

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Ammonium Nitrate and Regulated Ammonium Nitrate Materials

**I.D. No.** AAM-22-06-00003-E

**Filing No.** 572

**Filing date:** May 11, 2006

**Effective date:** May 11, 2006

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

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

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

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

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

sive chemical used to make bombs such as those used in the 1993 World Trade Center and 1995 Oklahoma City bombings.

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

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

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

**Purpose:** To implement L. 2005, ch. 620 relating to ammonium nitrate and regulated ammonium nitrate materials.

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

#### Part 154

#### AMMONIUM NITRATE SECURITY

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

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

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

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

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

(See Appendix in this issue.)

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

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

154.4 *Records.* (a) Persons and entities required to be registered shall make and maintain, for a minimum of two years, a record in the following

format for every sale of ammonium nitrate and regulated ammonium nitrate materials:

(See Appendix in this issue.)

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire August 8, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

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

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

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

##### 2. Legislative objectives:

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

##### 3. Needs and benefits:

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

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

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

##### 4. Costs:

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

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

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

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

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

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

###### (c) Source:

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

##### 5. Local government mandates:

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

##### 6. Paperwork:

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

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

##### 7. Duplication:

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

##### 8. Alternatives:

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

##### 9. Federal standards:

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

##### 10. Compliance schedule:

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

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

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

#### **Regulatory Flexibility Analysis**

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

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

##### 2. Compliance requirements:

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

##### 3. Professional services:

None.

##### 4. Compliance costs:

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

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

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

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

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

##### 6. Minimizing adverse impact:

The rule is designed to minimize any adverse economic impact the rule may have on small businesses by closely following the requirements of

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

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

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

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

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

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

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

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

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

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

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

##### 3. Costs:

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

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

It is anticipated that the cost of the security measures that must be taken by those required to register will vary with the size of the business and the extent of the security measures currently being taken. If a seller does not have its premises secured to provide reasonable protection against vandal-

ism, theft or other unauthorized access, it could cost several thousand dollars, depending upon the size of the premises, to fence or otherwise enclose or lock storage facilities when they are unattended. Daily inspection for signs of attempted entry, vandalism and structural integrity and an ongoing process of inventory control are anticipated to be minimal and to already be part of the business management practices of most sellers.

#### 4. Minimizing adverse impact:

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

#### 5. Rural area participation:

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

#### Job Impact Statement

##### 1. Nature of impact:

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

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

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

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

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

##### 4. Minimizing adverse impact:

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

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

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

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

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

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

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

#### Text of emergency rule:

##### PART 404

##### BUDGET PLANNERS/DELEGATION OF CERTAIN ACTIVITIES

##### § 404.1 Definitions.

For purposes of this Part:

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

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

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

(d) The term "non-licensee service provider" shall mean an entity that holds, or has access to, or can effectuate possession of, by any means, the monies of a licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include enti-

## Banking Department

### EMERGENCY RULE MAKING

#### Regulation of Budget Planning Activities

**I.D. No.** BNK-22-06-00005-E

**Filing No.** 577

**Filing date:** May 15, 2006

**Effective date:** May 17, 2006

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

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

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

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

**Specific reasons underlying the finding of necessity:** Chapter 629 of the Laws of 2002, which became effective on April 7, 2003, made substantial changes to the conduct of the business of budget planning in this state. Amendments made to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law necessitated the emergency adoption of Part 402 of the Superintendent's Regulations on that date.

ties that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

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

§ 404.2 Explanatory note.

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

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

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

§ 404.3 Servicing By a Licensee Service Provider.

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

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

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

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

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

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

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

(d) A licensee shall not use a licensee service provider until the licensee receives written notice from the Superintendent confirming that the Superintendent has received a copy of the licensee service provider's bond or asset deposit agreement, if required under Section 404.3(c) of this Part.

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

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

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

§ 404.4 Servicing By A Non-Licensee Service Provider.

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

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

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

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

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

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

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

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

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

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

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

tendent confirming that the Superintendent has received all such information.

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

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

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

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

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

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

#### § 404.6 Compliance.

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

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

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

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

##### 2. Legislative Objective:

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

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

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

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

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

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

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

##### 3. Needs and Benefits:

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

technology, staffing, and budgetary resources to provide the critical services performed by the third party entities.

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

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

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

#### 4. Costs:

(a) Costs to State Government: None.

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

(b) Costs to Local Government: None.

(c) Costs to Regulated Entities:

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

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

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

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

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

#### 5. Local Government Mandates:

The proposed rule imposes no burdens on local governments.

#### 6. Paperwork:

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

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

#### 7. Duplication:

None.

#### 8. Alternatives:

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

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

(b) Do not propose the rule.

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

Under these circumstances, the Banking Department believes that if the rule was not proposed, licensed budget planners would have to be prohibited from using third party entities in distributing Debtor funds. This could be severely harmful to the budget planning industry, particularly since, the inability to use the third party entities may prevent the licensees from continuing to operate their businesses. Moreover, the inability to use the third party entities may prevent many prospective licensees from seeking a budget planning license in New York because they may not be able to operate without the services of the third party entities. Accordingly, the

proposed rule is needed not only to provide consumer protection to Debtors as mandated by Section 580(4) of the Banking Law, but also to prevent putting certain current licensees out of business, and to enable certain prospective licensees the opportunity to conduct the business of budget planning in New York.

9. Federal Standards:

None.

10. Compliance Schedule:

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

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

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

licensees business that it is servicing. If the licensee elects to place assets on deposit, no bond/asset deposit requirements are placed on the third party entity.

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

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

#### **Job Impact Statement**

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

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

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

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

Accordingly, based on the rule's requirements, it will have no impact on jobs in New York State.

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## Department of Correctional Services

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### NOTICE OF ADOPTION

#### **Visiting in Special Housing Units**

**I.D. No.** COR-11-06-00008-A

**Filing No.** 573

**Filing date:** May 11, 2006

**Effective date:** May 31, 2006

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

**Action taken:** Amendment of section 302.2(i)(1)(ii) of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112, 137(2) and 146

**Subject:** Visiting in special housing units.

**Purpose:** To clarify special precautions for visiting in special housing units.

**Text or summary was published** in the notice of propose rule making, I.D. No. COR-11-06-00008-P, Issue of March 15, 2006.

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

**Text of 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

**Assessment of Public Comment**

The agency received no public comment.

## Education Department

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

#### Mandatory Continuing Education Requirements for Landscape Architects

**I.D. No.** EDU-22-06-00030-P

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

**Proposed action:** Addition of section 79-1.5 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 212(3); 6504 (not subdivided); 6507(2)(a); and 7328(1), (2), (3), (4), (5) and (6)

**Subject:** Mandatory continuing education requirements for landscape architects.

**Purpose:** To establish continuing education requirements that licensed landscape architects must complete to be registered to practice this profession in New York State and requirements for the approval of sponsors of such continuing education.

**Substance of proposed rule (Full text is posted at the following State website: [www.op.nysed.gov](http://www.op.nysed.gov)):** The Commissioner of Education proposes to add section 79-1.5 of the Regulations of the Commissioner of Education, relating to mandatory continuing education requirements for landscape architects. The following is a summary of the substance of the proposed regulation:

A new section 79-1.5 is added to the Regulations of the Commissioner of Education, establishing continuing education requirements for licensed landscape architects.

Subdivision (a) of section 79-1.5 defines the term acceptable accrediting agency.

Subdivision (b) of section 79-1.5 cites the applicability of the continuing education requirement, namely that, effective January 1, 2007, each licensed landscape architect required to register with the department to practice in New York State shall comply with the mandatory continuing education requirements prescribed in the section. This subdivision also provides for exemptions and adjustments to the requirement.

Exemptions are allowed for those licensed landscape architects who are: (a) in the triennial registration period during which they are first licensed to practice landscape architecture in New York State, except those first licensed pursuant to an endorsement of a license of another jurisdiction; and (b) licensees who are not engaged in the practice of landscape architecture in New York State, as evidenced by not being registered to practice in New York State, except as otherwise provided.

An adjustment to the requirement is permitted for the licensee who documents good cause that prevents compliance, such as poor health certified by a physician, or a specific physical or mental disability certified by an appropriate health care professional, or extended active duty with the Armed Forces of the United States, or other good cause beyond the licensee's control which in the judgment of the department makes it impossible for the licensee to comply with the continuing education requirements in a timely manner.

Paragraph (1) of subdivision (c) of section 79-1.5 sets forth the general mandatory continuing education requirement for landscape architects. Subparagraph (i) establishes the requirement: 36 hours of continuing education acceptable to the Department for each triennial registration period, provided that at least 18 hours of such continuing education shall be in courses of learning, and no more than 18 hours of such continuing educa-

tion shall be in other educational activities. A minimum of 24 hours of such continuing education must be in the areas of health, safety, and welfare. Licensees whose first registration following January 1, 2007 is less than three years from that date shall be required to complete continuing education hours on a prorated basis at the rate of one hour of acceptable continuing education per month beginning January 1, 2007 up to the first registration date thereafter. Subparagraph (ii) sets forth the continuing education requirement during each registration period of less than three years.

Paragraph (2) of subdivision (c) defines continuing education that is acceptable to the State Education Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of this paragraph and be the types of learning activities prescribed in subparagraph (ii) of this paragraph.

Clause (a) of subparagraph (i) of paragraph (2) prescribes that acceptable continuing education shall contribute to professional practice in landscape architecture and be in one or more curricular areas listed, relating to the health, safety, and welfare of the public.

Clause (b) of subparagraph (i) of paragraph (2) prescribes that acceptable continuing education shall also be in other topics which contribute to professional practice in landscape architecture, as the practice is defined in section 7321 of the Education Law.

Subparagraph (ii) of paragraph (3) prescribes that acceptable continuing education shall be the types of learning activities prescribed in this subparagraph and be subject to the limitations prescribed in the subparagraph. The subparagraph specifies acceptable learning activities.

Subdivision (d) of section 79-1.5 provides that at each reregistration, the licensed landscape architect must certify to the Department compliance with or exemption or adjustment to the continuing education requirement.

Subdivision (e) of section 79-1.5 prescribes the requirement for a licensee returning to the practice of landscape architecture after a lapse in practice, defined as not being registered to practice in New York State.

Subdivision (f) of section 79-1.5 prescribes the requirement for the issuance of a conditional registration to a landscape architect who attests to or admits to noncompliance with the continuing education requirement.

Subdivision (g) of section 79-1.5 requires the licensed landscape architect to maintain and ensure access by the Department to records of completed continuing education as specified in the subdivision.

Subdivision (h) of section 79-1.5 provides for the measurement of continuing education study, specifically, that 50 minutes of study equal one hour of continuing education credit and, for credit bearing college or university courses, each semester-hour of credit equals 15 continuing education hours of credit and each quarter-hour of credit equals 10 continuing education hours of credit.

Subdivision (i) of section 79-1.5 prescribes sponsor approval requirements. Paragraph (1) of subdivision (i) states that sponsors of continuing education to licensed landscape architects in the form of courses of learning or self-study programs shall meet the requirements of either paragraphs (2) or (3) of this subdivision.

Paragraph (2) of subdivision (i) provides that the Department will deem approved as a sponsor of continuing education to licensed landscape architects in the form of courses of learning or self-study programs a sponsor approved by organizations prescribed in the paragraph, or a postsecondary institution that has authority to offer programs that are registered pursuant to Part 52 of this Title or authority to offer equivalent programs that are accredited by an acceptable accrediting agency.

Paragraph (3) of subdivision (i) sets the standards for Department review of sponsors to offer continuing education to licensed landscape architects in the form of courses of learning or self-study programs.

Subdivision (j) of section 79-1.5 sets the fees for mandatory continuing education, conditional registration, and the fee for an organization desiring to offer continuing education to licensed landscape architects in the form of courses of learning or self-study programs for a three-year term based upon a Department review.

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

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

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

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

**Regulatory Impact Statement**

**1. STATUTORY AUTHORITY:**

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

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department to determine and set fees for certifications and permits.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

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

Paragraph (a) of subdivision (1) of section 7328 of the Education Law, as added by Chapter 683 of the Laws of 2005, requires a licensed landscape architect to complete mandatory continuing education as a condition for registration to practice in New York State and provides an exception to licensees with a conditional registration certificate.

Paragraph (b) of subdivision (1) of section 7328 of the Education Law allows landscape architects to be exempt from the mandatory continuing education requirement for the triennial registration period during which they are first licensed. It also authorizes the State Education Department to adjust the requirement in certain cases.

Paragraph (c) of subdivision (1) of section 7328 of the Education Law provides an exemption from the continuing education requirement for licensees not engaged in the practice of landscape architecture and directs the State Education Department to establish continuing education requirements for licensees reentering the profession.

Subdivision (2) of section 7328 of the Education Law provides that a landscape architect must complete the mandatory continuing education requirements to be registered to practice in New York State, and establishes the continuing education hour requirement and a proration formula for certain licensees.

Subdivision (3) of section 7328 of the Education Law authorizes the State Education Department to issue conditional registrations for licensed landscape architects who do not meet the regular continuing education requirements, to establish requirements for such licensees under conditional registration, and to charge a fee for such conditional registration.

Subdivision (4) of section 7328 of the Education Law defines acceptable continuing education as courses of learning and educational activities which contribute to professional practice in landscape architecture and which meet standards prescribed in the Regulations of the Commissioner of Education.

Subdivision (5) of section 7328 of the Education Law requires landscape architects to maintain adequate documentation of compliance with the continuing education requirements and provide such documentation at the request of the State Education Department.

Subdivision (6) of section 7328 of the Education Law authorizes the State Education Department to charge landscape architects a mandatory continuing education fee.

**2. LEGISLATIVE OBJECTIVES:**

The proposed regulation carries out the intent of the aforementioned statute in that it will, as directed by statute, establish standards relating to mandatory continuing education for landscape architects. Specifically, the regulations would establish appropriate standards for what constitutes acceptable continuing education, educational requirements when there is a lapse in practice, requirements for licensees under conditional registration, recordkeeping requirements applicable to licensees, and standards for the approval of sponsors of continuing education to licensed landscape architects.

**3. NEEDS AND BENEFITS:**

The purpose of the proposed regulation is to establish continuing education requirements that licensed landscape architects must complete to be registered to practice this profession in New York State and requirements for the approval of sponsors of such continuing education. The proposed regulation is needed to clarify and implement the requirements of section 7328 of the Education Law, as added by Chapter 683 of the Laws of 2005.

As required by statute, the proposed regulation is also needed to establish continuing education requirements when there is a lapse in practice, requirements for licensees under conditional registration, and standards for the approval of sponsors of continuing education to licensed landscape architects. In addition, the regulation is needed to establish a fee for the

review by the State Education Department of sponsors of courses of learning or educational activities in order to defray the cost of such review.

**4. COSTS:**

(a) Costs to State government. The proposed regulation implements statutory requirements and establishes standards as directed by statute. The regulation will not impose any additional cost on State government, over and above the cost imposed by the statutory requirements.

(b) Costs to local government: None.

(c) Cost to private regulated parties. The proposed regulation does not impose additional costs on licensed landscape architects beyond those imposed by statute. Statutory provisions impose a mandatory continuing education fee of \$45 for landscape architects at each triennial registration and require that landscape architects complete a prescribed number of hours of acceptable continuing education. The proposed regulation establishes a \$900 fee for sponsors reviewed by the State Education Department for approval to offer continuing education in the form of courses of learning or educational activities for a three-year term.

(d) Cost to the regulatory agency: As stated above in Costs to State government, the proposed amendment does not impose additional costs on the State Education Department beyond those imposed by statute.

**5. LOCAL GOVERNMENT MANDATES:**

The proposed regulation implements the requirements of section 7328 of the Education Law relating to continuing education requirements for landscape architects. It does not impose any program, service, duty, or responsibility upon local governments.

**6. PAPERWORK:**

The proposed regulation requires each licensee to maintain or ensure access to, for six years, a record of completed continuing education which includes: the type of learning activity, title of the course if a course, subject of the continuing education, the number of hours completed, the sponsor's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, and the date and location of the continuing education. In addition, the regulation requires sponsors of continuing education to landscape architects, reviewed for approval by the State Education Department, to maintain a record for at least six years which includes: the name and curriculum vitae of the faculty, a record of attendance of licensed landscape architects in the course if a course, a record of participation of a licensed landscape architect in a self-study program if a self-study program, an outline of the course or program, date and location of the course or program, and the number of hours for completion of the course or program.

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

There are no viable alternatives to the proposed amendment, and none were considered. The proposed regulation implements statutory requirements.

**9. FEDERAL STANDARDS:**

There are no Federal standards for the continuing education of licensed landscape architects.

**10. COMPLIANCE SCHEDULE:**

The proposed regulation implements and clarifies statutory continuing education requirements for landscape architects. Landscape architects must comply with the continuing education requirements on the effective date of the authorizing statute, January 1, 2007. The statute and implementing regulation establish a phase-in period in which the licensee will be required to complete less than the full 36 hours of continuing education based upon a proration formula. No additional period of time is necessary to enable regulated parties to comply.

**Regulatory Flexibility Analysis**

(a) Small Businesses:

**1. EFFECT OF RULE:**

The proposed rule relates to mandatory continuing education for licensed landscape architects. This continuing education will be provided by sponsors approved by the State Education Department, some of which are small businesses. The State Education Department does not know the exact number of sponsors that will be small businesses, but estimates that number using the methodology below.

Individuals licensed in public accountancy have been subject to mandatory continuing education requirements since 1985, and sponsors of such continuing education must be approved by the State Education Department, after a State Education Department review. In accounting, about 800 sponsors of continuing education are approved by the State Education

Department. There are about 3.16 percent as many licensed landscape architects (1,165) as individuals licensed in public accountancy (36,820) in this State. Using that percentage, we calculate that there will be a need for about 25 sponsors of continuing education to licensed landscape architects. Of these, based upon a survey of the sponsors in accounting, the Department estimates that about 75 percent or 19 will be small businesses.

The proposed regulation has a provision that permits a sponsor to be deemed approved by the State Education Department, if it is approved by another prescribed organization that approves continuing education for landscape architects. For such sponsors there are no compliance requirements in the regulation. The Department expects that almost all 19 sponsor/small businesses will be deemed approved by virtue of their being approved by another organization that approves continuing education for landscape architects. Based upon the Department's experience in other licensed professions, which have similar sponsor approval procedures (architecture, engineering) only about 5 sponsors will seek approval through a State Education Department review, of which only about 4 will be small businesses (.75 x 5).

#### 2. COMPLIANCE REQUIREMENTS:

The regulation contains no compliance requirements for sponsors that are deemed approved through the approval of other organizations that approve continuing education for landscape architects.

There are compliance requirements for sponsors seeking approval through a State Education Department review. Every three years, organizations desiring to offer continuing education to licensed landscape architects based upon a review by the State Education Department must submit an application for advance approval as a sponsor at least 90 days prior to the date for the commencement of the continuing education. The applicants must document in the application: curricular areas of offerings, its organizational status as an educational entity or expertise in the professional area, the qualifications of course instructors, method for assessing the learning of participants, and recordkeeping procedures. Applicants would be approved to offer continuing education to licensed landscape architects for a three-year term.

#### 3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses to comply with the proposed regulation. The regular staff of small businesses will be able to complete the application needed for the review by the State Education Department.

#### 4. COMPLIANCE COSTS:

An organization seeking approval as a sponsor of continuing education to licensed landscape architects through a State Education Department review would be required to pay the State Education Department a fee of \$900 to defray the cost of its review. Such fee would be paid once every three years, upon submission of the organization's application. Therefore, the annualized cost is \$300.

The Department estimates that it would require a staff member to spend about eight hours to complete the application. Based on an hourly rate of \$37 per hour (including fringe benefits), we estimate that the cost of completing the application to be \$296. An application would have to be completed once every three years. Therefore, the annualized cost of completing the application is estimated to be \$98.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation will not impose any technological requirements on regulated parties. See above Compliance Costs for the economic impact of the regulation.

#### 6. MINIMIZING ADVERSE IMPACT:

The Department believes that the standards for sponsor review by the State Education Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

#### 7. SMALL BUSINESS PARTICIPATION:

Members of the State Board for Landscape Architecture, many of whom have experience in a small business environment, provided input in the development of the proposed regulation. In addition, staff of the State Education Department have worked with the statewide and national professional associations and councils that represent landscape architects by disseminating information concerning the proposed regulation to these organizations and seeking their input. These organizations include members who own and operate small businesses.

##### (b) Local Governments:

The proposed regulation establishes continuing education requirements for landscape architects and standards for sponsors of such continuing education. It will not impose any reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact on local gov-

ernments. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

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

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed regulation will apply to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. All 1,165 licensed landscape architects who are registered to practice in New York would be subject to the requirements of the proposed regulation. Of these, 174 reported that their permanent address of record is in a rural county of the State.

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

As required by section 7328 of the Education Law, effective January 1, 2007, the proposed regulation will require landscape architects, including those that reside or work in rural areas, to complete a prescribed number of hours of acceptable continuing education to be registered to practice in New York State. The proposed regulation prescribes the learning activities that may meet the continuing education requirement and the subjects for that continuing education. The regulation requires licensees to certify that they have met the requirement upon applying for renewal of registration to practice in New York State. The proposed regulation requires each licensee to maintain prescribed information concerning completed acceptable continuing education.

The proposed regulation also establishes standards for the Department's review of sponsors desiring to offer acceptable continuing education in the form of courses of learning or self-study programs, including sponsors that may be located in rural areas. The regulation requires such sponsors to maintain specified records related to the offering of the courses of learning and self-study programs for a six-year period from the date of completion of the coursework.

The proposed regulation does not impose a need for professional services other than educational services to meet the continuing education requirements.

##### 3. COSTS:

The proposed regulation does not impose additional costs on licensed landscape architects beyond the costs imposed by statute. However, the regulation does establish a fee of \$900 for entities reviewed by the State Education Department to become an approved sponsor of continuing education to licensed landscape architects for a three-year term.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed regulation implements and clarifies the continuing education requirements for landscape architects found in section 7328 of the Education Law. The statutory requirements do not make exceptions for individuals who live or work in rural areas. The Department has determined that the proposed regulation's requirements should apply to all licensed landscape architects, regardless of their geographic location, to help ensure continuing competency across the State. The Department has also determined that uniform standards for the Department's review of sponsors are necessary to ensure quality offerings in all parts of the State. Because of the nature of the proposed regulation, alternative approaches for rural areas were not considered.

##### 5. RURAL AREA PARTICIPATION:

Comments on the proposed regulation were solicited from statewide organizations representing all parties having an interest in the practice of landscape architecture. Included in this group were the State Board for Landscape Architecture and professional associations representing the landscape architecture profession. These groups have members who live or work in rural areas. Also, the Department solicited comment from all colleges and universities in the State that offer landscape architecture programs, including those located in rural areas. Each organization has been provided notice of the proposed rule making and an opportunity to comment.

#### **Job Impact Statement**

Section 7328 of the Education Law, as added by Chapter 683 of the Laws of 2005, establishes mandatory continuing education requirements for licensed landscape architects registered to practice in New York State. The proposed regulation establishes standards for acceptable continuing education to meet the statutory requirement.

The proposed regulation implements specific statutory requirements and directives. Section 7328 of the Education Law establishes the requirement that licensed landscape architects must complete a prescribed number of hours of continuing education in order to be registered to practice in this

State. Therefore, any impact on jobs and employment opportunities by establishing a continuing education requirement for landscape architects is attributable to the statutory requirement, not the proposed rule, which simply establishes consistent standards as directed by statute.

In any event, a similar statutory continuing education requirement was established for individuals licensed in architecture in 2000, and the Department is not aware that the requirement significantly affected jobs or employment opportunities in that profession. In addition, the statutory requirement should increase job and employment opportunities for instructors and administrators who will be needed to provide the continuing education instruction to licensees.

Because it is evident from the nature of the proposed regulation, which implements specific statutory requirements and directives, that the proposed rule will have no impact on jobs or employment opportunities attributable to its adoption or only a positive impact, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Requirements for Certification as a Nurse Practitioner

**I.D. No.** EDU-11-06-00004-RP

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

**Revised action:** Amendment of section 64.4 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 6504 (not subdivided); 6506(1); 6507(2)(a) and (3)(a); 6902(3)(a); and 6910(1)(c) and (5)

**Subject:** Requirements for certification as a nurse practitioner.

**Purpose:** To strengthen the education requirements for certified nurse practitioners to be certified in an additional specialty area of practice.

**Text of revised rule:** 1. Subparagraph (iii) of paragraph (2) of subdivision (c) of section 64.4 of the Regulations of the Commissioner of Education is amended, effective August 17, 2006, as follows:

(iii) satisfactory completion of a nationally recognized examination acceptable for licensure in New York State as a [physician's] *physician* assistant or [for certification] as a [nurse] midwife.

2. Subdivision (d) of section 64.4 of the Regulations of the Commissioner of Education is amended effective August 17, 2006 as follows:

(d) Alternative criteria for certification in additional specialty areas of practice. (1) *The alternative requirements of this subdivision are only available to applicants who apply to the department for certification in the additional specialty area of practice on or before September 15, 2006 and who meet all requirements for certification under this subdivision by September 15, 2007. These alternative requirements for certification shall not be available to applicants who do not meet these conditions and shall not be available to applicants who apply for certification after September 15, 2006.*

[(1)] (2) . . .

[(2)] (3) . . .

3. Subdivision (f) of section 64.4 of the Regulations of the Commissioner of Education is relettered subdivision (e), effective August 17, 2006.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 64.4(d).

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

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

**Public comment will be received until:** 30 days after publication of this notice.

### Revised Regulatory Impact Statement

Since publication in the *State Register* of the Notice of Proposed Rule Making on March 15, 2006, the proposed rule has been substantially revised as follows:

Subdivision (d) of section 64.4 of the Regulations of the Commissioner of Education is substantially revised to extend the date by which a certified nurse practitioner may apply for an additional specialty area of practice

under alternative criteria from August 15, 2006 to September 15, 2006, and extend the date by which they must meet all of the alternative requirements from September 15, 2006 to September 15, 2007. This change was made as a result of discussions between staff of the State Education Department and an organization representing nurse practitioners. The revision is needed to enable nurse practitioners who apply for certification in an additional specialty area of practice under the alternative criteria by September 15, 2006, additional time to meet the alternative criteria. It will enable nurse practitioners who are in the process of meeting the alternative requirements the opportunity to complete them by September 15, 2007 and allow them to meet deficiencies identified by the Department during its review.

The aforementioned revisions to the proposed rule require the following changes to the "Compliance Schedule" section of the Regulatory Impact Statement:

#### 10. COMPLIANCE SCHEDULE:

The proposed amendment contains a provision that phases out the alternative requirements. Certified nurse practitioners who apply for certification in an additional specialty area may meet the alternative requirements, provided that they apply to the Department for certification by September 15, 2006 and meet all of the alternative requirements by September 15, 2007.

#### Revised Regulatory Flexibility Analysis

Since publication in the *State Register* of the Notice of Proposed Rule Making on March 15, 2006, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The proposed amendment, as revised, makes a change in the certification requirements affecting individual certified nurse practitioners who seek certification in an additional specialty area of practice. It would phase out alternative requirements for such additional certification and require candidates to complete the standard requirements, including the completion of a master's degree or advanced certificate program in the specialty area. The proposed amendment, as revised, concerns the education requirements that individuals who are certified nurse practitioners must meet to obtain certification in an additional specialty area of practice. The amendment, as revised, does not regulate small businesses or local governments. It does not impose any reporting, recordkeeping or other compliance requirements on small business or local governments, or have an adverse economic effect on them.

Because it is evident from the nature of the proposed amendment, as revised, that it does not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

#### Revised Rural Area Flexibility Analysis

Since publication in the *State Register* of the Notice of Proposed Rule Making on March 15, 2006, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement filed herewith. The revisions to the rule do not necessitate any changes to the Rural Area Flexibility Analysis.

#### Revised Job Impact Statement

Since publication in the *State Register* of the Notice of Proposed Rule Making on March 15, 2006, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The purpose of the proposed amendment is to strengthen the education requirements that certified nurse practitioners must meet to be certified in an additional specialty area of practice. The amendment, as revised, would phase out alternative criteria for certification in an additional specialty area and require candidates to complete the standard requirements for certification, which include completion of a registered master's degree or advanced certificate program in the area of specialty, or its equivalent; or certification as a nurse practitioner in the specialty area by a national certifying body acceptable to the Department.

This amendment, as revised, concerns the education that nurse practitioners need to complete to qualify for certification in an additional specialty area of practice. The amendment does not affect the number of jobs or the number of employment opportunities in this field, or any other field. Because it is evident from the nature of the proposed amendment, as revised, that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

#### Assessment of Public Comment

The agency received no public comment.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Clean Water State Revolving Fund Program

**I.D. No.** ENV-07-06-00021-A

**Filing No.** 580

**Filing date:** May 16, 2006

**Effective date:** May 31, 2006

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

**Action taken:** Amendment of Part 649 of Title 6 NYCRR.

**Statutory authority:** L. 1989, ch. 565

**Subject:** CWSRF Program.

**Purpose:** To conform EFC's CWSRF regulations to current EFC and DEC administrative policies and practices and to update the Project Priority System (PPS) for the purpose of ensuring equitable Statewide treatment of funding priorities and to integrate the water quality objectives as set forth in the Federal Clean Water Act (CWA) sections 212, 319 and 320.

**Substance of final rule:** I. Subject:

The proposed revised regulations are for the New York State Water Pollution Control Revolving Fund ("CWSRF"), Section 1285-j of the Public Authorities Law ("PAL"), created and established in the joint custody of the New York State Environmental Facilities Corporation ("EFC") and the New York State Department of Environmental Conservation ("DEC"), by the Legislature pursuant to Chapter 565 of the Laws of 1989.

II. Purpose:

The proposed regulations set forth rules and procedures whereby DEC and EFC can adhere to its current administrative policies and practices and also updates the CWSRF Project Priority System ("PPS") for the purpose of ensuring equitable Statewide treatment of funding priorities and to integrate the water quality objectives set forth in the Clean Water Act ("CWA") Sections 212, 319 and 320.

III. General Substance:

It is proposed to amend the CWSRF regulations found within 6 NYCRR Part 649 in the following manner (Companion regulations found within 21 NYCRR Part 2602 will also be changed):

The proposed regulatory amendments serve to update several important definitions and to phase out inactive program requirements. The proposed amendments will also clarify financing eligibility of private entities carrying out certain water quality improvement projects and payment structures to certain recipients in accordance with state and federal authority. The proposed regulations will also allow for equitable scoring for not only the CWSRF's existing financing programs, but also non-point source ("NPS") projects, national estuary implementation projects and the water quality components of "non-traditional" projects.

In order to implement the expansion of the types of projects eligible for CWSRF financing, certain definitions will have to be amended within the regulations. It is proposed to add a new definition of "recipient" that will encompass both public and private entities, including individuals, partnerships and corporations. This new term will replace the majority of instances in the regulations where "municipality" is used. The definition of "project" will also be amended for the purposes of allowing CWSRF financing to be extended to additional activities anticipated under the CWA, including any activity whose purpose is the preservation, protection and/or improvement of water quality.

A new definition for CWSRF assistance of "Financing" will be included to also provide for non-loan assistance. This new term is defined as meaning any financial assistance from the CWSRF that is permitted under applicable laws and regulations.

It is also proposed that the Priority Ranking System scoring criteria be modified to ensure that unmet water quality needs receive the highest possible scoring. Point adjustments have been made to each scoring criterion to achieve a primary emphasis on water quality improvement and a secondary emphasis on water quality protection. Additional points have been added for projects addressing water quality problems in a DEC approved watershed management plan and for eligible land acquisition projects for which the State has committed interest and there are documented achievable water quality benefits.

It is also proposed that the PPS be expanded to include a new category (Category E) for non-municipal projects allowed under Sections 319 and 320 of the CWA. The addition of a new Category E will permit CWSRF funding to be extended to non-municipal projects while requiring only minor changes in both project scoring and the method by which annual funding levels are allocated and set forth in the Intended Use Plan ("IUP"). This new category will serve to protect the integrity of the existing municipal financing system, while at the same time preventing unfair competition between municipalities and private clients.

The proposed regulations state that an annual allocation for Category E, including a project funding cap, be determined annually by the Commissioner and described in the IUP. Through these changes, CWSRF funds may be made available to a variety of recipients (public and private) carrying out NPS projects, including land purchases and Brownfield remediation.

The proposed regulations also incorporate DEC's program which provides CWSRF assistance for land acquisition consistent with the provisions of 319 and 320 of the CWA.

In addition, there are proposed administrative-oriented changes to DEC's regulations. The following definitions, among others, will be changed for the purposes of following CWSRF administrative procedure: "Completion of Construction", "Engineering Report", and "Land Acquisition Plan or Management Plan." Grammatical changes will include the consistent use of the acronym "CWSRF" instead of "SWPSRF."

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 649.2(a)(5), (12), (17), (37) and (41); 649.3(c), (d)(2), (3) and (g)(2)(iii); 649.4(c)(3); 649.7(m); 649.8(e); 649.12; and 649.15.

**Text of rule and any required statements and analyses may be obtained from:** Richard Draper, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8111, e-mail: redraper@gw.dec.state.ny.us

#### Revised Regulatory Impact Statement

A revised Regulatory Impact Statement is not necessary because the changes made to the last rule are cosmetic, nonsubstantive changes having no impact on costs, local government mandates or paperwork.

#### Revised Regulatory Flexibility Analysis

The New York State Department of Environmental Conservation reiterates its prior determination that, pursuant to Section 202-b(3) of the State Administrative Procedure Act, a regulatory flexibility analysis is not required. The changes made to the last published rule are cosmetic, nonsubstantive changes in connection with the New York State Water Pollution Control Revolving Fund Program ("Program"). These changes will not have an adverse impact on small businesses or local governments and will not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

The Program provides a process whereby low cost financial assistance may be obtained by municipalities for the planning, design and construction of projects for the construction of publicly owned treatment works, such as water pollution control facilities and wastewater treatment plants, the implementation of a state's approved non-point source ("NPS") management plan or a state's approved estuary management plan. The proposed regulations will extend this financing to non-municipally owned NPS or estuary projects, which will have positive impacts on small businesses and local governments. Participation in the Program is intended to result in a financial benefit for the entity applying for assistance and improved job and employment opportunities. Participation in the Program is voluntary and any reporting, recordkeeping or other requirements are imposed only if an entity elects to participate in the Program.

For the same reasons, it is economically and technically feasible for small businesses and local governments to comply with these regulations.

#### Revised Rural Area Flexibility Analysis

The New York State Department of Environmental Conservation reiterates its prior determination that, pursuant to Section 202-bb(4) of the State Administrative Procedure Act, a rural area flexibility analysis is not required. The changes made to the last published rule are cosmetic, nonsubstantive changes in connection with the New York State Water Pollution Control Revolving Fund Program ("Program"). These changes will not have an adverse impact on rural areas and will not impose reporting, recordkeeping or other compliance requirements on rural areas.

The Program provides a process whereby low cost financial assistance may be obtained by municipalities for the planning, design and construction of projects for the construction of publicly owned treatment works, such as water pollution control facilities and wastewater treatment plants, the implementation of a state's approved non-point source ("NPS") man-

agement plan or a state's approved estuary management plan. The proposed regulations will extend this financing to non-municipally owned NPS or estuary projects, which will have positive impacts on rural areas. Participation in the Program is intended to result in a financial benefit for the entity applying for assistance and improved job and employment opportunities. Participation in the Program is voluntary and any reporting, recordkeeping or other requirements are imposed only if an entity elects to participate in the Program.

This conclusion is based on the express nature and purpose of the statute authorizing the Program and the regulations proposed herein.

#### **Revised Job Impact Statement**

The New York State Department of Environmental Conservation reiterates its prior determination that, pursuant to Section 201-a of the State Administrative Procedure Act, a job impact statement is not required. The changes made to the last published rule are cosmetic, non-substantive changes in connection with the New York State Water Pollution Control Revolving Fund Program ("Program"). These changes will not have an adverse impact on jobs and employment opportunities.

The Program provides a process whereby low cost financial assistance may be obtained by municipalities for the planning, design and construction of projects for the construction of publicly owned treatment works, such as water pollution control facilities and wastewater treatment plants, the implementation of a state's approved non-point source ("NPS") management plan or a state's approved estuary management plan. The proposed regulations will extend this financing to non-municipally owned NPS or estuary projects, which will have positive job impacts. Participation in the Program is voluntary and any reporting or recordkeeping requirements are imposed only if an entity elects to participate in the Program.

This conclusion is based on the express nature and purpose of the statute and regulations being proposed herein.

#### **Assessment of Public Comment**

1. No oral or written comments were received at the April 3, 2006 public hearing.

2. Written comment was received from the New York State Tug Hill Commission, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601-3782, which expressed support for the CWSRF program. The Commission also stated that, with New York State now playing an effective role in encouraging quality communities and promoting smart growth, that the provisions of the regulations should reflect this policy in order to prevent sprawl and water quality problems.

Agency's response: The proposed revisions to the regulations in connection with the CWSRF program (6 NYCRR Part 649 *et seq.*) add 10 points under the Intergovernmental Needs Criterion D for projects which protect or maintain the integrity of existing facilities. This tends to promote smart growth by scoring this type of project higher than those associated with system expansion. In addition, DEC and EFC are required under the CWSRF regulations to conduct any applicable environmental review requirements, including a State Environmental Quality Review Act and State Environmental Review Process ("SEQRA/SERP") review in connection with each CWSRF project. When applied, SEQRA requires a project sponsor to address secondary impacts such as sprawl induced by providing service to undeveloped areas. SERP requires DEC to do an independent review of a SEQRA decision for consistency.

Changes made in response to comments: none.

3. Written comment was received after the April 10, 2006 deadline from the Adirondack Council, 342 Hamilton Street, Albany, New York 12210, which expressed support for the CWSRF program and hopes for further expansion of the program to include infrastructure upgrades in the Adirondack Park. An area in great need identified by the Council is individual homeowners and or homeowners associations which need to upgrade, repair or replace their on-site wastewater treatment (septic) systems.

Agency's response: The CWSRF regulations as proposed do not preclude funding these types of projects, therefore further change is not necessary. However, an efficient mechanism is not currently in place to address these needs. DEC and EFC are aware of this need and will consider it during program implementation.

Changes made in response to comments: none.

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

#### **Fish and Wildlife Regulations**

**I.D. No.** ENV-22-06-00006-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 Chapter I of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, arts. 11 and 13

**Subject:** Correct or eliminate language in regulations which over time has become archaic, obsolete, or inaccurate.

**Purpose:** To correct and update the department's fish and wildlife regulations.

**Substance of proposed rule:** The proposed rule making will amend 6 NYCRR Chapter I, "Fish and Wildlife," in order to: (1) Correct or repeal parts of the fish and wildlife regulations that are no longer needed (*e.g.*, legislative changes have eliminated some permits; fish and wildlife cooperative areas have been closed); (2) Update or correct existing regulations (*e.g.*, administrative mailing addresses are changed; some legal citations need updating); (3) Amend regulations to conform with recent legislation (*e.g.*, changes in references to the status of species of special concern); (4) Replace archaic language with updated terminology (*e.g.*, replace the term "handicapped" with "disabled"; replace the term "district" with "region"); (5) Correct typographical and spelling errors; and (6) Simplify and improve the grammar and style of the regulations using plain English whenever possible.

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

**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 the State Environmental Quality Review Act, this rule making is a type II action.

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

#### **Consensus Rule Making Determination**

The purpose of the proposed rule making is to update and correct the Fish and Wildlife Regulations.

The proposed changes to 6 NYCRR Chapter I, "Fish and Wildlife," will update these regulations to: (1) Correct or repeal parts of the fish and wildlife regulations that are no longer needed (*e.g.*, legislative changes have eliminated some permits; fish and wildlife cooperative areas have been closed); (2) Update or correct existing regulations (*e.g.*, administrative mailing addresses are changed; some legal citations need updating); (3) Amend regulations to conform with recent legislation (*e.g.*, changes in references to the status of species of special concern); (4) Replace archaic language with updated terminology (*e.g.*, replace the term "handicapped" with "disabled"; replace the term "district" with "region"); (5) Correct typographical and spelling errors; and (6) Simplify and improve the grammar and style of the regulations using plain English whenever possible.

The substance of the regulations will be left unchanged. The proposed amendments will not create or impose any new responsibility on those subject to these regulations, and there will be no negative impacts on jobs or employment. In light of the above, the Department has determined that no person is likely to object to the Department's proposal to adopt this rule.

Therefore, the Department has concluded that use of the consensus rule making process is appropriate.

#### **Job Impact Statement**

A Job Impact Statement has not been prepared for this rule making because the proposed amendments simply correct minor clerical and typographical errors, update statutory authorities, and correct the Department's office addresses. The proposed amendments also repeal obsolete regulations, and change some terminology (*e.g.*, changes "handicap" to the more appropriate term "disability"). Consequently, the Department has concluded the regulatory changes in this rule making will not have a substantial adverse impact on jobs or employment opportunities. Therefore, the Department has determined that a Job Impact Statement is not required.

## Environmental Facilities Corporation

### NOTICE OF ADOPTION

#### Clean Water State Revolving Fund Program

**I.D. No.** EFC-07-06-00020-A

**Filing No.** 579

**Filing date:** May 16, 2006

**Effective date:** May 31, 2006

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

**Action taken:** Amendment of Part 2602 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 1284(5)

**Subject:** CWSRF Program.

**Purpose:** To conform EFC's CWSRF regulations to current EFC and DEC administrative policies and practices; update the Project Priority System (PPS) for the purpose of ensuring equitable statewide treatment of funding priorities; and integrate the water quality objectives as set forth in the Federal Clean Water Act (CWA) sections 212, 319 and 320.

**Substance of final rule:** The proposed rule sets forth regulatory revisions (21 NYCRR Part 2602 *et seq.*) for the New York State Environmental Facilities Corporation ("EFC") in connection with the New York State Water Pollution Control Revolving Fund ("CWSRF"). The rule seeks to, among other things, conform EFC's CWSRF regulations to current EFC and DEC administrative practices and to integrate the water quality objectives set forth in the Federal Clean Water Act Sections 212, 319 and 320. A summary of the subject, purpose and general substance of the rule is as follows:

#### I. Subject:

The proposed revised regulations are for the New York State Water Pollution Control Revolving Fund ("CWSRF"), Section 1285-j of the Public Authorities Law ("PAL"), created and established in the joint custody of the New York State Environmental Facilities Corporation ("EFC") and the New York State Department of Environmental Conservation ("DEC"), by the Legislature pursuant to Chapter 565 of the Laws of 1989.

#### II. Purpose:

The proposed regulations set forth rules and procedures whereby EFC and DEC can adhere to its current administrative policies and practices and also updates the CWSRF Project Priority System ("PPS") for the purpose of ensuring equitable Statewide treatment of funding priorities and to integrate the water quality objectives set forth in the Clean Water Act ("CWA") Sections 212, 319 and 320.

#### III. General Substance:

It is proposed to amend the CWSRF regulations found within 21 NYCRR Part 2602 in the following manner (Companion regulations found within 6 NYCRR Part 649 will also be changed):

The proposed regulatory amendments serve to update several important definitions and to phase out inactive program requirements. The proposed amendments will also clarify financing eligibility of private entities carrying out certain water quality improvement projects and payment structures to certain recipients in accordance with state and federal authority. The proposed regulations will also allow for equitable scoring for not only the CWSRF's existing financing programs, but also non-point source ("NPS") projects, national estuary implementation projects and the water quality components of "non-traditional" projects.

In order to implement the expansion of the types of projects eligible for CWSRF financing, certain definitions will have to be amended within the regulations. It is proposed to add a new definition of "recipient" that will encompass both public and private entities, including individuals, partnerships and corporations. This new term will replace the majority of instances in the regulations where "municipality" is used. The definition of "project" will also be amended for the purposes of allowing CWSRF financing to be extended to additional activities anticipated under the CWA, including any activity whose purpose is the preservation, protection and/or improvement of water quality.

A new definition for CWSRF assistance of "Financing" will be included to also provide for non-loan assistance. This new term is defined as meaning any financial assistance from the CWSRF that is permitted under applicable laws and regulations.

Section 2602.3(a) of EFC's proposed new regulations regarding the PPS make a cross reference to the PPS contained in Section 649.12 of DEC's regulations. It is proposed that the PPS be expanded to include a new category (Category E) for non-municipal projects allowed under Sections 319 and 320 of the CWA. The addition of a new Category E will permit CWSRF funding to be extended to non-municipal projects while requiring only minor changes in both project scoring and the method by which annual funding levels are allocated and set forth in the Intended Use Plan ("IUP"). This new category will serve to protect the integrity of the existing municipal borrowing system, while at the same time preventing unfair competition between municipalities and private clients.

The proposed regulations state that an annual allocation for Category E, including a project funding cap, be determined annually by the Commissioner and described in the IUP. Through these changes, CWSRF funds may be made available to a variety of recipients (public and private) carrying out NPS projects, including land purchases and Brownfield remediation.

The proposed regulations also incorporate EFC's program which provides CWSRF assistance for land acquisition consistent with provisions 319 and 320 of the CWA.

In addition, there are proposed administrative-oriented changes to EFC's regulations. The following definitions, among others, will be changed for the purposes of following CWSRF administrative procedure: "Completion of Construction", "Engineering Report", and "Land Acquisition Plan or Management Plan." Grammatical changes will include the consistent use of the acronym "CWSRF" instead of "SWPSRF."

A summary of the express terms is as follows:

- 1) Section 2602.1 concerns the purpose, scope and applicability of the regulations.
- 2) Section 2602.2 concerns definitions in connection with the CWSRF program.
- 3) Section 2602.3 concerns the priority ranking of CWSRF projects and the Intended Use Plan.
- 4) Section 2602.4 concerns direct financings under the CWSRF program.
- 5) Section 2602.5 concerns CWSRF financing of innovative projects.
- 6) Section 2602.6 concerns planning and design costs.
- 7) Section 2602.7 concerns general project requirements under the CWSRF.
- 8) Section 2602.8 concerns equivalency project requirements.
- 9) Section 2602.9 concerns CWSRF application and project financing agreements.
- 10) Section 2602.10 concerns CWSRF disbursements.
- 11) Section 2602.11 concerns remedies under the CWSRF.
- 12) Section 2602.12 concerns miscellaneous provisions of the CWSRF.
- 13) Section 2602.13 concerns material incorporated by reference under the CWSRF.
- 14) Section 2602.14 concerns severability of the provisions of the CWSRF.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 2602.2(a)(5), (12), (17), (37), (41)(iv), 2602.4(b)(4), (5) and (6), (e), 2602.7(h), (m), 2602.8(e) and 2602.14.

**Text of rule and any required statements and analyses may be obtained from:** James R. Levine, Senior Vice President and General Counsel, Environmental Facilities Corporation, 625 Broadway, Albany, NY 12207-2997, (518) 402-6969, e-mail: Levine@nysefc.org

#### **Revised Regulatory Impact Statement**

A revised Regulatory Impact Statement is not necessary because the changes made to the last rule are cosmetic, nonsubstantive changes having no impact on costs, local government mandates or paperwork.

#### **Revised Regulatory Flexibility Analysis**

The New York State Environmental Facilities Corporation reiterates its prior determination that, pursuant to Section 202-b(3) of the State Administrative Procedure Act, a regulatory flexibility analysis is not required. The changes made to the last published rule are cosmetic, nonsubstantive changes in connection with the New York State Water Pollution Control Revolving Fund Program ("Program"). These changes will not have an adverse impact on small businesses or local governments and will not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

The Program provides a process whereby low cost financial assistance may be obtained by municipalities for the planning, design and construction of projects for the construction of publicly owned treatment works, such as water pollution control facilities and wastewater treatment plants,

the implementation of a state's approved non-point source ("NPS") management plan or a state's approved estuary management plan. The proposed regulations will extend this financing to non-municipally owned NPS or estuary projects, which will have positive impacts on small businesses and local governments. Participation in the Program is intended to result in a financial benefit for the entity applying for assistance and improved job and employment opportunities. Participation in the Program is voluntary and any reporting, recordkeeping or other requirements are imposed only if an entity elects to participate in the Program.

For the same reasons, it is economically and technically feasible for small businesses and local governments to comply with these regulations.

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

The New York State Environmental Facilities Corporation reiterates its prior determination that, pursuant to Section 202-bb(4) of the State Administrative Procedure Act, a rural area flexibility analysis is not required. The changes made to the last published rule are cosmetic, non-substantive changes in connection with the New York State Water Pollution Control Revolving Fund Program ("Program"). These changes will not have an adverse impact on rural areas and will not impose reporting, recordkeeping or other compliance requirements on rural areas.

The Program provides a process whereby low cost financial assistance may be obtained by municipalities for the planning, design and construction of projects for the construction of publicly owned treatment works, such as water pollution control facilities and wastewater treatment plants, the implementation of a state's approved non-point source ("NPS") management plan or a state's approved estuary management plan. The proposed regulations will extend this financing to non-municipally owned NPS or estuary projects, which will have positive impacts on rural areas. Participation in the Program is intended to result in a financial benefit for the entity applying for assistance and improved job and employment opportunities. Participation in the Program is voluntary and any reporting, recordkeeping or other requirements are imposed only if an entity elects to participate in the Program.

This conclusion is based on the express nature and purpose of the statute authorizing the Program and the regulations proposed herein.

#### **Revised Job Impact Statement**

The New York State Environmental Facilities Corporation reiterates its prior determination that, pursuant to Section 201-a of the State Administrative Procedure Act, a job impact statement is not required. The changes made to the last published rule are cosmetic, non-substantive changes in connection with the New York State Water Pollution Control Revolving Fund Program ("Program"). These changes will not have an adverse impact on jobs and employment opportunities.

The Program provides a process whereby low cost financial assistance may be obtained by municipalities for the planning, design and construction of projects for the construction of publicly owned treatment works, such as water pollution control facilities and wastewater treatment plants, the implementation of a state's approved non-point source ("NPS") management plan or a state's approved estuary management plan. The proposed regulations will extend this financing to non-municipally owned NPS or estuary projects, which will have positive job impacts. Participation in the Program is voluntary and any reporting or recordkeeping requirements are imposed only if an entity elects to participate in the Program.

This conclusion is based on the express nature and purpose of the statute and regulations being proposed herein.

#### **Assessment of Public Comment**

1. No oral or written comments were received at the April 3, 2006 public hearing. 2. Written comment was received after the April 10, 2006 deadline from the New York State Tug Hill Commission, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601-3782, which expressed support for the CWSRF program. The Commission also stated that, with New York State now playing an effective role in encouraging quality communities and promoting smart growth, that the provisions of the regulations should reflect this policy in order to prevent sprawl and water quality problems.

Agency's response: The regulations incorporate provisions promoting smart growth and the preservation, protection and improvement of water quality. DEC'S accompanying regulations in connection with the CWSRF program (6 NYCRR Part 649 *et seq.*) revise the project priority scoring system in order to emphasize the preservation, protection and improvement of water quality. For instance, the revised scoring system adds 10 points under the Intergovernmental Needs Criterion D for projects which protect or maintain the integrity of existing facilities. In addition, the regulations require a recipient to submit documentation of satisfaction of

all applicable environmental review requirements, indicating compliance with the State Environmental Quality Review Act and State Environmental Review Process ("SEQRA/SERP") for each CWSRF project. SEQRA requires a recipient to specifically address and consider the potential impact on growth and character of the community or neighborhood.

Changes made in response to comments: none.

3. Written comment was received after the April 10, 2006 deadline from the Adirondack Council, 342 Hamilton Street, Albany, New York 12210, which expressed support for the CWSRF program and hopes for further expansion of the program to include infrastructure upgrades in the Adirondack Park. An area in great need identified by the Adirondack Council is individual homeowners and or homeowners associations which need to upgrade, repair or replace their on-site wastewater treatment (septic) systems.

Agency's response: The CWSRF regulations as proposed do not preclude funding these types of projects. Therefore, no change is required.

Changes made in response to comments: none.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **Nursing Home Pharmacy Regulations**

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

**Filing No.** 574

**Filing date:** May 12, 2006

**Effective date:** May 12, 2006

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

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

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

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

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

**Subject:** Nursing home pharmacy regulations.

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

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

Section 415.18 Pharmacy Services.

\* \* \*

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

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

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

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

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

censed/registered under Title VIII of the Education Law and authorized to administer controlled substances.

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

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

(i) sublingual nitroglycerine; and

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

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

\* \* \*

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order shall be given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a legally designated alternate [physician] practitioner within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-50-05-00004-P, Issue of December 14, 2005. The emergency rule will expire July 10, 2006.

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

**Regulatory Impact Statement**

**Statutory Authority:**

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

**Legislative Objectives:**

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

**Needs and Benefits:**

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

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

unique needs of special populations such as HIV, traumatic brain injury (TBI), or ventilator residents.

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

The present regulations call for the contents of the emergency medication kits to be identical on every unit throughout the facility. At a time when the needs of residents were similar in terms of clinical management, this made sense. However, with nursing homes providing care to special populations including HIV, TBI and ventilator care, this requirement inhibits the most efficient use of emergency medications kits to best meet the unique clinical needs of special populations. When promulgated, these regulations were seeking to address concerns that facilities would establish "mini" pharmacies by having a wide range of noninjectables in the emergency medication kit and that the presence of a high number of medications may result in administration errors. With safe product packaging that is present today, safety concerns have been significantly reduced. Therefore, the proposed regulation eliminates the cap of up to five noninjectable prepackaged medications per each kit. In addition, the proposed regulation changes would limit the total number of noninjectables that would be available in emergency kits for the entire facility to no more than twenty-five. This would further ensure resident safety and eliminate the concern that nursing homes might stock an unlimited amount of noninjectables in the emergency kits. The proposed revisions would also allow for the presence of controlled substances in nursing home emergency kits. This would allow for the nursing home to respond quickly to pain management concerns that are a major issue for some residents.

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

**COSTS:**

**Costs to Regulated Parties:**

There will be no additional costs to regulated parties.

**Costs to State and Local Government:**

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

**Costs to the Department of Health:**

There will be no additional costs to the Department.

**Local Government Mandates:**

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

**Paperwork:**

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

**Duplication:**

The regulation does not duplicate any federal or state regulation.

**Alternative Approaches:**

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

**Federal Standards:**

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

**Compliance Schedule:**

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

**Regulatory Flexibility Analysis**

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

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

Approximately 100 nursing homes would therefore be considered "small businesses".

**Compliance Requirements:**

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

**Professional Services:**

The regulation would impose no additional professional services.

**Compliance Costs:**

The regulation would impose no additional costs.

**Economic and Technological Feasibility Assessment:**

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

**Minimizing Adverse Impact:**

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

**Small Business and Local Government Input:**

The regulation would have no impact on small businesses and local governments. The regulation is supported by provider and consumer groups and feedback from these groups have been gathered. The proposed revisions have been sent to the Codes and Regulations Committee of the Council and have appeared on the agenda of the Codes and Regulations Committee which is made up of representatives of groups that have as their members representatives of small business and local government.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and for counties with a population greater than 200,000, which include towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuylar
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

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

**Professional Services:**

The regulation would not require additional professional services.

**Compliance Costs:**

The regulation would not impose additional costs.

**Minimizing Adverse Impact:**

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

**Opportunity for Rural Area Participation:**

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

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

New York Chapter of the American Society of Consulting Pharmacists

The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made

up of representatives of groups that have as their members representatives of rural areas.

**Job Impact Statement**

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

**EMERGENCY  
RULE MAKING**

**Controlled Substances in Emergency Kits**

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

**Filing No.** 575

**Filing date:** May 12, 2006

**Effective date:** May 12, 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) *Except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, a pharmacy may distribute a con-*

controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits. Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the type and quantity of the drug distributed, and the signature of the pharmacist.

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

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

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

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

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

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

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

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

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

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

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

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

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

*double-locked system or other secure method approved by the Department.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-50-05-00005-P, Issue of December 14, 2005. The emergency rule will expire July 10, 2006.

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

#### **Regulatory Impact Statement**

##### **Statutory Authority:**

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

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

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

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

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

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

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

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

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

The amendment to Section 80.11(f) authorizes a licensed pharmacy to supply controlled substances to a practitioner in a Class 3a facility for stocking in emergency medication kits. The amendments to Section 80.50(e) authorize a Class 3a healthcare facility to possess a limited supply of controlled substances in an emergency medication kit and specify limitations on the quantities of such substances and requirements for their

safeguarding. The amendment to Section 80.49 specifies recordkeeping requirements for controlled substances administered from emergency kits. When instituted together, these amendments will provide for timely access to controlled substances by practitioners and patients in the long-term care facility environment while simultaneously requiring adequate measures to ensure the security of such substances.

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

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

#### Costs:

##### Costs to Regulated Parties

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

##### Costs to State and Local Government

There will be no costs to state or local government.

##### Costs to the Department of Health

There will be no additional costs to the Department.

##### Local Government Mandates:

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

##### Paperwork:

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

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

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

##### Duplication:

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

##### Alternatives:

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

##### Federal Standards:

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

##### Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State. At that time, in order that the public health derive maximum benefit from this regulatory amendment, all Class 3a license holders will be authorized to possess and

administer controlled substances in an emergency medication kit to meet the immediate, legitimate need of a patient.

#### **Regulatory Flexibility Analysis**

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

This proposed rule will affect practitioners, pharmacists, retail pharmacies, and nursing homes and other healthcare facilities licensed by the Department as Class 3a institutional dispensers limited. Local government will only be affected if it operates one of the above facilities.

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

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

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

##### Compliance Requirements:

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

##### Professional Services:

No additional professional services are necessary.

##### Compliance Costs:

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

##### Economic and Technological Feasibility:

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

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

##### Minimize Adverse Impact:

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

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

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

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

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

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

The proposed rule will apply to participating pharmacies and Class 3a healthcare facilities located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New

York contain widespread rural areas. These can range in extent from small towns and villages, and their surrounding areas, to locations that are very sparsely populated.

#### Compliance Requirements:

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency situation. However, these actions are undertaken on a voluntary basis by both pharmacy and healthcare facility. The regulation does not require either party to participate.

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

#### Professional Services:

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

#### Compliance Costs:

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

#### Economic and Technological Feasibility:

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

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

#### Minimizing Adverse Impact:

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

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

#### Rural Area Participation:

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

#### Job Impact Statement

##### Nature of Impact:

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

## EMERGENCY RULE MAKING

### Self Attestation of Resources for Medicaid Applicants and Recipients

**I.D. No.** HLT-22-06-00008-E

**Filing No.** 578

**Filing date:** May 16, 2006

**Effective date:** May 16, 2006

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

**Action taken:** Amendment of section 360-2.3(c)(3) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 366-a(2)

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

**Specific reasons underlying the finding of necessity:** The specific reasons underlying the finding of necessity to adopt as an emergency rule:

Chapter 1 of the Laws of 2002 provides that Medicaid applicants and recipients seeking coverage of long-term care services, other than short-term rehabilitation, must provide adequate documentation to verify the amount of their accumulated resources. Persons who are not seeking coverage of long-term care services, or who are seeking coverage of short-term rehabilitation services, as defined by the Commissioner of Health, are allowed to attest to the amount of their resources.

The proposed regulation would provide the definition of the term "short-term rehabilitation" required by Chapter 1 of the Laws of 2002 and necessary to implement the provisions of such Chapter. The sooner the provisions of the statute can be implemented, the sooner the statutory goal of simplifying Medicaid enrollment and recertification will be achieved, with a consequent benefit to public health in terms of easier access to necessary health care. Therefore, complying with the normal rulemaking requirements would be contrary to the public interest, and the immediate adoption of the rule is necessary.

**Subject:** Self attestation of resources for Medicaid applicants and recipients.

**Purpose:** To allow an applicant or recipient to attest to the amount of his or her resources unless the applicant or recipient is seeking Medicaid payment for long term care services.

**Text of emergency rule:** Paragraph (3) of subdivision (c) of Section 360-2.3 is amended to read as follows:

(3) Verification of resources. (i) *The applicant may attest to the amount of his or her resources, unless the applicant is seeking coverage for long-term care services. For purposes of this paragraph, long-term care services shall include those services defined in subparagraph (ii) of this paragraph, with the exception of short-term rehabilitation as defined in subparagraph (iii) of this paragraph.* The applicant must provide documentation of all available or potentially available resources when applying for long-term care services. The social services district must record the documentation provided and determine the availability of such resources.

(ii) *Long-term care services shall include, but not be limited to care, treatment, maintenance, and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided in an intermediate care facility certified under article sixteen of the mental hygiene law; provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant to Section 31.02(a)(4) of mental hygiene law; provided in a developmental center operated by the Office of Mental Retardation and Developmental Disabilities; provided by a home care services agency, certified home health agency or long-term home health care program as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the department of health; provided by a personal care provider licensed or regulated by any other state or local agency; provided in a hospital that is equivalent to the level of care provided in a nursing facility; and provided by an assisted living program in accordance with regulations of the department of health. Long-term care services also shall include: private duty nursing; limited licensed home care services; hospice services including services provided by the hospice residence program in accordance with the regulations of the department of health; services provided in accordance with the consumer directed personal assistance program; services provided by the managed long-term care program; personal emergency response services; and care, services or supplies provided by the Care at Home Waiver program, Traumatic Brain Injury Waiver program, or Office of Mental Retardation*

and Developmental Disabilities Home and Community-Based Waiver program.

(iii) *Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.*

**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 August 13, 2006.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the Medical Assistance program, pursuant to titles eleven, eleven-A, and eleven-B of the Social Services Law (SSL). Section 363-a(2) of the SSL requires the Department to establish such regulations as may be necessary to implement the program of medical assistance for needy persons (Medicaid). Section 366-a(2)(a) of the SSL provides that a Medicaid applicant must provide information and documentation necessary for the determination of initial and ongoing eligibility. A new section 366-a(2)(b) of the SSL, as enacted by the Health Care Reform Act of 2002, provides that an applicant may attest to the amount of his or her resources, unless the applicant is seeking Medicaid coverage of long-term care services. An exception is made for short-term rehabilitation. For purposes of this provision, section 366-a(2)(b) of the SSL references the long-term care services described in paragraph (b) of section 367-f(1) of the SSL and authorizes the Commissioner of the Department to define the term "short-term rehabilitation".

##### Legislative Objectives:

Section 363-a of the SSL designates the Department as the single State agency responsible for implementing the Medicaid program in this State, and requires the Department to promulgate any necessary regulations which are consistent with federal and State law. The proposed regulatory amendment is necessary to define long-term care services and short-term rehabilitation for purposes of attestation of resources.

##### Needs and Benefits:

The purpose of the proposed regulatory amendment is to revise section 360-2.3(c)(3) of the Medicaid regulations concerning verification of resources. Currently, in determining whether an applicant is financially eligible for Medicaid, the applicant must provide documentation of all available or potentially available resources. A new subdivision (2) of section 366-a of the SSL, as enacted by the Health Care Reform Act of 2002, allows an applicant to attest to the amount of his or her resources, unless the applicant is seeking Medicaid coverage of long-term services. The section also allows an applicant to attest to the amount of his or her resources if Medicaid coverage is needed for short-term rehabilitation. The proposed regulatory amendment to section 360-2.3(c)(3) allows certain applicants to attest to the amount of their resources and to define the long-term care services for which resource documentation will still be required. Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.

As required by section 366-a(2)(b) of the SSL, the proposed regulatory amendment includes in the definition of long-term care services, those services described in section 367-f(1)(b) of the SSL. These services include care, treatment, maintenance and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided by a home care services agency, certified home health agency or long term home health care program, as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the Department of Health; or provided by a personal care provider licensed or regulated by any other state or local agency. In addition, the proposed regulatory amendment designates as long-term care services, for purposes of resource attestation, the following: a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility ("alternate level of care"); services provided in an intermediate care facility certified under article sixteen of the mental hygiene law; services provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant

to Section 31.02(a)(4) of the mental hygiene law; services provided in a developmental center operated by the Office of Mental Retardation and Developmental Disabilities; services provided by an assisted living program; private duty nursing; limited licensed home care services; hospice care including the hospice residence program; services provided in accordance with the consumer directed personal assistance program; services provided by the managed long-term care program; personal emergency response services; and care, services or supplies provided by the Care at Home Waiver program, Traumatic Brain Injury Waiver program, or Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program.

Section 366-a(2)(b) of the SSL allows attestation of resources by applicants seeking Medicaid coverage of short-term rehabilitation as defined by the Commissioner of the Department. Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.

##### Costs:

There should be no additional costs associated with this regulatory amendment. An analysis of several eligibility simplification proposals was performed in 2001 and it was concluded that while a fiscal impact could occur if applicants provided inaccurate information about their resources, this was unlikely. Since neither the Child Health Plus (CHP) nor the Family Health Plus (FHP) program have resource tests, it was determined that those Medicaid applicants who had excess resources would most likely still be eligible for either CHP or FHP. Therefore, this proposal has been considered to be cost neutral.

##### Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates. The amendment would remove the requirement that a Medicaid applicant submit proof of his or her resources for purposes of determining Medicaid eligibility, if the applicant is not seeking Medicaid coverage of long-term care services. The change simplifies the documentation requirements for local departments of social services administering the Medicaid program at the county level.

##### Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment. Currently, in determining Medicaid eligibility for long-term care services, social services districts must review resource documentation.

##### Duplication:

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

##### Alternatives:

Section 366-a(2)(b) of the SSL requires that the services specifically listed in Section 367-f(1)(b) of the SSL be included in the definition of long-term care services. No alternatives were considered to the inclusion of these services in the definition.

In addition, in accordance with the authority granted in Section 367-f(1)(b) of the SSL, the proposed regulatory amendment designates a number of services as long-term care services for purposes of resource attestation: hospice care; private duty nursing; alternate level of care in a hospital; assisted living program; intermediate care facility; residential treatment facility; developmental center; the Care at Home Waiver program; the Traumatic Brain Injury Waiver program; the Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program; limited licensed home care services; personal emergency response services; and the consumer directed personal assistance program. Alternatives were considered with respect to the inclusion or exclusion of particular services in this list. However, given the nature, duration, and cost of these services, as well as the fact that many of these services are delivered by the same providers who furnish the long-term care services specifically listed in SSL Section 367-f(1)(b), the Department determined that the best alternative was to require documentation of resources by applicants seeking coverage of these services.

For purposes of defining short-term rehabilitation, the Department formed a work group with representatives from local social services districts and solicited feedback from the local social services districts' provider community. It was reported that there is no durational difference between inpatient and community-based short-term rehabilitation. Therefore, the workgroup recommended that short-term rehabilitation not be defined solely by type of service. The workgroup recommended defining short-term rehabilitation as receipt of one annual episode of services lasting less than 30 days, because 30 days was the median length of stay for rehabilitation purposes according to information gathered from providers,

and because this would eliminate cases that are subject to spousal impoverishment budgeting, which is not viewed as short-term care.

The workgroup recommended that alternate level of care in a hospital not be included in the definition, because the average alternate level of care stay extends beyond 30 days and because none of the providers viewed this as a short-term rehabilitation situation. Similarly, investigation by Department staff indicated that personal care services are provided to individuals who are chronically ill and require care on a long-term basis. Consequently, these services were not included in the definition of short-term rehabilitation.

Federal Standards:

The proposed regulatory amendment complies with federal statute.

Compliance Schedule:

Social services districts will be advised of the change when the amendment becomes effective.

#### **Regulatory Flexibility Analysis**

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

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

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would allow certain Medicaid applicants to attest to the amount of their resources for purposes of determining Medicaid eligibility. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to allow certain Medicaid applicants to attest to the amount of their resources for purposes of determining eligibility for Medicaid.

sufficient time to review the requirements with respect to such filings prior to the date Article 28 becomes effective.

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

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

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

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

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

Section 221.2 provides definitions applicable to the regulation.

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

Section 221.4 provides the requirements for obtaining current credit information.

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

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

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

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

Section 221.9 provides standards for filings by the insurer.

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire August 7, 2006.

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

#### **Regulatory Impact Statement**

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

2. Legislative objectives: The Legislature, in enacting Chapter 215 of the Laws of 2004, wanted to assure that consumers are afforded certain protections with respect to the use of credit information for personal lines insurance. The Superintendent was directed to promulgate a regulation to establish limitations on, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite and rate risks for personal lines insurance business.

3. Needs and benefits: Most insurers currently use credit information in the underwriting and initial tier placement of consumers for personal lines insurance. The purpose of this regulation is to establish rules to implement the provisions of Article 28. In accordance with Article 28, the regulation establishes and clarifies limitations upon, and requirements for, the permissible use of credit information by insurers doing business in New York State to assure that consumers are afforded certain protections when credit

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## Insurance Department

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### EMERGENCY RULE MAKING

#### **Standards for the Use of Credit Information to Underwrite and Rate Personal Lines Insurance**

**I.D. No.** INS-22-06-00001-E

**Filing No.** 569

**Filing date:** May 10, 2006

**Effective date:** May 10, 2006

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

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

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

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

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

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

information is used to underwrite and rate risks for personal lines insurance business. The regulation clarifies prohibited and permitted uses of credit information in the underwriting and rating of personal lines insurance. The regulation sets forth whose credit information can be used, the form of the disclosure of the use of credit information and when the disclosure must be provided. The regulation sets forth standards for the notification when an insurer takes an adverse action based upon credit information. The regulation also requires an insurer to take corrective action within thirty days after it receives notice that the insured has obtained a determination pursuant to the process for dispute resolution and error correction under the federal Fair Credit Reporting Act that the credit information used by the insurer was incorrect or incomplete. The regulation also establishes rules for, and provides guidance to, insurers when filing their credit information requirements with the Superintendent.

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

5. Local government mandates: None.

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

7. Duplication: None.

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

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

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

Section 2802(g) of the law gives an insured, where an insurer has chosen to use credit information the right to request, not more often than once every 36 months, that the insurer re-underwrite and re-rate the policy based upon a current credit report or insurance score. Section 221.4(b)(1) of the rule requires that the insurer make any necessary adjustments including moving the insured to the appropriate tier, effective as of the date of the updated report or score. An alternative that has been suggested by the

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

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

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

For example, an insurer within the group uses agents but it has an affiliate that is a direct writer. The applicant applies for insurance and is placed with the insurer that uses agents. Upon re-underwriting and re-rating the insured, Sections 221.4 and 221.7 of the proposed rule would not require the direct writer affiliate to offer the insured coverage. These sections were intended to address insurer-group underwriting where an applicant that applies for insurance with one insurer is also considered for coverage with other insurers within the group without the need to apply separately to each insurer. Under the example, the insured would not have to be offered coverage with the direct writer since the direct writer is not a part of the group underwriting done with the insurer that uses agents. Further, the direct writer requires the applicant to apply directly with that company. Sections 221.4 and 221.7 reflect clarifications suggested by the industry of the intent of the proposed rule.

The use of "substantially equivalent coverage" in this context contemplates that there may be some differences in the policy forms used by affiliates, but only where the insured is eligible for placement with an affiliate pursuant to Sections 221.4 and 221.7. However, even in such case,

if the affiliate does not have a policy form that offers “substantially equivalent coverage”, then that affiliate is not required to offer the insured a new policy.

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

a) an insurer group consisting of two companies at two different rate levels which uses various factors in underwriting applicants,

b) the two groups of applicants, A and B, both have the same underwriting characteristics except that those in group A have “excellent” credit scores and are placed in the company with the lower rate level, and those in group B have “poor” credit scores and are placed in the company with the higher rate level, and

c) upon renewal, insureds in groups A and B remain in their respective companies with credit scores no longer being reviewed (except upon request as permitted by statute and regulation).

Under this example:

1. if the insurer group takes no rate action, the fact that insureds in group B pay higher rates than insureds in group A upon renewal does not violate Article 28 or the Regulation.

2. if the insurer group does make rate level adjustments to either of these companies, the Department would not consider such actions to be inconsistent with Article 28 or the Regulation provided such adjustments were based on the loss, expense and investment income experience, as set forth in the standards for rates in Article 23 of the Insurance Law.

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

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

The Department also considered some suggestions made by a consumer group. However, most of the suggestions conflict with the statute. For example, the consumer group wanted to amend the Regulation to require that all filed scoring models include loss experience to justify the use of credit information. The statute clearly does not require such information if scoring models are only used in initial underwriting.

The consumer group commented that when re-underwriting and rating the policy based upon new, updated or corrected credit information, the rate adjustment should be the “lowest rate possible” among all affiliates and tiers and not simply a “lower rate.” Sections 221.4(b)(2) and 221.7(b)(2) states that the insured is eligible for placement in an affiliate at a lower rate in accordance with the affiliates’ current underwriting rules. The insurer will have to follow its underwriting rules to determine which company to place the insured. An insurer cannot arbitrarily place an

insured in a higher premium company if the insured is also eligible to be placed in a company with lower premiums if everything else remains the same. The purpose of the underwriting rules is to provide guidelines so that insureds with similar characteristics are placed in the same company.

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

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

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

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

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

3. Costs: Regulated persons under these regulations are insurers. Insurance producers or other entities may be designated by the insurer to issue disclosure notices and adverse notices, in which case the producer or other entity will incur costs in producing and mailing these documents. However, the designation of a producer or other entity for this purpose is optional, not mandatory, on the part of the insurer and presumably such arrangements will be subject to a contractual agreement and will be used when it has an overall cost benefit. The submission of filings and notification requirements are required by the statute and the regulation is only implementing the statutory requirement. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State. This rule does not impose any additional burden on persons located in rural

areas, and the Insurance Department does not believe that it will have an adverse impact on rural areas.

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

**Job Impact Statement**

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

**EMERGENCY  
RULE MAKING**

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

**I.D. No.** INS-22-06-00002-E

**Filing No.** 570

**Filing date:** May 10, 2006

**Effective date:** May 10, 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire August 7, 2006.

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

**Regulatory Impact Statement**

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

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

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

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

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

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

At the time that amendment was promulgated, all risk management courses were conducted in a classroom setting in a lecture format. Since

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

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

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

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

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

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

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

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

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

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

Although the statute does not permit insurers to assess any fees against insureds for participating in these courses, insureds may have to schedule time away from their practice to participate in these risk management courses. However, it should be noted that participation in a proactive risk management course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

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

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

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

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

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

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

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

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

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

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

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

10. Compliance schedule: The provisions of this amendment will apply immediately. As required by statute, insurers must have a proactive risk management course available for their insureds in order for insureds to participate in the excess medical malpractice insurance program. It is expected that insurers will be able to comply with the new provisions in a relatively short period of time since most medical malpractice insurers already have had other risk management programs approved by the superintendent. In order to facilitate compliance with this statute, extensive discussions have been held by the Department with the major medical malpractice insurers in this state and the Medical Society of the State of New York so that the content of the course relative to excess management will be consistent from course to course and also qualify for continuing medical education credit.

Since the offering of risk management courses for the purpose of premium credits is optional for insurers, there is no compliance schedule with respect to the offering of these courses in an internet-based format. An

insurer may offer an internet-based risk management course to its insureds as soon as the Department determines that the course is in compliance with the provisions of this Part.

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

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

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

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

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

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

to offer internet-based risk management courses to insureds in addition to, or in place of, risk management courses in the lecture format.

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

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

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

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

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

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

#### **Job Impact Statement**

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

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

### **Unfair Claims Settlement Practices and Claim Cost Control Measures**

**I.D. No.** INS-22-06-00007-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 Part 216 (Regulation 64) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 305, 403, 2601, 2610, 3411 and 3412; Vehicle and Traffic Law, section 311

**Subject:** Unfair claims settlement practices and claim cost control measures.

**Purpose:** To make editorial changes, moving definitions to more appropriate sections of the rule, deleting redundant language, updating old language, adding the fraud warning statement to two of the forms, amending the time frame for the insurer to provide a copy of the calculation of the insured's total loss value to no later than the date of the settlement offer, adding reference to the claimant's vehicle when an insurer in the process of adjusting a total loss makes a deduction for salvage value, and adding clarification to the language of the regulation.

**Substance of proposed rule (Full text is posted at the following State website: [www.ins.state.ny.us](http://www.ins.state.ny.us)):** The rule governs unfair claims settlement practices and claim cost control measures. The rule is being amended to

move definitions to more appropriate sections of the rule, delete redundant language, update obsolete language, and make editorial changes.

The rule amends the time frame for the insurer to provide a copy of its calculation of the insured vehicle's total loss value to no later than the date of the settlement offer, adds the fraud language to forms NYS APD 1 and NYS APD 1-a to be consistent with the other forms attached to the rule, adds a reference to the claimant's vehicle when an insurer in the process of adjusting a total loss makes a deduction for salvage value, and adds language clarifying that the salvage deduction shall be applied to the actual cash value which shall include all monies paid or payable as sales taxes.

One of the changes being made by the rule is the updating of the forms to include the current fraud warning language. This appeared as a proposal in the Insurance Department's January 2006 Regulatory Agenda.

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

**Data, views or arguments may be submitted to:** Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: bcheung@ins.state.ny.us

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

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

#### Consensus Rule Making Determination

Sections 201, 301, 305, 403, 2601, 2610, 3411, and 3412 of the Insurance Law, and Section 311 of the Vehicle and Traffic Law authorize the Superintendent to promulgate regulations governing unfair claims settlement and claim cost control measures. No person is likely to object to the rule as the changes made are editorial, moving definitions to more appropriate sections of the rule, deleting redundant language, updating old language, adding the fraud warning statement to two of the forms, amending the time frame for the insurer to provide a copy of the calculation of the insured's total loss value to no later than the date of the settlement offer, adding reference to the claimant's vehicle when an insurer in the process of adjusting a total loss makes a deduction for salvage value, and adding clarification to the language of the regulation.

#### Job Impact Statement

The proposed rule change will have no impact on jobs and employment opportunities in New York State because it is making editorial changes, moving definitions to more appropriate sections of the rule, deleting redundant language, updating old language, adding the fraud warning statement to two of the forms, amending the time frame for the insurer to provide a copy of the calculation of the insured's total loss value to no later than the date of the settlement offer, adding reference to the claimant's vehicle when an insurer in the process of adjusting a total loss makes a deduction for salvage value, and adding clarification to the language of the regulation.

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## State Commission on Judicial Conduct

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### NOTICE OF ADOPTION

#### Political Activity and Disqualification of Commission Members and the Commission's Office Addresses

**I.D. No.** JDC-07-06-00006-A

**Filing No.** 571

**Filing date:** May 10, 2006

**Effective date:** May 31, 2006

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

**Action taken:** Addition of section 7000.14 and amendment of section 7001.4(a) and (b) of Title 22 NYCRR.

**Statutory authority:** Judiciary Law, section 42(5)

**Subject:** Political activity by commission members, disqualification of commission members, and the commission's office addresses.

**Purpose:** To prohibit certain political activity by commission members, articulate situations in which a commission member would be disqualified from a matter, and update the office addresses.

**Text or summary was published** in the notice of proposed rule making, I.D. No. JDC-07-06-00006-P, Issue of February 15, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Robert H. Tembeckjian, Commission on Judicial Conduct, 61 Broadway, New York, NY 10006, (212) 809-0566, e-mail: tembeck@scjc.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

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## Office of Mental Retardation and Developmental Disabilities

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### EMERGENCY RULE MAKING

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

**I.D. No.** MRD-22-06-00004-E

**Filing No.** 576

**Filing date:** May 12, 2006

**Effective date:** May 12, 2006

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

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

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

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

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

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

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

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

This regulation authorizes certain people to make enrollment and exceptions and appeals decisions for consumers receiving services from OMRDD or from an OMRDD regulated provider. Without the regulation, these parties cannot enroll consumers in a prescription drug plan, change plans for consumers or request that plans cover additional drugs for a consumer. Consumers would be left without a prescription drug plan or, if dually eligible, could be enrolled in plans that do not meet their needs.

Consumers also could be unable to request coverage for drugs not on a plan's formulary. Consumers would then have to pay for their prescriptions themselves or, in the case of consumers living in residential facilities certified by OMRDD, the operator of the residential facility would have to pay for the prescriptions. The regulation needs to be effective immediately so that enrollment changes, initial enrollments, and other actions related to a Medicare Part D prescription drug plan can take place for these consumers.

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

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

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

*Subpart 635-11 Enrollment in a Medicare prescription drug plan.*

*Section 635-11.1 Applicability and definitions.*

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

(b) *Definitions. As used in this subpart:*

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

(i) *filing a grievance;*

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

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

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

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

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

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

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

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

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

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

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

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

(2) *Process to request a different PDP.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• Revisions to § 635-99.1 Glossary

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

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

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

(n) [B/] DDSO. *The Developmental Disabilities Services Office is [T] the local administrative unit[, responsible to the Division of Program Operations of OMRDD, that has major responsibility for the planning and development of community, residential and other program services. The B/ DDSO is responsible for coordinating the service delivery system within a particular service area, planning with community and provider agencies, and ensuring that specific placement of individuals and program plans and provider training programs are implemented. In New York City this unit is called the Borough Developmental Services Office (BDSO); elsewhere in the State it is called the Developmental Disabilities Services Office (DDSO).] of OMRDD. The governing body of the DDSO is the central office administration of OMRDD. The DDSO director is its chief executive officer.*

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency 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 August 9, 2006.

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

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

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

2. Legislative Objectives: The emergency amendments further the legislative objectives embodied in sections 13.07(a), 13.07(c), 13.09(b) and 13.15(a) of the New York State Mental Hygiene Law by authorizing

parties other than guardians to act on behalf of the many adult consumers served by OMRDD who do not have the capacity to make decisions about the Medicare prescription drug benefit and who do not have guardians. The emergency amendments also authorize other parties to pursue appeals and other reviews for these consumers, so that their rights in a prescription drug plan will be protected.

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

Dual eligible persons were and will continue to be randomly assigned to a prescription drug plan as new persons become eligible for the benefit. The formularies (lists of drugs each plan covers), participating pharmacies and other services can vary from plan to plan, so that the plan to which a beneficiary is randomly assigned may not be the one best suited to that person's needs.

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

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

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

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

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

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

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

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

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

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

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

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

7. Duplication: None.

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

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

10. Compliance Schedule: No time is necessary for regulated parties to achieve compliance with the rule because similar standards have been in effect as an emergency rule since November 15, 2005. In addition, the rule itself does not contain any compliance requirements for the regulated parties. Instead, the rule establishes processes which may be utilized by regulated parties and others at their discretion.

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

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

Presentations and ongoing discussions have occurred with the Commissioner's Advisory Council on Family Care and the Statewide Committee on Family Support Services and also with the Part D task force (mentioned above) that helped develop this regulation. A series of informational mailings and frequent e-mail updates regarding Part D generally have been sent to affected providers beginning in June 2005. OMRDD promulgated a similar emergency regulation on November 15, 2005 and on February 13, 2006 and sent informational mailings about the regulations to affected parties. OMRDD has also posted relevant information on its website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

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

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

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

#### **Job Impact Statement**

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

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## New York State 911 Board

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### INFORMATION NOTICE NOTICE OF PROPOSED AMENDMENTS

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

*Proposed Amendments to Minimum Standards Regarding Call-Taker/Dispatcher Training.*

Summary. At its meeting of May 9, 2006, the Board proposed amended standards relating to minimum training requirements for call-takers/dispatchers who receive wireless 911 calls. These amendments add the IS-700 course to the required curriculum for call-takers/dispatchers. They also, for the first time, set forth a set of course requirements for call-takers/dispatchers who are in a supervisory position. A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

*Further information contacts:* Written comments may be submitted to Harry J. Willis, Esq., at the New York State Department of State, Office of

Counsel, 41 State St., Suite 830, Albany, NY 12231, fax: 518-473-9211, phone: 518-474-6740

**Text of proposed rule:** Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Section § 5201.3, is amended to read as follows:

§ 5201.3 Basic training standards.

(a) Emergency Services Dispatch Training Evaluation Program.

(1) The authority shall have in place for each PSAP an Emergency Services Dispatch Training/Evaluation Program (ESDTEP). Except for those commencing employment in such capacity prior to January 1, 2004, all call-takers/dispatchers must satisfactorily demonstrate competency in the performance criteria established therein.

(2) The ESDTEP shall consist of a minimum of 200 hours of training, including, but not limited, to:

- (i) specific performance criteria;
- (ii) daily written evaluations;
- (iii) observation of the trainee while interacting with the public and all relevant public safety agencies and organizations serviced by the PSAP.

(3) A call-taker/dispatcher who is otherwise subject to the training requirements set forth in this section, but who has been previously employed in such capacity, may in lieu of completing the training requirements, show competency in specific performance areas pursuant to a protocol established by the employing jurisdiction.

(4) Completion time. Every call-taker/dispatcher subject to the training requirements of this section shall satisfactorily complete the ESDTEP training program:

- (i) within 18 months of the date of initial appointment for persons employed more than 20 hours per week; or
- (ii) within 24 months of the date of initial appointment for persons employed 20 hours per week or less.

(5) Supervision.

(i) The ESDTEP program training shall occur under the immediate supervision of a competent trainer.

(ii) Call-takers/dispatchers shall not be assigned to unsupervised duty until the training is satisfactorily completed.

(6) Administrative requirements. The authority shall:

(i) maintain accurate and current copies of curricula consisting of course outlines and descriptions, and specific lesson plans for all training courses;

(ii) maintain and make available accurate training records of all trainees, including daily written evaluations.

(b) Classroom and related instruction.

(1) In addition to the ESDTEP program training, all call-takers/dispatchers shall complete the following:

(i) a course of classroom instruction consisting of a minimum of 40 hours, including but not limited to, the following topics:

- (a) Roles and Responsibilities;
- (b) Legal Aspects;
- (c) Interpersonal Communications;
- (d) Technologies;
- (e) Telephone Techniques;
- (f) Call Classification;
- (g) Radio Communications;
- (h) Stress Management; and

(ii) a course of study in Incident Command System, to include, but not be limited, to [the ICS 100 course available from the New York State Emergency Management Office]:

(a) IS-700, or the equivalent, as required by Homeland Security Presidential Directive Number Five; and

(b) ICS-100, or the equivalent, as required by Homeland Security Presidential Directive Number Five.

(2) The Board may establish a list of approved classroom and related instructional programs which meet the requirements set forth above.

(3) (2) Completion time. Every call-taker/dispatcher subject to the training requirements of this section shall satisfactorily complete the classroom and related instruction training set forth above within 12 months of the date of initial appointment.

(3) The Board may establish a list of approved classroom and related instructional programs which meet the requirements set forth above.

(4) All call-takers/dispatchers who are in a supervisory position shall complete the following:

(i) IS-700, or the equivalent, as required by Homeland Security Presidential Directive Number Five;

(ii) ICS-100, or the equivalent, as required by Homeland Security Presidential Directive Number Five; and

(iii) ICS-200, or the equivalent, as required by Homeland Security Presidential Directive Number Five.

(5) Every call-taker/dispatcher who is in a supervisory position shall satisfactorily complete the training requirements set forth in the section above within 12 months of the date of appointment to a supervisory position.

[(4)] (6) Administrative requirements. The authority shall:

(i) maintain accurate and current copies of curricula consisting of course outlines and descriptions, and specific lesson plans for all training courses;

(ii) maintain and make available accurate training records of all trainees, including daily written evaluations.

(c) Extensions of time.

(1) The Board may grant an extension of time for completion of the training required under subdivision (b) of this section under the following conditions:

- (i) illness;
- (ii) injury;
- (iii) military service;
- (iv) special duty assignment required and performed in the public interest;

(v) administrative leave involving the determination of workers' compensation or disability retirement issues, or suspension pending investigation or adjudication of an offense; or

(vi) any other reason documented by the authority, which reason shall be specifically described.

(2) Prior to the expiration of the time required for completion, the authority shall present written notification that the trainee is unable to complete such training due to one or more of the reasons set forth in paragraph (1) herein, accompanied by appropriate documentation.

(3) Any extension of time approved by the Board shall not exceed a single 12-month extension.

(d) The training standards set forth in this rule shall be met through attendance at either a recognized training academy or through an in-house training program. Trainees shall be required to attend all classes and shall not be placed on duty or on call during such training except in cases of emergency.

Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Part 5201, Appendix A, is amended to read as follows:

APPENDIX A

A-1 The following courses of instruction meet or exceed the classroom instruction requirements set forth in 21 NYCRR § 5201.3(b)(1)(i):

A-1.1 Association of Public Safety Communications Officials Basic Telecommunicator Course, Fourth Edition, Version 3 (2000).

A-1.2 National Academies of Emergency Dispatch, Emergency Telecommunicator Manual, Edition 1 (2001).

A-1.3 New York State Municipal Police Training Council, Public Safety Telecommunicator's Course.

A-2 The following programs meet or exceed the NHTSA EMD approved program of instruction:

A-2.1 Priority Dispatch;

A-2.2 PowerPhone.

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## Public Service Commission

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

**Interconnection Agreement between Sprint Communications Company L.P. and Rural Telephone Company**

**I.D. No.** PSC-22-06-00010-P

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

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

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

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

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

**Substance of proposed rule:** Sprint Communications Company L.P. and Rural Telephone Company have reached a negotiated agreement whereby Sprint Communications Company L.P. and Rural Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

**Data, views or arguments may be submitted to:** 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-C-0556SA1)

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

**Interconnection Agreement between Sprint Communications Company L.P. and Chautauqua and Erie Telephone Corporation**

**I.D. No.** PSC-22-06-00011-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 or reject, in whole or in part, a proposal filed by Sprint Communications Company L.P. and Chautauqua and Erie Telephone Corporation for approval of an interconnection agreement executed on May 4, 2006.

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

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

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

**Substance of proposed rule:** Sprint Communications Company L.P. and Chautauqua and Erie Telephone Corporation have reached a negotiated agreement whereby Sprint Communications Company L.P. and Chautauqua and Erie Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

**Data, views or arguments may be submitted to:** 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-C-0557SA1)

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

**Interconnection Agreement between Sprint Communications Company L.P. and Chazy & Westport Telephone Corporation**

**I.D. No.** PSC-22-06-00012-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 approve or reject, in whole or in part, a proposal filed by Sprint Communications Company L.P. and Chazy & Westport Telephone Corporation for approval of an interconnection agreement executed on May 4, 2006.

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

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

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

**Substance of proposed rule:** Sprint Communications Company L.P. and Chazy & Westport Telephone Corporation have reached a negotiated agreement whereby Sprint Communications Company L.P. and Chazy & Westport Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

**Data, views or arguments may be submitted to:** 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-C-0559SA1)

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

**Interconnection Agreement between Sprint Communications Company L.P. and Nicholville Telephone Company**

**I.D. No.** PSC-22-06-00013-P

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

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

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

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

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

**Substance of proposed rule:** Sprint Communications Company L.P. and Nicholville Telephone Company have reached a negotiated agreement whereby Sprint Communications Company L.P. and Nicholville Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement estab-

lishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

**Data, views or arguments may be submitted to:** 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-C-0560SA1)

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

**Interconnection Agreement between Verizon New York Inc. and Newport Telephone Company**

**I.D. No.** PSC-22-06-00014-P

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

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

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

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

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

**Substance of proposed rule:** Verizon New York Inc. and Newport Telephone Company have reached a negotiated agreement whereby Verizon New York Inc. and Newport Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

**Data, views or arguments may be submitted to:** 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-C-0561SA1)

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

**Interconnection Agreement between Sprint Communications Company L.P. and Champlain Telephone Company**

**I.D. No.** PSC-22-06-00015-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Sprint Commu-

nications Company L.P. and Champlain Telephone Company for approval of an interconnection agreement executed on May 4, 2006.

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

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

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

**Substance of proposed rule:** Sprint Communications Company L.P. and Champlain Telephone Company have reached a negotiated agreement whereby Sprint Communications Company L.P. and Champlain Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms, and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

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

**Data, views or arguments may be submitted to:** 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-C-0562SA1)

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

**New Types of Electricity Meters, Transformers and Auxiliary Devices by HVB AE Power Systems Incorporated**

**I.D. No.** PSC-22-06-00016-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 filed by HVB AE Power Systems Incorporated for the approval of Nissin Electric Company's voltage transformer type SVR-34C.

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

**Subject:** Approval of new types of electricity meters, transformers, and auxiliary devices—Case 279.

**Purpose:** To permit electric utilities in New York State to use the Nissin Electric Company voltage transformer type SVR-34C.

**Substance of proposed rule:** The Commission will consider a request from HVB AE Power Systems Incorporated for the approval for use of the Nissin Electric Company Voltage Transformer SVR-34C in New York State. According to HVB AE Power Systems Incorporated, the SVR-34C is capable of providing ANSI revenue metering class accuracy, and has been tested to meet the compliance accuracy requirements as stated in ANSI C12.11 and IEEE C57.13 test specifications. In accordance with 16 NYCRR Part 93, Consolidated Edison Company of New York, Inc. has submitted a letter of intent to use the SVR-34C voltage transformer in its customer billing and metering applications, if approved.

**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-0342SA1)

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

#### New Types of Electricity Meters, Transformers and Auxiliary Devices by Rochester Gas and Electric Corporation

I.D. No. PSC-22-06-00017-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, a petition filed by Rochester Gas and Electric Corporation for the approval of the SENTRY family of isolation relays, manufactured by Austin International Incorporated.

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

**Subject:** Approval of new types of electricity meters, transformers, and auxiliary devices — Case 279.

**Purpose:** To permit electric utilities in New York State to use the SENTRY family of isolation relays in commercial and industrial metering applications.

**Substance of proposed rule:** The Commission will consider a request by Rochester Gas and Electric Corporation (RG&E) for the approval to use the Sentry family of isolation relays in commercial and industrial applications in New York State. The Sentry relays are of solid state design that prevents corruption of meter data by providing an isolated signal between the revenue-based meter and electronic equipment, such as data monitoring equipment. According to RG&E, the Sentry relays have been tested to meet the applicable requirements as stated in ANSI C12.1 test specifications.

**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-0453SA1)

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

#### Submetering of Electricity by Battery Place Green, LLC

I.D. No. PSC-22-06-00018-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 in part, the petition filed by Battery Place Green, LLC to submeter electricity at Site 3, Battery Park City, New York, NY.

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

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

**Purpose:** To submeter electricity at Site 3, Battery Park City, New York, 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 Battery Place Green, LLC to submeter electricity at Site 3, Battery Park City, 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-0519SA1)

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

#### Hourly Pricing by National Grid

I.D. No. PSC-22-06-00019-P

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

**Proposed action:** As discussed in an order denying petition for rehearing and clarification in part and adopting mandatory hourly pricing requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on National Grid's economic development customers. The commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing before tariff provisions take effect.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10) and (12)

**Subject:** Impacts of hourly pricing on economic development customers.

**Purpose:** To assess the impacts of hourly pricing on National Grid's economic development customers to determine if any exemption from hourly pricing are needed.

**Substance of proposed rule:** As discussed in an Order Denying Petition for Rehearing and Clarification in Part and Adopting Mandatory Hourly Pricing Requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on National Grid's economic development customers. The Commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing before tariff provisions take effect.

**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:** August 1, 2006.

#### **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-E-0641SA3)

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

#### Hourly Pricing by New York State Electric & Gas Corporation

I.D. No. PSC-22-06-00020-P

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

**Proposed action:** As discussed in an order denying petition for rehearing and clarification in part and adopting mandatory hourly pricing requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on New York State Electric & Gas Corporation's economic development customers. The commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing before tariff provisions take effect.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10) and (12)

**Subject:** Impacts of hourly pricing on economic development customers.

**Purpose:** To assess the impacts of hourly pricing on New York State Electric & Gas Corporation's economic development customers to determine if any exemption from hourly pricing are needed.

**Substance of proposed rule:** As discussed in an Order Denying Petition for Rehearing and Clarification in Part and Adopting Mandatory Hourly Pricing Requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on New York State Electric & Gas Corporation's economic development customers. The Commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing before tariff provisions take effect.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-E-0641SA4)

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

**Hourly Pricing by Rochester Gas & Electric Corporation**

**I.D. No.** PSC-22-06-00021-P

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

**Proposed action:** As discussed in an order denying petition for rehearing and clarification in part and adopting mandatory hourly pricing requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on Rochester Gas and Electric Corporation's economic development customers. The commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing before tariff provisions take effect.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10) and (12)

**Subject:** Impacts of hourly pricing on economic development customers.

**Purpose:** To assess the impacts of hourly pricing on Rochester Gas and Electric Corporation's economic development customers to determine if any exemption from hourly pricing are needed.

**Substance of proposed rule:** As discussed in an Order Denying Petition for Rehearing and Clarification in Part and Adopting Mandatory Hourly Pricing Requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on Rochester Gas and Electric Corporation's economic development customers. The Commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing before tariff provisions take effect.

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

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

**Public comment will be received until:** September 1, 2006.

**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-E-0641SA5)

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

**Hourly Pricing by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-22-06-00022-P

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

**Proposed action:** As discussed in an order denying petition for rehearing and clarification in part and adopting mandatory hourly pricing requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on Consolidated Edison Company of New York, Inc.'s economic development customers. The commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10) and (12)

**Subject:** Impacts of hourly pricing on economic development customers.

**Purpose:** To assess the impacts of hourly pricing on Consolidated Edison Company of New York, Inc.'s economic development customers to determine if any exemption from hourly pricing are needed.

**Substance of proposed rule:** As discussed in an Order Denying Petition for Rehearing and Clarification in Part and Adopting Mandatory Hourly Pricing Requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on Consolidated Edison Company of New York, Inc.'s economic development customers. The Commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing.

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

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

**Public comment will be received until:** September 1, 2006.

**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-E-0641SA6)

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

**Hourly Pricing by Orange and Rockland Utilities, Inc.**

**I.D. No.** PCS-22-06-00023-P

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

**Proposed action:** As discussed in an order denying petition for rehearing and clarification in part and adopting mandatory hourly pricing requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on Orange and Rockland Utilities, Inc.'s economic development customers. The commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10) and (12)

**Subject:** Impacts of hourly pricing on economic development customers.

**Purpose:** To assess the impacts of hourly pricing on Orange and Rockland Utilities, Inc.'s economic development customers to determine if any exemption from hourly pricing are needed.

**Substance of proposed rule:** As discussed in an Order Denying Petition for Rehearing and Clarification in Part and Adopting Mandatory Hourly Pricing Requirements issued April 24, 2006 in Case 03-E-0641, the Public Service Commission will assess the impacts of hourly pricing on Orange and Rockland Utilities, Inc.'s economic development customers. The Commission may adopt, modify or reject, in whole or in part, any needed exemptions from hourly pricing.

**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:** September 1, 2006.

**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-E-0641SA7)

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

**Transfer of Land by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-22-06-00024-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Consolidated Edison Company of New York, Inc. for authority under Public Service Law section 70 to sell approximately 86 acres of land with two farm buildings, approval of the proposed accounting treatment for the transfer, and related relief.

**Statutory authority:** Public Service Law, sections 5(b), (c), 65(1), 66(1), (2), (5), (8), (9), (10), (11), (12) and 70

**Subject:** Transferring of approximately 86 acres of land, consideration of the accounting for the sale, and related matters.

**Purpose:** To transfer approximately 86 acres of land with two farm buildings and its associated accounting treatment and related matters.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the transfer of approximately 86 acres of land, owned by Consolidated Edison Company of New York, Inc. (Con Edison) to four individuals. The land, on which there are two farm buildings, is part of the Mid-Hudson site, which was acquired in the 1970s by Con Edison for generation purposes. The site is no longer needed for the company's utility operations, and Con Edison has been selling it in individual parcels. The Commission is also considering approval of Con Edison's proposed accounting treatment for the sale and making other related findings.

**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.

(99-E-1446SA2)

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

**Submetering of Electricity by Central Towers Preservation, LP**

**I.D. No.** PSC-22-06-00025-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 in part, the petition filed by Central

Towers Preservation, LP to submeter electricity at 400 Central Ave., Albany, NY.

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

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

**Purpose:** To submeter electricity at 400 Central Ave., Albany, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Central Towers Preservation, LP to submeter electricity at 400 Central Avenue, Albany, 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-0520SA1)

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

**Submetering of Electricity by Augustus & James Corporation**

**I.D. No.** PCS-22-06-00026-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 in part, the petition filed by Augustus & James Corporation to submeter electricity at 515 W. 59th St., New York, NY.

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

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

**Purpose:** To submeter electricity at 515 W. 59th St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Augustus & James Corporation to submeter electricity at 515 West 59 Street, New York, 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-0540SA1)

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

**Submetering of Electricity by Herbert E. Hirschfeld, P.E.**

**I.D. No.** PSC-22-06-00027-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 Mr. Herbert E. Hirschfeld, P.E., on behalf of Claremont Gardens, to submeter electricity at Van Cortlandt Ave. and Rte. 9, Ossining, NY.

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

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

**Purpose:** To submeter electricity at Van Cortlandt Ave. and Rte. 9, Ossining, 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 Mr. Herbert E. Hirschfeld, P.E., on behalf of Claremont Gardens, to submeter electricity at Van Cortlandt Avenue and Route 9, Ossining, 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-0564SA1)

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

**Transfer of Ownership of Stock and Other Related Matters between Corning Natural Gas Corporation and C&T Enterprises**

**I.D. No.** PSC-22-06-00028-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 will review a joint petition of Corning Natural Gas Corporation (Corning) and C&T Enterprises (C&T) for authorization under sections 69, 70 and 110 of the Public Service Law to transfer ownership of the stock of Corning Natural Gas Corporation to C&T Enterprises, under section 110 of the Public Service Law for financing approval, to make various changes in the rates, charges, rules and regulations of Corning contained in the schedule for gas services—P.S.C. Nos. 2, 3, and 4, and other related approvals.

**Statutory authority:** Public Service Law, sections 69, 70 and 110

**Subject:** Authorization for the transfer ownership of stock and other related approvals.

**Purpose:** To consider whether to allow the merger, change rates and approve the financing.

**Substance of proposed rule:** The Public Service Commission is considering a Joint Petition of Corning Natural Gas Corporation (Corning) and C&T Enterprises (C&T) for Authorization under Sections 69 and 70 of the Public Service Law (PSL) to transfer Ownership of the Stock of Corning Natural Gas Corporation to C&T Enterprises, under Section 110 of the PSL for Financing Approval, to make various changes in the rates, charges, rules and regulations of Corning contained in the schedule for gas services—P.S.C. Nos. 2, 3, and 4, and Other Related Approvals. The Commission may approve, reject or modify, in whole or in part, the relief requested by Corning.

**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-G-0569SA1)

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

**Residential and Farm Service Rates by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-22-06-00029-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 207.

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

**Subject:** Residential and farm service rates.

**Purpose:** To modify the rates contained in the Residential Service Classifications Nos. 1—Residential and Farm Service and 1C—Residential and Farm Service Option Time of Use Rates and to cancel 1B—Residential and Farm Service.

**Substance of proposed rule:** The Commission is considering Niagara Mohawk Power Corporation's (Niagara Mohawk's) request to increase the rates in Service Classification No. 1—Residential and Farm Service (SC 1); to eliminate Service Classification No. 1-B—Residential and Farm Service (SC 1-B); and to reduce the rates and alter the design of No. 1-C—Residential and Farm Service—Option Time of Use Rates (SC 1-C). Niagara Mohawk is proposing to decrease SC 1-C rates, eliminate its time-differentiated distribution delivery and competitive transition charges, and create new time-differentiated electricity supply cost charges and delivery charge adjustments using the same time-of-use and seasonal time periods as current SC 1-C. Niagara Mohawk is also proposing to cancel SC 1-B and move customers served thereunder to SC 1. Niagara Mohawk is proposing to recover the revenue difference arising from the rate decreases to SC Nos. 1-B and 1-C customers from SC 1 by increasing its distribution delivery rates to collect the revenue difference. The combination of these proposed changes would be revenue neutral to Niagara Mohawk. The Commission may approve, reject or modify, in whole or in part, Niagara Mohawk's request.

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

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

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

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

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

(01-M-0075SA29)

## Department of Transportation

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

#### Vehicle and Driver Operational Requirements

I.D. No. TRN-22-06-00009-P

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

**Proposed action:** Amendment of sections 720.1, 720.3-720.8, 720.11, 720.12, 721.1-721.4 and 721.6 of Title 17 NYCRR.

**Statutory authority:** Transportation Law, sections 14, 138 and 140; Vehicle and Traffic Law, sections 375 and 1223-a; L. 1997, ch. 202; L. 1999, ch. 525

**Subject:** Vehicle and driver operational requirements.

**Purpose:** To simplify, clarify, update, and correct the Department of Transportation's vehicle and driver operational requirements while preserving public safety.

**Substance of proposed rule (Full text is not posted on a State website):** Because of the length of the changes, the New York State Department of Transportation (NYSDOT or the Department) is submitting this summary of changes to Parts 720 and 721 of 17 NYCRR for publication in the State Register rather than the full text.

In July of 1999, these regulations were promulgated representing the first rewrite of the regulations in nearly 30 years, condensing over 200 pages of regulations to approximately 100 pages. In doing so the Department combined two sets of regulations (requirements for vehicles with a seating capacity of 22 passengers or less and requirements for vehicles with a seating capacity of more than 22 passengers).

Since the new regulations went into place the Department has worked closely with the passenger industry to both educate and assist operators in complying with the new requirements. The Department has released several rounds of "Interpretations & Guidance" in an effort to provide further clarification of what is required in the new regulations.

The "Interpretation & Guidance" were also used to deal with consistency issues that have arisen over the past years which fall into the following four categories:

1. New state statutes have been enacted which are in conflict with current regulations.
2. New technologies have been introduced to the market that provide for improved and safer vehicles, however in some cases these technologies are inconsistent with current regulations.
3. Corrections are needed to the current regulations in that with the combining of the two categories of vehicle types (vehicles with a seating capacity of 22 passengers or less and vehicles with a seating capacity of over 22 passengers), errors and omissions were made in the current text.
4. Further clarification is needed in an effort to assist the industry to better understand and, therefore, comply with the requirements.

In order to effectively promote safety of the public, the proposed revisions are intended to modernize, clarify and to further enhance NYSDOT's vehicle safety requirements making them consistent with newly enacted state statutes and federal regulations.

**Text of proposed rule and any required statements and analyses may be obtained from:** M. Gerald Smith, Department of Transportation, Passenger Carrier Safety Bureau, 50 Wolf Rd., POD 54, Albany, NY 12232, (518) 457-4823, e-mail: MSMITH@dot.state.ny.us

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

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

#### Regulatory Impact Statement

1. Statutory Authority: The statutory authority for the New York State Department of Transportation (NYSDOT or the Department) to promulgate these rules is found in the Transportation Law (TL) and the Vehicle and Traffic Law (VTL).

TL Section 14 sets forth the Department's general powers and specifically in Section 14(26) authorizes the Department to exercise those powers which were transferred to the Department from the Department of Motor Vehicles; Section 14(12) authorizes the Department to exercise all powers relating to traffic regulation and control as set forth in the VTL or in other

laws; and Section 14(18) authorizes the Department to make rules and regulations to discharge the Department's powers and duties.

TL Section 138 sets forth the Department's general powers regarding all motor carriers and specifically in Section 138(2) authorizes the Department to promulgate regulations for the administration of all provisions of TL Article 6 entitled Matters Relating to All Motor Carriers; Section 138(1) authorizes the Department to regulate motor carriers by establishing reasonable requirements with respect to continuous and adequate service, uniform systems of accounts, records, reports, preservation of records and safety of operation and equipment; and Section 138(6) authorizes the Department to establish reasonable classifications of carriers included in the term motor carrier and to promulgate regulations to be observed by such classifications of carriers.

TL Section 140 describes the Department's general authority regarding safety requirements and particularly states in Section 140(2)(a), (b) and (c) that the Department shall have the power to adopt rules and regulations governing the safety of operation of various types of motor vehicles and the inspection of all such motor vehicles.

VTL Section 375 sets equipment standards and authorizes the promulgation of regulations setting standards for equipment on various types of motor vehicles including school buses.

In particular, VTL Section 375(21-h(a.-c.)) requires school buses with a seating capacity of 10 passengers or more manufactured for use in this state on or after April first, two thousand, to be equipped with exterior reflective markings and every school bus with a seating capacity of 10 passengers or more used in this state on or after April first, two thousand two, shall be equipped with exterior reflective markings.

Chapter 202 of the Laws of 1997 gives the Department the authority to promulgate rules and regulations governing the safety of operation of certain double-decker vehicles, especially, the safety of historic double-decker sightseeing buses as appropriate and to ensure that the costs of inspections of double-decker sightseeing buses are borne by the operators of such sightseeing services.

VTL Section 1223-a requires identification on certain school buses of the telephone number of the owner and/or operator and, therefore, provides the basis for the proposed rules relating to such identification.

2. Legislative Objectives: The proposed amendments to the regulations follow the legislative intent by revising the existing vehicle and driver operational requirements to reflect recent changes in the Vehicle and Traffic Law, as well as to better meet the needs of carriers while at the same time maintaining the safety requirements for the passengers and the general public. The last amendments to the enabling legislation were by Chapter 525 of the Laws of 1999.

3. Need and Benefits: These changes represent further clarification and modification to the Department's bus and passenger carrying vehicle safety regulations which were completely updated in 1999 for the first time since responsibility for bus inspections was transferred to NYSDOT from the New York State Public Service Commission in the early 1970's. This effort represents the third Phase of an effort that was begun in the Fall of 1995, with the initiation of the Bus and Passenger Vehicle Out-of-Service (OOS) and Defect Criteria that was formally revised in September of 1996.

Specifically, the Phase III changes:

- i. Reflect newly enacted state statutes and federal requirements,
- ii. Allow for new technologies which do not comply with current regulations,
- iii. Correct errors and omissions which were made when the current regulations were completely updated in 1999 for the first time since the early 70's, and
- iv. Further simplify and clarify the present bus and passenger carrying vehicle requirements.

As a result, the proposed regulations are more user friendly and reflect the changes in recently enacted state statutes, federal regulations and the National School Transportation Specifications & Procedures released in May of 2000 and promulgated subsequent to the promulgation of the Department's existing bus regulations.

Key changes are as follows:

- Definitions have been updated.
- Regulation language has been revised to reflect newly enacted legislation regarding reflective tape requirements.
- New electronic brake performance technology has been implemented by the Department and is now reflected in the updated brake performance regulations.
- Inconsistencies and omissions between Department vehicle requirements and federal standards and national guidelines have been eliminated.

- The out-of-service criteria has been amended to either add, clarify or correct a total of 20 criteria; adding 3 new criteria due to new statutes or to provide further clarification; and adds language to 17 existing criteria to either correct errors or clarify current requirements.

In summary, the revised rules provide clearer language to describe what is required, correct errors and omissions, and allow operators more flexibility while maintaining public safety.

4. Costs: NYSDOT bus and passenger carrying vehicle safety regulations are applied to vehicles subject to Department semi-annual safety inspections and re-inspections pursuant to Section 140 of the Transportation Law. The major intent of the proposed revisions to the safety regulations is to provide a clearer understanding to the industry as to what is actually required, as well as to correct errors and omissions. It is therefore estimated that the proposed changes will have no significant cost benefit or detriment to the passenger transportation industry.

The one new requirement based on recently enacted legislation which amended the Vehicle and Traffic Law and Education Law to now require reflective tape on the exterior of school buses, required the Commissioner of the Department of Motor Vehicles (NYSDMV) to promulgate regulations. In doing so, NYSDMV submitted to the Governor's Office of Regulatory Reform a cost analysis of the new reflective tape requirement. In their submission, NYSDMV estimated a cost to the industry of \$4,900,000.00, based on taping 4000 new school buses and retrofitting 45,000 existing school buses with tape. Since this submission an amendment to this legislation was passed into law which requires reflective tape only on school buses with a seating capacity of 11 persons or greater versus the 1999 legislation which required reflective tape on any school vehicle. Therefore, based on the recently passed legislation, the Department modified the projected cost to the industry to be \$4,165,000. This is based on NYSDMV's submission and the Department's projection of approximately 15% of the 49,000 statewide school bus fleet having a seating capacity of 10 persons or less. Therefore, 41,650 school buses would require reflective tape at an estimated cost of \$100 per school bus for a total cost of \$4,165,000. This represents a \$735,000 savings to the industry out of the \$4,900,000 estimated cost based on the 1999 reflective tape legislation. In addition, since this is a State-aidable expense, the State will pick up some of the cost to local school districts. Although we do not have a precise figure, the Department estimates that the State will pay approximately 75% of the projected \$4,165,000 cost or \$3,123,750. The remaining \$1,041,250 would be paid by private schools and private school bus contractors.

With regards to the other additional modifications to the regulations, a precise estimate of savings realized by industry is difficult, however, if the more understandable and concise language makes it easier for the industry to pass a Department semi-annual safety inspection, savings will be realized. There are approximately 60,000 vehicles being inspected by NYSDOT twice annually. The current statewide out-of-service rate is approximately 12% which means the Department is required to perform 14,400 re-inspections annually. If the new more understandable requirements result in a one percent improvement in the statewide out-of-service rate, then the Department would only have to perform 13,200 re-inspections; a savings of 1200 re-inspections. Assuming this will free up each of these vehicles for an additional half day of service, and the average value is between \$200.00 and \$400.00 per half day, the potential value of these additional savings to the industry could be between \$240,000.00 - \$480,000.00 per year.

In summary, the enhanced flexibility will save the industry money by avoiding expensive retrofitting or holding a vehicle out-of-service until a NYSDOT re-inspection can be performed, while at the same time maintaining the safety requirements for the passengers and the general public.

5. Local Government Mandates: School districts will not pay the cost of adding the reflective tape since this is a State-aidable expense. As to the savings to local governments generated by the other modifications to the regulations, based on the projected industry wide savings noted above of \$240,000 - \$480,000 per year, school districts would realize savings of \$144,000 - \$288,000 per year. This is based on Department statistics which indicate that approximately 80% of the vehicles inspected by NYSDOT are involved in school transportation and of that population of vehicles, approximately 75% perform school transportation for local school districts.

6. Paperwork: Because the number of NYSDOT issued equipment waivers to operators, as well as re-inspections will be reduced, the amount of paperwork by NYSDOT staff will correspondingly be reduced. Specifically, it is expected that 1,200 vehicle re-inspections will be eliminated per year. This means that the processing of the additional paperwork associ-

ated with such re-inspections will be avoided. In addition, the bus operators, bus distributors and manufacturers should realize a similar savings in the amount of paperwork due to the elimination of 1,200 vehicle re-inspections.

7. Duplication: The revisions to the current passenger vehicle safety regulations do not duplicate Federal Motor Vehicle Safety Standards. The revisions do address issues that have surfaced since the Department's complete overhaul of the passenger vehicle safety regulations in 1999. Subsequently, New York State passed legislation requiring reflective tape on the side of school buses which is not required by federal regulation. In addition to the new state statute concerning reflective tape, the revisions allow for new technologies to be used by the passenger industry and provides clarification of existing requirements.

8. Alternatives: Yes, the Department did consider alternatives to the way the proposed language reads and in various cases the proposed rule is a direct outcome of industry outreach. For example, the industry requested that they be able to purchase school buses with a rear luggage compartment. Current regulations do not allow for a rear luggage compartment, therefore, the proposed regulations have been revised to allow a rear luggage compartment if the bus is equipped with a side emergency door. This configuration has always been allowed on school buses equipped with a rear engine. In addition, the industry asked the Department to allow for a step height of 8 inches versus the current 10 inch requirement. Since this request posed no safety concern the 8 inch step height revision has been proposed. The industry made a similar request concerning the vertical clearance requirement for entrance doors on smaller school buses from the current 72 inch requirement to 68 inches. As with the step height requirement, since this request posed no safety concern, the industry's request has been implemented into the Department's proposed revised regulation.

9. Federal Standards: The proposed regulations are consistent with current Federal Motor Vehicle Safety Standards (FMVSS) - 49 CFR Part 571 and the Federal Motor Carrier Safety Regulations (FMCSR) - 49 CFR Parts 350 to 399. Additionally, these rules are in keeping with the promulgated National School Transportation Specifications & Procedures released in May of 2000.

10. Compliance Schedule: Effective 60 days after publication of the final rule in the State Register in order to provide operators, vehicle manufacturers and distributors, as well as NYSDOT inspectors sufficient time to adjust to the updated requirements.

#### **Regulatory Flexibility Analysis**

1. Effect of Rule - The corrections and clarification of Parts 720 and 721 will especially benefit the smaller passenger carriers. There are 703 school districts in New York State and approximately two thousand small businesses, including small school districts with less than twenty-five vehicles subject to inspection by the New York State Department of Transportation (NYSDOT or Department) which will be positively affected by these rules.

The updated regulations will be a more user friendly product which will facilitate a better understanding of what is required of the operators, vehicle manufacturers and distributors in constructing, maintaining and operating vehicles subject to NYSDOT safety requirements. In most cases, the Department has made its vehicle construction standards consistent with the National School Transportation Specifications & Procedures released in May of 2000 and promulgated subsequent to the promulgation of the Department's existing bus regulations. As a result, there will be less confusion and need for vehicles to be purchased to meet unique New York State requirements that are not applicable in other parts of the United States.

2. Compliance Requirements - The descriptions of the out-of-service defects have been better defined in an effort to clearly specify when an out-of-service condition has been met.

Because the number of NYSDOT issued equipment waivers to operators, as well as re-inspections will be reduced, the amount of paperwork by NYSDOT staff will correspondingly be reduced.

Specifically, it is expected that 1,200 vehicle re-inspections will be eliminated per year. This means that the processing of the additional paperwork associated with such re-inspections will be avoided. In addition, the bus operators, bus distributors and manufacturers should realize a similar savings in the amount of paperwork due to the elimination of 1,200 vehicle re-inspections.

3. Professional Services - No additional or unique services are required. The clarifications and corrections of Parts 720 and 721 should facilitate a better understanding of Department requirements when such services are required.

4. Compliance Costs - There is no direct change from the present program, except fewer re-inspections will occur. As noted in the Regulatory Impact Statement, the proposed changes should save the industry between \$240,000 and \$480,000 per year.

In addition, the Vehicle and Traffic Law and Education Law were amended in 1999 to require reflective tape on the exterior of all school buses. In consultation with NYSDMV, the Department estimates a cost to the industry of \$4,900,000.00 based on taping 4000 new school buses and retrofitting 45,000 existing school buses with tape. Since this submission an amendment to this legislation was passed into law in 2001, which requires reflective tape only on school buses with a seating capacity of 10 passengers or more versus the 1999 legislation which required reflective tape on any school vehicle. Therefore, based on the recently passed legislation, the Department modifies the projected cost to the industry to be \$4,165,000. This is based on DOT's projection of approximately 15% of the 49,000 statewide school bus fleet having a seating capacity of 10 persons or less. Therefore, 41,650 school buses would require reflective tape at an estimated cost of \$100 per school bus for a total cost of \$4,165,000. This represents a \$735,000 savings to the industry out of the \$4,900,000 estimated cost based on the 1999 reflective tape legislation. In addition, since this is a State-aidable expense, the State will pick up some of the cost to local school districts. Although DOT does not have a precise figure, the Department estimates that the State will pay approximately 75% of the projected \$4,165,000 cost or \$3,123,750. The remaining \$1,041,250 would be paid by private schools and private school bus contractors. It should also be noted that most school districts purchase their buses off the Office of General Services' contract with school bus manufacturers. OGS awards bids to the lowest bidder who meets OGS' specifications. OGS requires the manufacturers to equip the buses with federal and State mandated equipment, such as reflective tape. Most school districts purchase off the OGS contract because the cost is far lower than if they go out to bid on their own. The cost is lower primarily because OGS purchases buses in such a large quantity which lowers the cost of the individual bus. School districts that purchase off the OGS contract are eligible for more State aid than those districts that go out to bid on their own. Moreover, when a district does not buy off the OGS contract, it is often because the district wants equipment above and beyond that required on the OGS bus. This too drives up the cost of the bus. There are no precise figures on the difference between the cost of a bus purchased off of the OGS contract and those purchased via a district bid. Public schools are eligible for partial reimbursement of bus equipment cost. State aid for bus equipment is determined by a formula set forth in the Education Law and administered by the State Education Department. Wealthy districts received much less State aid than poorer districts. The wealthier district receives about 6.5% reimbursement for aidable equipment, while the poorest districts receives 90% reimbursement. The average reimbursement rate across the State is 60%. Private schools are not eligible for state aid reimbursement.

5. Economic and Technological Feasibility - The proposed modifications to the regulations allow for new technologies for both current and emerging bus construction technologies. The changes do not add any increased requirements that would have a significant economic impact.

6. Minimizing Adverse Impact - This proposal will permit operators to purchase and maintain buses with fewer unique New York State requirements, while ensuring that public safety is not compromised. In addition to making the regulations easier to understand and therefore, easier to comply with the proposed regulations addresses issues raised by the industry. For instance the proposed language allows entrance doors on Type A buses to have a vertical opening clearance of 68 inches versus the current requirement of 72 inches. Many Type A buses are only equipped with a 68 inch vertical clearance on entrance doors, therefore this revised regulation will allow small businesses and local school districts to continue to use their buses in service without the need of costly retrofits. Please also refer to the discussion in No. 4 above regarding the cost savings to small businesses for reflective tape.

7. Small Business and Local Government Participation - These revisions were presented as an agenda item at the last annual Fall Motor Carrier Safety Conference in Saratoga Springs, New York. Nearly 900 industry and government representatives including the New York Association of Pupil Transportation, the New York State School Bus Contractors and the Bus Association of New York attended these sessions. In addition, the Department held an industry outreach session in December of 2000 lasting a full day with members of nearly every bus distributor and many bus manufacturers to discuss the proposed changes in greater detail. All suggestions were carefully reviewed by Department bus safety experts and appropriate revisions have been incorporated into this proposal.

Because the proposed changes correct errors and omissions and provide further clarification and flexibility, there is not expected to be any adverse impact on small businesses. Furthermore, the revisions do not increase the level of regulatory mandates or requirements on local governments.

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

A Rural Area Flexibility Analysis is not submitted because the proposed revisions to Parts 720 and 721 will not impose any adverse economic impact or recordkeeping, reporting, or other compliance requirements on public or private entities in rural areas. The Department, in consultation with motor carriers, school district representatives, associations, and industry representatives has considered the effects of the proposed revisions and has determined that they will not adversely impact rural areas. The proposed revisions to the Department's bus and passenger vehicle safety regulations correct errors and omissions and provide further clarification and flexibility to the passenger transportation industry, while preserving public safety.

Therefore, these proposed revisions will not adversely impact rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not submitted because the proposed revisions to Parts 720 and 721, by its very nature, will not have an adverse impact on jobs or employment opportunities. The proposed revisions to the Department's bus and passenger vehicle safety regulations correct errors and omissions and provide further clarification and flexibility to the passenger transportation industry, while preserving public safety. The proposed revisions also reflect recently enacted State legislation and are generally consistent with the National School Transportation Specifications & Procedures released in May of 2000. Compliance with the revised regulations shall become more uniform throughout the State because of the clarification of the requirements. Although uniformity should have a positive fiscal impact, it is not possible to quantify the impact on jobs and employment opportunities. Consequently, the proposed revisions will have either a positive impact or no impact on jobs and employment opportunities.