RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Tolerances and Regulations for Commercial Weighing and Measuring Devices

I.D. No. AAM-25-06-00012-A
Filing No. 1289
Filing date: Oct. 25, 2006
Effective date: Nov. 15, 2006

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

Action taken: Amendment of section 220.2 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18 and 179

Subject: Incorporation by reference in 1 NYCRR of the 2006 edition of National Institute of Standards and Technology ("NIST") Handbook 44.

Purpose: To incorporate by reference in 1 NYCRR the 2006 edition of NIST Handbook 44.

Text or summary was published in the notice of proposed rule making, I.D. No. AAM-25-06-00012-P, Issue of June 21, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Ross Andersen, 10B Airline Dr., Albany, NY 12235, (518) 457-3146, e-mail: ross.andersen@agmkt.state.ny.us

Assessment of Public Comment
The agency received no public comment.

Department of Audit and Control

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Filing of Abandoned Property Reports

I.D. No. AAC-46-06-00008-P

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

Proposed action: Amendment of section 123.1; repeal of sections 123.2 and 123.6 of Title 2 NYCRR.

Statutory authority: Abandoned Property Law, section 1414

Subject: Filing of abandoned property reports.

Purpose: To eliminate the use of magnetic tape cartridges as a method of transmitting personal identifying information of owners of abandoned property to the Comptroller.

Text of proposed rule: Section 123.1 of Title 2 of the New York Codes, Rules and Regulations is amended as follows:

Section 123.1 Filing of abandoned property reports

(a) All holders of abandoned property required to report such property pursuant to the Abandoned Property Law [must] *may* submit their reports of abandoned property using an *approved* electronic format [if reporting more than 25 items] or on form AC 2686, Report of Abandoned Property (Appendices 16 and 16-A of this Title, infra). *"Approved electronic format" shall consist of formats approved by the Comptroller. In no event will magnetic cartridges be permitted or accepted as an approved electronic format by the Comptroller. Information concerning approved electronic formats may be obtained by contacting the Comptroller's Office of Unclaimed Funds.*

[(b) Holders of abandoned property filing 25 or fewer items can submit their report using either an approved electronic format.]

(b) All reports of abandoned property, whether on an approved electronic format, or on form AC 2686, must be accompanied by a completed and notarized form AC 2709, Verification and Checklist for Unclaimed Property (Appendices 17 and 17-A of this Title, infra), signed by an authorized officer certifying that said report is true and complete to the best of said authorized officer's knowledge.

Section 123.2 of Title 2 of the New York Codes, Rules and Regulations is repealed.

Section 123.6 of Title 2 of the New York Codes, Rules and Regulations is repealed.

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

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 1414 of the Abandoned Property Law authorizes the Comptroller to adopt the rules and regulations necessary to enforce the provisions of the Abandoned Property Law. The amendment pertains to the format and procedure for reporting property deemed abandoned under the Abandoned Property Law to the Comptroller.

2. Legislative Objective:

The Comptroller is the custodian of property deemed abandoned under the Abandoned Property Law. Holders of property deemed abandoned under the law are required to report such property, as well as identifying information as to the owners of such property, to this Office to assist the Comptroller in processing claims to such property in the future. The amendment is intended to eliminate the use of magnetic tape cartridges for reporting identifying information to the Comptroller, in favor of more secure methods of transmitting such information.

3. Needs and Benefits:

In the administration of the Abandoned Property Law, holders of property deemed abandoned under the Abandoned Property Law are required to report personal identifying information as to the owners of such property to the Comptroller. To safeguard the personal identifying information of the owners of such property, the reporters must utilize secure methods of transmitting such information to the Comptroller. To this end, the Comptroller has determined that the reporting of such information by magnetic tape cartridge presents an unacceptable risk and, therefore, this means of transmitting information is being eliminated. The elimination of the use of this method of transmission will help ensure that the personal identifying information of owners of abandoned property is more secure while being transmitted to this Office.

4. Costs:

Initially, there may be a minimal cost to the regulated parties that are presently utilizing magnetic tape cartridges associated with changing the format of reporting this information to the Comptroller. There are no costs for continuing compliance with the amended rule. This amendment will not result in any additional costs to the agency.

5. Local Government Mandates:

Although a county, city, town, village, school district, fire district, or other special district that reports abandoned property to the Comptroller using magnetic tape cartridges may be affected by this amendment, presently none of these entities use this method of transmission. Furthermore, the amendment does not impose any new program, service, duty or responsibility on local governments. The amended rule simply eliminates a method of reporting personal identifying information to the Comptroller, in favor of more secure methods of transmitting such information.

6. Paperwork:

Since the amendment is merely eliminating a reporting format, *i.e.*, magnetic tape cartridge, the regulatory change will not result in any additional reporting requirements.

7. Duplication:

The amendment does not duplicate, overlap, or conflict with other rules or requirements of the State or Federal governments.

8. Alternatives:

There were no significant alternatives that were considered before deciding on the final proposal.

9. Federal Standards:

There are not any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule:

Based upon the previous reporting history of the Comptroller's Office, there are approximately 100 organizations including service providers using magnetic tape cartridges for reporting abandoned property to this Office. All these entities have been advised that the Comptroller will no longer accept reports submitted by magnetic tape cartridge. This Office has worked with reporters of abandoned property on alternative methods of transmitting such information and it does not anticipate that any additional time will be necessary to enable regulated parties to achieve compliance with the amended rule.

Regulatory Flexibility Analysis

1. Effect of Rule:

The amendment could potentially affect any small business or local government that reports property deemed abandoned under the provisions of the Abandoned Property Law to the Comptroller on magnetic tape cartridges. Based upon the previous reporting history of the Comptroller's Office, there are approximately 100 organizations including service providers using magnetic tape cartridges for reporting abandoned property to this Office. However, generally small businesses and local governments do not use this method of reporting. Therefore, generally small businesses and local governments will not be affected by the amendment.

2. Compliance Requirements:

Since the amendment will generally not affect small businesses or local governments there will not be any additional reporting, recordkeeping or other affirmative acts that a small business or local government will have to undertake to comply with the amendment. Further, it is noted that the amendment merely affects the format of reporting information to the Comptroller and does not impose any new reporting, recordkeeping or other affirmative acts on those affected by the amendment.

3. Professional Services:

No additional professional services are needed to comply with the amendment.

4. Compliance Costs:

To the extent that a reporter of abandoned property is currently utilizing magnetic tape cartridges to report information to the Comptroller, there could be an initial cost associated with changing the format of the report submitted to the Comptroller. There will, however, be no additional annual costs for continued compliance with the amended rule. The initial compliance costs will not vary for small businesses or local governments depending on the type and/or size of such business or local government.

5. Economic and Technological Feasibility:

As stated above, generally small businesses and local governments will not be affected by the amendment. However, even for those entities that had used magnetic tape cartridges to report information to this Office, changing their reporting format should not pose any economic or technical feasibility problems. There are several economic and readily available alternatives to the use of magnetic tape cartridges, including the use compact disks, diskettes and FTP (electronic transfer) or the use of paper reports.

6. Minimizing Adverse Impact:

As stated above, generally small businesses and local governments will not be affected by the amendment. In addition, the amendment will only have a minimal additional cost for any holder that had used magnetic tape cartridges to report information to this Office.

7. Small Business and Local Government Participation:

As stated above, generally small businesses and local governments will not be affected by the amendment. Additionally, it should be noted that any reporter that had previously reported information to this Office using magnetic tape cartridges was contacted by this Office and advised that magnetic tape cartridges would no longer be accepted. This Office worked with these reporters on acceptable alternative means of transmitting this information, including the use compact disks, diskettes and FTP (electronic transfer) or the use of paper reports.

Rural Area Flexibility Analysis

1. Types and Estimated Number of Rural Areas:

The proposed regulatory change will impact all reporters of abandoned property regardless of their location. However, there are only 100 reporters that have utilized magnetic tape cartridges to report abandoned property to this Office. Since it is generally large businesses that utilize this reporting format and these entities tend to be located around the financial and business centers in cities rather than in rural areas, the amended rule should not have an impact on rural areas.

2. Reporting, Recordkeeping and other Compliance Requirements; and Professional Services:

There are no additional reporting, recordkeeping or other compliance requirements imposed by the amendment. The amendment merely eliminates a format of reporting information to the Comptroller; all other requirements of the Abandoned Property Law remain the same. There are no professional services needed to comply with the amended rule.

3. Costs:

As stated above, generally reporters in the rural areas do not use magnetic tape cartridge as a means of transmitting information concerning property deemed abandoned under the Abandoned Property Law to the Comptroller. Therefore, the elimination of the use of this format of reporting such information will not impose any initial or continuing costs on such entities.

4. Minimizing Adverse Impact:

Implementation of the amendment will have little, if any, adverse impact on rural areas. As stated above, generally reporters in rural areas use other methods of transmitting abandoned property reports to the Comptroller, and, therefore, there will be no adverse impact on them.

5. Rural Area Participation:

As stated above, the amendment should not have an impact on rural areas. Additionally, all reporters of abandoned property that previously reported such property using magnetic tape cartridges were contacted by this Office and advised that magnetic tape cartridges would no longer be accepted. These reporters were also advised as to the other acceptable forms of transmitting information to this Office.

Banking Department

EMERGENCY RULE MAKING

Overdraft Protection Fee Disclosure

I.D. No. BNK-46-06-00010-E
Filing No. 1292
Filing date: Oct. 27, 2006
Effective date: Oct. 30, 2006

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

Action taken: Amendment of section 6.8 of Title 3 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Newly adopted section 6.8 permits state chartered banks, trust companies and thrift institutions to provide overdraft protection programs, and charge fees related thereto, to the same extent as permitted for federally chartered banks and thrift institutions. The emergency rule is necessary to ensure that consumers receive a separate, clear and conspicuous notice regarding any such fees that will apply to a new or existing account.

Subject: Overdraft protection fee disclosure.

Purpose: To require a separate clear and conspicuous notice to an accountholder if the account is or will be subject to newly permitted overdraft protection fees.

Text of emergency rule: ADDITIONAL AUTHORITY OF BANKS, TRUST COMPANIES, SAVINGS BANKS AND SAVINGS AND LOAN ASSOCIATIONS PURSUANT TO BANKING LAW, SECTIONS 14-g and 14-h

(Statutory Authority: Banking Law Sections 14-g, 14-h)

Section 6.8 of Part 6 of 3 NYCRR is amended to read as follows:

§ 6.8 Overdraft Protection Charges.

a. The Banking Board hereby finds that the promulgation of this section is consistent with the policy of the State of New York as declared in section 10 of the New York Banking Law and thereby protects the public interest, including the interests of depositors, creditors, shareholders, stockholders and consumers and is necessary to achieve or maintain parity between banks and trust companies and national banks, and between savings banks and savings and loan associations and federal savings associations, with respect to rights, powers, privileges, benefits, activities, loans, investments or transactions.

b. The Banking Board hereby finds that title 12, United States Code, section 24 (Seventh) permits national banks to lend money. Title 12, United States Code, section 1464 permits federal savings associations to accept deposits.

c. The Banking Board hereby finds that title 12, Code of Federal Regulations, Section 7.4002 provides that national banks may impose charges and fees on their customers, and title 12, Code of Federal Regulations, Section 557.12(f) allows federal savings associations to impose charges and fees regardless of any state laws. The Office of the Comptroller of the Currency and the Office of Thrift Supervision, in interpreting these sections, permit national banks and federal savings associations, respectively, to impose greater daily charges in connection with overdraft protection programs than is otherwise allowed under New York Banking Law for banks and trust companies, savings banks and savings and loan associations. (See Joint Guidance on Overdraft Protection Programs, 70 Federal Register 9127 (February 24, 2005), applicable to banks and trust companies and Guidance on Overdraft Protection Programs, 70 Federal Register 8428 (February 18, 2005), applicable to savings banks and savings and loan associations.)

d. Notwithstanding any other provision of law or regulation, State-chartered banks and trust companies, and savings banks and savings and loan associations may impose charges, in addition to the charge provided for in Part 32.1(a), for paying or accepting checks or other written orders drawn on, or effectuating electronic transactions from, accounts containing insufficient funds in cases in which the drawer of the check or other written order, or the account holder seeking to effectuate the electronic transaction, does not have a written agreement for an overdraft line of credit pursuant to Sections 108(5), 235(8-b) or 380(2) of the Banking Law to the same extent, and subject to the same conditions, as national banks and federal savings associations, respectively.

e. Commencing no later than May 3 2006, state-chartered banks and trust companies, savings banks, and savings and loan associations shall provide a separate clear and conspicuous notice to a customer at the time he or she opens an account or to a current accountholder at least once if such account will be subject to charges for covering overdrafts as described in subsection (d) of this section. Such notice shall provide clear disclosure and explanation of the parameters, costs and limitations of overdraft protection, including the charges which may be incurred by the customer and how such charges would be calculated.

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 January 24, 2007.

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. Sections 14-g and 14-h of the Banking Law authorize the Banking Board to adopt a rule or regulation permitting, respectively, banks and trust companies, and savings banks and savings and loan associations (hereafter "banking institutions"), to exercise the same rights and powers and engage in the same activities as, respectively, national banks and federal savings associations on substantively the same terms and conditions, to the extent that the Banking Law or other state law does not so authorize such rights, powers and activities for such banking institutions. However, sections 14-g and 14-h also authorize the Banking Board, in authorizing such rights, powers and activities, to impose by rule or regulation conditions or limitations in addition to those that imposed pursuant to federal law to the extent the Board determines necessary or appropriate.

2. Legislative objectives. The Legislature intended that sections 14-g and 14-h of the Banking Law allow State-chartered banking institutions, by Banking Board adoption of rules and regulation, to exercise the same rights and powers, and engage in the same activities as federally chartered banking institutions without requiring that the Legislature enact additional amendments to the Banking Law. Presumably, if other provisions of the Banking Law or other state law did not empower State chartered banking institutions to do the same things or to the same extent as federally chartered banking institutions, or even conflicted with the authorizations granted federally chartered banking institutions to do so, sections 14-g and 14-h were intended to permit the Banking Board by rule or regulation to enable State chartered banking institutions to so operate in the same fashion as federally chartered institutions.

3. Needs and benefits. In order that the account disclosures and required information therein addressed by the federal Guidances on Overdraft Protection Programs (Joint Guidance on Overdraft Protection Programs, 70 Federal Register 9127 (February 23, 2005), and Guidance on Overdraft Protection Programs, 70 Federal Register 8428 (February 18, 2005) and the federal regulations pertaining to the Truth in Savings Act (Regulation DD, 12 CFR Part 230)) be clearly set forth to customers and accountholders, the emergency rule requires State chartered banking institutions to provide a separate disclosure regarding any bounce protection that will apply to a new or existing account, beyond the one-time fee previously permitted by the Department's regulations. The information contained in the disclosure will need to conform to the standards specified by the federal Guidances and the TISA regulations. The purpose of this requirement is to ensure that particulars of bounce protection are not solely described within an account agreement's terms and conditions or a periodic statement, though banking institutions presumably will continue to also set forth those particulars in the account agreements. Bounce protection programs may cause consumers to incur significant costs if the bounce

protection feature is used extensively. The information contained in the required notice that is the subject of this rule making may well be overlooked by customers due to scope of other information contained in the account agreement and the statement, if it is not disclosed through a separate format.

4. Costs. There will be additional cost imposed on banking institutions by the giving of the separate notice, but the industry has indicated to the Department it does not object to the requirement.

5. Local government mandates. None.

6. Paperwork. This requirement will increase paperwork for banking institutions but this cannot be avoided as it is the objective of the rule making.

7. Duplication. The information contained in the required notice will be identical to the information contained in the account agreement's terms and conditions, or would otherwise be disclosed in a periodic account statement if the bounce protection program were applied to the account after it was opened.

8. Alternatives. There are no alternatives if the objective of the rule is to require a separate distinct and clear notice. Presumably, if banking institutions apply the product to accounts after being opened, they will not also disclose such information in the periodic account statements.

9. Federal standards. The content of the disclosures and the requirements of when such disclosures must be given are specified in the federal Guidances and Regulation DD, as cited above, and apply to all insured accounts.

10. Compliance schedule. Banking institutions must commence giving such notices not later than May 3, 2006, a date 90 days after the publication date of the initial emergency rule. Thereafter, pursuant to Regulation DD, banking institutions are required to give the notice when an account is initially opened and 30 days prior to applying a bounce protection program to an existing account. If the fees related to such program change following this required notice as they apply to existing accounts, then Regulation DD requires that notice be given 30 days prior the fees becoming effective, though such notice need not be a separate notice.

Regulatory Flexibility Analysis

1. Effect of rule: The emergency rule will require State-chartered banking institutions to provide a separate disclosure if a customer's bank account will be subject to bounce protection charges which go beyond the one-time fee previously permitted by the Department's regulations. This notice must be given either at the time the account is opened if bounce protection is one of the features of the account or if and when applied to an account after it has been opened. The content of such notice is prescribed pursuant to federal Guidances related to overdraft protection programs and federal Regulation DD, Truth in Savings, which applies to all deposit accounts. The information disclosed by banking institutions, absent the emergency rule, would be made either in the account agreement's terms and conditions when the account is opened, or in a periodic statement of account transactions if bounce protection were added as a feature of the account thereafter.

2. Compliance requirements: Banking institutions must provide such notice within 90 days after the effective date of this rule to accounts that have a bounce protection feature presently, to new accounts opened thereafter that have a bounce protection feature, or to existing accounts to which bounce protection is applied after such ninety day period.

3. Professional services: Banking institutions will not need additional professional services in order to execute this requirement.

4. Compliance costs: There will additional costs associated with providing a separate disclosure notice, but such costs should be minimal for all institutions.

5. Economic and technological feasibility: There are no economic or technological feasibility issues posed by this rule making or the resulting regulatory requirement.

6. Minimizing adverse economic impact: This rule is the sole provision imposed by the Banking Board that goes beyond the federal regulatory requirements and standards that otherwise pertain to the bounce protection programs banking institutions provide to account holders.

7. Small business participation and local government participation: No local government participation was necessary as the rule has no effect upon local governments. The banking industry trade associations were advised of the rule requirement prior to adoption by the Banking Board and did not object. A member of the Board, who is a CEO of a small banking institution, advised during the discussion of the proposed emergency rule, that it poses no compliance problems for banking institutions.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this rule making. The emergency rule will affect only banking institutions and such institutions in rural areas will not be held to any standards that differ from the standards applicable to banking institutions elsewhere in the state. Further, the regulatory requirement will not impose any adverse technological or economic burden upon such institutions. Presumably, the rule will benefit consumers located in rural areas, who are accountholders of banking institutions, by helping to ensure the accountholders are aware when bounce protection may be applied to their accounts, and thereby causes them to be knowledgeable of both the benefits and costs of such programs.

Job Impact Statement

A job impact statement is not submitted with this rule making. The emergency rule will not affect adversely employment opportunities in banking institutions and will have no adverse effect upon other businesses. It is expected that the emergency rule will neither increase nor decrease job opportunities and employment in all areas of the state.

Office of Children and Family Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Child Protective Investigations

I.D. No. CFS-46-06-00002-P

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

Proposed action: Amendment of section 432.2 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 421(3)

Subject: Child protective investigations.

Purpose: To clarify the procedures for cases where a child or home cannot be accessed by child protective service staff to conduct a safety assessment; and clarify the possible collateral contacts who may provide information relevant to a child protective investigation.

Text of proposed rule: Subparagraph (ii) of paragraph (3) of subdivision (b) of section 432.2 is amended to read as follows:

(ii) The full child protective investigation [shall] *must* include the following activities:

(a) face-to-face interviews with subjects of the report and family members of such subjects, including children named in the report. *If at any time during an investigation the subject of the report or another family member refuses to allow a child protective service worker to enter the home and/or to observe or talk to any child in the household, or if a child in the household cannot be located, the child protective service worker must assess whether it is necessary to seek a court order to obtain access to the child or home or to compel production of the child or whether other emergency action must be taken. The assessment must be made, at a minimum, in consultation with a child protective service supervisor as soon as necessary under the circumstances, but no later than 24 hours after the refusal or failure to locate the child or access the home. When it is assessed that it may be appropriate to seek a court order, legal staff who represent the child protective service must also be consulted, if possible. The assessment and the decision must be clearly documented in the progress notes for the investigation*;

(b) [the] obtaining [of] information from the reporting sources and other collateral contacts [such as] *which may include, but are not limited to,* hospitals, *family medical providers,* schools, police, [and] social service agencies *and other agencies providing services to the family, relatives, extended family members, neighbors and other persons who may have information relevant to the allegations in the report and to the safety of the children*; provided however, the name or other information identifying the reporter and/or source of a report of suspected child abuse or maltreatment, as well as the agency, institution, organization, [and/or] program *and/or other entity* with which such person(s) is associated must only be recorded or documented in progress notes and such documentation

must be recorded in the manner specified by OCFS pursuant to section 428.5(c)(2) of this Title;

(c) within seven days of receipt of the report, conducting a preliminary assessment of safety to determine whether the child named in the report and any other children in the household may be in immediate danger of serious harm. If any child is assessed to be unsafe, undertaking immediate and appropriate controlling interventions to protect the child(ren); the results of each safety assessment must be documented in the case record in the form and manner required by [the department] *OCFS*;

(d) a determination of the nature, extent and cause of any condition enumerated in such report and any other condition that may constitute abuse or maltreatment;

(e) obtaining the name, age and condition of other children in the home; and

(f) after seeing that the child or children named in the report are safe, notifying the subjects and other persons named in the report, except children under the age of 18 years, in writing, no later than seven days after receipt of the oral report, of the existence of the report and the subject's rights pursuant to title 6 of article 6 of the Social Services Law concerning amendment or expungement of the report.

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the New York State Office of Children and Family Services (OCFS), as successor agency to the former New York State Department of Social Services, to establish rules, regulations and policies to carry out its powers and duties under the SSL.

Section 421(3) of the SSL requires OCFS to promulgate regulations setting forth requirements for the performance by local social services districts of the duties and powers imposed and conferred upon them by the provisions of Title 6 of Article 6 of the SSL regarding child protective services and Article 10 of the Family Court Act regarding child protective proceedings.

2. Legislative Objectives:

The regulations carry out the intent of Section 421(3) of the SSL, which requires OCFS to promulgate regulations governing the provision of child protective services. Additionally, the regulations support the legislative findings and purpose contained in Section 411 of the SSL, as it pertains to having local district child protective services ". . . .capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment. . . ."

3. Needs and Benefits:

These regulations clarify two important aspects of child protective investigation practice relating to obtaining access to children involved in reports of suspected child abuse or maltreatment and obtaining information from collateral contacts. Recently, OCFS discovered that some child protective service staff are confused regarding these practices. Therefore, it is necessary to adopt these regulatory clarifications to reinforce the existence of these practices that help to preserve the health, safety and welfare of children involved in child protective services cases.

Existing statute and regulations require child protective service staff to conduct a preliminary assessment of the safety of the children involved in a report of suspected child abuse or maltreatment to determine whether the children are in immediate danger and to assess whether family court or criminal court intervention is necessary. Training for child protective service staff further explains the various legal options available to protect the children involved in a report including what actions should be taken when the children or home cannot be accessed. However, the existing regulations do not specify what child protective workers must do when they are unable access the children or the home. Therefore, the regulations explicitly require that when a child protective service worker is prevented from entering the home or from seeing or talking to a child and/or when a child cannot be located, the worker must assess whether it is necessary to seek a court order to obtain access to the child or home or to compel production of a child, or whether other emergency action must be taken. This assessment must be done with a child protective service supervisor as soon as necessary under the circumstances but no later than 24 hours after access has been refused or failed. When a court order is thought to be necessary, legal staff also must be consulted if possible. While most child protective service staff regularly use these practices, the new regulatory requirements codify these important practices. It is necessary to adopt these regulatory provisions given the inability of child protective service staff to assess accurately the potential danger to children if the children or home are intentionally or unintentionally made unavailable to child protective service staff, especially when the children are not in regular contact with other institutions such as schools.

Existing regulations also require that a child protective investigation include obtaining information from collateral contacts such as hospitals, schools, police and social services agencies. The intent of the existing regulations is for child protective service staff to contact those entities and persons who may have information relevant to the allegations made in the child protective services report and to the safety of children in the home. This intent is reinforced in the current training and other information provided to child protective service staff. OCFS recently learned that despite the wording of the existing regulations that indicates the list is illustrative and despite the fact that more complete information is currently provided in training, some district staff incorrectly believe that the only collateral contacts they can make are with the four types of entities listed as examples in the existing regulations. Therefore, the regulations clarify that collateral contacts also may include family medical providers, other agencies providing services to the family, relatives, extended family members, neighbors, and other persons who may have information relative to the investigation and to the safety of the children. This clarification should avoid future confusion on the part of child protective service staff regarding the collateral contacts they should make.

4. Costs:

These regulations clarify and codify existing child protective services investigation practices. Therefore, there is no fiscal impact on the State or local social services districts.

5. Local Government Mandates:

These regulations make explicit two existing child protective services investigation practices. As such, they are not new mandates on local governments. These regulations support child protective service staff's overall statutory mandates to investigate reports of suspected child abuse and maltreatment and to protect children from further abuse or maltreatment.

6. Paperwork:

No new forms or other paperwork are required by these regulations. However, these activities, like all case activities performed by child protective service staff, must be clearly documented in the appropriate part of the child protective services electronic case record.

7. Duplication:

These regulations do not duplicate or impede any other state or federal requirements.

8. Alternate Approaches:

Significant alternatives to the proposed regulations have not been considered. No real alternative to a thorough investigation of a report of suspected child abuse or maltreatment exists. Lack of understanding of the intent of the existing regulations led some child protective staff to believe they did not have the authority to pursue effective measures when denied access to a child who may be at risk or to speak to potential collateral resources who may have information relevant to the allegations. Such lack of understanding creates a significant potential for placing children in unsafe situations and/or at greater risk of future abuse or neglect. The clarification regarding the requirement to consider the need to obtain an appropriate court order was discussed with 30 – 40 local social services district commissioners at a recent New York Public Welfare Association (NYPWA) meeting. Issues regarding collateral contacts and who may be interviewed in the course of a thorough child protective investigation were discussed at a recent local social services attorneys meeting with General Counsel held at NYPWA. The Office determined that these regulations were the best way to clarify the existing child protective services investigation practices that help protect New York State's vulnerable children.

9. Federal Standards:

These regulations exceed the minimum standards of the federal government in that federal standards do not specify activities for investigations of allegations of suspected child abuse and maltreatment. These activities need to be included in State regulations as they reflect important practices in serving New York's vulnerable children.

10. Compliance Schedule:

The actions required in these regulations are already part of good practice in New York's local social services districts. As such, districts

should not need any additional time to comply with the regulations. Therefore, compliance will be required upon the effective date of the regulations.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments:

The regulations apply to all fifty-eight (58) of New York State's local social services districts. As the regulation make explicit two existing child protective services investigatory practices, the effect on the local social services districts is clarifying existing requirement.

2. Compliance Requirements:

These regulations clarify two important aspects of child protective services practice relating to obtaining information from collateral contacts during child protective services investigations and obtaining access to children involved in reports of suspected child abuse or maltreatment.

The intent of the regulations is for the child protective services to contact those entities and persons who may have information relevant to the allegations contained in a child protective services report during the investigation of such report. Therefore, the regulations amend the existing regulations to clarify that collateral contacts also include family medical providers, other agencies providing services to the family, relatives, extended family members, neighbors, and other persons who may have information relative to the investigation and to the safety of the children. This clarification should avoid future confusion on the part of child protective services staff regarding the collateral contacts they should make.

Further, the regulations explicitly require that when a child protective services worker is prevented from entering the home or from seeing or talking to a child and/or when a child cannot be located, the worker must assess if it is necessary to seek a court order to obtain access to or compel production of the child, or if other emergency action must be taken. This assessment must be done within 24 hours of the refusal or failure to locate the child, and must be completed in consultation with the caseworker's supervisor and, when a court order is necessary, legal staff. As with all child protective services practice, actions and results must be appropriately documented in the case record.

3. Professional Services:

The regulations do not create the need for additional professional services.

4. Compliance Costs:

These regulations clarify and codify existing child protective services practices. Therefore, there is no fiscal impact on the State or local social services districts.

5. Economic and Technological Feasibility:

Social services districts currently have the economic and technological ability to comply with the regulations through the case recording system and the legal offices associated with each child protective service.

6. Minimizing Adverse Impact:

These regulations make explicit two existing child protective services investigatory practices.

As such, they are not new mandates and will not result in any adverse impact on social services districts.

7. Small Business and Local Government Participation:

The regulations clarify existing practices and are designed to eliminate any confusion about how the child protective services should and may proceed. As such, at this time no participation of local government is necessary.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed regulations will apply to all forty-four (44) of New York State's social services districts that are in rural areas.

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

The regulations will not create any new reporting, recordkeeping or other compliance requirements. However, these activities, like all case activities performed by child protective services staff, must be clearly documented in the appropriate part of the child protective services case record. No additional professional service beyond the child protective services staff is required.

3. Costs:

These regulations clarify and codify existing child protective services practices. Therefore, there is no fiscal impact on the State or local social services districts.

4. Minimizing adverse impact:

These regulations will not result in any adverse impact upon small businesses or social services districts in rural areas.

5. Rural area participation:

The regulations clarify existing practices and are designed to eliminate any confusion about how the child protective services should and may proceed. As such, no participation of local interests in rural areas is necessary at this time.

Job Impact Statement

The Office of Children and Family Services has determined that these regulations would not result in the loss of any jobs. It is apparent from the nature and purpose of the regulations that they will not have any impact on jobs and employment opportunities. As such, a full job impact statement is not necessary for these regulations.

Department of Civil Service

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-46-06-00003-P

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

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by decreasing the number of positions of Compliance Specialist 1 from 2 to 1.

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

Data, views or arguments may be submitted to: John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: john.barr@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 1, 2006 under the notice of proposed rule making I.D. No. CVS-05-06-00005-P.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-46-06-00004-P

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

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of the Budget," by increasing the number of positions of ϕSenior Fiscal Policy Analyst from 4 to 8.

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

Data, views or arguments may be submitted to: John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: john.barr@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 1, 2006 under the notice of proposed rule making I.D. No. CVS-05-06-00005-P.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-46-06-00005-P

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

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of the Budget," by increasing the number of positions of Budget Fellow from 37 to 52.

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

Data, views or arguments may be submitted to: John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: john.barr@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 1, 2006 under the notice of proposed rule making I.D. No. CVS-05-06-00005-P.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-46-06-00006-P

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

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by adding thereto the positions of Minority Business Specialist 2 (1).

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

Data, views or arguments may be submitted to: John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: john.barr@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 1, 2006 under the notice of proposed rule making I.D. No. CVS-05-06-00005-P.

State Consumer Protection Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Telemarketing Registry Updates in the Do Not Call Law

I.D. No. CPR-46-06-00007-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 section 4603.3 of Title 21 NYCRR.

Statutory authority: Executive Law, section 553

Subject: Telemarketing Registry updates in the Do Not Call Law.

Purpose: To bring the rules into parity with recently amended General Business Law, section 399-z(7)(a).

Text of proposed rule: 4603.3 Safe harbor provisions.

A person (which includes an entity, corporation, or other telemarketer) shall not be held liable for violating these regulations if the person can demonstrate, by clear and convincing evidence, that: (1) the person has obtained a [copy of an updated, quarterly 'do not call' registry] *version of the "do-not-call" registry from the federal trade commission no more than thirty- one (31) days prior to the date any telemarketing call is made, pursuant to the telemarketing sales rule section 16 C.F.R. Section 310.4 (b) (1) (iii)* and has established and implemented written policies and procedures related to the requirements of these regulations; (2) the person has trained his or her personnel in the requirements of these regulations; (3) the person maintains records demonstrating compliance with this section and the requirements of these regulations; and (4) any subsequent unsolicited telemarketing sales call is the result of an error.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa R. Harris, Executive Deputy Director and General Counsel, Consumer Protection Board, Five Empire State Plaza, Corning Tower, Suite 2101, Albany, NY 12223, (518) 474-2348, e-mail: Lisa.Harris@consumer. 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.

Consensus Rule Making Determination

Consensus Rule Statement for amendment of Section 4603.3 of Title 21 NYCRR dealing with Executive Law § 553 and General Business Law § 399-z (Do Not Call legislation.) The proposed amendment is a consensus rule because this change is being made to bring the rules in parity with existing New York State General Business Law Section 399-7 (a). The Federal Communications Commission (FCC) issued amended rules to the Telephone Consumer Protection Act (TCPA) of 1991, in January 2005 that required telemarketers to update the Registry every Thirty-One (31) days.

General Business Law Section 399-7 (a) needs to comply with the law.

Job Impact Statement

Job Impact Statement (JIA) (SAPA 201-A) for amendment of Section 4603.3 of Title 21 NYCRR dealing with Executive Law § 553 and General Business Law § 399-z ("Do Not Call" legislation).

1. JOB IMPACT EXEMPTION (JIE):

The proposed regulations should not have a substantial adverse impact, defined as a decrease of 100 jobs (SAPA § 201-a(6)(c)). Telemarketing firms are currently required to comply with updating the Do Not Call Registry every Thirty-One (31) days. Accordingly, we conclude that telemarketing firms will be able to comply with the proposed amendments using existing resources. Because it is evident from the nature of these amendments that they would have little impact on the number of jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required.

2. JOB IMPACT STATEMENT (JIS):

This requirement is not applicable. See the Job Impact Exemption section.

3. JOB IMPACT REQUEST FOR ASSISTANCE (JIRA):

This requirement is not applicable. See the Job Impact Exemption section.

Department of Economic Development

EMERGENCY RULE MAKING

Empire State Commercial Tax Credit Program

I.D. No. EDV-46-06-00025-E
Filing No. 1302
Filing date: Oct. 31, 2006
Effective date: Oct. 31, 2006

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

Action taken: Addition of Part 180 to Title 5 NYCRR.

Statutory authority: L. 2006, chs. 62 and 440

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

Specific reasons underlying the finding of necessity: The Legislature has determined that a commercial tax credit would provide incentive for commercials to be produced in NY, thereby stimulating the State's economy.

Subject: Empire State Commercial Tax Credit Program.

Purpose: To establish procedures for the allocation of commercial production tax credits.

Substance of emergency rule: The Empire State commercial production tax credit program provides a three component tax credit program for eligible qualified commercial production companies. First, under the growth credit program, an eligible company may receive a 20% credit on qualified production costs provided the applicant has met the threshold test and shown that the total qualified production costs are greater in the calendar year for which they are applying than in the average of the three previous years. Assuming this test is met, the 20% credit is applied to the amount of total qualified production costs in the calendar year the applicant is applying that are greater than the total costs of the preceding year. There is a $300,000 tax credit cap per applicant annually.

The second component program is referred to as the downstate credit program. This credit is 5% of the qualified production costs paid or incurred in the production of a qualified commercial within the metropolitan commuter transportation district. In order to be eligible for such credit, a qualified commercial production company must have qualified production costs in excess of $500,000 in the metropolitan commuter transportation district during the calendar year and the credit shall be applied to only those costs exceeding such amount.

The third component program is referred to as the upstate credit program. This credit is 5% of the qualified productions costs paid or incurred in the production of a qualified commercial outside of the metropolitan commuter transportation district. In order to be eligible for such credit, a qualified commercial production company must have qualified production costs in excess of $200,000 outside of the metropolitan commuter transportation district during the calendar year and the credit shall be applied to only those costs exceeding such amount.

This rule implements Chapter 62 of the Laws of 2006. Part 180 of Title 5 NYCRR is hereby created and is summarized as follows:

First, the rule makes clear that the Governor's Office for Motion Picture and Television development shall administer the Empire State commercial production tax credit program. This proposed rule does not govern the New York City commercial production tax credit program – eligibility in either the state or city program does not guarantee eligibility or receipt of a credit in the other.

Second, eligibility in the program is established through the definition of applicant. In order to be eligible to apply for the program, a business must be a qualified commercial production company or sole proprietor thereof that submits an application to the Office after it has completed a calendar year's worth of qualified commercials.

Third, an application process is created. An applicant must complete an application between the first day of business in January and April 1 of the year succeeding the year in which the commercial work was performed. The Office then reviews the application based on criteria set out in the proposed rule, including the completeness of the application and whether or not it meets the statutory requirements for qualification, including whether at least 75% of its production costs (excluding post-production) paid or incurred directly and predominantly in the actual filming or recording of each qualified commercial are qualified production costs, and whether its qualified production costs correspond to one or more of the three component tax credit programs.

Fourth, if the application is approved, the Office shall issue a certificate of tax credit to the applicant. If the application is disapproved, the applicant receives notice of its rejection from the program and may reapply at a later date.

Fifth, the proposed rule requires applicants to maintain records of qualified production costs used to calculate their potential or actual benefit under the program for a period of 3 years. Such records may be requested by the Office upon reasonable notice.

Finally, the proposed rule creates an appeal process. Applicants who have had their applications disapproved, or who have a disagreement over the dollar amount of their tax credit, have the right to appeal.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire January 28, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Thomas P. Regan, Department of Economic Development, 30 S. Pearl St., 6th Fl., Albany, NY 12245, (518) 292-5123, e-mail: tregan@empire.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section (8)(e) of Part V of Chapter 62 of the Laws of 2006 requires the Commissioner of Economic Development to promulgate rules and regulations by October 31, 2006 to establish procedures for the allocation of the Empire State commercial production tax credit, including provisions describing the application process, the due dates for such applications, the standards used to evaluate the applications, and the documentation provided to taxpayers to substantiate to the State Department of Taxation and Finance the amount of the tax credit for the program itself. Such legislation provides that, notwithstanding any other provisions to the contrary in the State Administrative Procedure Act, the rules and regulations may be adopted on an emergency basis.

LEGISLATIVE OBJECTIVES:

The emergency rule is in accord with the public policy objectives the Legislature sought to advance by creating a tax credit program for the commercial industry. This program is an attempt to create an incentive for commercial industry to bring productions to New York State as opposed to other competitive markets, such as California and overseas. It is the public policy of the State to offer a tax credit that will help provide incentive for the commercial industry to bring productions to the State. The proposed rule helps to further such objectives by establishing an application process for the program, clarifying portions of the Program through the creation of various definitions and describing the credit allocation process itself.

NEEDS AND BENEFITS:

The emergency rule is required to be promulgated by October 31, 2006 (see section 8(e) of Part V of Chapter 62 of the Laws of 2006). It is necessary to administer properly the tax credit program. The statute itself does not set out the specifics of the program; rather, it deals primarily with its creation and calculation of the actual tax credit. There are several administrative benefits that would be derived from this emergency rule making. First, the emergency rule establishes a clear and precise application process, complete with due process as there is an opportunity for applicants to appeal from denials of applications or a disagreement regarding the actual amount of the tax credit. Second, the emergency rule describes in detail the standards to be used to evaluate applications created under this program. Third, it describes the documentation that will be provided to taxpayers to substantiate to the State Tax and Finance Department the amount of the tax credits allocation. Finally, it clarifies some existing definitions and creates several new definitions in order to help facilitate an effective and efficient administration of the program.

COSTS:

I. Costs to private regulated parties (the Business applicants): None. The proposed regulation will not impose any additional costs to the commercial industry.

II. Costs to the regulating agency for the implementation and continued administration of the rule: There could be additional costs to the Department of Economic Development associated with the proposed rule making as the Office will need two additional employees to help with the program's new created administrative process. Such costs are estimated to be $120,000 in annual salary for both employees.

III. Costs to the State government: The program shall not allocate more than $7 million in any calendar year. The program sunsets on December 31, 2011 so the overall cost to the State is $35 million.

IV. Costs to local governments: None. The proposed regulation will not impose any additional costs to local government.

LOCAL GOVERNMENT MANDATES:

None.

PAPERWORK:

The emergency rule creates an application process for eligible applicants, including the creation of an application, certain tax certificates and forms relating to commercial expenditures.

DUPLICATION:

The proposed rule will not duplicate or exceed any other existing Federal or State statute or regulation.

ALTERNATIVES:

No alternatives were considered in regard to creating a new regulation in response to the statutory requirement. The Department of Economic Development, through its Governor's Office for Motion Picture and Television Development, did an extraordinary amount of outreach to various interested parties before submitting this emergency rule. For example, the Department met with seven commercial industry producers to seek industry input. In addition, the Department met with both the CEO and the CFO of the Association of Independent Commercial Producers to solicit their comments. Furthermore, the Department was in close contact with representatives from the State Tax and Finance Department and the Mayor's Office of Film, Theatre and Broadcasting to coordinate the details of the emergency rule.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire State commercial production tax credit program; it is purely a state program that offers a state tax credit to eligible applicants. Therefore, the proposed rule does not exceed any federal standard.

COMPLIANCE SCHEDULE:

The effected State agencies (Economic Development) and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented. In terms of compliance schedule, the statute (Chapter 62 of the Laws of 2006) was signed into law on June 6, 2006. The statute gave the Department until October 31, 2006 to promulgate regulations to implement the program. The program applies to taxable years beginning on or after January 1, 2007 and expires on December 31, 2011.

Regulatory Flexibility Analysis

Participation in the Empire State commercial production credit program is entirely at the discretion of qualified commercial production companies. Neither Chapter 62 of the Laws of 2006 nor the proposed regulations impose any obligation on any local government or business entity to participate in the program. The proposed regulation does not impose any adverse economic impact or compliance requirements on small businesses or local governments. In fact, the proposed regulation may have a positive economic impact on small businesses due to the possibility that these businesses may enjoy a commercial production tax credit if they qualify for the program's tax credit.

Because it is evident from the nature of the proposed rule that it will have either no impact or a positive impact on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small business and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

This program is open to participation from all qualified commercial production companies, defined by statute to include a corporation, partnership or sole proprietorship making and controlling a qualified commercial in New York. The locations of the companies are irrelevant, so long as they meet the necessary qualifications of the definition. This program may impose responsibility on statewide businesses that are qualified commercial production companies, in that they must undertake an application process to receive the Empire State commercial production credit. However, the proposed regulation will not have a substantial adverse economic impact on rural areas. Accordingly, a rural flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed regulation creates the application process for the Empire State commercial production credit program. As a tax credit program, it is designed to impact positively the commercial industry doing business in New York State and have a positive impact on job creation. The proposed regulation will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the proposed rule making that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Education Department

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Licensure as a Clinical Laboratory Technologist

I.D. No. EDU-21-06-00009-ERP
Filing No. 1290
Filing date: Oct. 27, 2006
Effective date: Oct. 30, 2006

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

Emergency action taken: Addition of Subparts 79-13, 79-14 and 79-15 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 212(3); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a) and (4)(a); 6508(1); 8605(1)(b) and (c) and (2)(b) and (c); 8602(2) and (3); 8607(1) and (2); and 8608 (not subdivided)

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

Specific reasons underlying the finding of necessity: Article 165 of the Education Law establishes three new licensed professions in New York State: clinical laboratory technologist, cytotechnologist, and clinical laboratory technician. This statute requires individuals who practice these professions to be licensed or under application for a license under the special "grandparenting" requirements in order to practice these professions in New York State on or after September 1, 2006.

Based on recent estimates, approximately 20,000 persons are employed in these three professional areas and, as of September 1, 2006, require licensure or submission of an application under the grandparenting provisions in order to continue to practice these professions. As of October 13, 2006, in excess of 15,000 applications have been received. The State Education Department expects that most current practitioners will be licensed under the grandparenting provisions. These clinical laboratory technology practitioners are employed in the State's clinical laboratories to perform tests and procedures needed for the diagnosis and treatment of illness and disease. They perform important functions that protect the general welfare, health, and safety of residents of New York State.

The proposed regulation implements the requirements of Article 165 of the Education Law by establishing education and examination standards for licensure or certification, special requirements for licensure or certification for applicants already practicing in these field or who have related education and/or experience (grandparenting applicants), and requirements for limited permits in the three professions. It also sets forth interim standards for meeting the educational requirement for licensure or certification in these fields, consistent with statutory requirements. These requirements must be in place in order for the State Education Department to license individuals to practice these new professions. The interim stan-

dards are expected to be in place for a transition period of five years while educational institutions make required changes in their educational programs.

The State Education Department originally planned to adopt these regulations in July 2006, but in response to public comment, the Department needed to make substantial changes to the regulations. These changes required a new public comment period and delayed permanent adoption of the rule past September 1, 2006. Further public comment has led to continued discussions concerning the appropriate requirements for educational programs seeking registration by the Department as licensure qualifying programs, requiring further substantial revisions to the regulations. A second emergency action, as revised, is necessary to ensure that the requirements for licensure continue in place past the expiration date of the emergency regulations adopted in July 2006. This second emergency action will enable applications to continue to be submitted so that the State Education Department can continue to license individuals in a timely manner and so that practitioners can continue to provide clinical laboratory services.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare to ensure that procedures and standards are in place to continue to license clinical laboratory practitioners while final determinations are made concerning the requirements for the registration of licensure-qualifying educational program, thereby enabling such practitioners to meet the health care needs of residents of New York State.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its January 2007 meeting.

Subject: Licensure as a clinical laboratory technologist and as a cytotechnologist and certification as a clinical laboratory technician.

Purpose: To implement the provisions of Education Law, art. 165 by establishing requirements for licensure as a clinical laboratory technologist or cytotechnologist and for certification as a clinical laboratory technician, requirements for limited permits in these fields, and standards for registered college preparation programs for these professions.

Substance of emergency/revised rule: The Commissioner of Education proposes to promulgate regulations, relating to licensure as a clinical laboratory technologist and as a cytotechnologist and certification as a clinical laboratory technician. The following is a summary of the substance of the regulations.

Subpart 79-13 of the Regulations of the Commissioner of Education is added to establish requirements for licensure as clinical laboratory technologists. Section 79-13.1 establishes two alternative professional education requirements available to applicants who apply for licensure prior to September 1, 2011. The applicant must also certify to the department that he or she has reviewed the regulations of the New York State Department of Health and the U.S. Department of Health and Human Services, relating to practice, as directed by the department.

Section 79-13.2 establishes examination requirements for licensure as a clinical laboratory technologist.

Section 79-13.3 establishes requirements for limited permits to practice as a clinical laboratory technologist. The applicant must: (1) file an application for a limited permit with the department and pay the initial licensure and registration fee, and a limited permit fee of fifty dollars; (2) have met all requirements for licensure as a clinical laboratory technologist, except the examination requirement; (3) submit adequate documentation that the applicant will be under the general supervision of the director of a clinical laboratory, as prescribed. The limited permit has a one-year duration and may be renewed once for good cause.

Section 79-13.4 establishes special provisions that certain applicants may meet to be licensed as a clinical laboratory technologist. The applicant must apply for licensure under this section by September 1, 2007, and meet the alternative requirements for licensure under this section by September 1, 2008, unless the particular requirement prescribes an earlier date for completion, in which case the requirement must be completed by that earlier date. The applicant must: (1) file the application for licensure with the department and pay the prescribed fees, all by September 1, 2007; (2) be of good moral character as determined by the department; (3) be at least 18 years of age; and (4) meet one of six requirements.

The regulation also provides that, in accordance with subdivision (2) of section 8607 of the Education Law, an individual who on or before September 1, 2007 files with the department an application for licensure as a clinical laboratory technologist under this section and certifies to a good faith belief that he or she has or will have met the requirements for licensure under this section by the prescribed completion dates which shall in no case be later than September 1, 2008, shall be deemed qualified to practice as a clinical laboratory technologist from the date of filing the application with the department until such time as the department has acted upon such application.

Subpart 79-14.1 of the Regulations of the Commissioner of Education is added to establish requirements for licensure as cytotechnologists. Section 79-14.1 establishes two alternative professional education requirements for licensure available to applicants who apply for licensure prior to September 1, 2011. In addition, the applicant must certify to the department that he or she has reviewed the regulations of the New York State Department of Health and the U.S. Department of Health and Human Services, relating to practice as directed by the department.

Section 79-14.2 establishes examination requirements for licensure as a cytotechnologist.

Section 79-14.3 establishes requirements for limited permits to practice as a cytotechnologist. The applicant must: (1) file an application for a limited permit with the department and pay the initial licensure and registration fee, and a limited permit fee of fifty dollars; (2) have met all requirements for licensure as a cytotechnologist, except the examination requirement; and (3) submit adequate documentation that the applicant will be under the general supervision of the director of a clinical laboratory, as prescribed. The limited permit has a one-year duration and may be renewed once for good cause.

Section 79-14.4 establishes special provisions that certain applicants may meet to be licensed as a cytotechnologist. The applicant must apply for licensure under this section by September 1, 2007, and meet the alternative requirements for licensure under this section by September 1, 2008, unless the particular requirement prescribes an earlier date for completion, in which case the requirement must be completed by that earlier date. The applicant must:(1) file the application for licensure with the department and pay the prescribed fees, all by September 1, 2007; (2) be of good moral character as determined by the department; (3) be at least 18 years of age; and (4) meet one of two requirements.

The regulation also provides that, in accordance with subdivision (2) of section 8607 of the Education Law, an individual who on or before September 1, 2007 files with the department an application for licensure as a cytotechnologist under this section and certifies to a good faith belief that he or she has or will have met the requirements for licensure under this section by the prescribed completion dates which shall in no case be later than September 1, 2008, shall be deemed qualified to practice as a cytotechnologist from the date of filing the application with the department until such time as the department has acted upon such application.

Subpart 79-15 of the Regulations of the Commissioner of Education is added to establish requirements for certification as clinical laboratory technicians. Section 79-15.1 establishes the professional education requirements for certification for applicants who apply for certification prior to September 1, 2011. The applicant must also certify to the department that he or she has reviewed the regulations of the New York State Department of Health and the U.S. Department of Health and Human Services, relating to practice as directed by the department.

Section 79-15.2 establishes examination requirements for certification as a clinical laboratory technician.

Section 79-15.3 establishes requirements for limited permits to practice as a clinical laboratory technician. The applicant must: (1) file an application for a limited permit with the department and pay the initial certification and registration fee, and a limited permit fee of fifty dollars; (2) have met all requirements for certification as a clinical laboratory technician, except the examination requirement; (3) submit adequate documentation that the applicant will be under the general supervision of the director of a clinical laboratory, as prescribed. The limited permit has a one-year duration and may be renewed once for good cause.

Section 79-15.4 establishes special provisions that certain applicants may meet to be certified as a clinical laboratory technician. The applicant must apply for certification under this section by September 1, 2007, and meet the requirements for certification under this section by September 1, 2008, unless the particular requirement in this section prescribes an earlier date, in which case the requirement must be completed by that earlier date. The applicant must (1) file the application for certification with the department and pay the prescribed fees, all by September 1, 2007; (2) be of good moral character as determined by the department; (3) be at least 18 years of age; and (4) meet one of three requirements.

The regulation also provides that, in accordance with subdivision (2) of section 8607 of the Education Law, an individual who on or before September 1, 2007 files with the department an application for certification as a clinical laboratory technician under this section and certifies to a good

faith belief that he or she has or will have met the requirements for certification under this section by the prescribed completion dates which shall in no case be later than September 1, 2008, shall be deemed qualified to practice as a clinical laboratory technician from the date of filing the application with the department until such time as the department has acted upon such application.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on May 24, 2006, I.D. No. EDU-21-06-00009-P. The emergency rule will expire December 25, 2006.

Revised rule making(s) were previously published in the State Register on August 16, 2006.

Emergency rule compared with proposed rule: Substantial revisions were made in sections 52.36, 52.37 and 52.38, 79-13.1(b), 79-14.1(b) and 79-15.1(b).

Text of 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 the Professions, Education Department, 2M West Wing Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: opdepcom@mail.nysed.gov

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

Regulatory Impact Statement

Since publication in the *State Register* of the Notice of Emergency Adoption and Revised Rule Making on August 16, 2006, the proposed rule has been revised as follows:

Sections 52.36, 52.37, and 52.38 have been deleted from the rule making. These three sections contained content requirements for registered programs leading to licensure as a clinical laboratory technologist and as a cytotechnologist, and certification as a clinical laboratory technician. Based upon consultation with New York State colleges offering programs in these fields and other public comment, the Department has decided to delete these requirements from the rule making. The Department will consult with the colleges and other interested parties and work with the State Board for Clinical Laboratory Technology to revise the requirements for the registered programs. In the meantime, the transitional education requirements prescribed in Subparts 79-13, 79-14, and 79-15 will apply.

Subdivision (b) of section 79-13.1 of the Regulations of the Commissioner of Education is substantially revised to delete three alternative requirements for applicants to meet the professional education requirement for admission to the licensing examination for clinical laboratory technologists. These three alternatives include or reference requirements for registered programs leading to licensure in section 52.36 of Commissioner's Regulations which have been deleted in this rule making. Former paragraphs (1), (2), and (3) have been deleted, and former paragraphs (4) and (5) have been renumbered (1) and (2), respectively.

Subdivision (b) of section 79-14.1 of the Regulations of the Commissioner of Education is substantially revised to delete three alternative requirements for applicants to meet the professional education requirement for admission to the licensing examination for cytotechnologists. These three alternatives include or reference requirements for registered programs leading to licensure in section 52.37 of Commissioner's Regulations which have been deleted in this rule making. Former paragraphs (1), (2), and (3) have been deleted, and former paragraphs (4) and (5) have been renumbered (1) and (2), respectively.

Subdivision (b) of section 79-15.1 of the Regulations of the Commissioner of Education is substantially revised to delete two alternative requirements for applicants to meet the professional education requirement for admission to the examination for professional certification for clinical laboratory technicians. These two alternatives include or reference requirements for registered programs leading to licensure in section 52.38 of Commissioner's Regulations which have been deleted in this rule making. Former paragraphs (1) and (2) have been deleted, and former paragraph (3) is renumbered subdivision (b).

The revisions to the rule do not necessitate any changes to the Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication in the *State Register* of the Notice of Emergency Action and Revised Rule Making on August 16, 2006, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions to the rule do not necessitate any changes to the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Rural Area Flexibility Analysis

Since publication in the *State Register* of the Notice of Emergency Adoption and Revised Rule Making on August 16, 2006, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions to the rule do not necessitate any changes to the Rural Area Flexibility Analysis.

Job Impact Statement

Since publication in the *State Register* of the Notice of Emergency Adoption and Revised Rule Making on August 16, 2006, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Article 165 of the Education Law establishes a requirement that clinical laboratory technologists and cytotechnologists be licensed to practice in New York State and that clinical laboratory technicians be certified to practice in this State. The proposed regulation, as revised, implements the requirements of Article 165 of the Education Law by establishing education and examination standards for licensure or certification, special requirements for licensure or certification for applicants already practicing in these field or have related education and/or experience (grandparenting applicants), and requirements for limited permits in the three professions. It also sets forth standards for registered college preparation programs that lead to licensure or certification in these fields, in accordance with statutory requirements.

The proposed regulation, as revised, implements statutory requirements and directives and will have no impact on jobs or employment opportunities, beyond the impact of Article 165 of the Education Law. Therefore, any impact on jobs and employment opportunity by establishing a licensure requirement for clinical laboratory technologists, cytotechnologists and clinical laboratory technicians is attributable to the statutory requirements, not the proposed rule, which simply establishes consistent implementing standards as directed by statute.

Because it is evident from the nature of the proposed regulation, 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 has not been prepared.

Assessment of Public Comment

A Notice of Proposed Rule Making concerning this regulation was published in the *State Register* on May 24, 2006. A Notice of Emergency Adoption and Revised Rule Making was published on August 16, 2006. The following is a summary of comments received by the State Education Department since the publication of the Notice of Emergency Adoption and Revised Rule Making, and the Department's response to the comments.

COMMENT: Experienced cytotechnologists who have worked in the field for many years, have completed an associate or certificate program, are registered by the Department Health, are engaged in the training of new cytotechnologists, have completed continuing education in the field, and have passed proficiency examinations should receive licensure through the "grandparenting" provisions without having to complete a baccalaureate program in cytotechnology or a related field.

RESPONSE: The "grandparenting" provisions at issue are mandated by statute and permit the applicant to be licensed through two alternatives: The first alternative requires the applicant to complete a baccalaureate program in cytotechnology or a related title or a baccalaureate program in the major of biology, chemistry, or the physical science plus a program in cytotechnology and complete two years of experience performing the duties of a cytotechnologist. The second alternative requires the applicant to have previously qualified for a license or its equivalent to practice as a cytotechnologist in New York State through other regulatory requirements of a governmental unit of New York State authorized by law to qualify individuals for such licensure or its equivalent.

The Department may not change these statutory requirements through a regulation change. However, the Department understands the concerns expressed in the comment, and is exploring both legislative and administrative remedies to address these concerns.

COMMENT: The "grandparenting" provision that permits an applicant to be licensed as a cytotechnologist based upon the applicant having successfully performed the duties of a cytotechnologist for two years over the five years immediately preceding September 1, 2006 should be changed to permit this experience to be earned over the five years immediately preceding September 1, 2010.

RESPONSE: The "grandparenting" provisions are mandated in statute. Education Law section 8607(1)(c) requires the applicant to have performed the duties of a cytotechologist for two years of the previous five years prior to the effective date of Article 165 of the Education Law, which is September 1, 2006. Consequently, the Department does not have the authority to change this date in regulation.

COMMENT: The New York State Department of Health raised concerns that the implementation of the proposed regulations will have a negative impact on several public health programs, including the Woman, Infant and Children (WIC) program and rapid HIV testing program. The Department of Health states that these public health programs involve the administration of simple to use tests, designated by the Clinical Laboratory Improvement Act as "waived" tests and should not have to be conducted by licensed clinical laboratory technologists or technicians. The Department of Health maintains that technicians at limited service laboratories should not have to be licensed to perform routine tests.

COMMENT: The New York City Department of Health raised the concern that if the regulations are interpreted to restrict non-licensed individuals from performing Clinical Laboratory Improvement Act waived testing, this would seriously impair the City's rapid HIV testing program. The New York City Department of Health maintains that such waived testing should not have to have to be performed by licensed individuals.

RESPONSE: Licensure in these new professions is mandated by statute, not by the proposed regulation. The purpose of the proposed regulation is to establish implementing requirements that an applicant for licensure must meet in order to qualify for licensure in these fields. It does not address scope of practice issues. The scope of practice for these new professions is specifically prescribed in Education Law section 8601, and exemptions to the licensure requirements are prescribed in Education Law section 8609. The Department may not expand exemptions to the licensure requirement beyond what is prescribed in statute. The Department is consulting with the New York State and New York City Departments of Health and the State Legislature to determine the scope of practice issues within the context of the statutory mandates. The Department plans to address the scope of practice issues in Practice Alerts and guidelines.

COMMENT: We support the revisions in the proposed regulation that establish a transitional path for applicants who apply for licensure in clinical laboratory technology prior to September 1, 2011. This will allow our medical technology program sufficient time to meet newly mandated curricular requirements.

RESPONSE: As a result of public comment, the regulation was previously substantially revised to establish education standards for licensure for applicants who apply prior to September 1, 2011. The Department has maintained this transitional pathway to licensure in the current revised regulation. The Department plans to revise the education requirement in the future through establishing requirements in regulation for registered programs leading to licensure in the three fields. These new requirements would be for applicants who apply for licensure on or after September 1, 2011.

COMMENT: The regulation that establishes course content requirements for registered programs in clinical laboratory technology (Section 52.36[b]) should provide that "for programs that are accredited by an acceptable accrediting agency or an equivalent institution, such acceptable accrediting agency shall determine which courses shall be deemed appropriate."

COMMENT: I think that specific training of at least six months in an area of clinical laboratory technology is needed. The 30 hour per week 24 week requirement in the registered program covering all areas of clinical laboratory technology practice will not provide the level of skill needed to practice.

COMMENT: We offer an accredited program in clinical laboratory technology. Our program would not meet the requirements for a registered programs leading to licensure in clinical laboratory technology because it does not include a laboratory component in: organic chemistry, biochemistry, physiology, and immunology courses. Laboratory experience in these fields is not needed to practice as a clinical laboratory technologist.

RESPONSE: These three comments relate to requirements for registered preparation programs for licensure in these three fields (sections 52.36, 52.37, and 52.38 of Commissioners regulations). Based upon consultation with New York State colleges offering programs in these fields and other public comment, the Department has decided to delete these requirements from the rule making. The Department will consult with the colleges and other interested parties and work with the State Board for Clinical Laboratory Technology to revise the requirements for registered programs leading to licensure. In the meantime, the transitional education requirements prescribed in Subparts 79-13, 79-14, and 79-15 will apply.

However, the Department must note that the Education Law requires the State Education Department to establish the education requirements for licensure in the three new professions. This authorizes the Department to require applicants to complete prescribed course work to help ensure their competency for entry-level practice. It would be improper for the Department to delegate this responsibility to a private accrediting agency. Therefore, the Department plans to establish in Part 52 course work requirements for registered programs leading to licensure in these fields.

COMMENT: ASCP/NCA certification examinations should be used to test individuals for state licensure since these are the primary means of certification for laboratory-based allied health professionals and are taken nationwide. They are available internationally and would facilitate laboratory professionals in moving into New York State.

RESPONSE: The regulation does not name specific examinations but establishes a general standard for their selection. The Department, in consultation with the State Board for Clinical Laboratory Technology, will select licensure examinations that are in accord with the regulatory standards.

COMMENT: Will there be a separate Blood Banking examination as has been the practice?

RESPONSE: Article 165 of the Education Law established a generalist license in each of the three professions. General examinations are necessary to ensure entry-level competency given the broad scope of practice for each profession. Clinical laboratories and other entities in New York State may establish additional specific requirements for employment, including examinations.

COMMENT: A detailed syllabus for the specific course requirements would be helpful.

RESPONSE: The proposed regulation establishes transitional requirements for education to meet the licensure requirement, including general subject areas that must be covered. It is inappropriate to establish the content requirements for specific courses in regulation.

COMMENT: The sole physician member of the State Board for Clinical Laboratory Technology was not appointed until July 2006, so this member did not have adequate opportunity to participate in the development of the regulation. In addition, the Board has not had adequate opportunity to discuss the public comments that were submitted.

RESPONSE: A physician member of the Board was appointed in July 2006 after an extensive search. Several nominees did not respond to their nomination or determined that they were not interested in appointment following interviews. The physician has participated in board discussion regarding the proposed rule and received the minutes of board proceedings regarding this matter on the date of his appointment. The board has been closely involved in the development of this regulation and has discussed the public comments.

COMMENT: The Department did not timely implement the application process for licensure in these new professions.

RESPONSE: The licensure law was enacted in January 30, 2005 with an implementation date of September 1, 2006. The process of appointing a State Board, developing the proposed regulations and publishing these in the *State Register*, receiving comment and responding to the comment required the sequential flow of prescribed activities that took a number of months before the Board of Regents could enact the emergency regulations in July 2006. Within two weeks of this action by the Board of Regents, applications were available online and in hard copy. Applicants had adequate time to apply for licensure under the "grandparenting" provisions.

COMMENT: Licensure and the fees are just ways to add money to the State's general fund and are excessive.

RESPONSE: The licensure and registration fees for these professions are established in statute. The Department does not have the statutory authority to change them in regulation. Licensure fees are placed into a protected revenue account to be used solely for the process of carrying out the activities related to licensing, conduct and determinations of professional practice to ensure the health, safety and welfare of the public.

NOTICE OF ADOPTION

State Aid for Public Library Construction

I.D. No. EDU-34-06-00016-A
Filing No. 1291
Filing date: Oct. 27, 2006
Effective date: Nov. 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 90.12 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 215 (not subdivided) and 273-a(5); and L. 2006, ch. 53, section 1

Subject: State aid for public library construction.

Purpose: To prescribe eligibility requirements and criteria for applications for State aid for library construction; and conform to the commissioner's regulations to recent changes to Education Law, section 273-a.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-34-06-00016-P, Issue of August 23, 2006.

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

Text of 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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 23, 2006, the State Education Department received the following comments.

COMMENTS:

Comments were received from several entities in Erie County. These comments did not address the provisions of the proposed amendment, but instead offered broader policy and practical concerns regarding Erie County's fiscal and budgetary situation and the implementation of the library construction grant program as detailed in guidance posted on the Department's website (www.nysl.nysed.gov/libdev/construc/faq14m.htm), including concerns relating to the deadline/timeframe for submission of proposals; submission of an architect's estimate combined with a formal adopted budgetary commitment for the project, or submission of a feasibility study, in lieu of a contractor's bid or quote; providing evidence of the availability of funds to pay for the project minus the amount awarded through the construction grant program; prior approval by the State Historic Preservation Office for projects concerning buildings that are 50 years old or older; and allowing applications for phases of the project rather than the full project.

DEPARTMENT RESPONSE:

The comments are beyond the scope of the proposed amendment, which is intended to conform the Commissioner's Regulations to recent changes to Education Law section 273-a, as made by Chapter 572 of the Laws of 2003 and Chapter 57 of the Laws of 2005, so that funds appropriated pursuant to Chapter 53 of the Laws of 2006 are awarded pursuant to statutory requirements. However, the Department will address the expressed concerns via a conference call followed by individual responses.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Behavioral Interventions

I.D. No. EDU-28-06-00005-RP

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

Revised action: Amendment of sections 19.5, 200.1, 200.4, 200.7 and 201.2 and addition of section 200.22 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 210 (not subdivided), 305(1), (2) and (20), 4401(2), 4402(1), 4403(3) and 4410(13)

Subject: Behavioral interventions, including aversive interventions.

Purpose: To establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; provide for a child-specific exception to the prohibition on the use of aversive interventions; and establish standards for programs using aversive interventions.

Substance of revised rule: The Commissioner of Education proposes to amend section 19.5 of the Rules of the Board of Regents and sections 200.1, 200.4, 200.7 and 201.2 of the Regulations of the Commissioner of Education, and to add a new section 200.22 of the Commissioner's Regulations, effective January 31, 2007, relating to standards for behavioral interventions, including aversive interventions. The following is a summary of the substance of the proposed amendments.

Section 19.5(a)(1) of the Rules of the Board of Regents, as amended, provides that no teacher, administrator, officer, employee or agent of a school district in New York State (NYS), a board of cooperative educational services (BOCES), a charter school, a State-operated and State-supported school, an approved preschool program, an approved private school, an approved out-of-State day or residential school, or a registered nonpublic nursery, kindergarten, elementary or secondary school in this State, shall use corporal punishment against a pupil.

Section 19.5(b) of the Rules of the Board of Regents, as amended, establishes a prohibition on the use of aversive interventions, except as provided by a child-specific exception pursuant to proposed section 200.22(e) of the Commissioner's Regulations, and defines the term 'aversive intervention.'

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of functional behavioral assessment to cross reference the requirements in section 200.22(a).

Sections 200.1(lll) and (mmm) of the Commissioner's Regulations, as added, provide, respectively, definitions of the terms 'aversive intervention' and 'behavioral intervention plan.'

Section 200.4(d)(3)(i) of the Commissioner's Regulations, as amended, provides that the CSE or CPSE shall, in developing a student's IEP, consider supports and strategies to address student behaviors that are consistent with the requirements in section 200.22.

Section 200.7(a)(2)(i)(f) of the Commissioner's Regulations, as added, provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive interventions.

Section 200.7(a)(3)(iv) of the Commissioner's Regulations, as amended, provides that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22(e) or that an approved private school is using aversive interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) of the Commissioner's Regulations, as added, provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive interventions to reduce or eliminate maladaptive behaviors of students; and prohibits an approved preschool program from using aversive interventions with preschool students with disabilities without exception.

Section 200.7(c)(6) of the Commissioner's Regulations, as added, requires a private school that proposes to use or continue to use aversive interventions in its program to submit its written policies and procedures on behavioral interventions to the Department; provides that only those programs with policies and procedures that are approved pursuant to section 200.22(f)(8) on or before June 30, 2007 shall be authorized to use such interventions with NYS students; and provides that failure to comply with the provisions of this paragraph may result in revocation of approval to accept new admissions of NYS students or termination of private school approval pursuant to section 200.7(a)(3).

Section 200.22 of the Commissioner's Regulations, as added, establishes program standards for behavioral interventions. This section further provides that for an education program operated pursuant to section 112 of the Education Law and Part 116 of the Regulations of the Commissioner of Education, if a provision of section 200.22 relating to use of time out rooms, emergency use of physical restraints, or aversive interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of section 200.22 shall not apply.

Section 200.22(a) establishes requirements for the conduct of a functional behavioral assessment to assess student behaviors.

Section 200.22(b) establishes requirements for behavioral interventions for students with disabilities.

Section 200.22(c) establishes requirements regarding the use of time out rooms.

Section 200.22(d) establishes requirements for the use of emergency interventions, including requirements to document the emergency intervention and notify the student's parent.

Section 200.22(e) establishes the process for a child-specific exception to the Regents prohibition on the use of aversive interventions. A child-specific exception may be granted for a school-age student, in accordance with the procedures outlined in the subdivision, only during the 2006-2007, 2007-2008 and 2008-2009 school years; provided that a student whose individualized education program (IEP) includes the use of aversive interventions as of June 30, 2009 may be granted a child-specific exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. This subdivision also provides timelines and procedures for an independent panel of experts appointed by the commissioner or commissioner's designee to make a recommendation to the CSE and to the Commissioner as to whether a child-specific exception is warranted.

Section 200.22(f)(1) sets forth applicability provisions for the requirements set forth in the subdivision.

Section 200.22(f)(2) establishes general requirements for programs that employ the use of aversive interventions.

Section 200.22(f)(3) requires each school that uses aversive interventions to establish a Human Rights Committee to monitor the school's behavior intervention program to ensure the protection of legal and human rights of individuals.

Section 200.22(f)(4) establishes supervision and training requirements for persons who use aversive interventions.

Section 200.22(f)(5) states that aversive interventions shall be provided only with the informed written consent of the parent and no parent shall be required by the program to remove the student from the program if he or she refuses consent for an aversive interventions.

Section 200.22(f)(6) requires the program to conduct quality assurance reviews of its use of aversive interventions, including a review of all incident reports relating to such interventions.

Section 200.22(f)(7) provides for ongoing monitoring of student progress in programs using aversive interventions; and requires a school district that places a student in such a program to: oversee the student's education and behavior program, including review of written progress monitoring and incident reports; conduct observations of, and, as appropriate, interviews with the student at least once every six months; regularly communicate with the student's parent; and convene a CSE meeting at least every six months to review the student's educational program and placement.

Section 200.22(f)(8) requires each school that proposes to use aversive interventions pursuant to the child-specific exception in 200.22(e) to submit its policies and procedures consistent with the standards in this section to the Department for approval prior to the use of aversive interventions; and only schools with policies and procedures approved by the Department on or before June 30, 2007 shall be authorized to use such interventions.

Section 201.2(a) proposes to amend the definition of behavioral intervention plan to add that the strategies must include positive behavioral supports and services to address the behavior.

Revised rule compared with proposed rule: Substantial changes were made in sections 19.5(b)(2), 200.1(r), (lll) and (mmm), 200.7(b)(8) and (c)(6), 200.22(b), (c), (d), (e) and (f) and 201.2(a).

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: Rebecca H. Cort, Deputy Commissioner, VESID, Education Department, One Commerce Plaza, Rm. 1606, Albany, NY 12234, (518) 473-2714, e-mail: rcort@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on July 12, 2006, the following substantial revisions were made:

Section 19.5(b) was revised to define aversive intervention to mean an intervention intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors, and delete reference to certain aversive interventions.

Section 200.1(r) was revised to clarify that functional behavioral assessments (FBAs) must be developed consistent with the requirements in section 200.22(a), and replace the term "effective" with "affective."

Section 200.1(lll) was revised for clarification and consistency to add a cross citation to the definition of "aversive interventions" in Regents Rules section 19.5(b)(2).

Section 200.1(mmm) was revised to add that behavioral intervention plan (BIP) strategies must include positive behavioral supports and services.

Section 200.7(b)(8) was revised to limit the use of aversive interventions through a child specific exception to school-age programs and prohibit without exception an approved preschool program from using aversive interventions.

Section 200.7(c)(6) was revised to limit the use of aversive interventions to programs having policies and procedures approved by the Department on or before June 30, 2007, and clarify that failure to comply with this paragraph may result in revocation of approval to accept new admissions of New York students or termination of private school approval.

Section 200.22(b) was revised for clarification and consistency to add a cross citation to the definition of BIP in section 200.1(mmm).

Section 200.22(c) was revised to define time out room; add specific minimum requirements for a school's policies and procedures regarding time out rooms; clarify that a time out room is to be used in conjunction with a BIP or for unanticipated situations that pose an immediate concern for the physical safety of a student or others; add requirements regarding information that must be provided to parents; and clarify that staff must continuously monitor the student in a time out room.

Section 200.22(d) was revised to change the term "emergency use of physical restraints" to "emergency interventions;" define "emergency"; clarify that emergency interventions may not be used as a punishment and may be used only in situations when other procedures and methods not involving physical force cannot be reasonably employed; clarify training requirements for staff implementing emergency interventions; and add documentation and reporting requirements when emergency interventions are used.

Section 200.22(e) was revised to authorize child specific exceptions for school-age students only for the 2006-07, 2007-08 and 2008-09 school years, provided that a student with an individualized education program (IEP) that includes aversive interventions as of June 30, 2009 may be granted a child specific exception in each subsequent year, unless the IEP is revised to no longer include such exception; add that no child-specific exception shall be granted for a preschool student; clarify that aversive interventions be considered only for students displaying self-injurious or aggressive behavior that threaten the physical well-being of the student or others, and only to address such behaviors; add that no child-specific exceptions will be granted for certain aversive interventions; clarify that the purpose of the independent panel is to provide a recommendation to a Committee on Special Education (CSE) as to whether a child-specific exception is warranted; specify that panel shall notify the school district of its recommendation for students whose current IEP does not include a child-specific exception within 15 business days of receipt of an application; add that a Subcommittee on Special Education cannot make the determination to provide a child-specific exception; require that the CSE request participation of the school physician member to any meeting where an aversive intervention is being considered; require that the district provide a copy of the IEP to the Commissioner when it includes aversive interventions; clarify that the IEP must identify the self-injurious an/or aggressive behaviors to be targeted and any mechanical restraint devices to be used to provide the aversive intervention; clarify that an application for a child-specific exception must be submitted annually; and add that district must submit a revised copy of the IEP to the Commissioner if it is amended to no longer include a child-specific exception.

Section 200.22(f)(1)(i) was revised to delete approved preschool programs from applicability provisions of this subdivision and to clarify that programs must be authorized by the Department to use aversive interventions.

Section 200.22(f)(2) was revised to clarify that no program may combine the simultaneous use on a student of a physical or mechanical restraint with another aversive intervention and delete proposed qualifications for individuals who develop BIPs.

Section 200.22(f)(3) was revised to add that the Human Rights Committee may include not more than two individuals selected by the program or agency.

Section 200.22(f)(4) was revised to require that aversive interventions be administered by appropriately licensed professionals or certified special

education teachers or under the direct supervision and direct observation of such staff; and that training be provided on a regular, but at least annual basis.

Section 200.22(f)(5) was revised to add that parents must be provided with a copy of the school's policies and procedures on the use of aversive interventions.

Section 200.22(f)(6) was revised to clarify that quality assurance reviews of incident reports regarding aversive interventions must be conducted periodically by the program providing such interventions.

Section 200.22(f)(7) was revised to require that a representative of a school district placing a student in a program that uses aversive interventions with the student, observe the student in the program at least every six months and, as appropriate, interview the student, communicate regularly with the parents and report the results to the CSE.

Section 200.22(f)(8) was revised to limit the schools that use aversive interventions to those that have their policies and procedures approved by the Department as of June 30, 2007.

Section 201.2(a) relating to the definition of behavioral intervention plan, was revised to add that intervention strategies to address the problem behavior must include positive behavioral supports and services.

The above revisions require that the term "aversive behavioral intervention" be replaced with "aversive intervention" throughout the previously published Regulatory Impact Statement and that the Costs, Local Government Mandates and Paperwork sections be revised to read as follows:

COSTS:

a. Costs to State government: See costs to the State Education Department.

b. Costs to local governments: None.

c. Costs to regulated parties: School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at $200 per student) and CSE meetings at least every six months for students receiving aversive interventions (estimated at $1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using aversive interventions and most of these have only one student where such a recommendation currently appears on the student's IEP. Schools using aversive interventions may also incur additional administrative costs estimated at less than $8,000 annually for implementing the proposed standards, including staff training and convening Human Rights Committee meetings at least quarterly (*e.g.,* administrative oversight, duplication and meeting costs estimated at $6,000 per year).

d. Costs to the State Education Department of implementation and continuing compliance: The cost of funding a three-member independent panel of experts to provide a recommendation regarding the need for a child-specific exception is estimated at approximately $230,000 for the first year. This calculation was based on approximately 100 requests for child-specific exceptions, at an estimated cost of $2,300 for each student. Additional costs for State administration and oversight of the child-specific exception, including duplication of materials for the panel are estimated at $10,000 annually. The annual costs of the review panel are expected to be less in subsequent years and after July 1, 2009 should diminish significantly. These costs may be offset if the CSE determines that a student no longer requires aversive interventions since the cost for one student currently placed in an out-of-state residential school for aversive interventions ranges from $281,180 to $329,970 per year.

LOCAL GOVERNMENT MANDATES:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of aversive interventions except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of FBA to cross reference the requirements in section 200.22(a).

Section 200.4(d)(3)(i) requires a CSE, in developing a student's IEP, to consider supports and strategies, including positive behavioral interventions, to address student behaviors that are consistent with program standards in section 200.22.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency interventions. Section 200.22(e) provides that a child-specific exception to the prohibition of the use of aversive interventions may be granted for school-age students only during the 2006-2007, 2007-2008 and 2009-2010 school years; provided that a student whose IEP includes use of aversive interventions as of June 30, 2009 may be granted such exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, aversive interventions to be used, and aversive conditioning devices where the aversive interventions include use of such devices.

Public schools, BOCES, charter schools, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of aversive interventions. Each school using aversive interventions shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using aversive interventions shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), aversive interventions shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of aversive interventions is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

Section 201.2(a) proposes to amend the definition of BIP to add that the strategies must include positive behavioral supports and services to address the behavior.

PAPERWORK:

CSEs must compile and submit student record information and school districts must submit an application for the child-specific exception. Currently there are approximately 23 school districts that have students recommended for aversive interventions.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on July 12, 2006, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revisions require that the term "aversive behavioral intervention" be replaced with "aversive intervention" throughout the previously published Regulatory Flexibility Analysis and that the Compliance Requirements and Compliance Costs sections be revised to read as follows:

COMPLIANCE REQUIREMENTS:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of aversive interventions except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of FBA to cross reference the requirements in section 200.22(a).

Section 200.4(d)(3)(i) requires a CSE, in developing a student's IEP, to consider supports and strategies, including positive behavioral interventions, to address student behaviors that are consistent with program standards in section 200.22.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency interventions.

Section 200.22(e) provides that a child-specific exception to the prohibition of the use of aversive interventions may be granted for school-age students only during the 2006-2007, 2007-2008 and 2009-2010 school years; provided that a student whose IEP includes use of aversive interventions as of June 30, 2009 may be granted such exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, aversive interventions to be used, and aversive conditioning devices where the aversive interventions include use of such devices.

Public schools, BOCES, charter schools, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of aversive interventions. Each school using aversive interventions shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using aversive interventions shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), aversive interventions shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of aversive interventions is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

Section 201.2(a) proposes to amend the definition of BIP to add that the strategies must include positive behavioral supports and services to address the behavior.

COMPLIANCE COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a $200 per student) and Committee on Special Education (CSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at $1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using aversive interventions and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using aversive interventions may also incur additional administrative costs estimated at less than $8,000 annually for implementing standards, including staff training (estimated at $2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (*e.g.*, administrative oversight, duplication and meeting costs estimated at $6,000 per year).

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on July 12, 2006, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revisions require that the term "aversive behavioral intervention" be replaced with "aversive intervention" throughout the previously published Rural Area Flexibility Analysis and that the Reporting, Record-Keeping and Other Compliance Requirements and Professional Services section and Cost section be revised to read as follows:

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of aversive interventions except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.1(r) of the Commissioner's Regulations, as amended, revises the definition of FBA to cross reference the requirements in section 200.22(a).

Section 200.4(d)(3)(i) requires a CSE, in developing a student's IEP, to consider supports and strategies, including positive behavioral interventions, to address student behaviors that are consistent with program standards in section 200.22.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency interventions.

Section 200.22(e) provides that a child-specific exception to the prohibition of the use of aversive interventions may be granted for school-age students only during the 2006-2007, 2007-2008 and 2009-2010 school years; provided that a student whose IEP includes use of aversive interventions as of June 30, 2009 may be granted such exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student. Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, aversive interventions to be used, and aversive conditioning devices where the aversive interventions include use of such devices.

Public schools, BOCES, charter schools, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of aversive interventions. Each school using aversive interventions shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using aversive interventions shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), aversive interventions shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of aversive interventions is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

Section 201.2(a) proposes to amend the definition of BIP to add that the strategies must include positive behavioral supports and services to address the behavior.

COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a $200 per student) and Committee on Special Education (CSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at $1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using aversive interventions and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using aversive interventions may also incur additional administrative costs estimated at less than $8,000 annually for implementing standards, includ-

ing staff training (estimated at $2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (*e.g.*, administrative oversight, duplication and meeting costs estimated at $6,000 per year).

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on July 12, 2006, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, is necessary in order to establish standards for behavioral interventions for students with disabilities, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. These amendments will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring. The revised proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised proposed rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Summary of Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Proposed Rule Making on July 12, 2006, the State Education Department (SED) received the following comments.

1. General

COMMENT:

Most opposed use of aversives; some supported procedures to limit aversives and assure children receive other appropriate interventions; a few opposed any restrictions on aversives.

DEPARTMENT RESPONSE:

Use of aversives has been considered in relation to its treatment value for students with severe self-injurious behaviors, its basis in scientific research, its potential effect on a student's health and safety, and moral and ethical issues. SED does not support the use of aversives. However, some parents expressed that without this intervention their child's health and safety is at risk because of the child's severe self-injurious behaviors. Revised rule allows for new child-specific exceptions to use aversive interventions until June 30, 2009, provided that students with aversive interventions recommended on their individualized education programs (IEPs) as of June 30, 2009 may continue to be considered for a child-specific exception annually thereafter. SED will take steps during the next two years to ensure that effective research-based alternative behavioral interventions are available for all New York students.

2. Section 19.5(a) - Prohibition of corporal punishment

COMMENT:

Prohibit corporal punishment without exception; distinguish between "physical force" and "corporal punishment."

DEPARTMENT RESPONSE:

Corporal punishment is prohibited without exception. Other recommended changes are beyond scope of proposed rule making.

3. Section 19.5(b)(2) and Section 200.1(lll) – Definition of aversive intervention

COMMENT:

Categorize restrictive interventions at different levels; identify aversives not allowed; add definitions of other interventions; allow aversives such as helmets and restraints necessary to avoid injury; prohibit harmful aversives such as electric shock and noxious sprays.

DEPARTMENT RESPONSE:

Revised rule revised definition of 'aversive intervention' and specifies aversives not allowed. It is not practicable to define the various forms of other behavioral interventions.

4. Section 19.5(b) - Exception to the prohibition on aversives

COMMENT:

Prohibit aversives without exception. Mild aversives may be more appropriate than time out or restraints. Allowing aversives violates students' civil rights. It is discriminatory to prohibit aversives for nondisabled students but allow them for students with disabilities.

DEPARTMENT RESPONSE:

Limited exceptions to use aversives are intended to address parent concerns for their children with severe self-injurious behaviors who may not have had the opportunity to benefit from current research and practice on the effective use of nonaversive interventions. Revised rule sunsets child-specific exception by June 30, 2009 except for students with IEPs including aversive interventions as of June 30, 2009.

5. Section 200.7 - Approval of private schools

COMMENT:

Require onsite program review by SED staff prior to approval of a new program.

DEPARTMENT RESPONSE:

SED may consider this recommendation in future rule making.

6. Section 200.22(a) – Functional Behavioral Assessment (FBA)

COMMENT:

Prohibit use of aversives and require training on FBAs and positive behavior intervention plans (BIPs). Require in-depth analyses of behaviors when shock is used.

DEPARTMENT RESPONSE:

The Individuals with Disabilities Education Act (IDEA) requires IEPs to include positive behavioral supports and services and FBAs and BIPs to be developed and implemented for students with behaviors that impede learning. The definition of BIP is revised to require intervention strategies to include positive behavioral supports and interventions.

7. Section 200.22(b) – BIPs

COMMENT:

Specify qualified professionals that can design and supervise BIPs; require all interventions, including antecedent and other consequences, be supported by peer-reviewed research.

DEPARTMENT RESPONSE:

Requirement that BIPs be designed and supervised by qualified professionals in accordance with their respective areas of professional competence has been deleted since BIPs are often developed by teams of qualified individuals. Section 200.4 requires the IEP to include, to extent practicable, programs and services that are based on peer-reviewed research.

8. Section 200.22(c) – Time Out Rooms

COMMENT:

Define time out room; prohibit its use; provide clear procedures on its use with the student's safety as the priority; prohibit seclusion.

DEPARTMENT RESPONSE:

Revised rule establishes standards for use of time out rooms including physical and monitoring requirements, parent rights and IEP requirements. Section is revised to define "time out room;" add other monitoring, policy and parent communication requirements; and clarify that time out rooms are to be used in conjunction with a BIP except for unanticipated situations that pose an immediate concern for the physical safety of the student or others.

9. Section 200.22(d) - Emergency use of physical restraints

COMMENT:

Prohibit non-emergency restraint use in facilities receiving federal funding. Adopt federal law (42 USC § 15009); allow use of mechanical restraints for emergency interventions; define physical, chemical and mechanical restraints; specify appropriate durations of restraint; add reporting requirements; and require parent consent prior to use of physical restraint.

DEPARTMENT RESPONSE:

Proposed regulation is consistent with federal law. Revised rule defines emergency; clarifies emergency interventions may not be used as a punishment and may be used only in situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed; requires the school to maintain documentation on the use of emergency interventions; and prohibits use of aversives as an emergency intervention. It is not possible to specify the appropriate duration of an emergency intervention or require parent consent prior to intervening in an emergency situation.

10. Section 200.22(e) - Child-specific exception to use aversives

COMMENT:

While most opposed a child-specific exception, comments requested clarification and additional protections if exception allowed, including: clarify criteria for when an exception is appropriate; require Panel to include other individuals, including those experienced with aversives; do not limit Panel's review to written documentation; require districts to notify SED if a previously approved aversive plan is discontinued; include an enforcement mechanism so that school districts would be held accountable for noncompliance; allow Committees on Special Education (CSEs) to reapply if alternative procedures fail to suppress or reduce behaviors; give parents the right to choose aversives; allow court-ordered use of aversives; do not allow CSEs to make the final decision to allow aversives;

require more medical information and CSE consultation with a certified behavior analyst or psychologist with extensive experience in behavior analysis; do not limit aversives based on a student's unsuccessful history with positive behavioral supports; and clarify that an exception application must be submitted annually.

DEPARTMENT RESPONSE:

Panel's determination is based on the professional judgment of the Panel members in review of the individual student's behaviors, evaluations, including medical information, and history of the use of positive and other behavioral interventions used with the student. Positive behavioral supports are only one factor in the determination. Panel members must have appropriate clinical and behavioral expertise to make a determination. It is not necessary for such individuals to have experience using aversives. Only a CSE can develop a student's IEP consistent with federal and State laws and regulations.

Revised rule requires CSE to notify and provide a copy of the student's IEP to SED when a child-specific exception is in the IEP and when IEPs are amended to no longer include a child-specific exception; to require the school physician to be invited to the CSE meeting whenever a recommendation for the use of aversives is being considered; and clarify that an exception application must be submitted each year.

11. Section 200.22(f) Program standards for the use of aversives

COMMENT:

Provide greater limitations on programs using aversives; require greater oversight and supervision when aversives used, including medical and psychological reviews, outcome measures identified and use of video cameras. Clarify what is meant by use of aversives in a humane and dignified manner. Define "aggressive behavior." Ban electric skin shock and do not allow devices that administer electric shock. Limit behaviors for which aversives can be used to only most serious ones. Give programs discretion as to type of aversives that can be used, including use of contingent physical restraints and allow aversives to be used for noncompliant and antecedent behaviors because one program reported students who were receiving aversives for noncompliance and other inappropriate behaviors are now demonstrating academic and behavioral regression. Require related services for a student receiving aversives to include "research-validated cognitive-behavior therapy" and "sensory integrative experiences." Limit use of aversive devices only with populations for which devices have been approved; and require regular maintenance of aversive devices. Allow physical restraint to be used as a contingent procedure. Adopt policies and procedures specific to the use of helmets, restraints and other mechanical devices to ensure the health and safety of a child, not to punish or inflict discomfort. Disseminate information on risks associated with using restraints, seclusion and physical force to school personnel. Prohibit use of aversive consequences in combination with negative practice (overcorrection) procedure.

DEPARTMENT RESPONSE:

Revised rule limits programs using aversives to those whose policies and procedures are approved by June 30, 2007; prohibits use of aversives by preschool programs; requires aversives be considered only for students displaying self-injurious and/or aggressive behaviors that threaten the physical well being of the student or that of others and only to address such behaviors; requires CSE to request participation of school physician to any meeting where use of aversives is being considered; requires aversives be administered by appropriately licensed professionals or certified special education teachers or under the direct supervision and direct observation of such staff; defines emergency interventions; and requires training in safe and effective restraint for staff who may be called upon to implement emergency interventions.

Use of automated aversive conditioning devices present health and safety risks. Mechanical restraint for the purpose of applying another aversive such as skin shock is corporal punishment. The CSE determines appropriate related services for a student. Proposed regulations require evidence of the safety and effectiveness of aversive devices for the population to be served. Interventions medically necessary for the treatment or protection of the student are not considered aversives.

12. Human Rights Committee (HRC)

COMMENT:

Clarify purpose of the HRC; require special educators, school psychologists and positive behavior experts as members. Allow staff employed by the agency and others not employed by the program to serve on the HRC; do not allow a physician's assistant or nurse practitioner to be used in place of a doctor and a law student or paralegal in place of a lawyer.

DEPARTMENT RESPONSE:

The HRC serves as an objective review body to protect student rights. To be practicable, flexibility to appoint a licensed physician, physician's assistant or nurse practitioner and an attorney, law student or paralegal is necessary to ensure availability of medical and legal perspectives at HRC meetings. The revised rule allows additional HRC members who are not affiliated with the program.

13. Supervision and training requirements

COMMENT:

Require higher qualifications on individuals who provide, supervise and monitor aversive interventions.

DEPARTMENT RESPONSE:

Revised rule requires appropriately licensed professionals or certified special education teachers or under the direct supervision and direct observation of such staff to administer aversives.

14. Parental Consent

COMMENT:

Ensure parents understand their rights and are provided with effective alternatives to aversives. Allow adult students to provide consent for aversives. Allow the program to discharge the student if the parent does not consent for aversives.

DEPARTMENT RESPONSE:

A school must provide the parent with written prior notice that describes any other options considered when it requests parent consent. A program must not intentionally or unintentionally coerce a parent to provide consent. NYS does not transfer IDEA rights to the student at the age of majority.

15. School district responsibility for progress monitoring

COMMENT:

Increase school district oversight of a student in a program that uses aversives.

DEPARTMENT RESPONSE:

Revised rule requires a six-month student observation and interview.

16. Other:

COMMENT:

Restrict use of medications with negative side effects and that are not approved for children by the Food and Drug Administration.

DEPARTMENT RESPONSE:

The use of medication is beyond the scope of this rule making.

Insurance Department

EMERGENCY RULE MAKING

Rules Relating to Processing of Claims

I.D. No. INS-46-06-00012-E
Filing No. 1295
Filing date: Oct. 31, 2006
Effective date: Oct. 31, 2006

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

Action taken: Addition of Part 56 (Regulation 183) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802 and art. 49

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

Specific reasons underlying the finding of necessity:

Insurance Law and regulations require certain health insurance policies to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits insurers to exclude coverage for surgery that is considered to be cosmetic. Articles 49 of the Insurance Law and Public Health Law, enacted after Section 52.16, provide for internal and external appeal when services are denied as not medically necessary.

It is the Insurance Department's position that whenever surgery is a covered benefit under a policy, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law. It has come to the Department's

attention that insurers and health maintenance organizations (HMOs) have been inconsistent as to what they consider to be medically necessary surgery or cosmetic surgery and some insureds have not been provided with the right to utilization review and external appeal for denials of surgical services. If the appropriate appeal rights are not given, an insured may be unable to obtain medically necessary health care services, adversely affecting the health of the insured.

To establish uniformity, ensure that consumers are protected, and address concerns of health plans, a new part 56 is added to 11 NYCRR and the cosmetic surgery exclusion in Part 52.16(c)(5) is amended. These two regulations clarify that denials for the reason that services are considered cosmetic are subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law or Public Health Law if certain conditions are met.

The requirements established in these regulations are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Health plans are aware of the requirements in these regulations and have advised the Insurance Department that they would like to begin implementation through revised subscriber contracts. The Insurance Department has already received and approved subscriber contracts from health plans that include the process outlined in Part 56 and the amended Part 52. Promulgating Part 56 and the amended Part 52 on an emergency basis will ensure that all subscriber contracts that are being filed and approved are consistent with regulatory requirements and will enable health plans to make all contract changes in one filing.

Moreover, these amendments will ensure that all health plans are following the same requirements and that access to utilization review and external appeal by insureds will not be dependent on the particular health insurance policy the insured may have. These amendments will further ensure that insureds will be able to obtain medically necessary surgical services so that the health of insureds is not compromised.

For the reasons stated above, the immediate adoption of this regulation is necessary for the preservation of the general welfare.

Subject: Rules relating to processing of claims.

Purpose: To clarify when plans may exclude coverage for cosmetic surgery.

Text of emergency rule: A new Part 56 of Title 11 NYCRR (Regulation No. 183) is adopted to read as follows:

Section 56.0 Preamble. Section 52.16(c)(5) of Part 52 of this Title (Regulation 62), permits insurers and health maintenance organizations (HMOs) that are required to provide coverage for surgical services, to exclude coverage of cosmetic surgery. Part 52 does not define cosmetic surgery, but does provide examples of two types of reconstructive surgeries that may never be considered cosmetic. Subsequent to the promulgation of Part 52, Title I and Title II of Article 49 of the Insurance Law and Public Health Law were enacted that require medical necessity denials to be subject to utilization review and external appeal. The Insurance Department has found inconsistencies among insurers and HMOs as to when denials of surgery are considered medical necessity denials and subject to utilization review and external appeal. Section 56.3 of this Part and an amended section 52.16(c)(5) of Part 52 of this Title clarify that, whenever surgery is a covered benefit under certain policies, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Titles I and II of Article 49 of the Insurance Law and Public Health Law, except in certain cases when the claim or request for surgery is identified by one of the codes in subdivision (f) of section 56.3 of this Part and is submitted without medical information.

Section 56.1 Applicability. This Part shall be applicable to policies that provide hospital, surgical or medical expense coverage.

Section 56.2 Definitions. The following words or terms shall have the following meanings when used in this Part:

(a) Health care professional means an appropriately licensed, registered or certified health care professional pursuant to title eight of the education law or a health care professional comparably licensed, registered or certified by another state.

(b) Health care provider means a health care professional or a facility licensed pursuant to article 28, 36, 44 or 47 of the public health law or a facility licensed pursuant to article 19, 23, 31 or 32 of the mental hygiene law.

(c) Health plan means an insurer or health maintenance organization (HMO) that has issued a policy that provides hospital, surgical or medical expense coverage.

(d) Medical information means any medical data, written explanation from a health care professional, or medical record.

Section 56.3 Claim review requirements for surgical services.

(a) A claim or request for coverage of reconstructive surgery when such service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part, and reconstructive surgery because of congenital disease or anomaly of a covered dependent child that has resulted in a functional defect shall not be considered by a health plan to be cosmetic. Reconstructive surgery may however be reviewed for medical necessity subject to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(b) A claim or request for coverage of surgery other than for the surgical services described in subdivision (a) or (c) of this section that is considered by a health plan to be cosmetic shall be reviewed for medical necessity subject to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(c) A claim or request for coverage of surgery, other than a request for pre-authorization, that is solely identified by one of the codes in subdivision (f) of this section and is submitted to a health plan without any accompanying medical information, may be denied by a health plan as cosmetic without subjecting the request to the requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law, provided that:

(1) notice of the denial includes a clear statement describing the basis for the denial;

(2) notice of the denial includes a statement that the insured has a right to a medical necessity review if the insured or the insured's health care provider believes the claim or request involves issues of medical necessity and submits medical information;

(3) if a medical necessity review is requested and medical information is submitted, the health plan treats the request as a utilization review appeal pursuant to section 4904 of the Insurance Law or Public Health Law; and

(4) if the health plan denies coverage of the procedure after receipt of medical information, the health plan issues a final adverse determination in compliance with section 4904(c) of the Insurance Law and section 410.9(e) of Part 410 of this Title (Regulation 166) or section 4904(3) of the Public Health Law and 10 NYCRR 98-2.9(e), as applicable.

(d) If an initial claim or request for a procedure listed in subdivision (f) of this section is submitted to a health plan with accompanying medical information, the claim or request shall be reviewed in compliance with Title I and Title II of Article 49 of the Insurance Law or Public Health Law.

(e) If an initial claim or request for a procedure listed in subdivision (f) of this section is submitted to a health plan as a pre-authorization request without accompanying medical information, the necessary information shall be requested as required by section 4905(k) of the Insurance Law or section 4905(11) of the Public Health Law and the claim or request shall be reviewed in compliance with Title I and Title II of Article 49 of the Insurance Law or Public Health law.

(f) Common Procedural Terminology (CPT code (copyright)) and Description

11200 Removal of skin tags, multiple fibrocutaneous tags, any area; up to and including 15 lesions
11201 Removal of skin tags; each additional 10 lesions
11950 Subcutaneous injection of filling material (eg, collagen); 1 cc or less
11951 Subcutaneous injection of filling material (eg, collagen); 1.1 to 5.0 cc
11952 Subcutaneous injection of filling material (eg, collagen); 5.1 to 10.0 cc
11954 Subcutaneous injection of filling material (eg, collagen); over 10.0 cc
15775 Punch graft for hair transplant; 1 to 15 punch grafts
15776 Punch graft for hair transplant; more than 15 punch grafts
15780 Dermabrasion; total face (e.g. for acne scarring, fine wrinkling, rhytids, general keratosis)
15781 Dermabrasion, segmental, face
15782 Dermabrasion, regional, other than face
15783 Dermabrasion, superficial, any site, (eg, tattoo removal)
15786 Abrasion; single lesion (eg, keratosis, scar)

15787 Abrasion; each additional four lesions or less
15788 Chemical peel, facial; epidermal
15789 Chemical peel, facial; dermal
15790 Chemical peel; total face
15791 Chemical peel; face, hand or elsewhere
15792 Chemical peel, nonfacial; epidermal
15793 Chemical peel, nonfacial; dermal
15810 Salabrasion; 20 sq cm or less
15811 Salabrasion; over 20 sq cm
15819 Cervicoplasty
15820 Blepharoplasty, lower eyelid;
15821 Blepharoplasty, lower eyelid; with extensive herniated fat pad
15824 Rhytidectomy; forehead
15825 Rhytidectomy; neck with platysmal tightening (platysmal flap, P-flap)
15826 Rhytidectomy; glabellar frown lines
15828 Rhytidectomy; cheek, chin, and neck
15829 Rhytidectomy; superficial musculoaponeurotic system (SMAS) flap
15832 Excision, excessive skin and subcutaneous tissue (including lipectomy); thigh
15833 Excision, excessive skin and subcutaneous tissue (including lipectomy); leg
15834 Excision, excessive skin and subcutaneous tissue (including lipectomy); hip
15835 Excision, excessive skin and subcutaneous tissue (including lipectomy); buttock
15836 Excision, excessive skin and subcutaneous tissue (including lipectomy); arm
15837 Excision, excessive skin and subcutaneous tissue (including lipectomy); forearm or hand
15838 Excision, excessive skin and subcutaneous tissue (including lipectomy); submental fat pad
15839 Excision, excessive skin and subcutaneous tissue (including lipectomy); other area
15876 Suction assisted lipectomy; head and neck
15877 Suction assisted lipectomy; trunk
15878 Suction assisted lipectomy; upper extremity
15879 Suction assisted lipectomy; lower extremity
17340 Cryotherapy (CO_2 slush, liquid N_2) for acne
17360 Chemical exfoliation for acne (eg, acne paste, acid)
17380 Electrolysis epilation, each ½ hour
19316 Mastopexy
19355 Correction of inverted nipples
21120 Genioplasty; augmentation (autograft, allograft, prosthetic material)
30430 Rhinoplasty, secondary; minor revision (small amount of nasal tip work)
36468 Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); limb or trunk
36469 Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); face
36470 Injection of sclerosing solution; single vein
36471 Injection of sclerosing solution; multiple veins, same leg
69090 Ear piercing
69300 Otoplasty, protruding ear, with or without size reduction
S0500 Laser in situ keratomileusis
S0810 Photorefractive keratectomy
S0812 Phototherapeutic keratectomy
65760 Keratomileusis
65765 Keratophakia
65767 Epikeratoplasty
65771 Radial keratotomy

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This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 28, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Consolidated Regulatory Impact Statement

1. Statutory Authority: The Superintendent's authority for the addition of Part 56 to Title 11 of NYCRR (Regulation 183) and for the Thirty-fifth Amendment to Part 52 of Title 11 NYCRR (Regulation 62) is derived from Sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802 and Article 49 of the Insurance Law.

Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations affecting HMOs and effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Section 3201 authorizes the Superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state.

Sections 3216 and 3217 authorize the Superintendent to issue regulations to establish minimum standards for the form, content and sale of health insurance. Section 3221 sets forth standard health insurance policy provisions.

Section 4235 establishes requirements for group accident and health insurance.

Article 43 of the Insurance Law sets forth requirements for non-profit medical and dental indemnity corporations and non-profit health or hospital corporations, including requirements pertaining to minimum benefits of individual and small group contracts. Sections 4303, 4304 and 4305 set forth required benefits and standard provisions in group, blanket and group remittance contracts.

Section 4802 establishes the grievance procedures for all insurers which offer a managed care product.

Article 49 establishes the utilization review and external review requirements for all insurers subject to Article 32 or 43 of the Insurance Law or any organization licensed under Article 43 of the Insurance Law.

2. Legislative Objectives: The statutory sections mentioned above contain standard provisions for accident and health insurance coverage and set forth the Superintendent's power to promulgate regulations governing minimum standards for the form, content and sale of such coverage. The promulgation of Regulation 183 and the amendment to Section 52.16(c)(5) of Regulation 62 further the legislative goal of having meaningful health insurance coverage available to the insurance-buying public in this state while at the same time providing reasonable regulation to ensure consistency in the application of permissible exclusions in such coverage.

The cosmetic surgery exclusion set forth in Regulation 62 predates Article 49 of the Insurance Law and Article 49 of the Public Health Law which provide for internal and external appeal of medical necessity denials. Subsequent to the promulgation of Article 49, the Insurance Department has found inconsistencies among health maintenance organizations (HMOs) and insurers as to what they consider to be medically necessary surgery and what they consider to be cosmetic. The Insurance Department and Health Department have advised health plans that cosmetic surgery denials must be subject to the utilization review and external review requirements. However, some health plans have questioned the Department's position in cases involving procedures usually considered to be cosmetic when medical information is not submitted.

By clarifying the requirements relating to the cosmetic surgery exclusion, the Superintendent is furthering the legislative intent set forth in Article 49 of the Insurance Law and Article 49 of the Public Health Law which require health plans to conduct utilization reviews to determine if services are medically necessary, and then provide external appeal rights if services are denied. The amendment of Regulation 62, and the addition of new Regulation 183, is necessary to establish uniformity among health plans and ensure that cosmetic surgery denials are given the appropriate review.

3. Needs and Benefits: The Insurance Law and corresponding regulations require most insurers to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits plans to exclude coverage for cosmetic surgery but provides an exception to the cosmetic surgery exclusion for reconstructive surgery. However, the reconstructive surgery exception is not the only type of surgery that would not be cosmetic. The amendment to Regulation 62 and the new Regulation 183 clarify that whenever surgery is a covered benefit, a determination that the surgery is cosmetic is a medical necessity determination that must be subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. This amendment to Regulation 62 and the new Regulation 183 codifies existing Department policy that cosmetic denials, with the small exception in the regulation, are medical necessity denials subject to Article 49 of the Insurance Law. Health plans should currently be following the standard that this amendment and new regulation establish.

To address the concerns of health plans that certain procedures usually considered cosmetic would be subject to the utilization review and external review requirements when medical information is not submitted, Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law and Public Health Law. However, if a request for surgery identified by a code on the designated list is submitted with medical information, or as a preauthorization request, then the Article 49 utilization review process must be followed to adjudicate the claim. In addition, if the automatic denial process is used for the designated codes, the denial must explain that the insured may request a medical necessity review and submit medical information, in which case the plan must review as a utilization review appeal and provide external appeal rights.

The requirements established in these regulations, and the list of procedures set forth in Table 1 of the new Regulation 183, are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Interested parties agreed that it is in the best interest of both health plans and consumers for there to be uniformity among the plans when making coverage decisions, and these regulations are intended to establish such uniformity. Representatives of insurers and HMOs also expressed concern about the cost of a clinical peer review when services usually considered to be cosmetic are reviewed retrospectively and medical information has not been submitted. The list of procedures in Regulation 183 that may be denied without such review addresses this concern while still ensuring that consumer utilization review and external appeal rights are not compromised. Striving to minimize the costs of health insurance and protecting the interests of consumers who purchase health insurance and are important functions of the Superintendent. These regulations accomplish both and ensure that there is uniformity among health plans when making coverage determinations.

4. Costs: The regulations apply only to insurers and HMOs issuing insurance policies that exclude cosmetic surgery. Any costs imposed on regulated parties as a result of the regulations will be minimal as they involve only clarification of existing optional insurance policy provisions. Actual costs to insurers and HMOs will be limited to the time that product compliance personnel will spend in implementing any accompanying changes to their claims procedure or making any filings.

The regulations may indirectly affect health care providers since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic. However, current law permits insurers and HMOs to request medical information in order to make a claim determination.

The costs to the Insurance Department will be limited to the time spent by existing staff to review products submitted by insurers for compliance.

There should be no costs associated with these regulations to state or local government.

5. Local Government Mandates: The regulations impose no new programs, services, duties or responsibilities on any county, city, town, village, school district or fire district.

6. Paperwork: The regulations do not impose any additional paperwork requirements on insurers or HMOs. Insurers and HMOs are currently required by law to make form and utilization review report filings with the Department. HMOs and insurers are also currently permitted to request medical information from providers and consumers and therefore it is unlikely that any greater burden would be imposed on providers or consumers.

The regulations may indirectly affect health care providers since they clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic. However, current law permits insurers and HMOs to request medical information in order to make a claim determination.

7. Duplication: The regulations do not duplicate standards of either the federal or other state governments. The regulations set standards applicable to health insurance coverage for New York State.

8. Alternatives: The regulations were developed through meetings with interested parties. Alternatives such as precluding plans from denying procedures when medical information is not submitted, or including an expanded list of procedures, were both discussed but the Insurance Department and Health Department determined that the list of procedures included the regulation is the most appropriate to meet the needs of health plans and protect consumers. The Department also considered whether these requirements could be established through guidelines, and determined that regulations would be needed to integrate the new requirements with existing requirements and to ensure uniformity and consistency in application.

9. Federal Standards: The U.S. Department of Labor Claims Payment Regulation, 29 C.F.R. 2560.503 issued pursuant to the Employee Retirement Income Security Act (ERISA) creates federal standards for the treatment of medical necessity denials and the processing of such claims. However, these regulatory actions do not effect, modify, or duplicate any existing Federal Standards.

10. Compliance Schedule: Regulated parties should be able comply with the regulations immediately. Insurers and HMOs have been made aware of the requirements in the regulations through meetings and Department correspondence. In addition, the Insurance Department has always instructed insurers and HMOs that they must treat cosmetic surgery denials as medical necessity denials. The regulations merely clarify this instruction and provide an option for claims processing when medical information is not submitted.

Consolidated Regulatory Flexibility Analysis

1. Effect of the rule: These regulations will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Based upon information provided by these companies in annual statements filed with the Insurance Department, HMOs and insurers licensed to do business in New York do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act because none of them are both independently owned and have under 100 employees. These regulations may indirectly affect health care providers since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic. These regulations do not apply to or affect local governments.

2. Compliance requirements: These regulations will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to request information from providers and consumers in order to make coverage determinations.

3. Professional services: Small businesses or local governments will not need professional services to comply with the regulations.

4. Compliance costs: These regulations will not impose any compliance costs upon small businesses or local governments. The Insurance Law and Public Health Law currently permit health plans to request medical information from providers and their patients in order to make coverage determinations.

5. Economic and technological feasibility: Small businesses or local governments will not incur an economic or technological impact as a result of the regulations.

6. Minimizing adverse impact: These regulations apply to the insurance market throughout New York State. The same requirements will apply uniformly, and do not impose any adverse or disparate impact on HMOs, insurers, health care providers or consumers.

7. Small business and local government participation: These regulations are directed at HMOs and insurers licensed to do business in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Act. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. This notice was intended to provide small businesses with the opportunity to participate in the rule making process, but no input was received. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

Consolidated Rural Area Flexibility Analysis

1. Types and Estimated Number of Rural Areas: Insurance companies and health maintenance organizations (HMOs) to which these regulations apply do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13). Some of the home offices of these companies lie within rural areas. These regulations may also indirectly affect health care providers, including providers located in rural areas; since the regulations clarify that medical information must be submitted by providers or their patients for certain health care procedures usually considered to be cosmetic.

2. Reporting, Recordkeeping and Other Compliance Requirements, and Professional Services: Insurance companies and HMOs may have to modify their claim processing procedures and/or make new filings to the

Insurance Department to conform to the regulations. No professional services will be necessary to comply with the proposed rule. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to request information from providers and consumers in order to make coverage determinations.

3. Costs: The costs to regulated parties as a result of the regulations will be limited to the costs associated with the time that product compliance personnel will spend in implementing any modified claims procedures, or making any necessary filings.

4. Minimizing Adverse Impact: These regulations apply uniformly to entities that do business in both rural and nonrural areas of New York State. These regulations do not impose any additional burden on persons located in rural areas and the Insurance Department does not believe that the regulations will have an adverse impact on rural areas.

5. Rural Area Participation: Notice of the regulations was published in the Insurance Department's Regulatory Agenda. Although there was no specific effort to obtain rural area input during the development of the regulations, interested parties, including health plan representatives, were consulted through direct meetings during the development of the regulations.

Consolidated Job Impact Statement

This proposed addition of a new Part 56 and the Thirty-fifth Amendment to Part 52 of 11 NYCRR will not adversely impact job or employment opportunities in New York. It will have no impact as it merely involves a slight modification to existing health insurance policy provisions and the associated claims processing procedures.

EMERGENCY RULE MAKING

Minimum Standards for the Form, Content, and Sale of Health Insurance

I.D. No. INS-46-06-00013-E
Filing No. 1296
Filing date: Oct. 31, 2006
Effective date: Oct. 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 52.16(c)(5) (Regulation 62) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305 and 4802 and art. 49

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

Specific reasons underlying the finding of necessity: Insurance Law and regulations require certain health insurance policies to provide coverage for surgical services. 11 NYCRR 52.16(c)(5) permits insurers to exclude coverage for surgery that is considered to be cosmetic. Articles 49 of the Insurance Law and Public Health Law, enacted after Section 52.16, provide for internal and external appeal when services are denied as not medically necessary.

It is the Insurance Department's position that whenever surgery is a covered benefit under a policy, a determination that the surgery is cosmetic is a medical necessity determination subject to the utilization review and external review requirements of Title I and Title II of Article 49 of the Insurance Law or Public Health Law. It has come to the Department's attention that insurers and health maintenance organizations (HMOs) have been inconsistent as to what they consider to be medically necessary surgery or cosmetic surgery and some insureds have not been provided with the right to utilization review and external appeal for denials of surgical services. If the appropriate appeal rights are not given, an insured may be unable to obtain medically necessary health care services, adversely affecting the health of the insured.

To establish uniformity, ensure that consumers are protected, and address concerns of health plans, a new part 56 is added to 11 NYCRR and the cosmetic surgery exclusion in Part 52.16(c)(5) is amended. These two regulations clarify that denials for the reason that services are considered cosmetic are subject to the utilization review and external appeal requirements of Article 49 of the Insurance Law or Public Health Law. Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of the Insurance Law or Public Health Law if certain conditions are met.

The requirements established in these regulations are the result of a collaborative effort among the New York Health Plan Association, the New York State Conference of Blue Cross and Blue Shield Plans, the New York State Department of Health and the New York State Insurance Department. Health plans are aware of the requirements in these regulations and have advised the Insurance Department that they would like to begin implementation through revised subscriber contracts. The Insurance Department has already received and approved subscriber contracts from health plans that include the process outlined in Part 56 and the amended Part 52. Promulgating Part 56 and the amended Part 52 on an emergency basis will ensure that all subscriber contracts that are being filed and approved are consistent with regulatory requirements and will enable health plans to make all contract changes in one filing.

Moreover, these amendments will ensure that all health plans are following the same requirements and that access to utilization review and external appeal by insureds will not be dependent on the particular health insurance policy the insured may have. These amendments will further ensure that insureds will be able to obtain medically necessary surgical services so that the health of insureds is not compromised.

For the reasons stated above, the immediate adoption of this regulation is necessary for the preservation of the general welfare.

Subject: Minimum standards for the form, content, and sale of health insurance.

Purpose: To clarify when plans may exclude coverage for cosmetic surgery.

Text of emergency rule: Paragraph (5) of subdivision (c) of Section 52.16 of Part 52 of Title 11 of the Official Compilation of Codes, Rules and Regulations is amended to read as follows:

(5) cosmetic surgery, except that cosmetic surgery shall not include reconstructive surgery when such service is incidental to or follows surgery resulting from trauma, infection or other diseases of the involved part, and reconstructive surgery because of congenital disease or anomaly of a covered dependent child which has resulted in a functional defect. *However, if the policy provides hospital, surgical or medical expense coverage, including a policy issued by a health maintenance organization, then coverage and determinations with respect to cosmetic surgery must be provided pursuant to Part 56 of this Title (Regulation 183)*;

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 January 28, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-46-06-00012-E, Issue of November 15, 2006.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-46-06-00012-E, Issue of November 15, 2006.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-46-06-00012-E, Issue of November 15, 2006.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-46-06-00012-E, Issue of November 15, 2006.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Physicians and Surgeons Professional Insurance Merit Rating Plans

I.D. No. INS-46-06-00011-EP
Filing No. 1294
Filing date: Oct. 30, 2006
Effective date: Oct. 30, 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/proposed rule (Full text is posted at the following State website: http://www.ins.state.ny.us): 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 as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 27, 2007.

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@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.

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. Furthermore, the aim of participation in risk management courses is to improve 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 to ensure 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.

NOTICE OF ADOPTION

Charges for Professional Health Services

I.D. No. INS-35-06-00007-A
Filing No. 1293
Filing date: Oct. 27, 2006
Effective date: Nov. 15, 2006

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

Action taken: Amendment of section 68.8 (Regulation 83) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601, 5221 and art. 51

Subject: Charges for professional health services.

Purpose: To update the addresses of the Department of Health and the Education Department for the purposes of reporting patterns of health provider overcharges, excessive treatment or any other improper actions; and update the name of the Insurance Department Bureau that is collecting the data.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-35-06-00007-P, Issue of August 30, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Labor

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Employee Occupational Safety and Health Standards

I.D. No. LAB-46-06-00001-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 section 800.3 of Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a.4(a)

Subject: Public employee occupational safety and health standards.

Purpose: To incorporate by reference into New York State occupational safety and health standards, those safety and health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of Aug. 24, 2006.

Substance of proposed rule (Full text is not posted on a State website); this is a consensus rule or a rule defined in SAPA § 102(2)(a)(ii). The proposed rule amends Section 800.3 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York, which sets forth those standards of the Occupational Safety and Health Administration which are incorporated by reference into state regulations. It is amended so as to incorporate those standards revised as of January 18, 2006.

The material incorporated by reference in Part 800.3 contains the following parts of Title 29 of the Code of Federal Regulations, revised as of the dates following the title of each part:

Part 1910 - General Industry Standards; July 1, 1988 edition
Part 1915 - Shipyard Employment Standards; July 1, 1988 edition
Part 1917 - Marine Terminal Standards edition; July 1, 1988 edition
Part 1918 - Longshoring Standards; July 1, 1988 edition
Part 1926 - Construction Standards; July 1, 1988 edition
Part 1928 - Agricultural Standards; July 1, 1988 edition

Certain revisions to these standards, published in the Federal Register though June 23, 2006, have been adopted previously.

Since the standards were last updated, the Department of Labor has obtained one additional standard:

1. Updating OSHA Standards Based on National Consensus Standards; General, Incorporation by Reference; Assigned Protection Faxtors; Final Rule, 71 Federal Register, 50121-50192.

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

Consensus Rule Making Determination

This amendment is necessary because Section 27-a(4)(a) of the Labor Law directs the Commissioner to adopt by rule, for the protection of the safety and health of public employees, all safety and health standards promulgated under the U.S. Occupational Safety and Health Act of 1970, and to promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to OSHA. This insures that public employees will be afforded the same safeguards in their workplaces as are granted to employees in the private sector.

Job Impact Statement

As the proposed action does not affect jobs and employment opportunities but simply affords workplace safety and health guidelines to improve job performance and safety, a job impact statement is not submitted.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Handling of Asbestos

I.D. No. LAB-46-06-00009-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 56 of Title 12 NYCRR.

Statutory authority: Labor Law, art. 30, section 906

Subject: Protection of the public health and safety relating to the handling of asbestos.

Purpose: To incorporate Federal standards by reference; and correct typographical errors in the rule.

Text of proposed rule:

Title 12 NYCRR Part 56

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SUBPART 56-6 PHASE [1] *I*B: BACKGROUND

AIR SAMPLING 47

Repeal 56-5.1(f)(1) and add new 56-5.1(f)(1)

(1) The asbestos survey shall, at a minimum, identify and assess with due diligence, the locations, quantities, friability and conditions of all types of installations at the affected portion of the building/structure relative to the ACM, suspect miscellaneous ACM, PACM or asbestos material contained therein. The following list is not inclusive of all types of ACMs, it only summarizes typical ACMs. The certified asbestos inspector is responsible for identification and assessment of all types ACM, PACM, suspect miscellaneous ACM and asbestos material within the affected portion of the building/structure:

(i) PACM
(a) Surfacing Treatments:
(1) Fireproofing;
(2) Acoustical Plaster;
(3) Finish Plasters; and
(4) Skim Coats of Joint Compound.
(b) Thermal System Insulation:
(1) Equipment Insulation;
(2) Boiler, Breeching, Duct, or Tank Insulation, Cement or Mortar Used for Boilers and Refractory Brick;
(3) Piping and Fitting Insulations including but not limited to, Wrapped Paper, Aircell, Millboard, Rope, Cork, Preformed Plaster, Job Molded Plaster and coverings over fibrous glass insulation.

(ii) SUSPECT MISCELLANEOUS ACM
(a) Roofing and Siding Miscellaneous Materials:
(1) Insulation Board;
(2) Vapor Barriers;
(3) Coatings;
(4) Non-Metallic or Non-Wood Roof Decking
(5) Felts;
(6) Cementitious Board (Transite);
(7) Flashing;
(8) Shingles;
(9) and Galbestos.
(b) Other Miscellaneous Materials:
(1) Dust and Debris;
(2) Floor Tile;
(3) Cove Base;
(4) Floor Leveler Compound;
(5) Ceiling Tile;
(6) Vermiculite Insulation
(7) Gaskets, Seals, Sealants (including for condensate control);
(8) Vibration Isolators;
(9) Laboratory Tables and Hoods;
(10) Chalkboards;
(11) Pipe Penetration Packing or Other Firestopping Materials
(12) Cementitious Pipe (Transite);
(13) Cementitious Board (Transite);
(14) Electrical Wire Insulation;
(15) Fire Curtains;
(16) Fire Blankets;
(17) Fire Doors;
(18) Brakes and Clutches;
(19) Mastics, Adhesives and Glues;
(20) Caulks;
(21) Sheet Flooring (Linoleum);
(22) Wallpaper;
(23) Drywall;
(24) Plasterboard;
(25) Spackling/Joint Compound;
(26) Textured Paint;

(27) Grout;

(28) Glazing Compound;

(29) Terrazzo; and

(30) Boiler Rope.

SUBPART 56-6

PHASE [1] *I*B: BACKGROUND AIR SAMPLING

56-6.2 Number and Location of Background Air Samples.

(a) Phase [1] *I* B Background Sampling – Large Asbestos Project

56-7.3 Asbestos Abatement Contractor Daily Project Log.

(a) Sections 7.1(d), 8.1[(c)] *(b)(2)*, 9.2[(a2)] *(b)(2)* – Work Stoppage Due to High Air Results.

(d) Section 7.9[(d3)] *(a)(3)* – HVAC System Positive Pressurization.

(k) Sections 9.3(c), 10.4, 11.2(f), 11.3(e), 11.4(d), 11.5(c), 11.6(e), 11.7(d), 11.8(d) – Final Inspection. To be documented by supervisor at completion of asbestos project *and/or work area*.

Repeal 56-7.5(d) and add new 56-7.5(d)

(d) Remote Personal Decontamination System Enclosure. If a personal decontamination system cannot be attached to the regulated abatement work area, due to available space restrictions or other building and fire code restrictions, a remote personal decontamination system enclosure may be used for limited Special Projects as per subpart 56-11, negative pressure tent enclosure work areas with glovebag only abatement, or if non-friable ACM is being removed in a manner which will not render the ACM friable. If it is found during Phase IIB, that the non-friable ACM or asbestos material will become friable during the removal process, and it is logistically possible to attach the decontamination system enclosure, abatement work must stop immediately while the remote personal decontamination system is relocated to be attached and contiguous to the regulated abatement work area. The following requirements apply for all remote personal decontamination systems:

(1) Protective Clothing. Workers shall don two (2) sets of disposable protective clothing and a supply of protective clothing shall be kept in the airlocks attached to the regulated abatement work area.

(2) Location. The remote personal decontamination system shall be constructed as close to the regulated abatement work area as physically possible. If the remote personal decontamination system must be located at the exterior of the building/structure due to space or code restrictions, it shall be constructed within fifty (50) feet of the building/structure exit used for access by the asbestos abatement contractor personnel. The decontamination unit shall be cordoned off at a distance of twenty-five (25) feet to separate it from public areas.

(3) Airlocks. At a minimum, two (2) extra airlocks as defined in Section 56-2.1 shall be constructed as per Section 56-7.5(b)(11). One shall be constructed at the entrance to the equipment room or equipment/ washroom. The other extra airlock shall be constructed at the entrance to the containment or regulated abatement work area(s). These airlocks shall have lockable doorways at the entrance to the airlock from uncontaminated areas. These airlocks shall be cordoned off at a distance of twenty-five (25) feet and appropriately signed in accordance with Section 56-7.4(c). Airlocks shall not be used as a waste decontamination area and shall be kept clean and free of asbestos containing material.

(4) Designated Pathway. The walkway from the regulated abatement work area to the personal decontamination system or next regulated abatement work area shall be cordoned off and signage installed as per Section 56-7.4(c), to delineate it from public areas while in use during Phase IIA through IID.

(5) Travel Through Uncontaminated Areas. If at any time a worker must travel through an uncontaminated area to access the personal decontamination area, the worker shall HEPA-vacuum and/or wet wipe his/her outer protective clothing while in the regulated abatement work area, then proceed into the airlock, which serves as a changing area, where he/she shall remove the outer clothing and don a clean set of protective clothing. The worker may then proceed to the personal decontamination system enclosure only along a designated pathway as described above. Travel in any other area shall not be allowed.

(6) Removal. The remote personal decontamination unit shall be removed only after satisfactory clearance air sampling results have been achieved.

56-7.11(f)(1)(ii) Tent Construction.

(a) Tents with greater than [20] *twenty (20)* square feet of floor space, [or tents] that are scheduled for gross removal of friable ACM, PACM, or asbestos material, shall be constructed of two (2) layers of six (6) mil fire-retardant plastic sheeting and shall include walls, ceiling and a floor (except for portions of walls, floors and ceilings that are the removal surface) with double-folded seams. Seams shall be duct taped airtight and then duct taped flush with the adjacent tent wall.

(b) Tents with [20 square feet or less of floor space and] no gross removal of friable ACM, PACM or asbestos material, shall be constructed of one (1) layer six (6) mil fire-retardant plastic sheeting and shall include walls, ceiling and a floor (except for portions of walls, floors and ceilings that are the removal surface) with double-folded seams. Seams shall be duct taped airtight and then duct taped flush with the adjacent tent wall.

56-11.3 Minor Asbestos Projects*or Minor Size Regulated Abatement Work Area.*

(a) Air Sampling and Analysis. Air sampling and analysis on a [minor] *Minor* asbestos project *or Minor size regulated abatement work area* conducted under this Section shall be conducted in accordance with the requirements of Subpart 56-4 of this Part.

(b) Where Allowed. For asbestos projects *or regulated abatement work areas* with abatement of less than or equal to ten (10) square feet or twenty-five (25) linear feet of ACM, PACM or asbestos material, Phase II Minor asbestos project abatement procedures as per this Section may be complied with in lieu of full compliance with Sections 56-7 through 56-9. All other requirements of this Part shall apply. Minor asbestos project corrective actions shall include limited enclosure, spot repair/patching, incidental disturbance clean-up, spot removal, and spot encapsulation. All corrective actions except spot removal shall be performed using non-asbestos material. Repairs where spot removal has occurred shall also utilize non-asbestos material. The regulated abatement work area shall be established as per the requirements of Section 56-7.4.

56-11.6(b) Regulated Abatement Work Area Preparation.

(3) Decontamination System Location. The personal [and waste] decontamination system enclosures can be remote but must be within [50] *fifty (50)* feet of the building/structure entrance used by the asbestos handlers (workers), and shall be removed only after obtaining satisfactory clearance air results for the regulated abatement work area or an acceptable visual inspection has determined that the abatement is complete, as per Section 56-9.2(e).

56-11.8(b)(2) Preliminary Preparation.

(i) Exception. For exterior regulated abatement work areas with ACM, PACM or asbestos material intact, establishment of negative air systems as per Section 56-7.8, and installation of isolation barriers as per Section 7.11(b) is not required. Remote *personal* decontamination system enclosures are allowed for exterior regulated abatement work areas.

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

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

Consensus Rule Making Determination

This amendment is necessary to correct typographical errors and to incorporate by reference 29 CFR 1926 and ASTM International Standards E 1368-05, which are referenced in the text adopted on January 11, 2006 but were not made a part thereof.

Job Impact Statement

As the proposed action does not affect jobs and employment opportunities but simply correct typographical errors and incorporates by reference 29 CFR 1926 and ASTM International Standard E 1368-05, which sections are referenced in the text adopted on January 11, 2006.

Long Island Power Authority

NOTICE OF ADOPTION

Green Choice Program

I.D. No. LPA-31-06-00001-A

Filing date: Oct. 30, 2006

Effective date: Oct. 30, 2006

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

Action taken: The Long Island Power Authority has adopted revisions to its tariff for electric service concerning LIPA's Green Choice Program.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Tariff for electric service.

Purpose: To adopt revisions to LIPA's tariff for electric service concerning eligibility for LIPA's Green Choice Program.

Text or summary was published in the notice of proposed rule making, I.D. No. LPA-31-06-00001-P, Issue of August 2, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Richard M. Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, e-mail: rkessel@lipower.org

Assessment of Public Comment:

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

NOTICE OF ADOPTION

Wind Net Metering

I.D. No. LPA-31-06-00002-A

Filing date: Oct. 30, 2006

Effective date: Oct. 30, 2006

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

Action taken: The Long Island Power Authority has adopted revisions to its tariff for electric service concerning wind net metering and to modify and combine existing tariff language.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Tariff for electric service.

Purpose: To adopt revisions to LIPA's tariff for electric service concerning wind net metering, and modify and combine existing tariff language concerning solar and wind net metering.

Text or summary was published in the notice of proposed rule making, I.D. No. LPA-31-06-00002-P, Issue of August 2, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Richard M. Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, e-mail: rkessel@lipower.org

Assessment of Public Comment:

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

Office of Mental Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Criminal History Record Review

I.D. No. OMH-46-06-00014-P

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

Proposed action: Amendment of Part 550 of Title 14 NYCRR.

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

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

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

Substance of proposed rule (Full text is posted at the following State website: omh.state.ny.us/omhweb/policy.): Chapter 643 of the Laws of 2003, as amended by Chapter 575 of the Laws of 2004, imposed the requirement of criminal history record checks on each prospective operator, employee, or volunteer of certain mental health treatment providers who will have regular and substantial unsupervised or unrestricted physical contact with the clients of such providers. The purpose of this legislation was to enable providers of services for persons with mental illness to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received from individuals seeking employment or volunteering their services.

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

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

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

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

Regulatory Impact Statement

1. Statutory Authority:

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

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

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

2. Legislative Objectives:

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

3. Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves

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

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

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

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

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

4. Costs:

The proposed regulations implement a system that will require providers of services licensed, funded, or approved by the Office of Mental Health to obtain all information from a prospective employee or volunteer necessary for the purpose of initiating a criminal history record check. While the statute does not require all new employees to be fingerprinted, for purposes of systems design, the Office has estimated that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10,514 full time equivalent employees, and 2,390 full time equivalent volunteers. The Office has created a Criminal History Information Tracking System (CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, it intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. There is also a statutory fee of $75 to obtain a criminal history record check from the Division of Criminal Justice Services; however, this amount will be fully borne by the Office of Mental Health. At an estimated number of 15,000 fingerprint requests per year, annual cost of this fee for the Office is approximately $1,125,00.00.

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

5. Local Government Mandates:

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

6. Paperwork:

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

7. Duplication:

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

8. Alternatives:

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

9. Federal Standards:

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

10. Compliance Schedule:

These regulations will be effective immediately. Providers have been required to be in compliance with the substance of these regulations since April of 2005, via previous emergency adoptions.

Regulatory Flexibility Analysis

1. Effect of Rule:

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

2. Compliance Requirements:

Providers of service that are subject to these requirements must, by statute, request criminal history information concerning prospective employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record information must be obtained through the Office of Mental Health, which will pay the $75 fee to the Division of Criminal Justice Services for each history requested. Providers of service must inform prospective employees and volunteers of their right to request such infor-

mation and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees/volunteers cannot be hired before a determination is received from the Office of Mental Health about whether or not the application must be denied, providers can give temporary approval to prospective employees and permit them to work so long as they do not have unsupervised contact with clients.

3. Professional Services:

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

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impact:

Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, OMH has developed its compliance plan with the goal of minimizing adverse impact of compliance to the greatest extent possible. The Criminal History Information tracking System is one example of a strategy intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Furthermore, OMH has endeavored to maximize its capability to have fingerprints taken electronically, through a system called LIVE SCAN. LIVE SCAN is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process. Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. The card would then need to be mailed to the Division of Criminal Justice Services by OMH. However, before OMH could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into OMH databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint card is difficult to read.

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

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

7. Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

1. Effect of Rule:

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

2. Reporting, Recordkeeping, and other Compliance Requirements:

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

3. Costs:

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

4. Minimizing Adverse Impact:

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

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

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

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

5. Rural Area Participation:

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

Job Impact Statement

A Job Impact statement is not necessary for this filing. Proposed 14 NYCRR Part 550 should not have any adverse impact on the existing employees and volunteers of providers of mental health services as it

applies only to future prospective employees and volunteers. It is anticipated that the number of all future prospective employees/volunteers of mental health providers of services who have regular and substantial unsupervised or unrestricted physical contact with clients will be reduced to the degree that the criminal history record check reveals a criminal record barring employment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Suburban/Rural Comprehensive Emergency Program

I.D. No. OMH-46-06-00016-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 591 and repeal Part 596 of Title 14 NYCRR.

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

Subject: Suburban/Rural Comprehensive Emergency Program.

Purpose: To amend a rule and repeal an obsolete rule.

Text of proposed rule: 1. Part 591 is amended to read as follows:

PART 591

MEDICAL ASSISTANCE PAYMENTS FOR COMPREHENSIVE PSYCHIATRIC EMERGENCY PROGRAMS [AND SUBURBAN/RURAL COMPREHENSIVE PSYCHIATRIC EMERGENCY PROGRAMS]

(Statutory authority: Mental Hygiene Law, §§ 7.09, *7.15,* 31.04, *31.27,* 43.02)

Section 591.1 Background and intent. This Part establishes standards for the reimbursement of comprehensive psychiatric emergency programs [and suburban/rural comprehensive psychiatric emergency programs] under the medical assistance program. Comprehensive psychiatric emergency programs [and suburban/rural comprehensive psychiatric emergency programs] must comply with the requirements of [Parts] *Part* 590 [and 596] of this Title.

591.2 Legal base. (a) Sections 7.09*(b)*, 7.15 and 31.04*(a)* of the Mental Hygiene Law [gives] *give* the commissioner the power and responsibility to plan, establish and evaluate programs and services for the benefit of the mentally ill, and to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(b) Sections 364 and 364-a of the Social Services Law [gives] *give* the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of [Social Services] *Health* and others.

(c) Section 31.27 of the Mental Hygiene Law gives the commissioner the authority to establish and license comprehensive psychiatric emergency programs [and suburban/rural comprehensive psychiatric emergency programs].

(d) Section 43.02 of the Mental Hygiene Law provides that payments under the medical assistance program for services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget.

591.3 Definitions. (a) Brief emergency visit means a face-to-face interaction between a patient and a staff physician, preferably a psychiatrist, to determine the scope of emergency service required. This interaction should include a mental health diagnostic examination. It may result in further comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] evaluation or treatment activities on the patient's behalf or discharge from the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program].

For those persons who are discharged from the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] and who require additional mental health services, the brief emergency visit must include a discharge plan.

(b) Crisis outreach service means mental health emergency services provided outside an emergency room setting which includes clinical assessment and crisis intervention treatment.

(c) Interim crisis service means a mental health service provided outside an emergency room setting for persons who are released from the emergency room of the comprehensive psychiatric emergency program [or any component of a suburban/rural comprehensive psychiatric emergency program], which includes immediate face-to-face contact with a mental health professional [for a comprehensive psychiatric emergency program or clinical staff person for a suburban/rural comprehensive psychiatric emergency program] for purposes of facilitating a patient's community tenure while waiting for a first post-comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] visit with a community based mental health provider.

(d) Full emergency visit means a face-to-face interaction between a patient and a psychiatrist and other clinical staff as necessary to determine a patient's current psychosocial and medical condition. [In a suburban/rural comprehensive psychiatric emergency program the face-to-face interaction may occur between the patient and a physician and a mental health professional.] It must include a psychiatric or mental health diagnostic examination; psychosocial assessment; and medical examination; which results in a comprehensive psychiatric emergency treatment plan and a discharge plan when comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] services are completed. It may include other examinations and assessments as clinically indicated by the patient's presenting problems. Full emergency visits should be provided to patients whose presenting symptoms are initially determined to be serious and where the clinical staff believe commencement of treatment should begin immediately, and/or where staff are evaluating a person for retention in an extended observation bed or admission to a psychiatric inpatient unit.

591.4 Standards pertaining to reimbursement. (a) The comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] must have a valid operating certificate.

(b) The staff and services must conform with the requirements of Part 590 [or 596] of this Title.

(c) The written records of the reimbursed unit of service, including presentation log, case records and discharge plans and summaries, as appropriate, must conform with the requirements of Part 590 [or 596] of this Title.

(d) A patient may receive one brief or one full emergency visit service in one calendar day. If a patient receives one of each, the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] shall receive reimbursement for the full emergency visit.

(e) A patient may receive one crisis outreach visit or one interim crisis service and either one brief or one full emergency visit in one calendar day.

(f) A patient may receive interim crisis services for a period not to exceed five days after release from the emergency room of the comprehensive psychiatric emergency program [or any component of a suburban/rural comprehensive psychiatric emergency program].

(g) In any calendar day comprehensive psychiatric emergency services [or suburban/rural comprehensive psychiatric emergency program services] reimbursed pursuant to this Part shall not be included in the limitation on the number of reimbursed services included in [Parts 579 and] *Part* 588 of this Title.

(h) The services provided in a medical/surgical emergency or clinic setting for comorbid conditions shall be separately reimbursed. These services shall not substitute, for reimbursement purposes, for medical and nursing evaluations provided in the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program]. If medical and/or nursing evaluations provided outside the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] are utilized by the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program], the comprehensive psychiatric emergency program [or suburban/rural comprehensive psychiatric emergency program] may be reimbursed for a brief emergency visit only.

(i) [Each suburban/rural comprehensive psychiatric emergency program may designate one entity or component of the suburban/rural comprehensive psychiatric emergency program's network of provider agencies to act as the sole authority to submit claims for reimbursement for allowable services provided by any of the suburban/rural comprehensive psychiatric emergency program's affiliated agencies.

(j) An affiliated agency of the suburban/rural comprehensive psychiatric emergency program, which is also designated as a comprehensive outpatient program, may not bill for crisis outreach services or interim crisis services which are provided on the site of the comprehensive outpatient program during normal working hours.

(k)] The standards of reimbursement included within this Part shall be in effect as long as continued Federal financial participation is assured.

591.5 Reimbursement for comprehensive psychiatric emergency [program and suburban/rural comprehensive psychiatric emergency program] programs.

Reimbursement for comprehensive psychiatric emergency programs [and suburban/rural comprehensive psychiatric emergency programs] under the medical assistance program shall be in accordance with the following fee schedule:

Brief emergency visit	$ 76.00
Full emergency visit	445.00
Crisis outreach service visit	445.00
Interim crisis service visit	445.00

2. Part 596 of Title 14 NYCRR is hereby repealed.

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

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

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

Consensus Rule Making Determination

No person is likely to object to this proposed rule making since it merely amends obsolete references in Part 591 of 14 NYCRR and repeals Part 596 of such Title, which is an obsolete Part of Title 14 that no longer applies to any person or organization. Statutory language in Part M of Chapter 57 of the Laws of 2006, the enacted budget for state fiscal year 2006-07, amended the Mental Hygiene Law (MHL) to delete all references to suburban-rural comprehensive psychiatric emergency programs and repealed the authority of the Commissioner of Mental Health to license such programs.

Section 1 of Part M amended MHL § 31.27(a)(5) to delete language from the definition of "Extended Observation Beds": which referred to "a suburban/rural program."

Section 2 of Part M amended MHL § 31.27(b)(1) to repeal language providing the Commissioner's authority to license the operation of "suburban/rural programs."

Section 3 of Part M repealed MHL § 31.27(a)7, deleting the definition of "suburban/rural program."

Section 4 of Part M provided that "any suburban/rural comprehensive psychiatric emergency program licensed and operating on the effective date of this act shall continue in existence and shall be deemed to be licensed and operated as an urban comprehensive psychiatric emergency program."

The effect of these amendments to the Mental Hygiene Law is to render obsolete any reference to suburban/rural comprehensive psychiatric emergency programs in Part 591 and the entirety of Part 596.

Job Impact Statement

It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. The proposed rule making repeals 14 NYCRR Part 596 – Suburban/Rural Comprehensive Psychiatric Emergency Programs and amends Part 591 – Medical Assistance Payments for Comprehensive Psychiatric Emergency Programs and Suburban/Rural Comprehensive Psychiatric Programs. The purpose of these amendments is to remove references to suburban/rural comprehensive psychiatric emergency programs made obsolete by statute.

Section 4 of Part M of Chapter 57 of the Laws of 2006 provides that effective April 12, 2006, "any suburban/rural comprehensive psychiatric emergency program licensed and operated as such shall continue in existence and shall be deemed to be licensed and operated as an urban comprehensive psychiatric emergency program." All current suburban/rural comprehensive psychiatric emergency programs have, by statute, become "urban" comprehensive psychiatric emergency programs, and will be subject, for future recertification, to the staffing requirements of Part 590 – Operation of Comprehensive Psychiatric Emergency Programs.

Since the staffing requirements of Part 590 are higher than those of Part 596, recertification under Part 590 will not result in fewer jobs or employment opportunities.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Environmental Requirements for Certified Residential and Non-Residential Facilities

I.D. No. MRD-46-06-00015-P

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

Proposed action: Repeal of Subpart 635-7, addition of new Subpart 635-7, and amendment of sections 635-99.1, 686.15 and 686.16 of Title 14 NYCRR.

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

Subject: Environmental requirements for OMRDD certified residential and non-residential facilities, including family care homes.

Purpose: To revise and update the physical plant standards for facilities certified and/or operated by OMRDD.

Substance of proposed rule (Full text is not posted on a State website):

● Applies to all residential and non-residential facilities certified and/or operated by OMRDD, including family care homes and individualized residential alternatives (IRAs).

● Requires the application of the 2002 edition instead of the 1984 edition of the NYS Uniform Fire Prevention and Building Codes (a.k.a. Uniform Code). The codes apply to all communities across New York State, except in New York City.

● Existing certified facilities will not have to make any changes to meet the new codes. Any new construction or renovations to existing facilities will be required to meet the new codes.

● Adds new regulatory language to assist OMRDD in establishing the compliance of existing, non-documented building with the 2002 edition of the Uniform Code by the utilization of the identified Life Safety Code (LSC) requirements.

● Revises terminology. Previously, residential occupancy classifications (outside of New York City) were identified as A-1 for a one family dwelling, A-2 for a two-family dwelling or B-1 for a multiple dwelling. The new code references occupancy classifications, R-3 for a one or two family dwelling and R-2 for a multiple dwelling. Revisions of the occupancy classifications for those facilities where the Building Code of New York City is applied to "mirror" the revisions regarding the application of the Uniform Code in the various facility classes.

● Deletes requirements which already are contained in the Uniform Code.

● Developmental centers. Adds "Institutional" occupancy classification to allow OMRDD to apply the corresponding codes when the capabilities and/or numbers of the occupants warrant it.

● Private schools. Deletes former single occupancy classification for Private Schools. Adds new occupancy classifications which reflect current and future use of buildings.

● Requires the application of the 2000 edition instead of the 1985 edition of the Life Safety Code (LSC) as mandated by the federal Centers for Medicaid and Medicare Services (CMS) in ICF/DDs and Specialty Hospitals.

● Requires the application of the 2000 edition of the LSC in the following facilities that currently apply the 1985 edition of the LSC:

- Community residences (excluding IRAs housing eight or fewer persons) for which the 1985 edition of the LSC already applies.
- New private school buildings.
- Day treatment facilities.
- Diagnostic and research clinic facilities.

● Requires, for evacuation requirements, the compliance with policies and procedures, as described in NFPA 101A, Guide on Alternative Approaches to Life Safety, 2001 edition, rather than the Life Safety Code, appendix F, with regards to E-scores maintained by the residential facility.

● IRAs. Since the regulation was originally promulgated before IRAs existed, language was added throughout the section identifying which requirements are applicable to IRAs.

● Extends the application of requirements for facilities with landlocked courtyards statewide.

● Adds a requirement that land line telephone service be provided in each facility, including family care homes.

● Adds the requirement for annual tests of private water sources in family care homes and IRAs for eight or fewer people.

● Adds a requirement that all new handrails terminate into the ground or the wall.

● Increases minimum bedroom size (in new residential facilities) to 70 square feet from 60 square feet per person.

● Incorporates numerous technical revisions (including the deletion of dated material) to make the regulation current or for purposes of clarification.

Text of proposed 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

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

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.

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

1. Statutory Authority:

a. Section 13.07 of the New York State Mental Hygiene Law establishes that OMRDD shall have responsibility for seeing that persons with developmental disabilities receiving care and treatment have their personal and civil rights protected.

b. The OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. Section 16.00 of the New York State Mental Hygiene Law enables the commissioner of OMRDD to regulate and assure the quality of services provided to persons with developmental disabilities.

2. Legislative Objectives: The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b) and 16.00 of the New York State Mental Hygiene Law by revising and updating the physical plant standards for facilities certified and/or operated by OMRDD. This furthers OMRDD's responsibility to assure the consistent high quality of services for persons with developmental disabilities by fostering safer environments.

3. Needs and Benefits: Since its beginnings as an independent agency, OMRDD has faced and surmounted a range of challenges that have arisen out of its transformation from an institutional to a community-based system of supports and services.

New York State's institutions have by and large been replaced by community-based options that, for example, provide flexible residential supports and services to more than 36,000 individuals. Since 1990, the community residential system has continued to expand, with more than 50 percent growth, and day services opportunities have also increased dramatically. Further, the types of day services have changed, with services provided through employment and day habilitation becoming dominant.

Housing supports through OMRDD encompass both certified and non-certified options. Certified housing alternatives (which are affected by the proposed regulatory revisions) include: semi-independent living (supportive community residences and individualized residential alternatives (IRAs)), family living situations (family care homes), housing with 24 hour available on-site assistance and training (supervised community residences and individualized residential alternatives), and housing with both 24 hour, on-site assistance and training and specific intensive medical and behavioral supports (intermediate care facilities for persons with developmental disabilities).

Adult day supports involve a range of opportunities (to which the regulatory revision would apply, if delivered in a certified site) such as adult social or community activities, senior day programs, habilitative or vocational skills training in sheltered employment programs, day training programs, day habilitation options, and intensive therapeutic and habilitation services through day treatment services.

In 2003, the NYS Department of State adopted new Fire Prevention and Building Codes (a.k.a. Uniform Code) that apply to buildings in New York State (outside of New York City). These proposed regulations contain the changes necessary to conform OMRDD environmental requirements applicable to certified facilities to the 2002 Uniform Code.

In addition, the federal Centers for Medicare and Medicaid Services (CMS) promulgated regulations in 2003 to mandate that Intermediate Care Facilities (ICFs) and hospitals comply with the 2000 edition of the Life Safety Code (LSC). Previously, CMS regulations had required compliance with the 1985 version of the LSC. The proposed regulations also include the changes necessary to conform OMRDD certified or operated ICFs and Specialty Hospitals to these federal requirements.

In addition, the requirements for compliance with the 2000 version of the LSC are extended to other types of facilities certified by OMRDD, that are currently required to apply the 1985 edition. This will enhance safety, as the newer version incorporates the use of newer technology and building techniques. In addition, it will eliminate the confusion that would be engendered by the same provider having to comply with various versions of the LSC depending on the type of facility operated.

The proposed regulation also permits greater flexibility in the utilization of existing buildings for new facilities.

Current OMRDD requirements are also updated to enhance service environments and consumer safety. (See Summary for details.) For example, current requirements for telephone service are enhanced by specifying that land-line service be provided, so that vital communication can still occur during power outages.

In addition, the proposed regulation clarifies the applicability of regulatory standards to Individualized Residential Alternatives (IRAs). The current regulation was promulgated before IRAs were developed and the application of the existing language is unclear.

Specific current regulations that are duplicative of requirements in the Uniform Code are also deleted.

4. Costs: The Office of Mental Retardation and Developmental Disabilities (OMRDD) operates or licenses and funds several thousand residential facilities in community settings. These facilities are homes that vary in size from single-bed homes and apartments to a small number of settings serving fifteen or more persons. Fewer than six people live in the average OMRDD residence (2005 data). The trend towards smaller homes has continued in recent years, with newly developed homes (mostly Individualized Residential Alternatives) averaging fewer than four consumers and many larger homes planned for reduction in capacity or closure.

Facilities in the ICF class are currently mandated under Federal regulations to comply with the 2000 edition of the National Fire Protection Association (NFPA) Life Safety Code. The proposed regulations would apply the 2000 edition of the Code to community residences (CRs), including IRAs of nine residents or more.

Such existing facilities that are not undergoing substantial renovation would be required to meet the "existing" chapter of the 2000 Code; the only change immediately applicable to existing facilities relates to new fire-retardant standards for existing draperies, which are rarely used in OMRDD residences. Virtually all of the other proposed regulatory changes would have little or no impact on existing, certified facilities, making compliance costs minimal for these facilities. Moreover, to the extent that an individual facility were to experience new mandated costs in excess of $1000, those costs would be potentially eligible for reimbursement under existing rate reimbursement regulations.

Under the proposed regulations, certain new CRs/IRAs and existing CRs and IRAs undergoing substantial renovation would be required to comply with the "new" chapter of the 2000 Code. Other proposed changes, such as minimum bedroom sizes, would apply to all new or substantially renovated facilities. While the cost of construction or renovation to comply with the new requirements may be somewhat higher than in the absence of

the regulation, those compliance costs are eligible for capital reimbursement under existing regulations.

Finally, the average annual cost for an IRA is around $92,500 per bed. A general rule of thumb is that 95 percent of that cost is for operating, with five percent or less for capital costs. Of that five percent, only a very small percentage is potentially attributable to compliance with the proposed regulation.

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

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: OMRDD considered not establishing the application of the 2000 addition of the LSC as an option for those facilities not mandated by federal regulations, where the 1985 edition of the LSC already applies. However, due to the increased level of fire safety and for the ease in the continuity of working with the same code, OMRDD decided to permit the application of the 2000 edition in all other facilities that are currently required to comply with the older LSC.

9. Federal Standards: The proposed amendments do not exceed any minimum standards of the Federal government.

10. Compliance Schedule: Due to the nature of the purpose of the proposed amendments it is OMRDD's intent to finalize the proposed amendments as quickly as allowed by the requirements of SAPA.

Regulatory Flexibility Analysis

1. Effect on small businesses: These proposed amendments apply to facilities operated and/or certified by OMRDD.

OMRDD has determined, through a review of the certified cost reports, that the 309 voluntary not-for-profit agencies which operate the certified facilities, employ fewer than 100 employees at the discrete certified or authorized sites, and would, therefore, be classified as small businesses.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. The proposed amendments are not anticipated to result in any new costs for the vast majority of existing facilities. Some specific requirements may result in minor or insignificant additional costs, such as the requirement that telephone services consist of land-line service and the new requirement for annual testing of private water sources for family care homes and small IRAs. In addition, for existing facilities that apply the 2000 edition of the LSC instead of the 1985 version, modest additional expenditures will result from the higher cost of fire-retardant replacements for worn-out draperies and furniture, as opposed to non-fire-retardant products.

New facilities and renovations to existing facilities/buildings: The application of the 2000 edition of the LSC instead of the 1985 edition will result in an additional cost if compliance with the newer code means the installation of a sprinkler system based on specific facility and occupant characteristics, when the older code may not have required the installation. In addition, the increase in minimum bedroom size per person (from 60 sq. ft. to 70 sq. ft.) may result in some additional modest cost.

The proposed amendments result in no new costs for local government.

2. Compliance requirements: Existing facilities with current operating certificates will be compliant with the proposed amendments. However, if an existing certified facility does not have telephone service through a land line, it will have to be installed to be compliant with the revised regulation. The proposed amendments contain no compliance requirements for local government.

Pursuant to NYS Department of State and federal CMS requirements, new facilities outside of New York City already are required to comply with the 2002 Uniform Code and new ICFs must comply with the 2000 edition of the LSC. The regulations would impose modest additional requirements for new facilities beyond these existing requirements.

3. Professional services: No additional professional services are required as a result of these proposed amendments. Regulated parties will continue to rely upon design and construction professional to advise them on the requirements of the Uniform Code and the LSC. 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 and minor potential costs to 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 proposed amendments impose no adverse economic impact on local governments or small businesses.

7. Small business and local government participation: Draft copes of the proposed amendments were mailed to each of the 10 provider associations for distribution to their membership. The provider association, New York State Association of Community and Residential Agencies (NYSACRA) placed a reminder about the request for comment on their website. However, no comments were received by OMRDD as a result of this outreach effort.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed 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 amendments propose to revise and update the physical plant standards for facilities certified and/or operated by OMRDD. There is no impact specific to rural areas anticipated.

Job Impact Statement

A Job Impact Statement is not submitted because the amendment will not present an adverse impact on existing jobs or employment opportunities. The amendments propose to revise and update the physical plant standards for facilities certified and/or operated by OMRDD. OMRDD anticipates that there will be no impact on the existing or future employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Enrollment and Appeals In Medicare Prescription Drug Plans

I.D. No. MRD-46-06-00017-P

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

Proposed action: Addition of Subpart 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)

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 proposed 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) "Actively involved" means significant and ongoing involvement in a person's life so as to have sufficient knowledge of the person's needs.

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

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

(5) "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, or to act in the Part D review process, the person may enroll himself or herself or act in the Part D review process for himself or herself, or may appoint another party to enroll or act in the Part D review process for him or her.

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

appoint another party to enroll or act in the Part D review process for him or her.

(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 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 or to act in the Part D review process, the person may enroll himself or herself in a PDP or act in the Part D review process, or may appoint another party to enroll or act in the Part D review process.

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

(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]*F*amily 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]*he* 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.

Text of proposed 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

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 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, and as plans no longer participate in Part D or lose their benchmark status. 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.

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 plan 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 developmental disabilities. Several of the task forces, committees and subcommittees have continued to meet to oversee the Part D implementation through out 2006.

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

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed 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 proposed 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. There is no impact specific to rural areas anticipated.

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 proposed 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.

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-24-06-00013-P	June 14, 2006
PSC-24-06-00014-P	June 14, 2006
PSC-28-06-00009-P	July 12, 2006

NOTICE OF ADOPTION

Individual Service Agreements by Massena Electric Department

I.D. No. PSC-13-06-00023-A
Filing date: Oct. 25, 2006
Effective date: Oct. 25, 2006

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

Action taken: The commission, on Oct. 18, 2006, adopted an order allowing Massena Electric Department to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service P.S.C. No. 2.

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

Subject: Individual service agreements.

Purpose: To approve the establishment of a new Service Classification No. 8 — Individual Service Agreements.

Substance of final rule: The Public Service Commission adopted an order approving Massena Electric Department's tariff filing to establish a new Service Classification No. 8 for Individual Service Agreements, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-E-0288SA1)

NOTICE OF ADOPTION

Exemptions from Electric Standby Rates for Small Non-Demand Customers by Plug Power, Inc.

I.D. No. PSC-27-06-00012-A
Filing date: Oct. 25, 2006
Effective date: Oct. 25, 2006

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

Action taken: The commission, on Oct. 18, 2006, adopted an order granting in part, Plug Power, Inc.'s rehearing request and extended the time for expiration of exemptions from standby rates that utilities have tariffed for residential and small non-demand customers to May 31, 2009.

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

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

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

Substance of final rule: The Public Service Commission adopted an order granted in part, Plug Power, Inc.'s rehearing request and extended the time for expiration of exemptions from standby rates that utilities have tariffed for residential and small non-demand customers to May 31, 2009, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(02-E-0551SA5)

NOTICE OF ADOPTION

Marketer/Direct Customer Capacity Program by The Brooklyn Union Gas Company

I.D. No. PSC-32-06-00007-A
Filing date: Oct. 26, 2006
Effective date: Oct. 26, 2006

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

Action taken: The commission, on Oct. 18, 2006, approved The Brooklyn Union Gas Company's request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12.

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

Subject: Marketer/Direct Customer Capacity Program.

Purpose: To incorporate in the company's tariff a Marketer/Direct Customer Capacity Program, including a Virtual Storage Program and customer surcharges/credits related to the Marketer/Direct Customer Capacity Program and extend its current merchant function back-out credit.

Substance of final rule: The Commission adopted an order approving The Brooklyn Union Gas Company's tariff revisions to incorporate into its tariff; Marketer/Direct Customer Capacity Program, Virtual Storage Program, Customer surcharge/credits related the program and extending its current merchant function back-out credit.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-0871SA1)

NOTICE OF ADOPTION

Marketer/Direct Customer Capacity Program by KeySpan Gas East Corporation d/b/a Brooklyn Union of L.I.

I.D. No. PSC-32-06-00008-A
Filing date: Oct. 26, 2006
Effective date: Oct. 26, 2006

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

Action taken: The commission, on Oct. 18, 2006, adopted an order approving the KeySpan Gas East Corporation, d/b/a Brooklyn Union of L.I.'s request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 1.

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

Subject: Marketer/Direct Customer Capacity Program.

Purpose: To incorporate in the company's tariff a Marketer/Direct Customer Capacity Program, including a Virtual Storage Program and customer surcharges/credits related to the Marketer/Direct Customer Capacity Program and extend its current merchant function back-out credit.

Substance of final rule: The Commission adopted an order approving various changes to the KeySpan Gas East Corporation, d/b/a Brooklyn Union of L.I.'s tariff revisions to incorporate into its tariff; Marketer/Direct Customer Capacity Program, Virtual Storage Program, Customer surcharge/credits related the program and extending its current merchant function back-out credit.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-0873SA1)

NOTICE OF ADOPTION

Average Commodity Cost of Gas by Central Hudson Gas & Electric Corporation

I.D. No. PSC-33-06-00027-A
Filing date: Oct. 26, 2006
Effective date: Oct. 26, 2006

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

Action taken: The commission, on Oct. 18, 2006, adopted an order approving Central Hudson Gas & Electric Corporation's request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12.

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

Subject: Average commodity cost of gas.

Purpose: To reflect the inclusion of risk management fees in the calculation of the average cost of gas.

Substance of final rule: The Commission adopted an order approving Central Hudson Gas & Electric Corporation's tariff filing to clarify the calculations of the average commodity cost of gas used to determine the gas adjustment charge, to contain the costs and benefits associated with the risk management programs.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-0908SA1)

NOTICE OF ADOPTION

Capacity Release Service Program by Orange and Rockland Utilities, Inc.

I.D. No. PSC-33-06-00028-A
Filing date: Oct. 27, 2006
Effective date: Oct. 27, 2006

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

Action taken: The commission, on Oct. 18, 2006, approved Orange and Rockland Utilities, Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 4.

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

Subject: Capacity release service.

Purpose: To indefinitely extend the Capacity Release Service Program; and place a limitation on the sellers' ability to increase or decrease their capacity requirements from year to year.

Substance of final rule: The Commission approved Orange and Rockland Utilities, Inc.'s request to extend its Capacity Release Service Program indefinitely, to become effective November 1, 2006.

Final rule compared with proposed rule: No changes.

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

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

(06-G-0917SA1)

NOTICE OF ADOPTION

Capacity Release Service Program by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-06-00029-A
Filing date: Oct. 27, 2006
Effective date: Oct. 27, 2006

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

Action taken: The commission, on Oct. 18, 2006, approved Consolidated Edison Company of New York, Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 9.

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

Subject: Capacity release service.

Purpose: To indefinitely extend the Capacity Release Service Program, to move the Capacity Release Service from S.C. No. 9 to S.C. No. 20; and limit the aggregate marketers' ability to either increase or decrease their capacity requirement by not more than 20 percent of the aggregate percentage of capacity released to marketers in the preceding capacity release period.

Substance of final rule: The Commission approved Consolidated Edison Company of New York, Inc.'s request to extend their Capacity Release Service Program indefinitely, to become effective November 1, 2006.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(06-G-0918SA1)

NOTICE OF ADOPTION

Billing Service Credit by Orange and Rockland Utilities, Inc.

I.D. No. PSC-36-06-00002-A
Filing date: Oct. 27, 2006
Effective date: Oct. 27, 2006

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

Action taken: The commission, on Oct. 27, 2006, adopted an order approving Orange and Rockland Utilities, Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 2.

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

Subject: Billing service credit.

Purpose: To approve limiting the applicability of its billing services credit to correspond with the implementation of a billing and payment processing charge for gas service.

Substance of final rule: The Commission adopted an order approving Orange and Rockland Utilities, Inc.'s request to limit the applicability of its Billing Services Credit to correspond with the implementation of the billing and payment processing charge for electric service.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(06-E-0985SA1)

NOTICE OF ADOPTION

Transfer of Ownership Interests by Alliance Energy, New York LLC and RPL Holdings LLC

I.D. No. PSC-36-06-00003-A
Filing date: Oct. 25, 2006
Effective date: Oct. 25, 2006

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

Action taken: The commission, on Oct. 24, 2006, adopted an order approving the joint petition of Alliance Energy, New York LLC and RPL Holdings LLC, for the transfer of ownership interests in an 85 MW electric and steam generating facility located in Massena, NY.

Statutory authority: Public Service Law, section 70

Subject: Transfer of ownership interests in an electric and steam generating facility.

Purpose: To approve the transfer.

Substance of final rule: The Commission adopted an order approving the joint petition of Alliance Energy, New York LLC and RPL Holdings LLC, for the transfer of ownership interests in an 85 MW electric and steam generating facility located in Massena, New York, subject to the terms and conditions set forth in order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(06-M-0948SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Electric Water Heater Leasing Business by Central Hudson Gas and Electric Corporation

I.D. No. PSC-46-06-00018-P

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

Proposed action: The commission is considering whether to approve or reject in whole or in part or modify a proposed plan filed by Central Hudson Gas and Electric Corporation per the terms of the order establishing rate plan dated July 24, 2006 in Case 05-E-0934 regarding the termination of all activities related to the utility's electric water heater leasing business.

Statutory authority: Public Service Law, sections 65(1) and 66(1), (5), (10) and (12)

Subject: Plan and schedule to terminate all activities related to the utility's electric water heater leasing business.

Purpose: To consider the plan and schedule to terminate all activities related to the utility's electric water heater leasing business.

Substance of proposed rule: The Commission may approve or reject in whole or in part or modify the proposal filed by Central Hudson Gas and Electric Corporation per the terms of the Order Establishing Rate Plan dated July 24, 2006 in Case 05-E-0934 regarding the termination of all activities related to the utility's electric water heater leasing business. The Commission required Central Hudson Gas and Electric Corporation, within 90 days following the Order Establishing Rate Plan, to file with the Commission the utility's proposed plan for unwinding the electric water heater leasing business and exiting from that business.

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

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

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

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

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

(05-E-0934SA5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Asset Sale Gain Account by New York State Electric & Gas Corporation

I.D. No. PSC-46-06-00020-P

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

Proposed action: The Public Service Commission is considering whether to adopt, modify or reject, in whole or in part, a joint proposal (JP) to allocate and distribute to New York State Electric & Gas Corporation (NYSEG or the company) customers $77.1 million from the company's asset sale gain account (ASGA).

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 66(1), (12-a) and 107(1)

Subject: Proposed allocation and distribution of $77.1 million from the company's ASGA to NYSEG customers.

Purpose: To determine the allocation and distribution of $77.1 million from the company's ASGA to NYSEG customers.

Substance of proposed rule: The Public Service Commission is considering whether to adopt, modify or reject, in whole or in part, a joint proposal to allocate and distribute to New York State Electric & Gas Corporation (NYSEG or the Company) customers $77.1 million from the Company's Asset Sale Gain Account.

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

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

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

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

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

(05-E-1222SA5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Submetering of Electricity by Energy Investment Systems Inc.

I.D. No. PSC-46-06-00021-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 Energy Investment Systems, Inc., on behalf of Heywood Towers Associates and Dalton Management, to submeter electricity at 175 W. 90th 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 consider the request of Energy Investment Systems, Inc., on behalf of Heywood Towers Associates and Dalton Management, to submeter electricity at 175 W. 90th St., 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 Energy Investment Systems, Inc., on behalf of Heywood Towers Associates and Dalton Management, to submeter electricity at 175 West 90th 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. Brilling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-E-1299SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Uniform System of Accounts by Corning Natural Gas Corporation

I.D. No. PSC-46-06-00022-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 request from Corning Natural Gas Corporation (Corning) for deferred accounting treatment of miscellaneous deferred debits, the incremental uncollectible account expense incurred over and above the last established in rates. These incremental costs incurred over and above the amount authorized in the company's previously approved rate Case 05-G-1359 effective May 22, 2005 and rate Case 02-G-0003 effective Jan. 11, 2003.

Statutory authority: Public Service Law, section 66-9

Subject: Uniform system of accounts—request for accounting authorization.

Purpose: To allow the company deferred accounting treatment for expenses beyond the end of the year in which it occurred.

Substance of proposed rule: The Public Service Commission is considering a request from Corning Natural Gas Corporation (Corning) for the deferral of Miscellaneous Deferred Debits, the incremental uncollectible account expense incurred over and above the level last established in rates. These incremental costs incurred over and above the amount authorized in the Company's previously approved Rate Case 05-G-1359 effective May 22, 2005 and Rate Case 02-G-0003 effective January 11, 2003. 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. Brilling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-G-1266SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Filing Requirement Waivers by New York State Electric & Gas Corporation

I.D. No. PSC-46-06-00024-P

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

Proposed action: Consideration of New York State Electric & Gas Corporation's request for waivers of 16 NYCRR section 86.3(a)(1), (2) and (b)(2) in its application for a certificate of environmental compatibility and public need under article VII of the Public Service Law for the Ithaca Transmission Project.

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

Subject: Filing requirements in article VII proceedings concerning the submission of maps, drawings, and aerial photographs.

Purpose: To determine whether the appropriate filing requirements are met without imposing any undue burdens.

Substance of proposed rule: The Commission is considering a request from New York State Electric & Gas Corporation (NYSEG) for waivers of certain filing requirements of the Commission's rules. Specifically, NYSEG seeks waivers of 16 NYCRR §§ 86.3(a)(1); 86.3(a)(1)(i); 86.3(a)(1)(iii); 86.3(a)(2); and 86.3(b)(2). NYSEG seeks a Certificate of Environmental Compatibility and Public Need to construct a 15-mile long 115kV electric transmission line from Etna Substation in the Town of Dryden to a new substation in the Town of Lapeer. NYSEG also plans to rebuild 14.8 miles of an existing 115kV transmission line. This matter is being considered by the Commission in Case 06-T-1298.

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

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

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

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

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

(06-T-1298SA1)

State University of New York

NOTICE OF ADOPTION

Traffic and Parking Regulations of the State University College at Old Westbury

I.D. No. SUN-37-06-00002-A
Filing No. 1298
Filing date: Oct. 31, 2006
Effective date: Nov. 15, 2006

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

Action taken: Addition of section 581.1 to Title 8 NYCRR.

Statutory authority: Education Law, section 360(1)

Subject: Proposed amendments to the traffic and parking regulations of the State University College at Old Westbury.

Purpose: To bring the traffic and parking regulations into conformity with chapter 699, Laws of 2005, by authorizing the exemption of veterans attending the State University College at Old Westbury from parking and registration fees.

Text or summary was published in the notice of proposed rule making, I.D. No. SUN-37-06-00002-P, Issue of September 13, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Joel Pierre-Louis, Associate Counsel, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: joel.pierre-louis@suny.edu

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Traffic and Parking Regulations of the State University of New York College of Agriculture and Technology at Cobleskill

I.D. No. SUN-37-06-00003-A
Filing No. 1297
Filing date: Oct. 31, 2006
Effective date: Nov. 15, 2006

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

Action taken: Amendment of Part 573 of Title 8 NYCRR.

Statutory authority: Education Law, section 360(1)

Subject: Traffic and parking regulations of the State University of New York College of Agriculture and Technology at Cobleskill.

Purpose: To increase the allowable amount for parking fines, name previously unnamed roads, change configuration of roadways to help traffic flow and congestion and to bring the traffic and parking regulations into conformity with chapter 699, Laws of 2005, by authorizing the exemption of veterans from parking and registration fees attending the State University of New York College of Agriculture and Technology at Cobleskill.

Text or summary was published in the notice of proposed rule making, I.D. No. SUN-37-06-00003-P, Issue of September 13, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Wendy Kowalczyk, Associate Counsel, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: wendykowalczyk@suny.edu

Assessment of Public Comment

The agency received no public comment.

Thruway Authority

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

E-ZPass Discount Plan

I.D. No. THR-46-06-00019-P

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

Proposed action: Amendment of section 101.2 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), (8), (15) and 361(1)(a); Vehicle and Traffic Law, section 1630

Subject: E-ZPass Discount Plan.

Purpose: To implement a special additional E-ZPass Discount Plan for E-ZPass customers who have vehicles that meet certain fuel efficiency and emissions standards.

Text of proposed rule: Amendment to Section 101.2 of NYCRR Title 21.

Section 101.2 Toll schedules and fees.

The following toll schedules and fees shall apply for the use of the Thruway system:

(a) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the cash tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule" and

each of which is appended hereto in Appendix A-1, (see section 101.4 of this Part) and made a part hereof. Effective January 6, 2008 such cash tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule 2008" and each of which is appended hereto in Appendix A-2, (see section 101.4 of this Part) and made a part hereof.

(b) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the E-ZPass tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule – E-ZPass" and each of which is appended hereto in Appendix A-3, (see section 101.4 of this Part) and made a part hereof except that certain commercial vehicles including but not limited to certain commercial vehicles in classes 2H, 3H, 4H, 5H, 6H and 7H, may be eligible for a special additional E-ZPass discount[.] *and except that certain vehicles in class 2L that meet certain fuel efficiency and emissions standards may also be eligible for a special additional E-ZPass discount.*

(c) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the E-ZPass tolls for motorcycles and for motorhomes each having an authorized E-ZPass tag shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule – Motorhome E-ZPass and Motorcycle E-ZPass" and each of which is appended hereto in Appendix A-4, (see section 101.4 of this Part) and made a part hereof.

(d) Annual permit plan.

(1) Class 2L vehicles with authorized E-ZPass tags are eligible for the annual permit plan on the controlled system only if such vehicles are held in the name of or leased to:

(i) an individual or two individuals not constituting a business entity; or

(ii) a nonprofit, religious, charitable or educational organization.

Class 2L vehicles owned by or leased to partnerships, corporations or other business entities (including rental companies) are not eligible for the annual permit plan. To receive the annual permit plan discount, customers must comply with all of the terms and conditions of their authorized E-ZPass License Agreement.

(2) All customers that apply and qualify for the annual permit plan shall, upon payment of $80, be entitled to use one designated E-ZPass tag, which is transferable to vehicles listed in paragraph (1) of this subdivision that are on the customer's E-ZPass account, that will provide an unlimited number of trips of 30 miles or less on the controlled system without payment of additional tolls, except that a toll of 45 cents shall be charged for all trips across the Castleton-on-Hudson Bridge, which will be charged to the annual permit plan customer's account at the time of exit from the controlled system. Under the annual permit plan, for each trip over 30 miles, the amount of the toll charged shall be discounted by the amount of the toll for the first 30 miles of that trip in accordance with the detailed toll schedule, which is designated "New York State Thruway Toll Schedule – Permits" which is appended hereto in Appendix A-5, (see section 101.4 of this Part) and made a part hereof. The annual permit plan shall become effective on the date of issuance of such permit and shall be valid for a term of one year. Customers may purchase the annual permit plan for each E-ZPass tag issued under their account for vehicles listed in paragraph (1) of this subdivision.

(e) Commercial charge accounts. Commercial charge account customers must have an authorized E-ZPass account. Commercial charge account customers with authorized E-ZPass tags shall be allowed a volume discount on such terms as may be set by the authority from time to time, provided that their operators or operating companies apply, qualify, establish and maintain a formal commercial charge account with the authority. Registered omnibuses that maintain a formal charge account with the authority shall be allowed a special discount, in addition to a volume discount, if any, provided that their operators or operating companies file with the authority's department of finance and accounts a formal certification that the operator or operating company operates buses on the Thruway system.

(f) Bridge and barrier stations. (1) The cash tolls for bridge and barrier stations are as follows:

	TAPPAN ZEE BRIDGE *	NEW ROCHELLE *	YONKERS	SPRING VALLEY *	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
2L	$4.00	$1.25	$0.75	$0.00	$0.75	$0.75	$0.75
3L	$9.50	$2.00	$1.00	$2.50	$1.00	$1.00	$1.00
4L	$11.25	$2.50	$1.25	$3.75	$1.25	$1.25	$1.25
2H	$12.25	$2.75	$1.50	$4.25	$1.50	$1.50	$1.50
3H	$17.00	$3.50	$1.75	$6.75	$2.25	$2.50	$1.75
4H	$20.25	$4.25	$2.25	$6.75	$2.50	$2.75	$2.25
5H	$27.00	$6.75	$3.50	$11.00	$3.50	$4.25	$3.50
6H	$33.75	$7.50	$3.75	$12.25	$4.25	$4.75	$3.75
7H	$40.50	$8.25	$4.25	$13.50	$4.75	$5.50	$4.25

* Toll collected one way only.

The E-ZPass tolls for bridge and barrier stations are as follows, except that certain commerical vehicles including but not limited to certain commercial vehicles in classes 2H, 3H, 4H, 5H, 6H and 7H, may be eligible for a special E-ZPass discount[:] *and except that certain vehicles in class 2L that meet certain fuel efficiency and emissions standards may also be eligible for a special additional E-ZPass discount:*

	TAPPEN ZEE BRIDGE ** PEAK	TAPPEN ZEE BRIDGE ** OFF PEAK	NEW ROCHELLE *	YONKERS	SPRING VALLEY ** PEAK	SPRING VALLEY ** OFF PEAK	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
Resident									$0.09
Carpool	$0.50	$0.50							
Commuter	$2.00	$2.00	$1.00	$0.50			$0.50	$0.50	$0.25
2L	$3.60	$3.60	$1.13	$0.68	$0.00	$0.00	$0.68	$0.68	$0.68
3L	$9.50	$4.75	$1.80	$0.90	$2.50	$1.25	$0.90	$0.90	$0.90
4L	$11.25	$5.63	$2.25	$1.13	$3.75	$1.88	$1.13	$1.13	$1.13
2H	$12.25	$6.13	$2.61	$1.43	$4.25	$2.13	$1.43	$1.43	$1.43
3H	$17.00	$8.50	$3.33	$1.66	$6.75	$3.38	$2.14	$2.38	$1.66
4H	$20.25	$10.13	$4.04	$2.14	$6.75	$3.38	$2.38	$2.61	$2.14
5H	$27.00	$13.50	$6.41	$3.33	$11.00	$5.50	$3.33	$4.04	$3.33
6H	$33.75	$16.88	$7.13	$3.56	$12.25	$6.13	$4.04	$4.51	$3.56
7H	$40.50	$20.25	$7.84	$4.04	$13.50	$6.75	$4.51	$5.23	$4.04

* Toll collected one way only.

** Toll collected one way only and the toll indicated for classes 3L through 7H represent the maximum amounts to be charged. The tolls for classes 3L through 7H may be reduced, on a graduated scale or otherwise, during certain hours for E-ZPass holders within such classes and upon such terms and conditions as the authority may determine from time to time.

The motor home and motorcycle Plan tolls for bridge and barrier stations are as follows:

	TAPPEN ZEE BRIDGE ** PEAK	TAPPEN ZEE BRIDGE ** OFF PEAK	NEW ROCHELLE *	YONKERS	SPRING VALLEY ** PEAK	SPRING VALLEY ** OFF PEAK	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
MTRHOME 2 AXLES	$3.60	$3.60	$1.13	$0.68	$0.00	$0.00	$0.68	$0.68	$0.68
MTRHOME 3 AXLES	$9.50	$4.75	$1.80	$0.90	$2.50	$1.25	$0.90	$0.90	$0.90
MTRHOME 4 AXLES	$11.25	$5.63	$2.25	$1.13	$3.75	$1.88	$1.13	$1.13	$1.13
2/3 AXLES MTRCYCL	$2.00	$2.00	$0.63	$0.38	$0.00	$0.00	$0.38	$0.38	$0.38

* Toll collected one way only.

** Toll collected one way only and the toll indicated for motor homes (with 3 or more axles represents the maximum amounts to be charged. The tolls for motor homes (with 3 or more axles may be reduced, on a graduated scale or otherwise, during certain homes for E-ZPass holders within such classes and upon such terms and conditions as the authority may determine from time to time.

On January 6, 2008 the Cash tolls will increase for bridge and barrier stations as follows:

	TAPPAN ZEE BRIDGE *	NEW ROCHELLE *	YONKERS	SPRING VALLEY *	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
2L	$4.50	$1.50	$1.00	$0.00	$1.00	$1.00	$1.00
3L	$10.50	$2.25	$1.25	$2.75	$1.25	$1.25	$1.25
4L	$12.50	$2.75	$1.50	$4.25	$1.50	$1.50	$1.50
2H	$13.50	$3.25	$1.75	$4.75	$1.75	$1.75	$1.75
3H	$18.75	$4.00	$2.00	$7.50	$2.50	$2.75	$2.00
4H	$22.50	$4.75	$2.50	$7.50	$2.75	$3.25	$2.50
5H	$29.75	$7.50	$4.00	$12.25	$4.00	$4.75	$4.00
6H	$37.25	$8.25	$4.25	$13.50	$4.75	$5.25	$4.25
7H	$44.75	$9.25	$4.75	$15.00	$5.25	$6.25	$4.75

* Toll collected one way only.

Text of proposed rule and any required statements and analyses may be obtained from: Macy Pavone, New York State Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2860, e-mail: marcy_pavone@thruway.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority:

Subdivision 5 of section 354 of the Public Authorities Law authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction." Subdivision 8 of that section, in pertinent part, authorizes the Authority "to fix and collect such fees, rentals and charges for the use of the thruway system or any part thereof necessary or convenient....to produce sufficient revenue to meet the expense of maintenance and operation...." Subdivision 15 of the same section authorizes the Authority "to do all things necessary or convenient to carry out its purposes and exercise the powers expressly given." In addition, subdivision 1(a) of section 361 of the Public Authorities Law authorizes the Authority "to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience, for the preservation of its property and for the collection of tolls..." Furthermore, section 1630 of the Vehicle and Traffic Law authorizes the Authority to regulate traffic on and charge tolls for the use of its facilities.

2. Legislative Objectives:

This amendment of section 101.2 of NYCRR Title 21 will allow the Authority to implement a special additional E-ZPass Discount Plan for E-ZPass customers who have vehicles that meet certain fuel efficiency and emissions standards.

3. Needs and Benefits:

The Governor announced a 9-Point Strategic Energy Action plan in September 2005 which aims to minimize the impact of high fuel prices, increase the use of renewable energy, and develop a long-term strategy to lower the State's dependence on foreign fossil fuels. In support of this Energy Action Plan, the Authority Board has approved a special Green Discount Plan for Authority E-ZPass customers who have vehicles that meet certain fuel efficiency and emissions standards. The Green Discount Plan would provide a 10 percent discount off the E-ZPass rate for hybrid vehicles that meet the following criteria:

- Vehicles which are certified to the California Super Ultra Low Emission Vehicle (SULEV) standard and achieve a United State Environmental Protection Agency (USEPA) highway fuel economy rating of 45 miles per gallon or more; or
- Pre-model year 2005 hybrid vehicles which are certified to the California Ultra Low Emission Vehicle (ULEV) standard and achieve a USEPA highway fuel economy rating of 45 miles per gallon or more.

This is the same criteria that the New York State Department of Motor Vehicles uses to qualify vehicles to use certain high occupancy vehicle lanes even though the vehicles do not contain the requisite number of passengers ordinarily required for use of such lanes. Authority customers will be required to request enrollment in the Green Discount Plan in writing and include a copy of the qualified vehicle's registration. Vehicle registrations will be verified to ensure compliance with the Green Discount Plan requirements. If qualified, customers will receive a green E-ZPass tag to signify their enrollment in the Green Discount Plan.

4. Costs:

There is no cost to regulated parties for the implementation of and continuing compliance with the regulation. There are no additional administrative costs for implementation of the revised regulation.

5. Local Government Mandates:

This rule imposes no program, service, duty or responsibility on local government.

6. Paperwork:

None.

7. Duplication:

None:

8. Alternatives:

None.

9. Federal Standards:

None.

10. Compliance Schedule:

Ongoing.

Regulatory Flexibility Analysis

This regulation will have no negative impact on small businesses beyond the effect that the current regulations already have on them.

Rural Area Flexibility Analysis

This regulation does not impose any adverse impact on rural areas whether through compliance, reporting or in any other way, and as such, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

It is apparent from the nature and purpose of the proposed rule that it will have no impact on jobs and employment opportunities. As such, a Job Impact Statement is not required.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Maximum Speed Limit on the Thruway and Electronic Toll Collection

I.D. No. THR-46-06-00023-P

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

Proposed action: Repeal of section 103.2 and addition of new section 103.2 to Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5) and (15) and section 361(1)(a); Vehicle and Traffic Law, sections 1180-a and 1630

Subject: Maximum speed limit on the thruway and electronic toll collection.

Purpose: To reflect that the majority of the speed limit on the thruway is now 65 miles per hour; amend the regulations to clarify that the speed limit for travel through toll plaza lanes dedicated for electronic toll collection shall be as posted and the speed limits for electronic toll collection at highway speed shall be the maximum speed limit on the thruway system unless otherwise posted; and update the regulations to reflect the administrative process that is currently used for addressing electronic toll collection speed violations and appeals.

Text of proposed rule: Section 103.2 is repealed and a new section 103.2 is adopted to read as follows:

§ 103.2 Speed limits.

The maximum speed limit on the Thruway system is sixty-five miles per hour except:

(a) from milepost NE-3.54 to milepost NE-15.01, for trucks only, 50 miles per hour;

(b) as otherwise posted; and

(c) electronic toll collection:

(1) Speeds.

(i) Speed limits on travel through toll booth lanes dedicated for electronic toll collection shall be as posted; and

(ii) Speed limits for electronic toll collection at highway speed shall be the maximum speed limit on the Thruway system unless otherwise posted.

(2) Offenses. If a vehicle equipped with an electronic toll collection device passes through a toll booth lane dedicated for electronic toll collection at a speed in excess of the posted limit, the electronic toll collection account may, at the Authority's discretion, be subject to the following:

(i) a warning advising that any further offenses may result in suspension of the account; or

(ii) account suspension for up to 180 days; or

(iii) account revocation.

A written notice will be sent to the account holder advising of the action taken.

(3) Appeal process. An electronic toll collection account holder may submit a written appeal of an account suspension or revocation to the Authority within 10 business days of the date of the notice. Such suspension or revocation will be held in abeyance pending resolution of the appeal.

(i) The Authority will review the appeal within twenty business days of receipt and advise the account holder of the Authority's decision.

(ii) When an account is revoked, the account balance and tag deposit will be returned to the account holder in accordance with the account terms and conditions.

(iii) An electronic toll collection account holder may not open a new account until the end of any suspension/revocation.

(4) General. Notwithstanding these provisions, all motorists are subject to arrest for violation of the New York State Vehicle and Traffic

Law or the Thruway Authority's rules and regulations (e.g., reckless driving, speed too fast for conditions, etc.).

Text of proposed rule and any required statements and analyses may be obtained from: Marcy Pavone, New York State Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2860, e-mail: marcy_pavone@thruway.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority:

Public Authorities Law (PAL) section 354, subdivision 5, authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction." In addition, subdivision 15 of this section authorizes the Thruway Authority to "do all things necessary or convenient to carry out its purposes and exercise the powers expressly given." Subdivision 1(a) of section 361 of PAL authorizes the Authority "to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience." Vehicle and Traffic Law (VTL) section 1180-a authorizes the Thruway Authority to establish a 65-mph maximum allowable speed limit on the Thruway System. Section 1630 of the VTL authorizes the Authority to regulate traffic on its facilities.

2. Legislative Objectives:

The amendment to 21 NYCRR 103.2 is intended to reflect that the majority of the speed limit on the Thruway is now sixty-five miles per hour. The new section will also amend the regulations to clarify that the speed limit for travel through toll plaza lanes dedicated for electronic toll collection shall be as posted and the speed limits for electronic toll collection at highway speed shall be the maximum speed limit on the Thruway System unless otherwise posted. The amendment also updates the regulations to reflect the administrative process that is currently used for addressing electronic toll collection speed violations and appeals.

3. Needs and Benefits:

This amendment will update the regulations to reflect the statutorily authorized sixty-five miles per hour speed limit that is currently posted on the majority of the Thruway System. In addition, higher speed E-ZPass lanes have been implemented at fourtoll plazas and the construction of highway speed E-ZPass lanes is also anticipated and the regulations need to be modified to be consistent with the variations in posted speed limits related to electronic toll collection.

4. Costs:

There is no cost to regulated parties for the implementation of and continuing compliance with the regulation. There are no additional administrative costs for implementation of the revised regulation.

5. Local Government Mandates:

This rule imposes no program, service, duty, or responsibility on local government.

6. Paperwork:

There is no prescribed paperwork required; however, a written appeal must be submitted by an electronic toll collection account holder who appeals an account suspension or revocation.

7. Duplication:

There is no duplication of State or Federal Law.

8. Alternatives:

There is no significant alternative to be considered.

9. Federal Standards:

There is no specific federal requirement.

10. Compliance Schedule:

Ongoing.

Regulatory Flexibility Analysis

This regulation will have no negative impact on small businesses beyond the effect that the current regulations already have on them.

Rural Area Flexibility Analysis

This regulation does not impose any adverse impact on rural areas whether through compliance, reporting or in any other way, and as such, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

It is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs and employment opportunities. As such, a Job Impact Statement is not required.