets and the support industries for both commercial and recreational fisheries. Failing to take these actions to protect our natural resources could have severe adverse impact on the commercial and recreational fisheries for this species, as well as the supporting industries for those fisheries.

6. Small business and local government participation:

In developing this proposal, the Department drew upon input from the Marine Resources Advisory Council, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon discussions and recommendations of other interested and affected parties, including commercial fishers, local government and State Parks personnel.

7. Economic and technological feasibility:

The changes required by this action have been determined to be economically feasible for the majority of the affected parties. For those proposals which are required under interstate fishery management plans, the Department does not have any discretion regarding this economic impact. New York must comply with the provisions of the FMPs or face federal sanctions, including possible closure of the fishery.

There is no additional technology required for small businesses or local governments.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas Affected:

The Department of Environmental Conservation has determined that the rules for American lobster and horseshoe crabs will not impose an adverse impact on rural areas. The lobster and horseshoe crab fisheries

directly affected by the proposed rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state.

The proposed regulations for blue crabs will affect recreational and commercial blue crab harvesters in rural areas. Blue crabs are found not only in New York's marine and coastal district, but also in the Hudson River up to the dam at Troy. This includes the rural counties of Greene, Ulster, Putnam, Columbia, and Rensselaer.

The proposed rules would also affect any seafood shipper or dealer who purchases for subsequent resale, stores or transports blue crabs in New York State. Most of these dealers are located in the geographic areas adjacent to the marine and coastal district. In 2004, there was a total of 427 Finfish and Crustacean dealer license holders. The majority (78%) were from marine and coastal district counties, while 7% were from rural areas.

2. Compliance Requirements:

Under the proposed rule, Commercial crab license holders may need to modify their gear if it does not meet the proposed requirements. Escape panels may need to be installed, crab pots may need to be marked, buoys and lines may need to be modified, and crab pots in certain areas may be required to have terrapin excluder devices installed. Commercial crab license holders may need to change the areas from which they harvest the resource. The proposed regulations stipulate that crab pots may not be set within 25 feet of designated navigation channels. The proposed regulations also require adherence to minimum size limits for blue crabs.

3. Costs:

Minor costs will be associated with complying the proposed gear modification regulations. Escape panels are not currently required on crab pots, though some license holders may have installed escape panels voluntarily. An unknown number of commercial crab license holders will need to install escape panels on their crab pots. Estimated costs for installing escape panels would be \$0.45 for wire and hog rings. Proposed regulations require crab pots to be marked. The cost of marking the pot is dependent on the type of marking used, but should be less than \$0.25 per pot. Crab harvesters who choose to mark their gear on the surface may incur costs associated with purchasing new buoys and lines if their current gear does not meet the proposed regulations. Buoys cost approximately \$1.35 a piece, while sinking line would cost approximately \$0.12 per foot. If an area is deemed critical for diamondback terrapin, crab license holders may be required to install terrapin excluder devices which cost approximately \$0.50 a piece.

Commercial crab harvesters may incur increased travel costs in association with gear restrictions near designated navigation channels.

Compliance with minimum sizes for blue crabs may take the form of lost income in the short term.

4. Minimizing Adverse Impact:

Gear modification impacts can be minimized by license holders doing the work themselves rather than having it done by the manufacturer.

While there is no way to eliminate the short term losses in harvest of blue crabs due to minimum sizes, the regulations are designed to rebuild blue crab stocks. The maintenance of long term sustainable fisheries will have a positive affect on employment for the fishery, including wholesale and retail outlets and the support industries for both commercial and recreational fisheries. Failing to take these actions to protect our natural resources could have severe adverse impact on the commercial and recreational fisheries blue crab, as well as the supporting industries for those fisheries.

5. Rural Area Participation:

The Department issued 674 resident commercial crab licenses in 2004. The majority (99%) of the resident commercial crab license holders reside in the marine and coastal district, while only two percent reside in rural areas. Likewise, Finfish and Crustacean dealer licenses were issued to 427 dealers, 78% of which reside in the marine and coastal district and only 7% of which reside in rural areas. All current commercial crab license holders and Food fish and Crustacean Dealer license holders will be provided a notice from the Department describing the new crab regulations.

Department staff have focused public outreach in the marine and coastal district because that is where the majority of the harvesters and dealers reside. A draft version of the rule has been presented to the Marine Resources Advisory Council.

Job Impact Statement

The Department has determined that the proposed regulations will not have a substantial adverse impact on jobs and employment opportunities. Therefore, a job impact statement is not required.

There were 513 licensed commercial lobster harvesters, 63 lobster bait gill net license holders, 611 licensed commercial crab harvesters (316 of

which had horseshoe crab permits), and 320 Finfish and Crustacean Dealer license holders in New York during 2004. Many currently licensed commercial fishermen and dealers will be affected by these regulations. Some of the proposed regulations may result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties.

The maintenance of long term sustainable fisheries will have a positive effect on employment for the fisheries in question, including wholesale and retail outlets and the support industries for both commercial and recreational fisheries. Short term reductions in harvest or availability will be offset by the long term sustainability of fishery stocks. Failing to take these appropriate actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. Moreover, failure to implement the required provisions of interstate Fishery Management Plans can result in complete federal closure of the fishery in the state, an outcome with far more severe short-term consequences than those resulting from the proposed regulations.

Based on the above and the Department's experience in adopting regulations similar to those contained in this proposal, the Department has concluded that there will not be a substantial adverse impact on jobs or employment opportunities as a consequence of these amendments. In the short term, these proposals will prevent a federal closure of New York's fisheries; in the long term, these proposals, by conserving marine fisheries, will likely have a positive impact on employment opportunities in the commercial and recreational fishing industries.

Office of General Services

NOTICE OF ADOPTION

Automated External Defibrillation Program for State Institutions and Buildings

I.D. No. GNS-41-05-00010-A

Filing No. 260

Filing date: March 2, 2006

Effective date: March 22, 2006

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

Action taken: Addition of Part 303 to Title 9 NYCRR.

Statutory authority: Public Buildings Law, section 140

Subject: Regulations for the implementation and usage of automatic external defibrillators (AED) in public buildings in New York State.

Purpose: To provide for the installation and safe operation of a sufficient number of cardiac automated external defibrillators in each public building and to enable prompt response to human cardiac events that may occur in public buildings.

Text of final rule:

PART 303. AUTOMATED EXTERNAL DEFIBRILLATION SECTION 303.0 PURPOSE.

The regulations contained in this part have been promulgated by the Office of General Services ("OGS") pursuant to Section 140 of the Public Buildings Law, which requires that each Public Building be equipped with on-site cardiac automated external defibrillators. The purpose of this regulation is to provide for the installation and safe operation of a sufficient number of cardiac Automated External Defibrillators in each Public Building and to enable prompt response to human cardiac events that may occur in such Public Buildings.

SECTION 303.1 DEFINITIONS.

(a) As used in this section:

(1) Automated External Defibrillator, or AED. A device as defined in Public Health Law ("PHL") section 3000-b (1) (a).

(2) Public Building. A building or portion thereof located within the State of New York that is owned and/or operated by a State Agency, including leased space, for the conduct of governmental services and which houses (i) a staff of state employees; (ii) other intended occupants; or (iii) regular visitors, excluding any building that has limited use or a

nominal number of assigned staff as determined by the respective State Agency.

(3) State Agency or Agency. All state departments, boards, commissions, offices or institutions. State public authorities and public benefit corporations are excluded from this definition.

(4) Collaborative Agreement. A written agreement with an Emergency Health Care Provider ("EHCP"), which shall include a copy of an Agency's written practice protocols and policies and procedures for use of AEDs, as provided for in Public Health Law section 3000-b (2).

(5) Emergency Health Care Provider, or EHCP. A physician or a hospital as defined in Public Health Law section 3000-b (1) (b).

(6) Regional Emergency Medical Services Council(s), or REMSCO. An organization as defined in Public Health Law section 3003.

(7) Commissioner. The Commissioner of the New York State Office of General Services or his/her designee.

(8) OGS. The New York State Office of General Services.

(9) DOH. The New York State Department of Health.

SECTION 303.2 IMPLEMENTATION.

(a) Each State Agency shall comply with the provisions of Public Health Law section 3000-b.

(b) Each State Agency shall endeavor to provide and maintain on-site at each of its Public Buildings a sufficient number of functional cardiac AED devices, and shall endeavor to provide a sufficient number of trained AED operators for emergencies, in accordance with these regulations, unless conditions exist in a certain structure that prevent a State Agency from reasonably complying with the requirements of these regulations.

(c) Each Agency will be responsible for the phased-in installation of AEDs in its respective facilities. Such phase-in period shall not extend beyond March 31, 2010, absent extraordinary circumstances that warrant a longer phase-in period. Any such extraordinary circumstances resulting in exemption from or noncompliance with these regulations shall be detailed in the Agency's report pursuant to subdivision (h) of this section.

(d) In the event that a specific building space is shared between agencies, then memoranda of understanding ("MOU") may be made between such agencies relative to the development and funding of an AED program for the shared space, as well as the joint administration of all aspects of the AED program.

(e) Notwithstanding any other provision of this Part, if a State Agency is located in building space owned or managed by OGS, OGS will be responsible for installing AEDs in the building and for managing AED maintenance and AED operator training. Otherwise, it shall be the responsibility of the Agency occupying OGS space to comply with all other provisions of this Part, including recruiting Agency personnel as AED operators and coordinators.

(f) In the case of Public Buildings owned and/or managed by an Agency other than OGS, or Public Buildings managed by OGS by virtue of an agreement with another Agency or a private entity, the occupying agencies will be responsible for the installation of AEDs in the building and for the management of AED maintenance and AED operator training.

(g) If an Agency operates a medical facility that provides alternative services for the purpose of addressing emergency defibrillation, that Agency shall file with the Commissioner a written notification explaining how the medical facility addresses emergency defibrillation in a sufficient manner so as to be consistent with the health and safety objectives of these regulations. Agencies operating such an alternative services plan which has been approved by DOH will be deemed to have fulfilled the requirements of sections 303.5, 303.6, 303.7, and 303.8 of these regulations respecting the Public Buildings at which the alternative services plan is effective. Upon receipt of such written notification(s), the Commissioner will provide the Agency with an acknowledgment of receipt, and will also provide a copy of such written notification(s) to DOH...

(h) From the date of adoption of these regulations, each State Agency shall commence the planning process for implementation of an AED program. By April 1, 2006 all state agencies shall file with the Commissioner a written report setting forth the details of the Agency's AED program plan. The report shall include specific reference to the individual requirements set out in these regulations, including, but not limited to, a proposed schedule for implementation at each Public Building. If an Agency has previously commenced an AED program in its buildings, then that Agency's report should identify those buildings that currently have AEDs and should demonstrate how those buildings comply with the standards promulgated in these regulations. All such reports shall be updated annually, commencing April 1, 2007, and shall detail the status of the Agency's AED program respecting compliance with these regulations. Once full implementation is achieved, such annual reports shall be required only for

years in which substantive changes to the Agency's plan or its compliance therewith have developed. Upon receipt of such report(s), the Commissioner will provide the Agency with an acknowledgment of receipt, and will also provide a copy of such report(s) to DOH... A State Agency may commence installation of AEDs prior to submitting its written report to the Commissioner.

(i) If during the process of developing its AED program, a State Agency is unable to fulfill all the requirements of these regulations at its Public Buildings as a result of insufficient staff or other restrictive conditions, a written report explaining the reasons for such circumstances shall be provided to the Commissioner. A State Agency shall include in such report an alternative implementation program designed to provide AED protection at the Public Building(s) referenced in the report or an explanation as to why there is no feasible method of implementing an AED program for the subject Public Building(s). The filing of such an explanatory report shall temporarily suspend an Agency's obligation to fulfill other requirements of this part for such Public Building(s) until the underlying prohibitive condition(s) may be corrected. Upon receipt of such report(s), the Commissioner will provide the Agency with an acknowledgment of receipt, and will also provide a copy of such report(s) to DOH.

SECTION 303.3 LOCATION OF AEDS.

(a) Subject to the phased-in implementation of AEDs, each State Agency shall endeavor to have sufficient AEDs available at each of its Public Buildings to ensure ready access for use during emergencies.

(1) Each State Agency's phased-in implementation plan shall commence by prioritizing AED placement in those Public Buildings that house the largest number of state employees, other intended occupants or estimated regular visitors, or which the State Agency reasonably deems to merit priority treatment due to the high risk nature of the population served or the activities conducted at the Public Building.

(2) When prioritizing AED placement as described in paragraph "1" above, those Public Buildings where there is a greater level of physical activity or in which a higher occupant density is likely shall be given priority for AED placement over Public Building(s) that have a lower level of physical activity or lower likely levels of occupant density.

(3) Public Buildings housing a staff, other intended occupants or regular visitors of one hundred (100) people or more shall be considered priority structures for the implementation of an AED program.

(b) After a State Agency has prioritized its Public Buildings for purposes of implementing an AED program, the Agency shall determine the quantity and placement of AEDs. In implementing the physical placement of the AEDs, consideration shall be given to the size and physical layout of the Public Building, including but not limited to the following factors:

(1) placement of AEDs in centralized locations based upon the response system an Agency has established in its PAD plan, or mobile deployment of AEDs (e.g., placement of AEDs in emergency vehicles), such that a trained operator could optimally respond to the site of a cardiac event with an AED at or about an Agency's Public Building(s) in a period of not more than three (3) minutes;

(2) locations of stairways and elevators;

(3) number of floors in the facility;

(4) security features that limit access or restrict freedom of movement to certain areas of a building;

(5) conspicuous location for AED access and retrieval; and

(6) protection of the AED against accidental physical damage, tampering or theft.

(c) AEDs should not be located in locked rooms or where access is restricted, unless the AED is meant to be an additional device or is secondary to the AEDs installed for regular daily access. Notwithstanding the foregoing, where placement of an AED may be problematic due to security or other safety considerations, or where the combined logistics of building design, risk level and operator availability reasonably indicates a secure AED placement, the State Agency may consider alternate installations that are as consistent as possible with these rules and regulations.

(d) An Agency shall consider AED options for children in those state facilities that are regularly open to the public, e.g., museums, convention centers, recreational/sport facilities. Appropriate AED equipment options should be acquired and made available for resuscitating children in accordance with AED manufacturer's recommendations.

SECTION 303.4 OPERATORS.

(a) State officers and employees charged with management of Public Buildings should endeavor to recruit volunteers or, in appropriate circumstances, assign employees, in compliance with applicable collective bargaining agreements and relevant Labor Law provisions, as part of their official job duties to operate AEDs, such that there are optimally not less

than two (2) operators per each AED or, in multiple floor buildings, two (2) operators per floor, whichever is greater, which operators are trained in the operation and use of an AED and whose regular workstations are located in proximity of AEDs such that they may be able to comply with the response time described in section 303.3(b)(1) of these regulations.

(b) Operator training shall include a combination of both CPR and AED training. An AED operator is required to successfully complete a CPR/AED training class at intervals necessary to maintain certification.

(c) Agencies shall select and pay for a training provider approved by DOH for purposes of training employees to both administer CPR and use AEDs, consistent with the provisions of Public Health Law section 3000-b (3) (a). The successful completion of an approved CPR/AED training course shall be a prerequisite to being considered by an Agency for designation as an authorized AED operator.

(d) Agencies may determine where and how an operator receives his/her CPR/AED training, if such training is scheduled during the employee's regular workday. An operator that receives his/her CPR/AED training outside of the employee's regular workday will be eligible for reimbursement for the cost of the training so long as the provider is approved by DOH and the operator receives prior approval from the Agency.

(e) All activities pursuant to this Part 303 of all operators, coordinators, and administrators, and any designees thereof, whether such persons are acting as volunteers or by virtue of their assigned work responsibilities, shall be considered to be within the scope of the subject State employees' employment with the State of New York. The activities contemplated in this subdivision include all those contained in this Part, including but not limited to the location, operation, maintenance and testing of AED equipment, as well as the administrative and ministerial functions, and any other activity implied or reasonably necessary to the effective provision, operation and administration of a Public Access Defibrillation program. Pursuant to the provisions of section 17 of the Public Officers Law, operators, coordinators, and administrators who are volunteers and not State employees shall be eligible for defense and indemnification by the State in their activities pursuant to this Part 303 upon their express authorization by the respective State Agency to participate in the volunteer component of this State sponsored Public Access Defibrillation program.

SECTION 303.5 AED ADMINISTRATION.

(a) Each State Agency shall designate an AED administrator for its respective agency-wide AED program. The AED administrator shall be an Agency employee who is primarily responsible for administering and monitoring the Agency's AED program, which shall include oversight of the AED coordinators to insure that each coordinator fulfills his/her responsibilities as set forth in this section. The AED administrator shall maintain a copy of the Agency's written AED plan.

(b) Each State Agency shall designate an AED coordinator for each of its public buildings or for portions of buildings it occupies. The AED coordinator shall be an Agency employee who is the primary liaison between the Agency's AED program and the EHCP.

(1) The AED coordinator is responsible for: (i) maintaining the equipment and supplies; (ii) organizing training and re-training programs; (iii) maintaining a list of trained designated AED operators, or monitoring such tasks if performed by the AED vendor or other third party; (iv) forwarding incident data to the EHCP for medical director review; and (v) holding post-incident debriefing sessions for any responder(s) involved, if necessary.

(2) The AED coordinator shall hold an annual AED drill with the AED operators.

(3) The AED coordinator may be responsible for more than one building, and in circumstances determined by an Agency to be appropriate, the AED coordinator may be responsible for buildings on a regional or geographic basis.

(4) The AED coordinator may also serve as an AED operator.

SECTION 303.6 AED EQUIPMENT.

(a) Prior to purchasing AEDs and related equipment, and based upon the provisions of its AED program plan, each State Agency should determine the appropriate number of AEDs and should recruit or assign sufficient AED operators for each of its Public Buildings. Purchase of AED units shall be made pursuant to the State Finance Law or other applicable governing law.

(b) Each AED shall be a device approved by the Food and Drug Administration for adult use and/or for pediatric use, as appropriate for the population reasonably anticipated to be served by such device, and shall be installed and used according to the manufacturers instructions with due attention provided to operating procedures, maintenance and expiration date(s). AEDs are federally regulated medical devices, and can

only be purchased with a physician's prescription. Such physician's prescription should be obtained from the Agency's EHCP.

(c) Each Agency shall have the AEDs placed in their assigned locations within each of the Agency's facilities and shall ensure that trained AED operators for each facility are informed as to the locations of the AEDs. Manufacturers' directions should be followed for all AED installations and use.

(d) All AED coordinators, or their designees, shall use their reasonable best efforts to provide that all AEDs in their facilities shall be maintained and inspected according to Agency policy, manufacturers' and applicable federal and state government standards.

(e) All AED coordinators, or their designees, shall use their reasonable best efforts to perform or otherwise arrange for an inspection, on a regular basis not less frequently than recommended by the AED manufacturer, to check the AED supplies, accessories and spares for expiration dates and damage, and test the functionality of each AED. Such inspection should include the AED exterior and the connector.

SECTION 303.7 MEDICAL SUPPORT.

(a) A State Agency possessing or operating an AED is required to have a collaborative agreement with an Emergency Health Care Provider as defined in Public Health Law section 3000-b (2).

(b) For each Public Building being considered for AED placement, an Agency shall:

(1) Identify its local REMSCO. A list of REMSCOs located in the State of New York is maintained by DOH.

(2) Identify a physician or hospital knowledgeable and experienced in emergency cardiac care to serve as the EHCP and to participate in a collaborative agreement with the State Agency.

(3) Develop a written collaborative agreement with the EHCP, which shall include a copy of written practice protocols for use of the AEDs, together with written policies and procedures which together: provide training requirements for AED operators; direct the immediate calling of 911 in event of each emergency cardiac event; provide ready identification of AED unit locations; provide for regular maintenance and testing procedures of the AED unit(s) which procedures meet or exceed manufacturers recommendations; detail documentation requirements pertaining to AED usage; and define participation in a regionally approved quality improvement program as required by sections 3000-b (3) (e) and 3004-a (1) of the Public Health Law.

(4) Consistent with the requirements of Public Health Law section 3000-b (2), file with DOH and appropriate REMSCO a copy of the notice of intent to provide public access defibrillation ("PAD"), and a signed copy of the Collaborative Agreement with the EHCP. The EHCP and the Agency's AED administrator must sign the notice of intent and the collaborative agreement. An Agency should file a new collaborative agreement with the DOH and appropriate REMSCO if the EHCP changes. The Agency should endeavor to secure written confirmation from the REMSCO of its receipt of the Agency's PAD plan. A copy of the PAD plan shall be maintained by the Agency's AED administrator. Copies of all such notices, agreements, and confirmations shall also be provided to the Commissioner and the chairs of the subject Agency's labor and management and health and safety committees. Upon receipt of such notices, agreements, and confirmations, the Commissioner will provide the Agency with an acknowledgment of receipt.

(5) Refrain from operating AEDs until the Agency's PAD plan has been formally approved by a REMSCO; and

(6) Provide written notice to 911 or the community equivalent emergency vehicle dispatch center of the availability of AED service at the Agency's facility.

SECTION 303.8 RESPONSIBILITIES.

(a) Upon responding to an emergency cardiac event, an AED operator shall:

(1) Document each AED use on a patient, including all incident data. All such documentation shall be submitted to the Agency's AED coordinator immediately following the AED use.

(2) Following each use, deliver the AED unit to the Agency's AED coordinator or inform that person of its location.

(b) Upon receiving notice of an emergency cardiac event or AED use, an AED coordinator shall:

(1) Pursuant to the provisions of Public Health Law section 3000-b (3) (d), immediately report such AED use to the appropriate local emergency medical services system, emergency communications center or emergency vehicle dispatch center, as appropriate, and promptly notify the EHCP and appropriate AED administrator.

(2) Ensure that the AED data is downloaded to the designated computer system. For assistance with the data information retrieval, the AED vendor/manufacturer's name and telephone number should be available.

(3) Ensure that AED incident data are transmitted to the EHCP for evaluation within 24 hours of the cardiac event.

(4) Ensure that the Public Access Defibrillation Quality Improvement Report is completed by the Agency's EHCP or AED user and transmitted to the appropriate REMSCO within five (5) business days of AED use.

(5) Use his/her best efforts to check the AED and replace any used supplies as soon as possible following the cardiac event so the AED may be promptly returned to service.

(6) Perform a battery insertion test on the AED to ensure proper operation of the AED prior to its return to service.

(c) AED coordinators shall also be responsible to:

(1) Ensure that quarterly reports are submitted to the appropriate REMSCO and the Agency's labor and management and health and safety committees, provided that should such reports contain any personal information such information will be redacted prior to submission to said labor management and health and safety committees; and

(2) Perform a battery insertion test on an AED following any battery change.

SECTION 303.9 AED REPLACEMENT SCHEDULE.

After the initial AED installation, a replacement schedule which considers the useful life of the AED units shall be developed by the State Agency. The replacement schedule should be updated periodically.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 303.1(a)(2), 303.2(d), 303.3(a)(3), 303.4(a), (c), (d), 303.7(b)(4) and 303.8(c)(1).

Text of rule and any required statements and analyses may be obtained from: Kari L. Gathen, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: kari.gathen@ogs.state.ny.us

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

Changes made to Part 303 are intended for clarification and are not material changes to the regulation and thereby do not necessitate revision to the previously published Rural Area Flexibility Analysis, Regulatory Flexibility Analysis and Regulatory Impact Statement or Job Impact Statement.

Assessment of Public Comment

During or prior to the comment period, which comment period commenced upon publication of the Notice of Revised Rule Making in the State Register on October 12, 2005, comments were received from the Department of Environmental Conservation, Department of State, Department of Transportation, Office for Technology, Office of Mental Retardation and Developmental Disabilities, Public Employees Federation, AFL-CIO, New York State Police, and the Department of Taxation and Finance.

All comments received during or prior to the comment period were reviewed and assessed in accordance with the provisions of the State Administrative Procedure Act. The issues raised by these comments, significant alternatives suggested by them, statements of the reasons why alternatives suggested by such comments were not incorporated into the rule, and descriptions of the non-substantial changes made to the rule as a result of such comments are found below. Along with numbering corrections, the following non-substantial changes were made to clarify the rule that was published in the State Register on October 12, 2005:

Section 303.1(a)(2) was clarified to mean a public building or portion thereof to be located within the State of New York.

Section 303.2(d) was modified to allow the joint administration of an AED program to be included in an MOU between agencies in shared building space.

Section 303.3(a)(3) was modified to clarify that a Public Building should be included as a priority structure for implementation of an AED program if it houses one hundred (100) people including the staff and other intended occupants or regular visitors.

Section 303.4(a) was modified to specify that the assignment of employees to operate automatic external defibrillators as part of their official job duties must be in compliance with applicable bargaining agreements and relevant Labor Law provisions.

Section 303.4(c) and (d) were modified to clarify that a State Agency shall provide remuneration for a training provider whether the employee receives the training during or outside of their regular workday, so long as prior approval is given by the Agency.

Section 303.7(b)(4) was modified to include that copies of all of a State Agency's notices, subject agreements, and confirmations shall be provided to the Commissioner and the chairs of each Agency's labor and management and health and safety committees.

Section 303.8 (c)(2) was modified include that AED coordinators are responsible to also provide copies of quarterly reports to the subject Agency's labor and management and health and safety committees, provided that should such reports contain and personal information such information will be redacted prior to submission to said committees.

Summary of Comments:

(1) Several State Agencies and a public union provided comments regarding the lack of guidance as to the number, location, and list of circumstances allowing for the alternate placement of AEDs that would be deemed sufficient for a public building in order to meet the regulatory requirements. State Agency comments also addressed a need to have the § 303.1(a)(2) "Public Buildings" definition include a specific threshold for nominal staff and how a "support" building or satellite office would be included in the definition, as well as clarification as to what facilities would be included in the definition. A public union also provided a comment to add additional language to clarify that the regulatory intent is to prioritize the AED placement in public buildings housing more than 100 people.

(2) State Agency comments also addressed the situation in which one or more State Agencies occupied the same public building space and demonstrated the need to have a joint administration of the program included in the Memorandum of Understanding. An additional comment addressed the AED implementation responsibility in the event a State Agency shares public building space with a non-State tenant. A public union expressed comments recommending that § 303.2(c) provide a list of "extraordinary circumstances" that would prevent a State Agency from implementing an AED program within five years of adopting the regulation.

(3) State Agency comments raised concerns regarding issues of personal liability for AED usage and AED course certification regarding the substance of the training courses. State Agency comments also raised concerns with the administrative requirements placed on State Agencies. Additionally, a comment was raised as to how the regulation will coincide with the requirements of the voluntary PAD program in Public Health Law § 3000. State Agency comments also addressed the concern regarding the availability of financial aid to carry out the program and the use of OGS contracts in the purchasing of AEDs.

(4) State Agency and public union comments raised the concern as to who is the responsible party relating to the AEDs between OGS and a State Agency in regards to what role each agency plays.

(5) A public union provided comments regarding the role of collective bargaining agreements and relevant Labor Law provision in addressing situations that include employees which are a part of bargaining units assigned to operate AEDs. An additional comment was made regarding the role of committees in receiving copies of notices, agreements, and confirmations.

Assessment of Comments:

The numbered responses coincide with the Summary of Comments.

(1) The definition of a "Public Building" in subsection 303.1(a)(2) provides for agency discretion to determine which buildings would be best suited to determine which facilities should be excluded because they have limited use or a nominal number of assigned staff. The Public Building definition was clarified to mean a public building or portion thereof to be located within the State of New York. The State Agency is in the best position to know which of its buildings are being utilized in a way that would be best suited by positioning an AED to meet the public health objective of the regulation.

Each State Agency is most familiar with the individual floor plans of its public buildings and is in the best position to determine the number of AEDs that will be needed to comply with section 303.3. The State Agency shall endeavor to place a sufficient number of AEDs by determining the quantity and placement of the AEDs in accordance to floor plans and public building usage as set forth in subsection 303.3(b). This subsection also provides guidance that placement of an AED in the State Agency's public building should be such that a response to an incident could optimally be made in "not more than three (3) minutes".

The State Agency is also in the best position to decide what constitutes a nominal number of staff for a State Agency building as this may differ between agencies in terms of how the buildings are utilized. The language "other intended occupants or regular visitors" was added to follow "staff" in subsection 303.3(a)(3) to clarify that the regulatory intent is the priori-

tizing of public buildings housing more than 100 people. Additional language has been added to subsection 303.1(a)(2) that restricts the regulations reach to that of public buildings within New York State. Subsection 303.1(a)(2) has been revised from its original form to allow for Agency discretion and deference in excluding facilities that have limited use or a nominal number of assigned staff.

(2) Deference is given to each individual State Agency to determine what "extraordinary circumstances" exist. Subsection 303.2(i) is written to provide deference to each individual State Agency in identifying circumstances that would be unique to each agency and it is the agency that is in the best position to do so. The language "as well as the joint administration of all aspects of the AED program" has been added to subsection 303.2(d) to reflect the circumstances when more than one agency shares public building space including the situation where a State Agency has insufficient staff to carry out the AED operations.

(3) If the AED/CPR course is a certified course, it will be recognized by the State Agency. Subsection 303.4(e) provides that the operation of an AED is deemed to be within the scope of an employee's employment with the State. Public Officers Law § 17 et seq. provides for the indemnification of an employee by the State of New York when the action arises during the course of an employee's completion of official job duties. Public Officers Law § 17(4) provides for the Attorney General's duty "to defend or indemnify and save harmless" the said employee. Public Health Law § 3000-a and 3000-b also provides for exemption from liability during the course of an employee's use of an AED.

Deference is provided to the State Agency to endeavor in recruiting the suggested number of AED operators set forth in § 303.4(a). The written report requirement in § 303.2(i) can also be utilized to provide an explanation for noncomformance and to provide an alternative implementation plan. The New York State PAD Coordinator can also provide assistance to the State Agency in the recruitment effort. Additionally, a State Agency employee volunteer cannot be required to respond and perform the AED duties unless they are made part of the employee's official job duties.

The statutory authority for the regulation is found within Public Buildings Law § 140(2) mandating that the commissioner of OGS promulgate regulations to equip each public building with an AED. OGS promulgated 9 NYCRR Part 300 et seq. in compliance with Public Health Law " 3000-a and 3000-b. In particular, subsection 303.2(a) states that "[E]ach State Agency shall comply with the provisions of Public Health Law § 3000-b". References to both sections of the Public Health Law are made throughout 9 NYCRR 300 et seq. as statutorily required for consistency between the law and the regulation. Additionally, subsection 303.2(h) provides guidance for State Agency's that already had an AED program in place.

Public Buildings Law § 140(3) states that the moneys necessary to carry out the provisions in § 140 et seq. are to "be supplied from the moneys annually appropriated for the maintenance of the above described institutions." OGS statewide contracts are already available for the purchase of AEDs and each State Agency will be given discretion to determine how it moves forward with the determination of the number of AEDs to purchase.

(4) The AED implementation program responsibility for non-OGS owned or managed buildings is set forth in subsection 303.2(f) and states that the occupying State Agency will be responsible for the installation, management, and operator training for the AEDs. Subsection 303.2(e) has been revised and states in relevant part that "Notwithstanding any other provision of this Part, if a State Agency is located in building space owned or managed by OGS, OGS will be responsible for installing AEDs in the building and for managing AED maintenance and AED operator training." Pursuant to subsection 303.2(b) a State Agency would be responsible for AED implementation in agency-occupied areas of leased office space in a privately owned building. The occupying State Agency will also be responsible for all other provisions including the recruiting of AED personnel. The language "and pay for" was inserted before "a training provider" in subsection 303.4(c) in response to your seventh comment to clarify that training will be provided to employees by the State Agency.

(5) The language "in accordance with applicable collective bargaining agreements and relevant Labor Law provisions" has been added following "AEDs" in subsection 303.4(a) to include the situations in which employees are part of bargaining units assigned to operate AEDs. Additional language of "and the chairs of the subject Agency's labor and management and health and safety committees", which has been added following "Commissioner" has been added to § 307(b)(4) to provide copies of notices, agreements, and confirmations to committee chairs. Additionally, new language has been added to § 303.8(c)(1) as follows, "committees, provided that should such reports contain any personal information such

information will be redacted prior to submission to said labor management and health safety committees; and". However, "and the employee bargaining agent" language requested to be added to include such as a necessary party to form a written collaborative agreement with the EHCP could not be accommodated, as the necessary parties for such an agreement are dictated by the Public Health Law.

Office of Mental Health

EMERGENCY RULE MAKING

Criminal History Record Checks

I.D. No. OMH-12-06-00001-E

Filing No. 256

Filing date: March 1, 2006

Effective date: March 1, 2006

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

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

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

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

Specific reasons underlying the finding of necessity: This regulation is needed to implement OMH's statutory duty to facilitate requests for criminal background record checks, which are required by law as of April 1, 2005. This law is intended to protect mental health clients from risk of abuse or being victims of criminal activity. The regulations are necessary to implement the law as of its effective date so that we can fulfill our statutory imposed duty of ensuring the health, safety, and welfare of clients are not unreasonably placed at risk.

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire May 29, 2006.

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

Regulatory Impact Statement

1. Statutory Authority:

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

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

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

2. Legislative Objectives:

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

3. Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of employees and volunteers in mental health programs are dedicated, compassionate workers who provide quality care, there are cases where criminal activity and patient abuse take place at the very programs that are intended to help persons with mental illness seek recovery. While this proposal will not eliminate all instances of abuse in mental health programs it will eliminate many of the opportunities for individuals with a criminal record to be alone with those most at risk. Pursuant to Chapter 575 of the laws of 2004, this proposal requires providers of mental health services, including those that are licensed, who contract with, or who are otherwise approved by the Office of Mental Health, to request the Office to obtain criminal history information from the Division of Criminal Justice Services concerning each prospective employee or volunteer who will have regular and substantial unsupervised or unrestricted contact with the providers' clients. Prospective licensed operators of mental health services will be required to have a criminal background check through this process as well.

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

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

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

The proposed regulation establishes certain responsibilities of providers in implementing the criminal record review required by Chapter 575. For example, a provider must notify the Office when an individual for

whom a criminal history has been sought is no longer subject to such check. Providers must also ensure that prospective employees or volunteers who will be subject to the criminal background check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division of Criminal Justice Services.

4. Costs:

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

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

5. Local Government Mandates:

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

6. Paperwork:

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

7. Duplication:

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

8. Alternatives:

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

9. Federal Standards:

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

10. Compliance Schedule:

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

Regulatory Flexibility Analysis

1. Effect of Rule:

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

2. Compliance Requirements:

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

3. Professional Services:

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

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impact:

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

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

With LIVE SCAN, a scanner and laptop computer are used rather than an ink pad and a paper card. Rather than rolling his fingers in ink, a person would lay his hand on top of a scanner screen. A real-time fingerprint preview is provided, so the person taking the print would know the quality

of the print is acceptable before it can be sent to the Division of Criminal Justice Services. The information would then be automatically transmitted to the Division, eliminating the need to mail cards anywhere. Thus, the turnaround time for processing criminal history information is significantly less than under the "ink and roll" method.

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

7. Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

1. Effect of Rule:

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

2. Reporting, Recordkeeping, and Other Compliance Requirements:

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

3. Costs:

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

4. Minimizing Adverse Impact:

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

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

With LIVE SCAN, a scanner and laptop computer are used rather than an ink pad and a paper card. Rather than rolling his fingers in ink, a person would lay his hand on top of a scanner screen. A real-time fingerprint

preview is provided, so the person taking the print would know the quality of the print is acceptable before it can be sent to the Division of Criminal Justice Services. The information would then be automatically transmitted to the Division, eliminating the need to mail cards anywhere. Thus, the turnaround time for processing criminal history information is significantly less than under the "ink and roll" method.

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

5. Rural area participation:

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

Job Impact Statement

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

NOTICE OF ADOPTION

Mental Health Counselor, Marriage and Family Therapist, Creative Arts Therapist and Psychoanalyst

I.D. No. OMH-48-05-00002-A

Filing No. 261

Filing date: March 2, 2006

Effective date: March 22, 2006

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

Action taken: Amendment of sections 587.4, 589.4, 589.8, 593.4, 594.4 and 595.4 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b) and 31.04(a)

Subject: Mental health counselors, marriage and family therapist, creative arts therapist and psychoanalyst.

Purpose: To add definitions for new mental health practitioners.

Text or summary was published in the notice of proposed rule making, I.D. No. OMH-48-05-00002-P, Issue of November 30, 2005.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

NOTICE OF ADOPTION

Erie County Motor Vehicle Use Tax

I.D. No. MTV-02-06-00003-A

Filing No. 270

Filing date: March 6, 2006

Effective date: March 6, 2006

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

Action taken: Amendment of Part 29 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii)

Subject: Erie County motor vehicle use tax.

Purpose: To impose an Erie County motor vehicle use tax.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-02-06-00003-P, Issue of January 11, 2006.

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

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

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

**EMERGENCY
RULE MAKING**

**Agreement for Debtor-In-Possession Financing by Mirant Bowl-
line, LLC, et al.**

I.D. No. PSC-12-06-00015-EA

Filing date: March 6, 2006

Effective date: March 6, 2006

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

Action taken: The commission, on Feb. 8, 2006, adopted an order in Case 05-M-1542 approving the financing arrangement for Mirant Bowl-
line, LLC, Mirant Lovett, LLC, Mirant NY-Gen, LLC, and Hudson Valley Gas Corporation.

Statutory authority: Public Service Law, section 69

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

Specific reasons underlying the finding of necessity: Immediate approval of the financing is necessary to operate and maintain the generating facilities and provide safe and reliable service.

Subject: Agreement for debtor-in-possession financing.

Purpose: To secure funding for the maintenance and operation of generating facilities.

Substance of emergency rule: The Commission adopted as an emergency/permanent rule, a financing agreement sought by Mirant Bowling, LLC, Mirant Lovett, LLC, Mirant NY-Gen, LLC, and Hudson Valley Gas Corporation for the maintenance and operation of their generating facilities, subject to the terms and conditions set forth in the order.

The agency adopted the provisions of this emergency rule as a permanent rule, pursuant to section 202(6)(c) of the State Administrative Procedure Act because the purposes of the emergency measure would be frustrated if subsequent notice procedures were required.

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

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

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

(05-M-1542SA2)

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

Issuance of Long Term Debt by Caithness Long Island, LLC

I.D. No. PSC-12-06-00009-P

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

Proposed action: The commission is considering whether to approve or reject, in whole or in part, a petition of Caithness Long Island, LLC to issue and sell securities.

Statutory authority: Public Service Law, section 69

Subject: Issuance of long term securities of up to \$495 million.

Purpose: To permit Caithness Long Island, LLC to issue and sell long term securities to finance the construction of an electric generating facility.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, a petition filed by Caithness Long Island, LLC ("Caithness") requesting approval pursuant to Section 69 of the Public Service Law to issue long term securities of up to \$495 million to finance the construction and subsequent operation of an electric generating facility in the Town of Brookhaven, New York.

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

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

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

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

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

(05-E-0098SA2)

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

Submetering of Electricity by Ellicott Development Company

I.D. No. PSC-12-06-00010-P

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

Proposed action: The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Ellicott Development Company to submeter electricity at 220 Rainbow Blvd., Niagara Falls, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12), (14) and 67(1)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Ellicott Development Company to submeter electricity at 220 Rainbow Blvd., Niagara Falls, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Ellicott Development Company to submeter electricity at 220 Rainbow Boulevard, Niagara Falls, New York.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:

Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(06-E-0221SA1)

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

Value Added Charge by Niagara Mohawk Power Corporation

I.D. No. PSC-12-06-00011-P

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

Proposed action: The Public Service Commission is considering whether to approve, modify or reject tariff leaves filed by Niagara Mohawk Power Corporation regarding the methodology used to calculate the value added charge which is applicable to Service Classification No. 14—Gas Transportation Service for Dual Fuel Electric Generators. The value added charge is intended to provide a standard offer for generators while providing some benefit to gas utilities and their ratepayers and reflects increases or decreases in the wholesale market price of electricity relative to the changes in the cost of gas for electric generation.

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

Subject: A proposed methodology to calculate the value added charge which is applicable to non-core transportation service for electric generators.

Purpose: To determine whether to approve modify or reject a proposed methodology to calculate the value added charge applicable to non-core transportation service for electric generators.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject, tariff leaves filed by Niagara Mohawk Power Corporation regarding the methodology used to calculate the value added charge which is applicable to Service Classification No. 14 — Gas Transportation Service for Dual Fuel Electric Generators. The value added charge is intended to provide a standard offer for generators while providing some benefit to gas utilities and their ratepayers and reflects increases or decreases in the wholesale market price of electricity relative to the changes in the cost of gas for electric generation.

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

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

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

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

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

(03-G-1392SA3)

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

Gas Rates by Corning Natural Gas Corporation

I.D. No. PSC-12-06-00012-P

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

Proposed action: The Public Service Commission is considering whether to allow Corning Natural Gas Corporation to recover from customers up to

approximately \$346,653 of additional gas costs, plus interest of an uncertain amount, associated with lost and unaccounted for gas for the year ending Aug. 31, 2005. Whether or not such costs should be recovered, the commission is also considering the reasonableness of the company's current gas cost adjustment clause revenues and whether and, if so, when they should be adjusted.

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

Subject: Gas rates.

Purpose: To determine whether or not there are good reasons why the company is responsible for and should absorb the cost of gas losses in an historic period that were nearly double the allowed level and to determine if current gas cost adjustment revenues are at a reasonable level and, if not, what to do about it.

Substance of proposed rule: In a December 27, 2005 Commission order issued in Case 05-G-1155, Conning Natural Gas Corporation (the Company) was allowed, among other things, to recover from customers approximately \$403,254 of gas costs the Company had claimed were undercollected in the year ending August 31, 2005. The Company was simultaneously required to absorb, for the time being, approximately \$346,653 of other uncollected gas costs because they were associated with gas losses at a rate nearly double the one previously allowed by the Commission. The Commission's order also provided, however, that the Company could address such costs again in Case 05-G-1359, provided this would be done in a manner that affords other interested parties a reasonable opportunity to investigate any remaining issues and develop an adequate record for its consideration.

The Company has until March 17, 2006 to make a filing allowed by the December 27, 2005 order. The Company also has until the same date to report on whether it is overcollecting or undercollecting gas costs in the year ending August 31, 2006 to date, and to explain whether interim surcharges or refunds should be instituted to prevent any large overcollection or undercollection balances on August 31, 2006.

The Commission may take any rate or other actions warranted by these Company filings, taking into account any related submissions by active parties in Case 05-G-1359 and comments timely submitted by members of the public pursuant to this notice.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-G1359SA2)

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

Exchange of Retail Access Data

I.D. No. PSC-12-06-00013-P

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

Proposed action: The New York State Public Service Commission is considering modifications in supplement 1 to the technical operating profile document which contains the guidelines and specifications for phase II and III testing of electronic data interchange (EDI) systems. These modifications would recognize that phase III test schedules may be established on an "as needed" basis for one or more test applicants rather than requiring ESCOs to queue up in "batches". Further, the time between receipt of an ESCO test application and the start of testing would be reduced from 60 to 45 days and DPS staff would be authorized to direct a resolution of test scheduling disputes. To enable DPS to adequately monitor established test schedules, utilities would be required to file monthly phase III testing reports.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To review the TS814 enrollment request and response standard.

Substance of proposed rule: The guidelines that govern utility or ESCO testing of Electronic Data Interchange (EDI) systems are documented in the NY EDI Technical Operating Profile (TOP) document adopted in Opinion and Order No. 01-03, issued July 23, 2001 and in various TOP Supplements adopted in subsequent orders. Version 1.0 of TOP Supplement 1, adopted in an order issued on November 8, 2001, contains procedures for conducting Phase II (Utility Readiness) and Phase III (ESCO Readiness) EDI testing including test scenarios for the specific Transaction Standards adopted by the Commission in the July 23, 2001 order. As subsequent Transaction Standards were approved the corresponding test scenarios for the new standards were defined in new TOP supplements.

Comments are requested on proposed modifications to sections 1 through V of version 1.1 of TOP Supplement 1. These modifications address complaints from various ESCO test applicants that Phase III EDI testing has become a barrier to market entry in some utility service territories. The proposed changes in Supplement 1 would recognize that utilities may establish Phase III test schedules on an "as needed" basis for one or more test applicants rather than waiting for scheduled batch testing. The time between receipt of an ESCO's test application and the start of Phase III testing would be reduced from 60 to 45 days and DPS Staff would be authorized to direct a resolution of test scheduling disputes. To enable DPS to adequately monitor Phase III test schedules, utilities would now be required to submit monthly Phase III Testing Reports. Since March 2004 utilities have been submitting Phase III Testing Reports voluntarily on a sporadic basis.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (98-M-0667SA56)

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

Transfer of Water Plant Assets between the Town of Woodbury, Orange County and Ridge Road Water Co., Inc.

I.D. No. PSC-12-06-00014-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a joint petition filed by the Town of Woodbury, Orange County, and Ridge Road Water Co., Inc. requesting permission for the Town of Woodbury, Orange County to acquire the water plant assets of Ridge Road Water Co., Inc.

Statutory authority: Public Service Law, section 89-h

Subject: Transfer of water plant assets.

Purpose: To consider the transfer.

Substance of proposed rule: On February 15, 2006, the Town of Woodbury, Orange County (Town), and Ridge Road Water Co., Inc. (Ridge) filed a joint petition requesting permission to transfer the water plant assets of Ridge to the Town. The Town would acquire the water plant assets in exchange for payment of outstanding real property taxes, estimated to be approximately \$80,000, owed by Ridge. Ridge currently provides water service to 170 residential customers in the Town of Woodbury, Orange County. The Commission may approve or reject, in whole or in part, or modify the petition.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:

Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(06-W-0197SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

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

I.D. No. RWB-12-06-00004-E

Filing No. 262

Filing date: March 3, 2006

Effective date: March 3, 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4043.11(b) Establishes penalties for excess TCO₂ violations in a thoroughbred race horse ranging from a 60-day license suspension and \$1,000 fine to a maximum 60-day license suspension with a \$5,000 fine with a possible one-year board-imposed license suspension. Includes provision for purse redistribution in case of a positive excess TCO₂ test.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire May 31, 2006.

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

Regulatory Impact Statement

(a) Statutory authority. Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305, and 902.

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

(c) Needs and benefits. This rule making is necessary to assure the public's confidence and continue the high degree of integrity in racing at the pari-mutuel betting tracks. Through pre-race and post-race testing, this rule making will detect and deter the administration of alkali agents to thoroughbred racehorses and harness racehorses for the purpose of affecting the performance of such horse during a pari-mutuel wagering race.

The administration of alkali agents into a racehorse is commonly known as "milkshaking," where a person administers a mixture of sodium bicarbonate, sugar and water to a horse prior to a race mitigate the effects of lactic acid on the horse's muscles during the race, thereby gaining an advantage. Lactic acid is a naturally occurring byproduct of intense muscular exercise in mammals, and the accumulation of lactic acid in such muscles causes fatigue. Some people associated with racehorses believe that the administration of an alkaline substance, such as bicarbonate of soda, can neutralize the effect of lactic acid in a horse's muscles. This has

resulted in the use of alkalizing agents, or "milkshakes" which are administered to a racehorse in an attempt to alter the performance of the horse. Based on this belief, people have administered milkshakes to racehorses on the day of a race with the intent to gain a racing advantage.

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

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

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

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

(d) Costs.

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

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

(iii) The Board cannot fully provide a statement of costs the trainers for pre-race guarded quarantine because the actual cost of establishing a pre-race guarded quarantine varies greatly from location to location in New York State, and the physical characteristics of the buildings within which a horse of quarantine. All horses that race at a New York State thoroughbred or harness racetrack are currently afforded stable space for free, so the only added cost that can be expected will be the cost of a guard. A pre-race guarded quarantine may require one guard per horse, or one guard for many horses, depending upon the access points that need to be controlled for an effective guarded quarantine. The Board's rule making requires that the subject horse is kept in an area where access to the subject horse is restricted to authorized licensed trainers, owners and veterinarians as submitted by the owner, that guards maintain a record of all licensed persons who have had access to the horse while in guarded quarantine, along with the time and purpose of the visit. In addition to the distinctive limitations that the guarded quarantine barn will have upon the cost, the wages of a guard varies depending upon the racetrack itself. According to track representatives, the hourly cost of guard may range from \$7 per hour up to \$20 per hour, depending on the individual racetrack, experience required for the specific duties (e.g. a stable guard who is responsible for surveillance only compared to a quarantine supervisor who is responsible for also identifying illegal paraphernalia, treatments or procedures) and local pay scale. The minimum time that a horse is to be quarantined is six hours, and the maximum time for quarantine is 72 hours.

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

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

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

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

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

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

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

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

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