

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Captive Cervids

**I.D. No.** AAM-41-06-00025-EP  
**Filing No.** 1146  
**Filing date:** Sept. 26, 2006  
**Effective date:** Sept. 26, 2006

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

**Action taken:** Repeal of section 62.8 and addition of Part 68 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18(6), 72 and 74

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

**Specific reasons underlying the finding of necessity:** The proposed repeal of section 62.8 of 1 NYCRR and the adoption of 1 NYCRR Part 68 will help to prevent further introduction of chronic wasting disease (CWD) into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State. CWD is an infec-

tious and communicable disease of deer belonging to the Genus *Cervus* (including elk, red deer and sika deer) and the Genus *Odocoileus* (including white tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico, Illinois and Utah. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and New York and the Canadian provinces of Saskatchewan and Alberta.

The origin of CWD is unknown. The mode of transmission is suspected to be from animal to animal. The disease is progressive and always fatal. There is no live animal test for CWD, so it is impossible to determine whether a live animal is positive, nor is there a vaccine to prevent the disease. The incubation period is lengthy and 3 to 5 years of continued surveillance is needed with no new infection found before a herd can be declared free of CWD through quarantine. The United States Secretary of Agriculture has declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. On December 24, 2003, the USDA proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that it determines are equivalent to the proposed Federal program. The department believes that the State CWD herd certification program established by this rule is equivalent to the proposed Federal program.

New York State has 433 entities engaged in raising approximately 9,600 deer and elk in captivity with a value of several million dollars, and many of these entities have imported captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. The rule repeals a prohibition on the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless a permit authorizing such movement has been obtained from the Department prior to such importation or movement. Except for cervids moving directly to slaughter, permits shall be issued only for captive cervids that meet the health requirements established by the rule.

The rule establishes general health requirements for captive cervids, special provisions for captive cervids susceptible to CWD, requirements for CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State and permit it to be detected and controlled within the captive cervid population of the State.

The promulgation of this regulation on an emergency and permanent basis is necessary because further introduction and spread of CWD into and within New York State would be devastating from both an animal health and economic standpoint given the threat the disease poses to the approximately 9,600 captive deer in the State and the 433 entities which raise them.

**Subject:** Captive cervids.

**Purpose:** To prevent the introduction and spread of chronic wasting disease into and within the State.

**Public hearing(s) will be held at:** 10:30 a.m., Nov. 29, 2006 at Department of Agriculture and Markets, 10B Airline Dr., Albany, NY.

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

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

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.agmkt.state.ny.us/Al/repeal.html](http://www.agmkt.state.ny.us/Al/repeal.html)):** Section 62.8 of 1 NYCRR is repealed.

Section 68.1 of 1 NYCRR sets forth definitions for "CWD susceptible cervid," "CWD exposed cervid," "CWD positive cervid," "CWD negative cervid," "CWD suspect cervid," "CWD infected zone," "captive," "CWD Certified Herd Program," "Cervid," "Chronic Wasting Disease," "Commingling," "Department," "Enrollment Date," "Herd," "Herd Inventory," "CWD Herd Plan," "CWD Herd Status," "CWD positive herd," "CWD Suspect herd," "Special purpose herd," "CWD Exposed herd," "CWD certified herd," "Official identification," "CWD Monitored herd," "Owner," "Premises," "CWD Premises plan," "Quarantine," "State animal health official," "Status date," "Official test," "USDA/APHIS," and "Certificate of Veterinary Inspection (CVI)".

Section 68.2 of 1 NYCRR establishes general health requirements for captive cervids including requirements relating to mandatory reporting, the movement of captive cervids, enforcement, facilities, fencing, herd integrity, sample collection and premises location.

Section 68.3 of 1 NYCRR establishes special provisions for captive cervids susceptible to chronic wasting disease including requirements relating to importation, enrollment in the CWD Herd Certification program, Monitored herd program, licenses and permits issued by the Department of Environmental Conservation, fencing, premises inspection and record-keeping.

Section 68.4 of 1 NYCRR establishes requirements for the CWD Certified Herd program including requirements for captive susceptible cervid operations engaged in breeding and/or the sale or removal of live cervids from the premises for any purposes, the establishment of a CWD herd status, sampling and testing, animal identification, annual physical herd inventory and additions to CWD Certified Herd program herds.

Section 68.5 of 1 NYCRR establishes requirements for CWD Monitored Herds including requirements for special purpose herds consisting of one or more susceptible cervids, sampling and testing, additions to CWD monitored herds, animal identification and permitted movement to an approved CWD slaughter facility.

Section 68.6 of 1 NYCRR establishes requirements for approved susceptible cervid slaughter facilities, including requirements for holding pens, sample retention and holding facilities, susceptible cervid offal disposal plans and inspection.

Section 68.7 of 1 NYCRR establishes requirements for the importation of captive susceptible cervids for immediate slaughter including requirements for source herds, permits, direct movement, samples, waste and slaughter.

Section 68.8 of 1 NYCRR establishes requirements for the management of CWD positive, exposed or suspect herds including premises quarantine, establishment of a herd plan, depopulation, cleaning and disinfection, future land use restrictions, restocking constraints and timeframes, fencing requirements, risk analysis, official herd quarantines, elimination of high-risk cervids within the herd, special fencing requirements and the disposal of carcasses.

**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 November 24, 2006.

**Text of rule and any required statements and analyses may be obtained from:** John Huntley, DVM, State Veterinarian, Director, Division of Animal Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3502

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

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

#### **Regulatory Impact Statement**

##### **1. Statutory Authority:**

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

Section 72 of the Law authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of

communicable diseases among domestic animals and to prevent the spread of infection and contagion.

Section 72 of the Law also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside this State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the Law authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State. Subdivision (10) of said Section provides that "feral animal" means an undomesticated or wild animal.

##### **2. Legislative Objectives:**

The statutory provisions pursuant to which these regulations are proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State to control, suppress and eradicate such diseases and prevent the spread of infection and contagion. The Department's proposed repeal of 1 NYCRR section 62.8 and adoption of 1 NYCRR Part 68 will further this goal by preventing the importation of deer which may be infected with chronic wasting disease (CWD), and permitting CWD to be detected and controlled within the captive cervid population of the State.

##### **3. Needs and Benefits:**

CWD is an infectious and communicable disease of deer belonging to the Genus Cervus (including elk, red deer and sika deer) and the Genus Odocoileus (including white tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico, Illinois and Utah. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and New York and the Canadian provinces of Saskatchewan and Alberta.

The origin of CWD is unknown. The mode of transmission is suspected to be from animal to animal. The disease is progressive and always fatal. There is no live animal test for CWD, so it is impossible to determine whether a live animal is positive, nor is there a vaccine to prevent the disease. The incubation period is lengthy and 3 to 5 years of continued surveillance is needed with no new infection found before a herd can be declared free of CWD through quarantine. The United States Secretary of Agriculture has declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program.

New York State has 433 entities engaged in raising approximately 9,600 deer and elk in captivity with a value of several million dollars, and many of these entities import captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. This rule repeals a rule that had prohibited, with certain exceptions, the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless they are accompanied by a valid certificate of veterinary inspection and a permit authorizing such importation or movement has been obtained from the Department, in consultation with the New York State Department of Environmental Conservation. The rule establishes general health requirements for captive cervids, special requirements for captive cervids susceptible to CWD, requirements for a CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State, and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

##### **4. Costs:**

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

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk range from \$500 to \$2,000 per animal. The value of deer range from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, the prior prohibition on the importation of captive cervids susceptible to CWD prevented the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. It is not known how many captive cervids will meet the health requirements of 1 NYCRR Part 68 or otherwise qualify for importation or movement within the State of New York. The number and value of the captive cervids that will continue to be prohibited

from importation will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer in the State that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences, that they have an average of 20 adult cervids and a 160-acre square enclosure, it would require two miles of fence extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape at a cost of \$1.00 a foot, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7' plastic mesh and \$2.00 per foot for posts (\$20 post every 10 feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

The rule also requires that captive cervid operations, with the exception of special purpose herds, have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms that will need to upgrade their capture and restraint facilities. The owners of those farms will have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

Whitetailed deer experience a five to ten percent death loss when handled for purposes such as testing. The majority (1,975 out of 2,950) of captive whitetailed deer in the State are in quarantined premises and will not have to be handled. Handling the other whitetailed deer can be expected to produce a total death loss of 49 to 98 deer on 43 farms for a loss of \$1,700 to \$3,400 per farm per year, assuming the deer each have a value of \$1,500.

The labor costs associated with the handling of captive cervids required by this Part will average three person days, or \$250.00 per year. It is estimated that the recordkeeping associated with this rule will require less than one hour annually on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of \$400 to \$500 per farm.

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

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between \$500 and \$1,000 per farm annually, or between \$121,500 and \$243,000 annually to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

5. Local Government Mandates:

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

6. Paperwork:

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a movement permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least seventy-two months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be

followed for positive or trace herds that will be implemented within sixty days of a diagnosis of CWD.

7. Duplication:

None.

8. Alternatives:

Various alternatives, from the imposition of a total prohibition against the importation of all cervids, to no restriction on their importation were considered.

Due to the spread of CWD in other states and the threat that this disease poses to the State's captive deer population, the proposed rule was determined to be the best method of preventing the further introduction of this disease into New York State and permitting it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of captive cervids susceptible to CWD was not necessary if health standards and a permit system were established. It was also concluded that a failure to regulate the importation of cervids was an alternative that posed an unacceptable risk of introducing CWD to the State's herds of captive cervids.

9. Federal Standards:

The federal government currently has no standards restricting the interstate movement of cervids due to CWD, but has proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that are determined to be equivalent to the proposed Federal program. The Department believes that the State CWD program established by this rule is equivalent to the proposed Federal program.

10. Compliance Schedule:

It is anticipated that regulated parties can immediately comply with the rule.

**Regulatory Flexibility Analysis**

1. Effect of Rule:

There are approximately 433 small businesses raising a total of approximately 9,600 captive cervidae (the family that includes deer and elk) in New York State. The rule would have no impact on local governments.

2. Compliance Requirements:

Regulated parties are prohibited from importing captive cervids, other than those moving directly to slaughter, without a valid certificate of veterinary inspection. In addition, regulated parties importing or moving captive cervids into the State or within the State for any purpose must first obtain a permit from the Department, in consultation with the New York State Department of Environmental Conservation, authorizing such movement.

Captive cervid operations, with the exception of special purpose herds, must have proper restraining facilities to capture and restrain cervids for testing, as well as storage facilities for samples.

Captive cervid operations must have a continuous barrier fence and maintain herd integrity.

Regulated parties will be able to import CWD susceptible cervids only if they are moved from a herd which has achieved CWD certified herd status and the state of origin has adopted mandatory reporting and quarantine requirements equivalent to those set forth in 1 NYCRR Part 68. Regulated parties may not hold CWD susceptible cervids in captivity in New York State unless they are enrolled in the CWD Certified Herd Program or the CWD Monitored Herd Program or have a license or permit issued by DEC pursuant to ECL section 11-0515.

Regulated parties with herds containing at least one CWD susceptible cervid must have a perimeter fence that is at least eight feet high. Captive CWD susceptible cervid facilities and perimeter facilities must be inspected and approved by a state or federal regulatory representative.

Regulated parties must keep accurate records documenting purchases, sales, interstate shipments, escaped cervids and deaths, including harvested cervids, and maintain them for at least sixty months for all captive CWD susceptible cervid operations. The owners of all CWD susceptible cervid herds enrolled in the CWD Certified Herd Program shall establish and maintain accurate records that document the results of the annual herd inventory.

All captive CWD susceptible cervid herds that are not special purpose herds or held at an approved CWD susceptible cervid slaughter facility must participate in the CWD Certified Herd program. Samples must be submitted for testing as required by the Program. For reasons of animal disease control, limiting potential contamination of the environment and benefiting trace back/trace forward activities the carcasses of animals that have been tested for CWD must be retained until it has been determined that the tests are negative for CWD. As of the first annual inventory after

the effective date of 1 NYCRR Part 68, each herd member and herd addition shall have a minimum of two official/approved unique identifiers. At least one of these identification systems shall include visible identification. A physical herd inventory shall be conducted between ninety days prior to and ninety days following the annual anniversary date established based upon the CWD Certified Herd Program enrollment date. Cervids that were killed or died during the course of the year must be tested. A state or federal animal health official must validate the annual inventory. A report of the validated annual inventory containing all man-made identification of each animal must be submitted to the Department.

All special purpose herds consisting of one or more CWD susceptible cervid shall participate in the CWD Certified Herd Program. Samples shall be submitted for testing as required by the Program. Each herd addition must have a minimum of two official/approved unique identifiers affixed to the animal. Carcass and sample identification tags must be affixed to unidentified harvested captive cervids, natural deaths, and clinical suspects.

Direct movement from a CWD monitored herd to an approved CWD slaughter facility requires a permit from the Department prior to movement; all animals moved must be individually identified with an approved identification tag and all animals must be slaughtered within six days of the time the animals leave the premises of the CWD monitored herd.

Approved CWD susceptible slaughter facilities must have holding pens constructed to prevent contact with captive or free-ranging cervid populations. Sample retention and holding facilities must be adequate to preserve and store diagnostic tissues for seventy-two hours after slaughter. A CWD susceptible cervid offal disposal plan must be developed, implemented and approved by the Department in consultation with the Department of Environmental Conservation.

Herd owners, in conjunction with the Department and USDA/APHIS, must develop CWD herd plans for any CWD positive, exposed or suspect herd. Perimeter fencing adequate to prevent fence line contact with captive and free-ranging cervids must be established for all CWD positive herds and positive premises. The carcasses of CWD positive cervids that are depopulated shall be disposed of in accordance with disposal plans approved by the Department and USDA/APHIS.

The rule would have no impact on local governments.

### 3. Professional Services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

### 4. Compliance Costs:

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

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from \$500 to \$2,000 per animal. The value of deer ranges from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as a CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7' plastic mesh and \$2.00 per foot for posts (\$20 post every 10 feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

The rule also requires that captive cervid operations, with the exception of special purpose herds have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inven-

tory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms with 1,646 deer that will need to upgrade their capture and restraint facilities. The owners of those farms will have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

Whitetailed deer experience a five percent to ten percent death loss when handled for purposes such as testing. The majority, 1,975 out of 2,950, of captive whitetailed deer in the State are in quarantined premises and will not have to be handled. Handling the other captive whitetailed deer in the State can be expected to produce a death loss of 49 to 98 deer on 43 farms for a loss of \$1,700 to \$3,400 per farm per year, assuming a \$1,500 value per deer.

The labor costs associated with the handling of captive cervids required by this Part will average three person days or \$250.00 per year per farm. It is estimated that the recordkeeping associated with this rule will require less than one hour each year on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of \$400 to \$500 per farm.

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

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between \$500 and \$1,000 per farm annually, or between \$121,500 and \$243,000 to carry out necessary inspections and to collect and process samples.

#### (c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

### 5. Economic and Technological Feasibility:

The economic and technological feasibility of complying with the proposed amendments has been assessed. The rule is economically feasible. Although the regulation of the importation of captive deer into New York State will have an economic impact on the entities that imported a total of 360 captive deer into New York State in 2002, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater. The rule is technologically feasible. Captive deer imported into the State are already required to be accompanied by a health certificate. Endorsement of that certificate with the number of the permit issued by the Department presents no technological problem. The structural, recordkeeping and testing requirements of the rule involve existing technologies that are already in use.

### 6. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certified Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

The rule would have no impact on local governments.

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

In developing this rule, the Department has consulted with representatives of the approximately 433 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

### **Rural Area Flexibility Analysis**

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

The approximately 433 entities raising captive deer in New York State are located throughout the rural areas of New York.

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

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a movement permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New

York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least seventy-two months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be followed for positive or trace herds that would be implemented within sixty days of a diagnosis of CWD. All captive cervid locations shall be identified by a federal premises identification number issued by the Department and APHIS. The owner of the cervids must provide an adequate geographic location description and contact information in order to receive a federal premises identification number. It is not anticipated that regulated parties in rural areas will have to secure any professional services in order to comply with the rule.

3. Costs:

(a) Costs to regulated parties:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from \$500 to \$2,000 per animal. The value of deer ranges from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming that the farms will use post extensions and wire or tape, since at that height, only a visual barrier is needed, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as a CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7' plastic mesh and \$2.00 per foot for posts (\$20 post every 10 feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

The rule also requires that captive cervid operations, with the exception of special purpose herds have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms that will need to upgrade their capture and restraint facilities. Since the Department currently owns three portable deer chutes, the owners of those farms will only have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

Whitetailed deer experience a five percent to ten percent death loss when handled for purposes such as testing. The majority, 1,975 out of 2,950, of captive whitetailed deer in the State are in quarantined premises and will not have to be handled. Handling the other captive whitetailed deer in the State can be expected to produce a death loss of 49 to 98 deer on 43 farms for a loss of \$1,700 to \$3,400 per farm per year, assuming a \$1,500 value per deer.

The labor costs associated with the handling of captive cervids required by this Part will average three person days or \$250.00 per year per farm. It is estimated that the recordkeeping associated with this rule will require less than one hour each year on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of \$400 to \$500 per farm.

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

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between \$500 and \$1,000 per farm annually, or between \$121,500 and \$243,000 to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

4. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certification Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

5. Rural Area Participation:

In developing this rule, the Department has consulted with representatives of the approximately 433 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis and of the proposed adoption of the rule on a permanent basis, as required by the State Administrative Procedure Act.

**Job Impact Statement**

1. Nature of Impact:

It is not anticipated that there will be an impact on jobs and employment opportunities.

2. Categories and Numbers Affected:

The number of persons employed by the 433 entities engaged in raising captive deer in New York State is not known.

3. Regions of Adverse Impact:

The 433 entities in New York State engaged in raising captive deer are located throughout the rural areas of the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,600 captive deer currently raised by approximately 433 New York entities from the introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

**Permanency, Safety and Well-Being of Children in Foster Care**

**I.D. No.** CFS-37-06-00009-E

**Filing No.** 1145

**Filing date:** Sept. 25, 2006

**Effective date:** Sept. 25, 2006

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

**Action taken:** Addition of section 426.10; amendment of sections 421.4, 421.6, 421.17, 428.1, 428.2, 428.3, 428.4, 428.6, 428.7, 428.8, 428.9, 428.10, 430.8, 430.12 and 431.9; and repeal of sections 430.1-430.7, 430.13 and 441.20 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 383-c, 384 and 409-e; and Family Court Act, art. 10-A and section 1017

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

**Specific reasons underlying the finding of necessity:** The adoption of these regulations on an emergency basis is necessary for the preservation of the health, safety and welfare of children placed outside of their homes. Chapter 3 of the Laws of 2005 takes effect on December 21, 2005, and provides children placed out of their homes with more timely and effective judicial and administrative reviews in order to promote permanency, safety and well-being. Chapter 3 of the Laws of 2005 also contains authority for promulgating these regulations on an emergency basis, such that the benefits and protections afforded children who have placed outside of their homes will not be delayed. Delaying the adoption of these regulations would be contrary to the public interest because it could delay implementation of the enhanced procedures contained in Chapter 3 of the Laws of 2005, which are designed to improve permanency outcomes for children in foster care. Therefore, it is necessary to adopt these regulations on an emergency basis.

**Subject:** Promotion of permanency, safety and well-being of children who have been placed outside of their homes.

**Purpose:** To improve permanency outcomes for children in foster care.

**Substance of emergency rule:** Section 421 (Adoption Services)

The amendments conform the requirements for periodic court reviews, permanent neglect proceedings and conditional surrenders with amendments enacted by Chapter 3 of the Laws of 2005 (Permanency Bill).

Section 426.10 (Title IV-E Foster Care and Adoption Assistance)

Adds a new section to meet Title IV-E State Plan requirements regarding the specific goal for the maximum number of children who remain in foster care for more than 24 months.

Sections 423.2 (Definitions), 430.9 (Appropriate Provision of Mandated Preventive Services), 430.11 (Appropriateness of Placement), 431.9 (Termination of Parental Rights by Local Social Services Agency), 432.2 (Child Protective Service: Responsibilities and Organization), 441.21 (Casework Contacts), 441.22 (Health and Medical Services), 443.2 (Authorized Agency Operating Requirements), 476.2 (Terms and Conditions) and 507.2 (Special Assessments, Examinations and Tests Required for Children in Foster Care)

These sections are amended to reflect the change of the permanency goal from "independent living" to "another planned living arrangement with a permanency resource", as enacted by Chapter 3 of the Laws of 2005.

Part 428 (Standards for Uniform Case Records)

The amendments conform the requirements for periodic family assessments and service plans, plan amendments, service plan reviews and permanency hearing reports with Chapter 3 of the Laws of 2005. It adds such requirements for children placed by a court in the direct custody of a relative or other suitable person. It adds a case consultation requirement with certain required parties in order to meet the review requirements prior to the development of the permanency hearing report and the permanency hearing required by Chapter 3 of the Laws of 2005. It also conforms the requirements for seeking and obtaining information about absent and non-respondent parents and other relatives in accordance with the new Chapter Law.

Part 430 (Additional Limitations on Reimbursement Utilization Review for Foster Care and Preventive Services)

18 NYCRR 430.1 through 430.7 and 430.13 are repealed to reflect the repeal of sections 153-d and 398-b of the Social Services Law by Chapter 83 of the Laws of 2002. 18 NYCRR 430.8 is amended to reflect the uniform case recording standards set forth in 18 NYCRR Part 428. 18 NYCRR 430.12 is amended to add further definition to the service plan review process, including making the administrative service plan review unnecessary when a permanency hearing meets the federal requirements for an administrative or judicial review. In addition the permanency planning goal of "independent living" is changed to "another planned living arrangement with a permanency resource" in accordance with Chapter 3 of the Laws of 2005.

Section 431.9 (Termination of Parental Rights by a Local Social Services Agency)

The amendment makes minor conforming changes to reflect Chapter 3 of the Laws of 2005, so that considerations related to a determination to terminate parental rights are made in relation to the permanency hearing schedule.

Section 441.20 (Family Court Review of the Status of Children in Foster Care)

This section is repealed as it has been made obsolete by Chapter 3 of the Laws of 2005.

Technical amendments are made to sections 423.2 and 426.4 to make corrections to cross-references necessitated by the repeal of other sections.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. CFS-37-06-00009-P, Issue of September 13, 2006. The emergency rule will expire December 23, 2006.

**Text of emergency 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

#### Regulatory Impact Statement

##### 1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State.

Section 1017 of the Family Court Act (FCA), as amended by Chapter 3 of the Laws of 2005, authorizes the collection of certain information on non-respondent parents and relatives of children when the court determines that such children must be removed from their homes. Furthermore, such section authorizes the placement of the child with a non-respondent parent, relative or other suitable person.

Article 10-A of the FCA establishes uniform procedures for permanency hearings for all children who are placed in foster care either voluntarily or as abused or neglected children, or are directly placed with a relative or other suitable person pursuant to Article 10 of the FCA and all foster children who are completely freed for adoption.

Section 383-c of the SSL establishes the criteria for the surrender of custody and guardianship of a child in foster care to an authorized agency.

Section 384 of the SSL establishes the criteria for the surrender of custody and guardianship of a child not in foster care to an authorized agency.

Section 409-e of the SSL establishes the requirements for the completion, updating and review of assessments and services plans for all children who are in foster care and who are at risk of placement into foster care.

##### 2. Legislative objectives:

Chapter 3 of the Laws of 2005 provides children placed out of their homes with more timely and effective judicial and administrative reviews in order to promote permanency, safety and well-being. To effectuate this purpose, Chapter 3 grants the courts continuing jurisdiction over children in foster care placements under Article 10 of the Family Court Act, children who have been voluntarily placed in foster care, and children who have been completely freed for adoption; improves permanency outcomes for children in foster care; and provides for comprehensive reform of the provisions of law which govern the permanency hearing processes for children placed in the foster care or placed directly with a relative or other suitable person under Article 10 of the FCA. Chapter 3 of the Laws of 2005 further addresses the issue of conditional surrenders for adoption and any associated agreement that has been made for ongoing contact and communication between the adopted child and the birth parent and/or sibling or half sibling of the adopted child. This legislation also establishes standards for enforcement of the terms of conditional surrenders both prior and subsequent to the adoption of the child based on the best interests of the child.

Additionally, the regulations reflect the repeal of sections 153-d and 398-b of the SSL by Chapter 83 of the Laws of 2002 which, previous to repeal, had authorized OCFS to sanction social services districts if they did not meet certain requirements, including those relating to timely filing of certain court review petitions that have been eliminated by Chapter 3 of the Laws of 2005. The repeal of 18 NYCRR 430.1 through 430.7 and 430.13 are necessary to reflect these statutory changes.

##### 3. Needs and benefits:

The regulations implementing Chapter 3 of the Laws of 2005 provide for a more frequent series of administrative reviews and service plan development activities involving all parties with a stake in the outcome. The regulations support permanency planning through enhancing the service plan review process and the collection of comprehensive and timely information for the development of the permanency hearing report. The regulations also set out the critical areas of review necessary to advance the child's permanency plan. In accordance with the legislation, these regula-

tions provide a specific means for meeting documentation requirements with regard to a child's out-of-home placement or for any child considered for foster care. The regulations implement the change of the permanency goal from "independent living" to "discharge to another planned living arrangement with a permanency resource". The regulations support the need to locate an absent parent and other relatives of a child in out-of-home placement, in order to consider each of those persons as a resource for the child. The regulations also provide that any person designated by the child's birth parent to be the child's adoptive parent in a conditional surrender to be a certified or approved foster parent or an approved adoptive parent, in support of a child's need for a safe, permanent home.

#### 4. Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency for children in care and the associated savings attached to a shorter length of stay.

State activities related to the implementation of the statute and regulations will result in the delay of the final release of CONNECTIONS due to the redesign of current aspects of Build 18 (Case Management) and to incorporate the regulatory changes into the design of Build 19 (Financial Management).

There are anticipated costs as well as savings for local social service districts and voluntary authorized agencies as a result of implementation of the statutory provisions underlying these regulations. Initial implementation, as with any major policy and practice change, will require additional staff time to learn the new process and, with these regulations, to complete the statutorily required permanency hearing report and conduct case consultations prior to the development of permanency hearing reports in a more formal manner than is currently required. These staff costs will be offset, in part, by: the elimination of the requirements for administrative service plan reviews whenever the family court permanency hearing meets the federal requirement for such review to be held at least every six months; the elimination of the requirement for case consultations prior to service plan reviews; the elimination of filing of petitions with family court in most child welfare related matters, and elimination of the personal service of notice of hearings. Due to date certain calendaring of permanency hearings, it is anticipated that there will be a reduction in court adjournments resulting from the legislation underlying the regulations. This will reduce the time staff must spend in family court. Staff costs will be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

Additional savings to local districts include anticipated reduced lengths of foster care stays for some children as a result of permanency hearings held more frequently than is now the case. There is also the potential to avoid foster care placements at the time of emergency removals by requiring hearings in all cases. The implementation of these regulations and the underlying statutory provisions will also eliminate lapsed authority for foster care placements, as the court retains continuing jurisdiction until the child is discharged, and will promote more timely reasonable efforts determinations by the court, thereby reducing the compliance items for which the State, and therefore the local districts, may be sanctioned in the secondary federal Title IV-E review scheduled in New York State for August 2006 and subsequent Title IV-E reviews.

#### 5. Local government mandates:

The primary mandates are on local social services districts and voluntary authorized agencies to prepare for permanency hearings by conducting a case consultation with case members and other participants. Although case consultation is currently required, these regulations impose a formal structure and process. This case consultation is in addition to the service plan review that districts and agencies already conduct with such persons. In addition, they must prepare permanency hearing reports on the prescribed statutory schedule, increasing documentation requirements upon local social services districts. However, the requirement for preparation, filing and serving of petitions for most child welfare related court hearings no longer exists, thus offsetting such increased documentation requirements. The requirements established by the regulations are in keeping with the intent of Chapter 3 – that children served by the child welfare system are in settings where they are as safe as possible, and that such children reside in permanent homes as soon as reasonably can be accomplished.

#### 6. Paperwork:

Chapter 3 of the Laws of 2005 requires the completion of a permanency hearing report for filing with the court and sharing with other persons involved in the case for all children in foster care, with the exception of non-completely freed juvenile delinquents and persons in need of supervision, and all children directly placed in the custody of a relative or other suitable person pursuant to Article 10 of the FCA. This is a new requirement for child welfare staff who serve children impacted by Chapter 3. OCFS, in collaboration with OCA, the Administration for Children Services in New York City and a representative sample of local social services districts developed templates for use Statewide to meet the permanency hearing report requirement and to alleviate the need for local social services districts to design and create their own reports. Additionally, the requirements for Uniform Case Record documentation in accordance with section 409-e of the SSL have increased when a child is removed from his or her home. It is anticipated that there will be implementation costs associated with these regulations. The impact will be dependent on the individual district's or agency's current circumstances and capacity. This impact will be mitigated by the introduction of an automated permanency hearing report in 2007. In addition, this increase is partially offset by the first reassessment being due one month later than had previously been required.

#### 7. Duplication:

The regulations do not duplicate other State requirements.

#### 8. Alternatives:

There are no alternatives to these regulations as they are governed by the statutory requirements of Chapter 3 of the Laws of 2005.

#### 9. Federal standards:

This legislation facilitates permanency planning for such children and assists New York State to comply with federal standards set forth in the federal Adoption and Safe Families Act of 1996 (ASFA) and other eligibility requirements under Title IV-E of the Social Security Act. Each time a permanency hearing is delayed, a child potentially stays needlessly longer in foster care. If the permanency hearing is not timely, pursuant to federal Title IV-E standards, the local social services district is at jeopardy of losing federal Title IV-E funding for foster care for the child, until an appropriate court finding of reasonable efforts to enable a child to return home safely, if the goal is reunification, or that reasonable efforts were made to finalize the child's permanency plan is made. Chapter 3 improves permanency by granting the Family Court continuing jurisdiction over the child during foster care placement. By providing the Court with continuing jurisdiction, legal authority of the local social services district over the child placement does not lapse until completion of the child's permanency hearing or further direction of the court. Prior to enactment of Chapter 3 a lapse in legal authority could occur resulting in ineligibility for reimbursement under Title IV-E of the Social Security Act for foster care for the child. It is expected that continuing jurisdiction should reduce by months the time a child might spend in foster care.

#### 10. Compliance schedule:

Compliance with the regulations must begin immediately upon filing. December 21, 2005 is the effective date of the relevant sections of Chapter 3 of the Laws of 2005.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

Social services districts will be affected by the regulation. There are 58 social services districts. The St. Regis Mohawk Tribe is authorized as a social services district to provide child welfare services pursuant to its State/Tribal Agreement with OCFS. Voluntary authorized agencies also will be affected by the proposed regulation. There are approximately 250 of such agencies.

#### 2. Compliance Requirements:

The regulations would impose requirements on local social services districts and voluntary authorized agencies in relation to the preparation for permanency hearings by conducting a case consultation with case members and other participants. Although case consultation is currently required, these regulations impose a formal structure and process. This case consultation is in addition to the service plan review they already conduct with such persons. In addition, the districts and agencies must prepare permanency hearing reports on the prescribed statutory schedule, increasing documentation requirements upon local social services districts and the voluntary authorized agencies with which they contract. The requirements established by the regulations are consistent with the requirements and intent of Chapter 3 of the Laws of 2005 – that children served by the child welfare system are in settings where they are as safe as possible, and that such children reside in permanent homes as soon as reasonably can be accomplished.

Additionally, the regulations reflect the repeal of sections 153-d and 398-b of the SSL by Chapter 83 of the Laws of 2002 which, previous to repeal, had authorized OCFS to sanction social services districts if they did not meet certain requirements, including those relating to timely filing of certain court review petitions that have been eliminated by Chapter 3 of the Laws of 2005. The repeal of 18 NYCRR 430.1 through 430.7 and 430.13 are necessary to reflect these statutory changes.

### 3. Professional Requirements:

It is expected that there will be implementation costs associated with Chapter 3 and the regulations. The impact will be dependent upon the district's or agency's current circumstances and staffing. Current training programs will be enhanced to emphasize the casework support addressed by the regulations, meaning appropriate staff must be trained.

### 4. Compliance Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency for children in care and the associated savings attached to a shorter length of stay.

State activities related to the implementation of the statute and regulations will result in the delay of the final release of CONNECTIONS due to the redesign of current aspects of Build 18 (Case Management) and to incorporate the regulatory changes into the design of Build 19 (Financial Management).

There are anticipated costs as well as savings for local social service districts and voluntary authorized agencies as a result of implementation of the statutory provisions underlying these regulations. Initial implementation, as with any major policy and practice change, will require additional staff time to learn the new process and, with these regulations, to complete the statutorily required permanency hearing report and conduct case consultations prior to the development of permanency hearing reports in a more formal manner than is currently required. These staff costs will be offset, in part, by: the elimination of the requirements for administrative service plan reviews whenever the family court permanency hearing meets the federal requirement for such review to be held at least every six months; the elimination of the requirement for case consultations prior to service plan reviews; the elimination of filing of petitions with family court in most child welfare related matters, and elimination of the personal service of notice of hearings. Due to date certain calendaring of permanency hearings, it is anticipated that there will be a reduction in court adjournments resulting from the legislation underlying the regulations. This will reduce the time staff must spend in family court. Staff costs will be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

Additional savings to local districts include anticipated reduced lengths of foster care stays for some children as a result of permanency hearings held more frequently than is now the case. There is also the potential to avoid foster care placements at the time of emergency removals by requiring hearings in all cases. The implementation of these regulations and the underlying statutory provisions will also eliminate lapsed authority for foster care placements, as the court retains continuing jurisdiction until the child is discharged, and will promote more timely reasonable efforts determinations by the court, thereby reducing the compliance items for which the State, and therefore the local districts, may be sanctioned in the secondary federal Title IV-E review scheduled in New York State for August 2006 and subsequent Title IV-E reviews.

### 5. Economic and Technological Feasibility:

Chapter 3 of the Laws of 2005 requires the completion of a permanency hearing report for filing with the court and sharing with other persons involved in the case for all children in foster care, with the exception of non-completely freed juvenile delinquents and persons in need of supervision, and all children directly placed in the custody of a relative or other suitable person pursuant to Article 10 of the Family Court Act (FCA). This is a new requirement for child welfare staff who serve children impacted by Chapter 3. The regulation will not impose any additional economic or technological burdens on social services districts or child welfare services providers. Districts and agencies will not need additional computers beyond those already provided by the State. The economic impact of implementation will vary.

### 6. Minimizing Adverse Impact:

The Office of Children and Family Services (OCFS), in collaboration with the Office of Court Administration (OCA), the Administration for Children Services in New York City and a representative sample of local

social services districts developed templates for use Statewide to meet the permanency hearing report requirement and to alleviate the need for local social services districts to design and create their own reports. However, requirements for preparation, filing and serving of petitions for most child welfare related court hearings no longer exists, thus offsetting such increased documentation requirements. Furthermore, the impact will be mitigated by the introduction of an automated permanency hearing report in 2007. Additionally, the requirements for Uniform Case Record documentation in accordance with section 409-e of the Social Services Law (SSL) were expanded by Chapter 3 of the Laws of 2005 when a child is removed from his or her home. This expansion is partially offset by the first reassessment being due one month later than had previously been required. Finally, OCFS has submitted a Title IV-E State Plan amendment to the federal government, so that a permanency hearing can take the place of the administrative service plan review meeting with a third party reviewer to meet the federal requirement that the case be reviewed by an administrative or judicial review with an independent reviewer, as long as the permanency hearing is held and completed within six months of the previous service plan review.

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

OCFS actively sought and obtained the input of local social services districts in designing the permanency hearing reports and in defining the requirements for family assessments and services plans, service plan reviews and case consultations to prepare for the permanency hearings.

### *Rural Area Flexibility Analysis*

#### 1. Effect on Rural Areas:

The regulations will affect the 44 social services districts that are in rural areas. The St. Regis Mohawk Tribe is authorized as a social services district to provide child welfare services pursuant to its State/Tribal Agreement with OCFS. Those voluntary authorized agencies in rural areas contracting with social services districts to provide foster care and adoption services also will be affected by the regulations. Currently, there are approximately 100 such agencies.

#### 2. Compliance Requirements:

The regulations would impose requirements on local social services districts and voluntary authorized agencies in relation to the preparation for permanency hearings by conducting a case consultation with case members and other participants. Although case consultation is currently required, these regulations impose a formal structure and process. This case consultation is in addition to the service plan review they already conduct with such persons. In addition, the districts and agencies must prepare permanency hearing reports on the prescribed statutory schedule, increasing documentation requirements upon local social services districts and the voluntary authorized agencies with which they contract. The requirements established by the regulations are consistent with the requirements and the intent of Chapter 3 of the Laws of 2005 – that children served by the child welfare system are in settings where they are as safe as possible, and that such children reside in permanent homes as soon as reasonably can be accomplished.

Additionally, the regulations reflect the repeal of sections 153-d and 398-b of the SSL by Chapter 83 of the Laws of 2002 which, previous to repeal, had authorized OCFS to sanction social services districts if they did not meet certain requirements, including those relating to timely filing of certain court review petitions that have been eliminated by Chapter 3 of the Laws of 2005. The repeal of 18 NYCRR 430.1 through 430.7 and 430.13 are necessary to reflect these statutory changes.

#### 3. Professional Services:

It is expected that there will be implementation costs associated with Chapter 3 and the regulations. The impact will be dependent upon the district's or agency's current circumstances and staffing. Current training programs will be enhanced to emphasize the casework support addressed by the regulations, meaning appropriate staff must be trained.

#### 4. Compliance Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency for children in care and the associated savings attached to a shorter length of stay.

State activities related to the implementation of the statute and regulations will result in the delay of the final release of CONNECTIONS due to the redesign of current aspects of Build 18 (Case Management) and to incorporate the regulatory changes into the design of Build 19 (Financial Management).

There are anticipated costs as well as savings for local social service districts and voluntary authorized agencies as a result of implementation of the statutory provisions underlying these regulations. Initial implementation, as with any major policy and practice change, will require additional staff time to learn the new process and, with these regulations, to complete the statutorily required permanency hearing report and conduct case consultations prior to the development of permanency hearing reports in a more formal manner than is currently required. These staff costs will be offset, in part, by: the elimination of the requirements for administrative service plan reviews whenever the family court permanency hearing meets the federal requirement for such review to be held at least every six months; the elimination of the requirement for case consultations prior to service plan reviews; the elimination of filing of petitions with family court in most child welfare related matters, and elimination of the personal service of notice of hearings. Due to date certain calendaring of permanency hearings, it is anticipated that there will be a reduction in court adjournments resulting from the legislation underlying the regulations. This will reduce the time staff must spend in family court. Staff costs will be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

Additional savings to local districts include anticipated reduced lengths of foster care stays for some children as a result of permanency hearings held more frequently than is now the case. There is also the potential to avoid foster care placements at the time of emergency removals by requiring hearings in all cases. The implementation of these regulations and the underlying statutory provisions will also eliminate lapsed authority for foster care placements, as the court retains continuing jurisdiction until the child is discharged, and will promote more timely reasonable efforts determinations by the court, thereby reducing the compliance items for which the State, and therefore the local districts, may be sanctioned in the secondary federal Title IV-E review scheduled in New York State for August 2006 and subsequent Title IV-E reviews.

#### 5. Minimizing Adverse Impact:

The Office of Children and Family Services (OCFS), in collaboration with the Office of Court Administration (OCA), the Administration for Children Services in New York City and a representative sample of local social services districts developed templates for use Statewide to meet the permanency hearing report requirement and to alleviate the need for local social services districts to design and create their own reports. However, requirements for preparation, filing and serving of petitions for most child welfare related court hearings no longer exists, thus offsetting such increased documentation requirements. Furthermore, the impact will be mitigated by the introduction of an automated permanency hearing report in 2007. Additionally, the requirements for Uniform Case Record documentation in accordance with section 409-e of the Social Services Law (SSL) were expanded by Chapter 3 of the Laws of 2005 when a child is removed from his or her home. This expansion is partially offset by the first reassessment being due one month later than had previously been required. Finally, OCFS has submitted a Title IV-E State Plan amendment to the federal government, so that a permanency hearing can take the place of the administrative service plan review meeting with a third party reviewer to meet the federal requirement that the case be reviewed by an administrative or judicial review with an independent reviewer, as long as the permanency hearing is held and completed within six months of the previous service plan review.

#### 6. Small Business Participation:

OCFS actively sought and obtained the input of local social services districts in designing the permanency hearing reports and in defining the requirements for family assessments and services plans, service plan reviews and case consultations to prepare for the permanency hearings.

#### **Job Impact Statement**

The regulations address various functions of social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies in relation to achieving permanency for children in foster care. It is anticipated that these functions will be assumed by the current staff of such agencies and that the regulations will not have a substantial impact on jobs or employment opportunities in either public or private child welfare agencies. A full job statement has not been prepared for the regulations that are implementing Chapter 3 of the Laws of 2005. The regulations would not result in the loss of any jobs.

## Department of Civil Service

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-41-06-00010-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Labor.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Labor under the subheading "State Insurance Fund," by increasing the number of positions of Special Investment Officer from 3 to 4.

**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-41-06-00011-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) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Transportation.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Transportation, by increasing the number of positions of Special Assistant from 11 to 14.

**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-41-06-00012-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) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Executive Department.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of Homeland Security," by adding thereto the positions of Special Assistant (4).

**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-41-06-00013-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 Department of Labor.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor under the subheading "State Insurance Fund," by adding thereto the position of Director Training 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.

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

**Jurisdictional Classification**

**I.D. No.** CVS-41-06-00014-P

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

**Proposed action:** Amendment of 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 Department of Civil Service.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Civil Service under the subheading "Public Employment Relations Board," by adding thereto the position of Assistant Director Public Employment Conciliation (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-41-06-00015-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 Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Temporary and Disability Assistance," by increasing the number of positions of Immigrant Community Specialist 2 from 4 to 5.

**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-41-06-00016-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 Parole," by

increasing the number of positions of Assistant Regional Director of Parole Operations from 5 to 7.

**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-41-06-00017-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 in the Department of Mental Hygiene.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Mental Health," by adding thereto the positions of Advocacy Specialist 1 (1) and Advocacy Specialist 2 (2).

**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-41-06-00018-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 Department of Health.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Health, by deleting therefrom the position of Econometrician 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.

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

**Jurisdictional Classification**

**I.D. No.** CVS-41-06-00019-P

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

**Proposed action:** Amendment of 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 Westchester County.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in Westchester County under the subheading "Department of Correction" by deleting therefrom the position of Director-Correctional Health Services.

**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-41-06-00020-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 and classify a position in the non-competitive class in the Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by deleting therefrom the position of Ministerial Program Coordinator (1) and by adding thereto the position of Children and Family Services Ministerial Program Coordinator (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-41-06-00021-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 and classify a position in the non-competitive class in the Department of Environmental Conservation.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Environmental Conservation, by deleting therefrom the position of Fish Hatchery Maintenance Supervisor (1) and by adding thereto the position of Maintenance Supervisor 1 Fish Hatchery (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-41-06-00022-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 and classify positions in the non-competitive class in the Department of Mental Hygiene and the State University of New York.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Alcoholism and Substance Abuse Services," by deleting therefrom the position of Deputy Director Research Institute on Alcoholism (1); and, in the State University of New York under the subheading "SUNY at Buffalo," by adding thereto the positions of Deputy Director Research Institute on Alcoholism (1) and Director Research Institute on Alcoholism (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-41-06-000023-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) 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the exempt and non-competitive classes in the Executive Department.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department, by deleting therefrom the subheading "Office of Science, Technology and Academic Research," and the positions of Confidential Aide, Counsel, Deputy Director (3), Director of Operations, Director of Public Information, Executive Deputy Director, Secretary (3) and Special Assistant (3); and

Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department, by deleting therefrom the subheading "Office of Science, Technology and Academic Research," and the positions of Associate Counsel (1), Associate Policy Analyst NYSTAR (1), Associate Program Representative NYSTAR (2), Chief Program Specialist NYSTAR (1), Principal Policy Analyst NYSTAR (1), Principal Program Representative NYSTAR (1), Principal Program Specialist NYSTAR (2), Senior Policy Analyst NYSTAR (4) and Supervising Program Representative NYSTAR (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.

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## Department of Correctional Services

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### NOTICE OF ADOPTION

#### Inmate Correspondence Program

I.D. No. COR-28-06-00006-A

Filing No. 1142

Filing date: Sept. 22, 2006

Effective date: Oct. 11, 2006

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

**Action taken:** Amendment of sections 720.3 and 720.4 of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Inmate Correspondence Program.

**Purpose:** To require inmates to pay for certified or registered mail services and allow inmates to receive canceled, copied or voided checks or money orders.

**Text or summary was published** in the notice of proposed rule making, I.D. No. COR-28-06-00006-P, Issue of July 12, 2006.

**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

**Access to Records**

**I.D. No.** ENV-29-06-00002-A  
**Filing No.** 1151  
**Filing date:** Sept. 26, 2006  
**Effective date:** Oct. 11, 2006

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

**Action taken:** Amendment of Part 616 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 3-0301(2)(a); Public Officers Law, sections 87, 89, 92, 94, 95 and 96; and L. 2005, ch. 22

**Subject:** Access to records.

**Purpose:** To correct typographical errors that were made during the rule making that amended Part 616 of Title 6 NYCRR on November 30, 2005.

**Text or summary was published** in the notice of proposed rule making, I.D. No. ENV-29-06-00002-P, Issue of July 19, 2006.

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

**Text of rule and any required statements and analyses may be obtained from:** Helene G. Goldberger, Department of Environmental Conservation, Office of Hearings and Mediation Services, 625 Broadway, Albany, NY 12233-1550, (518) 402-9010, e-mail: hg-goldbe@gw.dec.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## Department of Health

### EMERGENCY RULE MAKING

**Payment for FQHC Psychotherapy and Offsite Services**

**I.D. No.** HLT-41-06-00009-E  
**Filing No.** 1144  
**Filing date:** Sept. 25, 2006  
**Effective date:** Sept. 25, 2006

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

**Action taken:** Amendment of section 86-4.9 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201.1(v)

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

**Specific reasons underlying the finding of necessity:** The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit article 28 clinics from billing for

group visits and to prohibit such services from being provided by part-time clinics.

Based upon the department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New Federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by Federal law. Failure to comply with these mandates could lead to Federal sanctions and the loss of Federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

**Subject:** Payment for FQHC psychotherapy and offsite services.

**Purpose:** To permit psychotherapy by certified social workers as a billable service under certain circumstances.

**Text of emergency rule:** Section 86-4.9 is amended to read as follows:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in paragraph (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services with the exception of clinical social services in FQHC clinics as defined in paragraph (g) of this section, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g) For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(h) Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promul-

gated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.

(i) Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.

(1) FQHC offsite services must:

(i) consist of services normally rendered at the FQHC site.

(ii) be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.

(iii) be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.

(iv) be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.

(v) not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.

(vi) not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.

(2) Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.

**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 December 23, 2006.

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

**Regulatory Impact Statement**

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act and 1905(a)(2) of the Social Security Act require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

- Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.
- Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.
  - Payment will be made on the basis of a FQHC group rate.
  - Payment will only be made for services that occur in FQHCs.
- Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.
- Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.
- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

Costs:

Costs for the Implementation of, and Continuing Compliance with this Regulation to Regulated Entity:

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services. These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Downstate			Statewide Average	Cost Estimates
	Downstate	Upstate	Statewide Average		
Offsite Visits					Offsite Visits
Subsequent Hospital Care	\$62.73	\$55.19	\$58.96		\$1,117,212
Psychotherapy Services					Group Therapy
Group Psychotherapy	\$34.86	\$30.81	\$32.84		\$6,222,733
2004 FQHC Visit Volume	1,894,864				
					Total
					\$7,339,945

Volume Increase Assumptions

Group Therapy Increase = 10% Increase

2004 FQHC Volume.

Off-site Visit Increase = 1% Increase

Over 2004 FQHC Volume

Cost to the Department of Health:

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

Local Government Mandates:

This amendment will not impose any program service, duty or responsibility upon any county, city, town, village school district, fire district or other special district.

Paperwork:

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

Federal Standards:

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

Compliance Schedule:

The proposed amendment will become effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

Effect on Small Businesses and Local Governments:  
No impact on small businesses or local governments is expected.

**Compliance Requirements:**

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Professional Services:**

No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department's (SED) new standards for social worker licensure.

**Compliance Costs:**

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Economic and Technological Feasibility:**

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

**Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Small Business Participation:**

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**

This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:**

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

**Compliance Costs:**

There are no direct costs associated with compliance.

**Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Rural Area Participation:**

The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and associations represent social workers and clinic providers from across the State, including rural areas.

**Job Impact Statement**

**Nature of Impact:**

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

**Categories and Numbers Affected:**

There are almost 1,000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

**Regions of Adverse Impact:**

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

**Minimizing Adverse Impact:**

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

**Self-Employment Opportunities:**

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

**NOTICE OF ADOPTION**

**Statewide Perinatal Data System**

**I.D. No.** HLT-46-05-00001-A

**Filing No.** 1148

**Filing date:** Sept. 26, 2006

**Effective date:** Oct. 11, 2006

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

**Action taken:** Addition of section 400.22 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 206(1), 2500, 2803(2), (4), (8), 2803(3), 2805-j and 2805-m; and Social Services Law, section 366-g

**Subject:** Statewide Perinatal Data System.

**Purpose:** To establish the SPDS to provide useful data on the births and maternal health for perinatal care providers and the Department of Health; and promote expedited Medicaid eligibility determination for newborns.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-46-05-00001-P, Issue of November 16, 2005.

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

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

**Assessment of Public Comment**

**Comment:**

Section 400.22(a) – One commenter requested deletion of the last sentence, stating that the regulations would control the hospitals' ability to access their own data.

**Response:**

Changes are not recommended. When complete and fully implemented, the system will provide the ability for hospitals to access their own data, as well as de-identified, aggregate data.

**Comment:**

Section 400.22(b) - One commenter expressed concern that it is unclear what data will be requested in the high-risk obstetric model and how the data will be obtained.

**Response:**

Changes are not recommended. The high risk obstetrical module has not been developed as yet. When the module is developed, it will be done in accordance with section 400.22(b)(4) of the Statewide Perinatal Data System (SPDS) regulations.

**Comment:**

Section 400.22(b)(3) - One commenter requested the addition of "not requiring signed consent" regarding the definition of the supplemental module, a set of data supplied by the patient.

**Response:**

Changes are not recommended. Once these regulations are adopted, signed consent language will no longer be necessary.

**Comment:**

Section 400.22(b)(5) – One commenter requested the addition of the following language regarding the high risk neonatal module: "Information collected shall be for newborns determined to be a live birth. Information shall include specific interventions provided to maintain or sustain the life of the newborn, including time and duration of interventions." The intent is that it is important to know and document that these newborns are determined to be live births, not fetal death in utero, and to have specific information on the type and duration of interventions attempted to sustain the life of the newborns.

Another commenter expressed concern that data is collected on "all" newborns who die in the delivery room, and recommended specification of a low-end weight cutoff, and possibly, a gestational age cutoff for infants that are entered into the NICU Module. The intent is that there is a portion of live-birth infants who die in the delivery room, who weigh significantly less than 400 grams, and for whom intensive care services are not an option.

**Response:**

Changes are not recommended. Use of the language "newborns who die in the delivery room" implies a live birth, followed by the death of the infant.

Regarding the suggested newborn weight language, the definition as contained in Section 400.22(b)(5) of the SPDS regulations is sufficiently

broad to collect clinically relevant information. The NICU module guidance on which infants to collect data will be used to operationalize this language.

Comment:

Section 400.22(b)(7)—One commenter requested the addition of “or facilities” to the following language, “. . . patients can be identified by using such data by the facility which provided the patient care and services.” The intent is that this language allows for the possibility that a woman or infant received care at more than one facility, and for all of these facilities to have access to the appropriate data.

Another commenter requested the deletion of the last 11 words in this section. The intent is that the providing facility cannot identify its own patients from the data under these regulations, rendering this sentence misleading.

Response:

Changes are not recommended. The additional language is not necessary and would not change the legal basis on which data are shared. The facility providing care has access to the data for that patient. The hospital submitting the SPDS data is the hospital that would have access to the data.

Comment:

Section 400.22(b)(8) – One commenter suggested that although section 400.22(c)(4) restricts the use of SPDS data to quality improvement purposes, section 400.22(b)(8) is so broadly written that any perinatal analysis would meet this definition. The commenter asks for clarification regarding whether SPDS data can be used for publishable research purposes.

Another commenter requested the addition of “county” regarding trends by hospital, hospital level or region. The intent is county level data be made available; that without county level data, local departments of health and perinatal networks cannot make best use of the data.

Response:

Changes are not recommended. Although the results of perinatal data analysis may be published in conjunction with quality improvement efforts, the intent must be the improvement of care regionally, not the expansion of general knowledge, as is the goal of research. Use of data for research purposes is covered under statute and requires institutional review board approval (IRB).

Regarding county level data, these regulations do not address county access to data.

Comment:

Section 400.22(c)(2) – One commenter requested deletion of the second-to-last sentence of the section, regarding issues of patient consent. The intent is that hospitals must be allowed to share data with RPCs.

Response:

Change is not recommended. The current regulatory language provides for transmission of data in compliance of regulation and additional data with consent, when consent is needed. This language is not meant to restrict release of data but protect information that cannot otherwise be released without consent.

Comment:

Section 400.22(c)(4) – One commenter recommended deletion of the first sentence, regarding access to SPDS data. The intent is that this clause removes any flexibility on the part of hospitals and RPCs to conduct or allow research using SPDS data. It also appears to forbid hospitals and RPCs from releasing any data to any perinatal stakeholders, and it does not differentiate raw from processed data.

Response:

Changes are not recommended. Individual hospitals have access to the raw data they submitted. RPCs have access to de-identified record-level data.

Comment:

Section 400.22(c)(4)(ii) – One commenter expressed concern with complete de-identification, commenting that the SPDS database cannot be linked to the NICU database by the originating hospital. Complete de-identification renders impossible many legitimate QA analyses that might be undertaken (geocoding, gestational dating, length of stay analyses, etc.)

Response:

Changes are not recommended. Linkages to the NICU database will not be done by the RPC, but by the originating hospital or SDOH to preserve confidentiality of personally identifiable information.

Comment:

Section 400.22(c)(4)(iii) – One commenter requested deletion of “with all patient and provider information eliminated.” The intent is that elimination of identifiers renders impossible the detection of outlying providers

whose practices deviate markedly from the norm, as well as the assessment of variation in practice patterns between groups of providers.

A second commenter requested addition of the following language regarding access to available selected aggregate core and supplemental module data about births within its target area and adjacent/comparison areas, “and to data about births to its aggregated program participants (through the unique identifier available to the regional perinatal center),” with all patient and provider identifiers eliminated. The intent is that comprehensive prenatal/perinatal services networks have the same need that regional perinatal centers and other hospitals do to learn about the birth outcomes of women who participate in perinatal services, and that linking program participant data to birth record data and then providing de-identified aggregate data, as has been done in the past, is the only way to get an objective and consistent data set to support this analysis.

A third commenter suggested language revisions regarding release of data to perinatal networks and other community based organizations, and expressed concern that it is unclear the extent to which the RPC is permitted to provide selected aggregate level only data to other perinatal community programs such as the CPPSNs, ACOG, March of Dimes.

Response:

Changes are not recommended. The de-identification protocol is being developed in accordance with federal and state laws and regulations, as well as current industry standards for privacy protection. In addition, the use of SPDS data by community-based organizations, including perinatal networks, must be accomplished within their role of assessing and improving perinatal health in their target area, as specified in their contract with the SDOH. Aggregate data are sufficient for these purposes.

Regarding the second comment, the language refers to a network or community based organization “program participant.” These are outside the purview of these regulations. The SPDS does not identify specific program participants, so this analysis is beyond its scope.

Regarding the third comment, the existing section language is sufficient as it allows for a comprehensive prenatal/perinatal services network or other community-based organization under contract to the Department of Health to be given access to available selected aggregate core and supplemental module data about births within its target area, which is sufficient to allow these organizations to assess and improve the quality of perinatal services in their target area.

Comment:

Section 400.22 (c)(4)(v) – One commenter suggested this section be deleted, because it eliminates use of SPDS data for research purposes, severely and unjustifiably limiting its utility, and there is no reason why de-identified data cannot be redisclosed because such data already is available to national researchers.

Response:

Changes are not recommended. RPC and affiliate data will be available for quality improvement purposes. Any use of data for research purposes is covered by statute and all research must be approved by appropriate institutional review board(s).

Comment:

Legislative Objectives—One commenter expressed the following concerns: because of the “streamlining” of the SPDS, less data are collected; because of the web-based system, hospitals do not retain their own data (unless they double-enter it), and then only get back part of it . . . eventually; the RPC’s role, oversight of data collection and quality, and expediting local analysis and QA will be considerably more difficult if these regulations are adopted.

Response:

Changes are not recommended. When complete and fully implemented, the system will provide the ability for hospitals to access their own patient-specific data, as well as aggregate data. Therefore, when the SPDS has been fully implemented, hospitals will not need redundant data collection systems.

Comment:

Needs and Benefits – One commenter expressed concern that de-identification of data makes it impossible to identify geographic subpopulations and to track quality indicators, and that hospitals now have to double-enter data to retain it, increasing the duplicative burden on hospitals, not minimizing it.

Another commenter expressed concern that the SPDS core module and high risk NICU module are separate entities that do not communicate between each other, that the high-risk obstetric module is not yet developed, and expressed concerns about the creation of hospital performance reports based upon data from high-risk neonatal module.

Response:

Changes are not recommended. When complete and fully implemented, including development of the high-risk obstetric module, the entire system will function as envisioned, as a single internet-based statewide system. Privacy considerations constrain the linkage of data sets without adequate security and authorization in place. The department is working to resolve the issues.

With regards to the comment about hospital performance reports, one of the original intents of the system was to provide an opportunity for SDOH to assess the impact of the perinatal service system. The Department of Health views hospital performance reports as an important quality improvement measure.

Comment:

Costs for Implementation and Continuing Compliance with these Regulations to Regulated Entities – Two commenters questioned the applicability of the Dye *et al.* cost-benefit study; one states that the study had more advantages to regional hospitals than does the SPDS as proposed in these regulations.

Two commenters expressed concern that, because many high risk centers already have computerized data bases collecting the same data, the NICU module is redundant, and since the high-risk obstetric module is not yet developed, it is impossible to discern the future costs of that module.

Response:

Changes are not recommended. When complete and fully implemented, the system will provide the ability for hospitals to access their own patient-specific data, and hospitals will not need redundant data collection systems. Changes in the current system from the prototype of ten years ago are in response to evolving technological and legal environments, and an increased focus on issues of data confidentiality.

Comment:

Alternatives – One commenter expressed concern that, although each hospital did have to maintain a copy of its own software with the old system, at least they also had a copy of their own birth data. Data entry may be easier with the web-based system, but this advantage is far outweighed by the disadvantage of the hospital losing its own data as soon as the coder pushes the send button.

Response:

Changes are not recommended. When complete and fully implemented, the system will provide the ability for hospitals to access their own patient-specific data, and hospitals will not need redundant data collection systems.

Comment:

Regulatory Flexibility Analysis for Small Business and Local Governments – One commenter expressed concern that, since many hospitals (especially those handling high-risk infants) may already have their own database systems, there will be no reduction in the cost of data reporting, and use of the SPDS will not reduce the amount of data collection. In fact, the costs may actually increase, as hospitals have to create redundant positions in order to comply with these new regulations.

Response:

Changes are not recommended. When the system is complete and fully implemented, hospitals will not need redundant data collection systems, and so will not need redundant data entry positions.

Comment:

Rural Area Flexibility Analysis – One commenter made the same observation as noted in the Regulatory Flexibility Analysis for Small Business and Local Governments, that redundant systems and data entry positions will impact savings with the SPDS.

Response:

Changes are not recommended. When the system is complete and fully implemented, hospitals will not need redundant data collection systems, and so will not need redundant data entry positions.

Comment:

Job Impact Statement – One commenter objected to the last sentence, that the SPDS will “not change the number of individuals required to enter or analyze perinatal data in the hospital.” The commenter states that, “Although core module data, in one form or another, has always been part of the requirements for a facility, the addition of high-risk obstetrics or neonatal data will obviously require additional time for collection and entry.”

Response:

Changes are not recommended. When complete and fully implemented, the system will reduce the time required for data entry and quality assurance functions. Staff to conduct data entry and quality assurance activities are already in place, and utilization of the SPDS, when fully

implemented, should decrease, not increase, staffing demands by speeding up analysis functions and reducing the time needed for QI activities.

Comment:

General – Three commenters had general observations about the SPDS and these regulations. One commenter noted that, based on the data definitions, it would seem that research nurses would be required to collect truly accurate data, while the reality is that data clerks are most always employed to glean the information from the medical records.

The second commenter suggested that all of the data fields be restored and reverted to the original definitions, and that hospitals be allowed to retain a copy of their own data, and send to the RPC in that region a copy.

The third commenter observed that de-identified information prohibits geocoding and analysis of patient length of stay. The RPC then loses its ability to analyze its own data and loses timely access to data. Since the core and supplemental modules do not communicate with each other, it is difficult, for example, to link women with their infants who have been moved to NICU, making thorough analysis difficult.

Response:

Changes are not recommended. Regarding the first comment, in general, the data collected for the new system are similar to the data fields collected previously, so the collection and entry processes for the hospital should not change substantively.

Regarding the second comment, although some SPDS data elements have been changed to maintain compliance with new National Center for Health Statistics (NCHS) birth certificate standardization requirements, the data collected for the new system are generally similar to the data collected previously. Therefore, the collection and entry processes for the hospital should not change substantively. When complete and fully implemented, the system will provide the ability for hospitals to access their own data.

Regarding the third set of comments, discussions are underway to address these concerns. When complete and fully implemented, the system will provide the ability for hospitals to access their own data, as well as RPCs to receive de-identified, aggregate affiliate hospital data. Privacy considerations constrain the linkage of data sets without adequate security and authorization in place. The department is working to resolve the issues.

## NOTICE OF ADOPTION

### HIV Laboratory Test Reporting

**I.D. No.** HLT-31-06-00016-A

**Filing No.** 1147

**Filing date:** Sept. 26, 2006

**Effective date:** Oct. 11, 2006

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

**Action taken:** Amendment of Part 63 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2130, 2139 and 2786(1)

**Subject:** HIV laboratory test reporting.

**Purpose:** To expand laboratory test reporting include viral load and CD4 test results and HIV resistance testing.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-31-06-00016-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:** William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

#### Assessment of Public Comment

Three public comments were submitted to the NYS Department of Health (“DOH”) in response to this regulation from the New York City Department of Health and Mental Hygiene (“NYCDOHMH”), the New York Civil Liberties Union (“NYCLU”) and the HIV Law Project (“HIVLP”).

The NYCDOHMH expressed full support of the proposed amendment, noting that it will:

a. Allow the State’s HIV/AIDS surveillance system to continue to keep pace with changes in the epidemic;

b. Allow the state to monitor the extent of successful viral load suppression in the community through reporting of all viral loads, including undetectable viral loads levels, that will in turn permit an understanding of the need for and how best to provide services;

c. Provide the information necessary for planning for sufficient resources to meet the needs of individuals diagnosed with HIV by reporting of all CD4 counts (not just those with CD4 counts less than 500); and

d. Facilitate assessment of drug resistant HIV infection and resistance in treated populations that will in turn provide useful information to physicians making treatment decisions for newly diagnosed persons with drug-resistant HIV.

NYCDOHMH stated “the proposed expanded laboratory reporting will significantly enhance the ability of planners to monitor the epidemic and implement programs to prevent HIV, ensure access to care and improve quality of life for PLWHA [persons living with HIV and AIDS].”

The NYCLU and the HIVLP noted several concerns with the proposed regulations. Each concern is summarized below, followed by the DOH response.

**Comment:**

The proposed regulations violate New York Public Health Law (“PHL”) Section 2130(1) which requires physicians and diagnostic laboratories to report initial diagnoses of HIV, AIDS or an HIV-related illness.

**Response:**

DOH does not agree. The requirement to report additional tests and related information is based on the broad definition of an HIV related test in PHL 2780(4) and on authority in PHL sections 2130 and 2139. PHL Section 2780(4) defines “HIV related test” as any laboratory test or series of tests for any virus, antibody, antigen or etiologic agent whatsoever thought to cause or to indicate the presence of HIV or AIDS. (Emphasis added) Some viral load tests indicate various new stages of HIV related illness (e.g. increasing viral load), hence DOH sees viral load testing as part of a series of tests that serve as diagnostic markers of new stages of HIV illness. Viral resistance testing may indicate unique strains of HIV infection; hence it is also viewed as constituting a new diagnosis related to HIV illness.

Further, PHL Section 2130 permits a report to “contain such information concerning the case as shall be required by the commissioner.” This language permits the Commissioner to determine what medical information regarding a person with HIV/AIDS is necessary for epidemiologic surveillance in NYS. PHL section 2139 permits the DOH to promulgate regulations to implement the system. Clearly, the legislative intent of the law was to permit adequate monitoring and evaluation of HIV/AIDS for purpose of public health protection. A robust and complete surveillance system which can yield valid epidemiologic data to track the epidemic and to determine need for public health programs and funding was intended, with latitude afforded to the Commissioner to implement the system. It is to this end that these changes are proposed.

Further, it should be noted that this method of requiring reporting of all laboratory test results in the reportable range dates to the initiation of laboratory reporting for CD4 test results less than 200 cells per microliter in 1993. Currently, both the Centers for Disease Control and Prevention and the Council of State and Territorial Epidemiologists recommend that states undertake reporting of all viral load and all CD4 lymphocyte tests as the standard method of conducting laboratory based surveillance. Consequently, it is clear that the DOH is not abusing its discretion or acting in any manner outside of sound public health practice in promulgating this regulation, but rather is conforming to national recommendations.

These changes also make clear current practice regarding collection of necessary laboratory data in a manner that assures the security of confidential information. Upon receipt of a specimen for testing, laboratories have no way of knowing whether the specimen represents an initial diagnosis or not. Maintaining a registry of previously identified HIV + patients at each laboratory would create a potentially insecure situation. As this is clearly an undesirable risk, the only workable alternative (which has been in place with low CD4 lymphocytes since 1993 and with other viral load and CD4 lymphocyte values since the implementation of the HIV Reporting and Partner Notification Law in 2000) has been for the DOH to collect all reportable laboratory values and determine which are initial. This ongoing process is not changed by the proposed regulations.

The proposed regulations support ongoing development of New York’s HIV reporting system. HIV reporting is useful for public health program development, clinical applications and will be used to determine federal funding under the Ryan White CARE Act beginning in 2007. Most importantly, robust reporting allows the Health Department to be able to quickly respond to emerging issues.

**Comment:**

The Department of Health failed to articulate a proper basis for implementation of the proposed regulations.

**Response:**

While the 2005 case of a multi-drug resistant strain of HIV reported in New York City was an initial impetus for amending section 63.4(a)(4) and repealing 63.11, it was not the only reason for the regulatory change. This case highlighted the need for the Health Department to be able to respond quickly to such an occurrence, now and in the future. Reporting authorized under the new regulation will allow examination of trends in resistance patterns over time, thereby providing physicians with valuable information that will help guide HIV treatment practices. This information will also help public health agencies to make the best use of scarce resources to develop effective prevention and care programs. The process of introducing, finalizing and making operational regulatory requirements in a changing environment, where time is of the essence (in terms of prompt diagnosis and treatment) dictated that the State proceed to amend the regulation, first by emergency promulgation, now by routine rule making. To have taken no action would have constituted an inadequate public health response, and would not have met DOH’s statutory responsibilities to protect the health of NYS residents.

More specifically, multi-drug resistance remains a major issue in public health surveillance of the HIV epidemic. On-going, timely reporting is the only way to track this across a potentially affected population. The proposed regulations are consistent with the legislative intent to ensure an accurate epidemiologic assessment of the HIV/AIDS epidemic in New York State through complete reporting; and ensure a complete epidemiologic picture of HIV/AIDS incidence, prevalence and progression.

**Comment:**

The revised consent form fails to comply with statutory requirements for informed consent as listed in section 2781 of the Public Health Law. More specifically the form fails to a) specify the HIV tests to which a person is consenting; b) does not make clear to whom the consent has been given; and c) is a “one time for all” consent intended to cover tests conducted immediately as well as in the future.

**Response:**

Although the details of the new HIV test consent form will be addressed below, DOH believes that a discussion of the contents of the HIV test consent form is not directly relevant to the promulgation of this regulation since the form has been deleted from section 63.11. The form appears, and will continue to appear, on the DOH website where it is available in English and in many other languages. There is no statutory requirement in PHL that the form appear in regulation. The DOH believes it is no longer advisable to have a single form fixed in regulation, given the changing testing technology and new types of HIV testing, all of which will likely necessitate periodic form up-dating. The Commissioner of Health is granted full authority to make such changes; the commenters do not question this authority. DOH wishes to underscore that the intent of revising the prior HIV consent form was to simplify and streamline testing (as requested by many patients and providers) in order to improve patient understanding of the test and its implications, particularly in regard to the need for follow up and to promote increased testing.

Addressing the details of the form, we note that the form is now divided into two parts, intended to be used in tandem at all times. The first part, A, specifies the HIV tests to which a person is consenting. The consent form also states “my health care provider has answered any questions I have regarding HIV testing;” thus appropriately referring a patient to his/her provider for specifics. Public Health Law does not require that the signature or name of the person obtaining consent be on the form itself. DOH notes that the standard blanket consent for medical tests or treatment signed by new patients in many medical contexts parallels this format. Next, the suggestion that the form provides authorization to anyone who comes into possession of the document belies real world practice of maintaining a signed form in the confidential medical record of the test subject.

Even without an express time limit in the form, it is important to note that individuals can withdraw their consent at any time. This right to withdraw is clearly noted on the consent form. Individuals can choose not to be tested in the future by not presenting for care or not allowing blood to be drawn for testing. The statute does not prohibit obtaining one-time consent for future tests. This form was drafted with the intent of full disclosure, noting that the current standard of care includes repetitive, routine viral load testing as a mechanism for monitoring disease. Moreover, the current form efficiently and effectively permits the provider to conform to the law by thoroughly, at one point in time, informing the patient and receiving that patient’s consent regarding the routine test or series of tests which will be performed to ensure optimum care is provided and public health is promoted. This consent process does not violate a person’s right to privacy, nor due process. Potential test subjects receive

the detailed part A of the form, which has been drafted to fully inform patients of the routine course of testing.

Finally, we note that the NYSDOH has met with the NYCLU and the HIVLP in efforts to resolve these concerns. We continue to be open to revising the website form, if it is determined to be advisable to do so.

Comment:

Community stakeholders should be involved in the conversation concerning drafting and implementation of the regulations. The Department is urged to schedule public meetings in locations throughout the State to allow for meaningful input by the community.

Response:

The DOH has already broadly solicited comments on the form. For example, the new consent form was shared with several health and human service providers, including AIDS service providers. DOH received comments from them for consideration prior to finalization of the form. The Director of the AIDS Institute also presented the form and solicited comments from the AIDS Advisory Council and from the State Prevention Planning Group (a council comprised largely of consumers). The form has also been presented and discussed at a Community Service Program leadership meeting. Given the scope and visibility of all these efforts, additional public meetings do not appear to be necessary.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

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

I.D. No. HLT-41-06-00026-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 360-2.3(c)(3) of Title 18 NYCRR.

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

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

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

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

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

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

*and Developmental Disabilities Home and Community-Based Waiver program.*

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

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

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

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

### Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

As required by section 366-a(2)(b) of the SSL, the proposed regulatory amendment includes in the definition of long-term care services, those services described in section 367-f (1)(b) of the SSL. These services include care, treatment, maintenance and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided by a home care services agency, certified home health agency or long term home health care program, as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the Department of Health; or provided by a personal care provider licensed or regulated by any other state or local agency. In addition, the proposed regulatory amendment designates as long-term care services, for purposes of resource attestation, the following: a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility ("alternate level of care"); services provided in an intermediate care facility certified under article sixteen of the mental hygiene law; services provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant to Section 31.02(a)(4) of the mental hygiene law; services provided in a

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

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

#### Costs:

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

#### Local Government Mandates:

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

#### Paperwork:

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

#### Duplication:

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

#### Alternatives:

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

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

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

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

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

#### Federal Standards:

The proposed regulatory amendment complies with federal statute.

#### Compliance Schedule:

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

#### Regulatory Flexibility Analysis

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

#### Rural Area Flexibility Analysis

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

#### Job Impact Statement

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

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## Industrial Board of Appeals

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

#### Subpoenas

**I.D. No.** IBA-41-06-00003-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 65.20 of Title 12 NYCRR.

**Statutory authority:** Labor Law, section 101

**Subject:** Subpoenas.

**Purpose:** To make the rule more closely reflect the statute, reducing the possibility of a party being taken by surprise if they try to enforce a subpoena.

**Text of proposed rule:** 65.20 Subpoenas.

(a) *A subpoena must be issued under the board's seal.* The board, by one or more members, shall have the power to issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, papers, documents and other evidence. Applications for subpoenas shall be filed with the board and such applications may be ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena shall, within 10 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The board shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceeding, or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The board shall make a statement of proce-

dural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto and any ruling thereon, shall become a part of the record.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.

(d) Subpoena forms shall be requested and obtained from the board, completed by the requesting party and submitted to the board for issuance. Service of subpoenas shall be effected by the requesting party.

**Text of proposed rule and any required statements and analyses may be obtained from:** John G. Binseel, Industrial Board of Appeals, Empire State Plaza, Agency Bldg. 2, 20th Fl., Albany, NY 12233, (518) 474-4785, e-mail: USCJGB@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**

Pursuant to the provisions of SAPA § 202(1)(b)(i), this proposed rule making is submitted as a consensus rule, inasmuch as the NYS Industrial Board of Appeals has determined that no person is likely to object to the rule as written.

The existing rule was recently amended in September 2004. This proposed amendment restates the statutory requirement of Labor Law section 100(5)(c)(3), that any subpoenas shall be issued under the seal of the department. The majority of the proceedings initiated with the board are filed by non-attorneys, who are representing themselves, or by attorneys with limited administrative law experience. This amendment will amend the rule, by restating the statutory requirement that all subpoenas shall be issued under the seal of the department, so that any party reviewing the board's rules will be able to rely upon them as setting forth the complete legal requirement for issuing a subpoena.

It is the board's determination that amending this rule to reflect a statutory requirement, that any subpoenas shall be issued under the board's seal, will ease compliance with the rule, making it easier to understand. This will help make the administrative process easier, more efficient, more effective, and that no person is likely to object to this proposal.

#### **Job Impact Statement**

This proposed amendment will not have any impact on jobs and/or employment opportunities.

This finding is based on the fact that this proposed rule making merely reflects the actual wording of the statute, reducing the possibility of a party being taken by surprise because they reviewed the rules, but not the underlying statute. This is because Labor Law section 100(5)(c)(3) states that all subpoenas "shall be issued under the seal of the department." Amending the rule to add the sentence that a "subpoena must be issued under the board's seal" will clarify the procedure for issuing subpoenas, make a subpoena's legal validity easier to determine, and reduce the possibility of a party issuing an invalid subpoena.

Because this proposal will amend the rule to reflect the statutory requirement that a subpoena must be issued under the board's seal, and does not add any new legal requirement to an administrative proceeding, it is reasonable to expect that the rule will not have a substantial adverse impact, if any, on jobs and employment opportunities.

## Insurance Department

### EMERGENCY RULE MAKING

#### **Rules Governing Individual and Group Accident and Health Insurance Reserves**

**I.D. No.** INS-41-06-00004-E

**Filing No.** 1139

**Filing date:** Sept. 21, 2006

**Effective date:** Sept. 21, 2006

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

**Action taken:** Repeal of Part 94 and addition of new Part 94 (Regulation 56) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517

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

**Specific reasons underlying the finding of necessity:** Regulation No. 56 was originally effective August 18, 1971 in its present form and has not been substantively amended since that time. In the intervening 31 years, the National Association of Insurance Commissioners has adopted new reserving tables for individual and group disability income insurance policies, popularly referred to as the Commissioners' Disability Tables ("CDT"). The current CDT was adopted in 1986 and is used widely across the country as the standard for holding reserves for individual and group disability insurance policies. It reflects both modern morbidity and claims experience and the judgement of actuaries and regulators who are knowledgeable about the current state of the disability insurance market.

However, New York authorized insurers are required to use the 1964 CDT because it was required by Regulation No. 56 (see, e.g., 11 NYCRR Part 94.1(a)(4)(iii)(A)). Also, Regulation No. 56 did not apply to group insurance, providing little or no guidance to New York insurers that write this important form of protection. The effect of the application of this outdated regulation is that New York authorized insurers are required to hold reserves far in excess of the national standard for disability insurance active lives reserves, but below the prevailing standard for claims reserves. Most New York authorized insurers hold reserves in excess of the amount needed to pay claims due to the required use of the outdated tables. For these insurers, the adoption of the more recent tables will significantly reduce the cost of doing business and allow them to compete more effectively with insurers that are not subject to New York standards and to pass the cost savings on to consumers. For some insurers, this regulation may require an increase in reserves especially for coverages such as group health insurance for which there had been no standards previously. The adoption of these standards will help to ensure that such insurers remain financially capable of paying claims as they come due.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on December 31, 2006. The filing date for the December 31, 2006 annual statement is March 1, 2007. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this new Regulation No. 56 is necessary for the general welfare.

**Subject:** Rules governing individual and group accident and health insurance reserves.

**Purpose:** To prescribe rules and regulations for valuation of minimum individual and group accident and health insurance reserves including standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

**Substance of emergency rule:** The following is a summary of the substance of the rule:

Section 94.1 lists the main purposes of the regulation including implementation of sections 1303, 4117, 4217(d), 4517(d) and 4517(f) of the Insurance Law and prescribing rules for valuing certain accident and health benefits in the life insurance policies.

Section 94.2 is the applicability section. This section applies to both individual policies and group certificates. The regulation applies to all insurers, fraternal benefit societies, and accredited reinsurers doing busi-

ness in the State of New York. It applies to all statutory financial statements filed after its effective date.

Section 94.3 is the definitions section.

Section 94.4 sets forth the general requirements and minimum standards for claim reserves, including claim expense reserves and the testing of prior year reserves for adequacy and reasonableness using claim runoff schedules and residual unpaid liability.

Section 94.5 sets forth the general requirements and minimum standards for unearned premium reserves.

Section 94.6 sets forth the general requirements and minimum standards for contract reserves.

Section 94.7 concerns increases to, or credits against reserves carried, arising from reinsurance agreements.

Section 94.8 prescribes the methodology of adequately calculating the reserves for waiver of premium benefit on accident and health policies.

Section 94.9 provides that a company shall maintain adequate reserves for all individual and group accident and health insurance policies that reflect a sound value being placed on its liabilities under those policies.

Section 94.10 provides the specific standards for morbidity, interest and mortality.

Section 94.11 allows for a four-year period for grading into the higher reserves beginning with year-end 2003 for insurers for which higher reserves are required because of this Part.

Section 94.12 establishes the severability provision of the regulation.

**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 December 19, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

The superintendent's authority for the adoption of Regulation No. 56 (11 NYCRR 94) is derived from sections 201, 301, 1303, 1304, 1305, 1308, 4117, 4217, 4310 and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise to make regulations.

Section 1303 covers loss or claim reserves for insurers.

Section 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1305 covers unearned premium reserves for insurers.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

Section 4117 covers loss reserves for Property and Casualty (P&C) insurers.

Section 4217(d) provides that reserves for all individual and group accident and health policies shall reflect a sound value placed on the liabilities of such policies and permits the superintendent to issue, by regulation, guidelines for the application of reserve valuation provisions for these types of policies.

Section 4310 covers investments, financial conditions, and reserves for non-profit health plans.

For fraternal benefit societies, section 4517(d) provides that reserves for all individual accident and health certificates shall reflect a sound value placed on the liabilities of such certificates and permits the superintendent to issue, by regulation, standards for minimum reserve requirements on these types of certificates. Additionally, section 4517(f) provides that reserves for unearned premiums and disabled lives be held in accordance with standards prescribed by the superintendent for certificates or other obligations which provide for benefits in case of death or disability resulting solely from accident, or temporary disability resulting from sickness, or hospital expense or surgical and medical expense benefits.

##### 2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is through requiring all insurers licensed to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

##### 3. Needs and benefits:

The regulation is necessary to help ensure the solvency of insurers doing business in New York. The Insurance Law does not specify mortality, morbidity, and interest standards used to value individual and group accident and health insurance policies and relies on the superintendent to specify the method. Without this regulation, there would be no standard method for valuing such products and, in fact, the current regulation, absent the proposed rule, provides no guidance related to certain coverages such as group accident and health policies. This could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

Additionally, the current regulation, absent the proposed rule, requires higher reserves than necessary for certain individual accident and health insurance policies. This proposed rule, by lowering such reserves for individual policies, will result in a lower cost of doing business in New York.

##### 4. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

##### 5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

##### 6. Paperwork:

The regulation imposes no new reporting requirements.

##### 7. Duplication:

The regulation does not duplicate any existing law or regulation.

##### 8. Alternatives:

The Department considered allowing an additional grade-in period, beyond the grade-in period currently cited in the emergency rule, for health and property and casualty insurers. The Department has decided against allowing an additional grade-in period since during an outreach effort to the property and health industries, only one insurer notified the Department that a material reserve increase would result. That insurer was notified of the proposed change to the rule during 2004 and has had ample time to prepare for the reserve change. Additionally, it is important that all insurers hold the correct amount of reserves as soon as possible and therefore be held to the same grade-in period.

The only other significant alternative to be considered was to keep the current version of Regulation No. 56, without adopting this proposed rule, which would result in different reserve requirements for those insurers licensed in New York.

##### 9. Federal standards:

There are no federal standards in the subject area.

##### 10. Compliance schedule:

Beginning with year-end 2003, where the requirements of this regulation produce reserves higher than those calculated at year-end 2002, the insurer may linearly interpolate, over a four year period, between the higher reserves and those calculated based on the year-end 2002 standards. Insurers must be in full compliance with this Part by year-end 2006. This allows insurers subject to the regulation ample time to achieve full compliance.

#### **Regulatory Flexibility Analysis**

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurance companies 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 Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas:

Insurance companies covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

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

The regulation establishes reserve requirements for individual and group accident and health policies and establishes standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

3. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with member companies of the Life Insurance Council of New York (LICONY). A copy of the draft was distributed to LICONY in November, 2002. Additional changes were made to the text of the regulation based on changes made to the NAIC's Health Insurance Reserves Model Regulation in December 2003 and a revised draft of the regulation was distributed to LICONY in January 2004. The draft was sent to American Insurance Association (AIA), Property Casualty Insurers Association of America (PCI) and National Association of Mutual Insurance Companies (NAMIC) for property and casualty insurers and to selected health insurers during late 2004 and early 2005. In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the June 28, 2006 issue of the *State Register*.

**Job Impact Statement**

Nature of impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for setting reserves for insurers. Most insurers will be able to reduce reserves and a few may need to increase reserves but this is unlikely to impact jobs and employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

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

**Rules for Key Person Company-Owned Life Insurance**

**I.D. No.** INS-41-06-00002-EP

**Filing No.** 1138

**Filing date:** Sept. 20, 2006

**Effective date:** Sept. 20, 2006

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

**Action taken:** Addition of Part 48 (Regulation 180) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301 and 3205

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

**Specific reasons underlying the finding of necessity:** Company-owned life insurance covering rank-and-file employees, also called "janitors insurance" or "dead peasant insurance," has been the focus of numerous negative press articles and public commentaries over the last several years. In many cases, the covered employees were not notified and did not consent to such insurance. In addition, the Internal Revenue Service has pursued litigation against some companies using company-owned life insurance as a means of evading taxes.

The potential for abuse in the company-owned life insurance market has long been a concern of the New York Legislature. Chapter 491 of the Laws of 1996 added a new subsection (d) to Section 3205 to provide notice, consent and termination rights to employees, including rank-and-file employees, whose lives were insured under company-owned life insurance programs designed to fund employee benefit plans. Such notice, consent and termination rights were designed to reduce the potential for abuse in the COLI market.

Since the notice, consent and termination rights only apply in the case of Section 3205(d) COLI and not key person COLI under Section 3205(a)(1)(B), it is imperative that insurers only insure key employees under Section 3205(a)(1)(B). This will also ensure that rank and file employees and other non-key employees receive the notice, consent and termination rights prescribed by Section 3205(d) and to curb some of the reported abuses associated with COLI on rank-and-file employees. In addition, this will serve to ensure that employees insured pursuant to the insurable interest provisions of Section 3205(a)(1)(B) are key employees.

The federal Pension Protection Act of 2006 (PL 109-280, 2006 HR 4) creates a new subsection to the Internal Revenue Code that excludes from gross income certain death benefits paid in connection with employer-owned life insurance. The Pension Protection Act of 2006 relies on the definition of highly compensated employee under Section 414(q) of the Internal Revenue Code and highly compensated individual under Section 105(h)(5) of the Internal Revenue Code ("except that '35 percent' shall be substituted for '25 percent' in subparagraph (C) thereof"). The definition of key employee in Regulation 180 is also based in part on the definitions of highly compensated individual and highly compensated employee in Sections 105(h)(5) and 414(q) of the Internal Revenue Code.

The establishment of a key employee standard based on federal legislation will aid in curbing abuse in the company-owned life insurance market. Therefore, for the reasons stated above, this rule must be promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Rules for key person company-owned life insurance.

**Purpose:** To provide guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) and (d) of the Insurance Law.

**Text of emergency/proposed rule:** A new Part 48 of Title 11 NYCRR (Regulation No. 180) is adopted to read as follows:

§ 48.0 Preamble and Purpose.

(a) Section 3205(b)(2) of the Insurance Law provides in part that "No person shall procure or cause to be procured, directly or by assignment or

otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable . . . to a person having, at the time when such contract is made, an insurable interest in the person insured.”

(b) Section 3205(a)(1)(B) of the Insurance Law defines the term “insurable interest”, for the purposes of life and accident and health insurance, to include “a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured.”

(c) Under Section 3205(a)(1)(B), an employer has an insurable interest in the lives of certain employees and other persons, commonly referred to as “key employees” or “key persons”, whose services and qualifications are of such nature that their death or disability would cause the employer to incur a substantial pecuniary loss.

(d) The purpose of this Part is to establish standards for life insurers and fraternal benefit societies issuing key person company-owned life insurance to ensure that the employees or other persons on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key persons.

#### § 48.1 Underwriting Guidelines.

An insurer using key person company-owned life insurance shall establish and apply appropriate underwriting guidelines to ensure that the employees or other persons on whose lives policies are written pursuant to Section 3205(a)(1)(B) are actually key persons.

#### § 48.2 Standards.

For purposes of this Part and for establishing whether there exists an insurable interest under Section 3205(a)(1)(B) at the time the policy is issued, the term key person shall include the following persons:

(a) An employee who is one of the five highest paid officers of the employer;

(b) An employee who is a five-percent owner of the employer. A “five-percent owner” shall mean:

(1) If the employer is a corporation, any person who owns or controls more than five percent of the outstanding stock of the corporation or stock possessing more than five percent of the total combined voting power of all stock of the corporation; or

(2) If the employer is not a corporation, any person who owns more than five percent of the capital or profits interest in the employer;

(c) An employee who had compensation from the employer in excess of \$90,000 in the preceding year;

(d) An employee who is among the highest paid 35 percent of all employees; or

(e) An employee or other person who makes a significant economic contribution to the company, including but not limited to, an employee who is responsible for management decisions, has a significant impact on sales or a special rapport with customers and creditors, possesses special skills, or would be difficult to replace. Criteria for the employer’s determination shall be included in the insurer’s underwriting guidelines.

**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 December 18, 2006.

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

**Data, views or arguments may be submitted to:** Ralph D. Spaulding, Insurance Department, One Commerce Plaza, 19th Fl., Albany, NY 12257, (518) 474-4552, e-mail: rspauldi@ins.state.ny.us

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

The superintendent’s authority for the adoption of Regulation 180 (11 NYCRR 48) is derived from Sections 201, 301, and 3205 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him (under the provisions of the Insurance Law) to prescribe forms or otherwise to make regulations.

Section 3205 of the Insurance Law defines the term “insurable interest” and sets forth insurable interest requirements for any policy of life insurance and accident and health insurance.

##### 2. Legislative objectives:

The insurable interest requirements contained in Section 3205 reflect the state’s public policy against contracts wagering on human life. Section

3205(b)(2) prohibits the issuance of any policy upon the life of another person unless the beneficiary is the insured, personal representative of the insured, or a person having an insurable interest in the insured at the time the policy is issued.

Section 3205(a)(1)(B), applicable when policies are purchased by persons not closely related to the insured by blood or by law, defines “insurable interest” to include a lawful and substantial economic interest in the continued, life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured. Employers and insurers have historically relied upon Section 3205(a)(1)(B) to satisfy the insurable interest requirement for the purchase of insurance on the lives of “key persons” or “key employees.”

In 1996, the Legislature added new subsections (d) and (e) to Section 3205 of the Insurance Law (L. 1996 c. 491) to specifically grant employers an insurable interest in any employee or retiree who is eligible to participate in an employee benefit plan. The Legislature enacted Section 3205(d) in order to assist employers with the financing of employee benefit plans through the use of company-owned life insurance (“COLI”) purchased on the lives of employees.

The purpose of the proposed regulation is to establish standards for life insurers issuing key employee COLI, pursuant to Section 3205(a) rather than Section 3205(d) COLI, to ensure that the employees on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key employees.

##### 3. Needs and benefits:

The potential for abuse in the COLI market has historically been a concern of the New York legislature as evidenced by the enactment of notice, consent and termination rights in Section 3205(d) and (e) of the Insurance Law in 1996, establishing an insurable interest for the purchase of life insurance used to fund employee benefit plans. Since the employee notice, consent and termination rights are not required when company-owned life insurance is purchased under Section 3205(a)(1)(B), it is imperative that insurers be provided with standards for key employees to ensure that such employees are key employees and to avoid the potential for any further abuses in the market. The establishment of a key employee standard would provide such guidance.

In addition, a key employee standard would enhance the Department’s market conduct exams by providing field examiners with a reference point. Field examiners currently lack statutory or regulatory standards for determining the proper application of Section 3205(a) and, specifically, whether COLI insurance issued pursuant to Section 3205(a) is on key employees.

The key employee standard is particularly important in the bank-owned life insurance market, in which employees do not receive Section 3205(d) protections. Currently, banks do not purchase coverage under Section 3205(d) because the employee’s ability to terminate coverage makes the policy an unreliable mechanism for funding plan liabilities and results in adverse tax consequences to the bank. When bank-owned life insurance is issued as key employee coverage under Section 3205(a)(1)(B), the key employee standard created by this proposed regulation will help ensure that the covered employees will in fact be key employees.

##### 4. Costs:

Life insurers licensed in New York that sell key employee COLI are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key employee COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the proposed regulation. Any insurers in the key employee COLI market that lack established key person underwriting guidelines would incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the proposed regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

##### 5. Local government mandates:

The proposed regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

##### 6. Paperwork:

The proposed regulation imposes no new reporting requirements.

##### 7. Duplication:

The proposed regulation does not duplicate any existing law or regulation.

##### 8. Alternatives:

The Department considered but rejected the prospect of issuing a Circular Letter to establish the standard for key person. The Department was concerned that the Circular Letter proposal would not have the same force and effect of a regulation, and would therefore be an inadequate mechanism to apply and enforce the insurable interest requirements of Section 3205.

9. Federal standards:

The definition of key employee in the proposed regulation is based in part on the definitions of highly compensated individual and highly compensated employee in Sections 105(h)(5) and 414(q) of the Internal Revenue Code. Similarly, the recently adopted Pension Protection Act of 2006 (PL 109-280, 2006 HR 4) relies on the same definitions. The Act creates a new subsection to the Internal Revenue Code exempting from tax death proceeds paid to employers with respect to highly compensated employees and highly compensated individuals in connection with company-owned life insurance, and does not relate to state insurable interest laws. This Act relies on the definition of "highly compensated employee" under Section 414(q) of the Internal Revenue Code and "highly compensated individual" under Section 105(h)(5) of the Internal Revenue Code ("except that 35 percent shall be substituted for 25 percent" in subparagraph (C) thereof"). Currently there is no federal standard that defines key employee in the context of insurable interest for life insurance.

10. Compliance schedule:

The proposed regulation establishes a standard for all key employee life insurance policies issued before and after the effective date of the Regulation.

**Regulatory Flexibility Analysis**

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies 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 Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas:

Insurers covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

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

The regulation provides guidance to insurers in defining the term key person.

3. Costs:

Life insurers that sell key person COLI to fund broad-based employee benefit plans are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key person COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the Regulation. Any insurers in the key person COLI market that lack established key person underwriting guidelines will incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the Regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with the Life Insurance Council of New York, a trade organization representing life insurers in New York.

**Job Impact Statement**

Nature of impact: The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation provides guidance to insurers in defining the term key person

for the purpose of compliance with the requirements of section 3205(a)(1)(B) of the Insurance Law.

Categories and number affected: No categories of jobs or number of jobs will be affected.

Regions of adverse impact: This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact: No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities: This rule would not have a measurable impact on self-employment opportunities.

**NOTICE OF ADOPTION**

**Rules Governing Advertisements of Life Insurance and Annuity Contracts**

**I.D. No.** INS-29-06-00004-A

**Filing No.** 1140

**Filing date:** Sept. 21, 2006

**Effective date:** Oct. 11, 2006

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

**Action taken:** Amendment of Part 219 (Regulation 34-A) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 308, 1313, 2122, 2123, 2402, 4224, 4226 and 4240(d)

**Subject:** Rules governing advertisements of life insurance and annuity contracts.

**Purpose:** To provide clarification of the terms "advertisement" and "public announcement" as used in the New York Insurance Law, permit the use of joint advertisements in New York which contain the names of, or references to insurance policies sold by, a New York authorized insurer and an affiliated insurer that is not authorized in New York and prescribe rules and guidelines governing such advertisements.

**Text or summary was published** in the notice of proposed rule making, I.D. No. INS-29-06-00004-P, Issue of July 19, 2006.

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

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

**Assessment of Public Comment**

Only one comment was received. It was from the Life Insurance Council of New York, Inc. (LICONY). LICONY strongly supports the proposed amendment and urges its promulgation.

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

**Claim Submission Guidelines**

**I.D. No.** INS-41-06-00006-P

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

**Proposed action:** This is a consensus rule making to amend Part 217 (Regulation 178) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 2403, 3224 and 3224-a

**Subject:** Claim submission guidelines for medical service hospital claims submitted in paper form.

**Purpose:** To update the claim payment guidelines on what is needed in order to determine when a health care insurance claim is considered complete and ready for payment.

**Text of proposed rule:** Section 217.2 is amended to read as follows:

Section 217.2 Health Insurance claim submission guidelines.

(a) A claim for payment of medical or hospital services submitted on paper shall be deemed complete if it contains the minimum data elements set forth in this Part. If the minimum data elements set forth are not present or accurate, the payer may, but need not, adjudicate the claim if the payer can determine, based on the information submitted, whether such claim should be paid or denied. Even if the claim is deemed complete, a payer may, pursuant to the provision of Section 3224-a(b) of the New York Insurance Law, request specific additional information, distinct from in-

formation on the claim form, necessary to make a determination as to its obligation to pay such claim.

(b)(1) In the case of a medical claim submitted on the national standard form known as a CMS 1500 (previously known as HCFA 1500 (New York State)) and its successors, attached as an appendix (Appendix 26), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

- 1a. Insured's ID. Number
2. Patient's Name
3. Patient's Date of Birth and Gender
4. Insured's Name (Last Name, First Name)
5. Patient's Address
9. Other Insured's Name (if appropriate)
- 9a. Other Insured's Policy or Group Number (if appropriate)
- 9b. Other Insured's Date of Birth and Gender (if appropriate)
- 9c. Employer's Name or School Name (if appropriate)
- 9d. Insurance Plan Name or Program Name (if appropriate)
- 10a. Is Patient's Condition Related to Employment?
- 10b. Is Patient's Condition Related to Auto Accident?
- 10c. Is Patient's Condition Related to Other Accident?
11. Insured's Policy, Group or FECA Number (if provided on ID Card)
- 11d. Is There Another Health Benefit Plan?
12. Patient's or Authorized Person's Signature (Can be completed by writing "signature on file" where appropriate)
13. Insured's or Authorized Person's Signature (if appropriate)
17. Name of Referring Physician or Other Source (if appropriate)
- 17a. ID. Number of Referring Physician (if appropriate)
18. Hospitalization Dates Related to Current Services (if appropriate)
21. Diagnosis or Nature of Illness or Injury
23. Prior Authorization Number (to report ZIP code for ambulance pick-up) (if appropriate)
  - 24A. Dates of Service
  - 24B. Place of Service
  - 24D. Procedures, Services, or Supplies
  - 24E. Diagnosis Code (refer to item 21)
  - 24F. \$ Charges
  - 24G. Days or Units (if appropriate)
25. Federal Tax ID. Number
28. Total Charge
29. Amount Paid (if appropriate)
30. Balance Due
31. Signature of Physician or Supplier Including Degrees or Credentials (if not already on file, except as required by applicable Federal and State laws)
33. Personal Identifying Number of the particular practitioner rendering the care plus, if practicing in a group, the Identifying Number of the group as well

(2) For items listed in paragraph (1) of this subdivision with the notation (if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(c)(1) In the case of a hospital claim submitted on the national standard form HCFA 1450 (also known as UB-92) and its successors, attached as an appendix (Appendix 27), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

1. Provider Name and Address
3. Patient Control Number
4. Type of Bill
5. Federal Tax Number
6. Statement Covers Period
7. Covered Days (if appropriate) (interim bill, etc)
8. Non-Covered Days (if appropriate)
9. Coinsurance Days (if appropriate)
10. Lifetime Reserve Days (if appropriate)
11. Newborn Birthweight (if appropriate)
12. Patient Name
13. Patient Address
14. Patient Birthdate
15. Patient Sex
17. Admission Date

18. Admission Hour
19. Type of Admission
22. Discharge Status Code
42. Revenue Codes
43. Revenue Description
44. HCPCS/CPT4 Codes
45. Service Date
46. Service Units
47. Total Charges (by revenue code)
48. Non-Covered Charges
50. Payer Name
51. Provider ID
54. Other Insurance Payment (if appropriate)
55. Estimated Amount Due (if appropriate)
58. Insured's Name
59. Patient Relationship
60. Patient's Cert. SSN - HIC - ID No.
62. Insurance Group Number (if on card) (where appropriate)
67. Principal Diagnosis Code
68. Code
69. Code
70. Code
71. Code
72. Code
73. Code
74. Code
75. Code
76. Admitting Diagnosis Code
77. E-Code
78. DRG#
79. P.C.
80. Principal Procedure Code and Date
81. Other Procedures Code and Date
82. Attending Physician's ID Number
84. Remarks (to report ZIP code for ambulance pick-up) (if appropriate)

(2) For items listed in paragraph (1) of this subdivision with the notation (if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(d) Nothing in this Part shall prohibit a payer from electing to accept some or all claims with less information than that specified in the lists set forth in subdivisions (b) and (c) of this section.

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

**Data, views or arguments may be submitted to:** Laura Dillon, Insurance Department, Consumer Services Bureau, One Commerce Plaza, Albany, NY 12257, (518) 486-9105, e-mail: Ldillon@ins.state.ny.us

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

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

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

Sections 201, 301, 1109, 2403, 3224 and 3224-a of the Insurance Law authorize the Superintendent to promulgate regulations governing the prompt payment of health care claims. No person is likely to object to the rule as the changes made are merely to update the fields required for the submission of health care claims in a paper format. This information is required by Medicare and it was inadvertently omitted from the original promulgation of the regulation.

#### **Job Impact Statement**

This regulation will not adversely affect jobs or employment opportunities in New York State. The regulation is tended to improve the relationship between payers and providers, ultimately getting payment to providers more quickly, and helping to keep providers in their communities. As a result of the regulation, insurers will spend less time requesting information from health care providers. The regulation will also lessen confusion as to whether insurers have exercised bad faith in requesting addition information.

There is no anticipated adverse impact on job opportunities in this state.

## State Liquor Authority

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the State Liquor Authority publishes a new notice of proposed rule making in the NYS Register.

#### Increase in Amount of Retail Bonds

I.D. No.	Proposed	Expiration Date
LQR-38-05-00001-P	September 21, 2005	September 21, 2006

## Office of Mental Health

### EMERGENCY RULE MAKING

#### Medical Assistance Payment for Outpatient Programs

**I.D. No.** OMH-41-06-00001-E  
**Filing No.** 1137  
**Filing date:** Sept. 20, 2006  
**Effective date:** Sept. 20, 2006

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

**Action taken:** Amendment of Part 588 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a)  
**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** These amendments increase the medicaid rate schedule associated with clinic treatment programs and day treatment programs serving children and makes certain other changes consistent with the enacted 2005-2006 State budget. These changes will avoid a reduction in services that would otherwise take place.

**Subject:** Medical assistance payment for outpatient programs.

**Purpose:** To increase the Medicaid rate schedule associated with certain clinic treatment and children's day treatment programs licensed under art. 31 of the Mental Hygiene Law.

**Text of emergency rule:** New subdivisions (e) and (f) are added to § 588.7 to read as follows:

(e) *The need for continuing day treatment benefits beyond 156 visits per benefit year shall be subject to the medical care utilization threshold requirements of 18 N.Y.C.R.R. Part 511, and shall be determined, in accordance with subdivision (f) of this section, no later than the 156th visit during the benefit year. Such determination shall include an estimate of the number of visits beyond 156 required for the recipient within the remaining benefit year. The need for continued continuing day treatment benefit beyond this estimated number of visits shall be determined at or prior to the provision of the estimated number of visits during the benefit year. The need for any additional revised estimates shall be determined accordingly.*

(f) *Determinations required in accordance with subdivision (e) of this section shall be:*

- (1) *completed by the treating clinician;*
- (2) *documented in the case record; and*
- (3) *reviewable by the Office of Mental Health or its designated agent.*

Subdivision (a) of Section 588.13 is amended to read as follows:

(a) Reimbursement under the medical assistance program for outpatient programs licensed pursuant to Article 31 of the Mental Hygiene Law and Part 587 of this Title which serve adults with a diagnosis of mental illness and children with a diagnosis of emotional disturbance shall be in

accordance with the following fee schedule. This section shall not apply to programs licensed by both the Office of Mental Health and the Department of Health.

(1) Reimbursement under the medical assistance program for clinic treatment programs operated by agencies which received State aid under article 41 of the Mental Hygiene Law, during the fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule. Such reimbursement shall be adjusted pursuant to [Section 579.7] *subdivisions (i), (j) and (k)* of this [Title] *Section*.

(i) For programs operated in Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, Putnam, Rockland and Westchester counties:

- Regular at least 30 minutes [\$66.00] \$71.94
- Brief at least 15 minutes [33.00] 35.97
- Group at least 60 minutes [23.10] 25.18
- Collateral at least 30 minutes [66.00] 71.94
- Group Collateral at least 60 minutes [23.10] 25.18
- Crisis at least 30 minutes [66.00] 71.94

(ii) For programs operated in Allegheny, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Tioga, Tompkins, Wayne, Wyoming and Yates counties:

- Regular at least 30 minutes [\$59.40] \$64.75
- Brief at least 15 minutes [29.70] 32.37
- Group at least 60 minutes [20.79] 22.66
- Collateral at least 30 minutes [59.40] 64.75
- Group Collateral at least 60 minutes [20.79] 22.66
- Crisis at least 30 minutes [59.40] 64.75

(iii) For programs operated in Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, St. Lawrence, Albany, Columbia, Dutchess, Greene, Orange, Rensselaer, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren and Washington counties:

- Regular at least 30 minutes [\$58.30] \$63.55
- Brief at least 15 minutes [29.15] 31.77
- Group at least 60 minutes [20.41] 22.25
- Collateral at least 30 minutes [58.30] 63.55
- Group Collateral at least 60 minutes [20.41] 22.25
- Crisis at least 30 minutes [58.30] 63.55

(2) Reimbursement under the medical assistance program for clinic treatment programs operated by providers of services which did not receive State aid under article 41 of the Mental Hygiene Law during fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule unless a higher fee was approved by the commissioner in accordance with the appeal methodology under the previous reimbursement regulations.

- Regular at least 30 minutes [\$58.30] \$63.55
- Brief at least 15 minutes [29.15] 31.77
- Group at least 60 minutes [20.41] 22.25
- Collateral at least 30 minutes [58.30] 63.55
- Group Collateral at least 60 minutes [20.41] 22.25
- Crisis at least 30 minutes [58.30] 63.55

(3) *The minimum duration of a group or group collateral visit at a school-based clinic program shall consist of the duration of a scheduled class period at the school in which the program is based, or 60 minutes, whichever is less.*

Sub-paragraphs (4) and (5) of § 588.13(a) are renumbered sub-paragraphs (5) and (6) are amended to read as follows:

(4) Reimbursement under the medical assistance program for non-state operated continuing day treatment programs licensed pursuant to Article 31 of the Mental Hygiene Law and Part 587 of this Title shall be in accordance with the following fee schedule. Such reimbursement shall be adjusted pursuant to Part 579.7 of this Title.

(i) For programs operated in Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, Putnam, Rockland and Westchester counties:

(a) Regular, collateral, group collateral, and crisis visits shall be reimbursed on the basis of service hours. The reimbursement for any service hour shall be based upon the cumulative number of service hours provided in a calendar month to an individual recipient. When the service hours of any single visit include more than one rate the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. The rates of reimbursement are as follows:

- Service hour 1-50 \$13.20 per service hour

Service hour 51-80 \$10.45 per service hour  
 Service hour beyond 80 \$7.70 per service hour

(ii) For programs operated in Allegheny, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Tompkins, Wayne, Wyoming and Yates counties:

(a) Regular, collateral, group collateral, and crisis visits shall be reimbursed on the basis of service hours. The reimbursement for any service hour shall be based upon the cumulative number of service hours provided in a calendar month to an individual recipient. When service hours of any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. The rates of reimbursement are as follows:

Service hour 1-50 \$11.88 per service hour  
 Service hour 51-80 \$10.45 per service hour  
 Service hour beyond 80 \$7.70 per service hour

(iii) For programs operated in Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, St. Lawrence, Tioga, Albany, Columbia, Dutchess, Greene, Orange, Rensselaer, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren and Washington counties:

(a) Regular, collateral, group collateral, and crisis visits shall be reimbursed on the basis of service hours. The reimbursement for any service hour shall be based upon the cumulative number of service hours provided in a calendar month to an individual recipient. When the service hours for any single visit include more than one rate, the provider of service shall be reimbursed at the rate that applies to the first hour of such visit. The rates of reimbursement are as follows:

Service hour 1-50 \$11.88 per service hour  
 Service hour 51-80 \$10.45 per service hour  
 Service hour beyond 80 \$7.70 per service hour

[(4)] (5) Reimbursement under the medical assistance program for day treatment programs serving children operated by agencies which received State aid under article 41 of the Mental Hygiene Law, during the fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule.

(i) For programs operated in Bronx, Kings, New York, Queens and Richmond counties:

Full day at least 5 hours [\$66.00] \$70.01  
 Half day at least 3 hours [33.00] 35.01  
 Brief day at least 1 hour [22.00] 23.34  
 Collateral at least 30 minutes [22.00] 23.34  
 Home at least 30 minutes [66.00] 70.01  
 Crisis at least 30 minutes [66.00] 70.01  
 Preadmission - full day at least 5 hours [66.00] 70.01  
 Preadmission - half day at least 3 hours [33.00] 35.01

(ii) For programs operated in other than Bronx, Kings, New York, Queens and

Richmond counties:  
 Full day at least 5 hours \$[63.80] 67.68  
 Half day at least 3 hours [31.90] 33.84  
 Brief day at least 1 hour [21.23] 22.52  
 Collateral at least 30 minutes [21.23] 22.52  
 Home at least 30 minutes [63.80] 67.68  
 Crisis at least 30 minutes [63.80] 67.68  
 Preadmission - full day at least 5 hours [63.80] 67.68  
 Preadmission - half day at least 3 hours [31.90] 33.84

[(5)] (6) Reimbursement under the medical assistance program for day treatment programs serving children operated by agencies which did not receive State aid under article 41 of the Mental Hygiene Law, during the fiscal year ended June 30, 1985 for agencies located in New York City and calendar year 1984 for agencies located outside of New York City, shall be in accordance with the following fee schedule unless a higher fee was approved by the commissioner in accordance with the appeal methodology under the previous reimbursement regulations.

Full day at least 5 hours [\$63.80] \$67.68  
 Half day at least 3 hours [31.90] 33.84  
 Brief day at least 1 hour [21.23] 22.52  
 Collateral at least 30 minutes [21.23] 22.52  
 Home at least 30 minutes [63.80] 67.68  
 Crisis at least 30 minutes [63.80] 67.68  
 Preadmission - full day at least 5 hours [63.80] 67.68  
 Preadmission - half day at least 3 hours [31.90] 33.84

[(6)] (7) Providers whose reimbursement under the medical assistance program for clinic, continuing day treatment, and/or day treatment has been supplemented in accordance with subdivision (g) of this section will have this additional reimbursement limited in total to an amount established by the Commissioner which shall be subject to the availability of appropriations in the Office of Mental Health's budget. Supplemental reimbursement received in excess of this threshold will be recovered in a succeeding year through the medical assistance recovery process authorized pursuant to Section 368-c of the Social Services Law.

Section 588.13 is amended by adding new subdivisions (i), (j), and (k) to read as follows:

(i) *Clinic treatment programs for which an operating certificate has been issued shall receive an adjustment to the fee schedules set forth in paragraph (1) of subdivision (a) of this Section if they are enrolled in a continuous quality improvement initiative implemented by the Commissioner. In order to be enrolled in such continuous quality improvement initiative, the program shall execute an agreement with the Office of Mental Health under which the provider agrees to participate in such initiative, and undertake such quality improvement measures as shall be developed by the Commissioner.*

(j) *Any program eligible to receive supplemental medical assistance reimbursement pursuant to subdivision (i) of this Section, and which fails at any time to meet the requirements set forth in the agreement executed pursuant to such subdivision, shall have its continuous quality improvement adjustment suspended until such time as the program meets such requirements, as determined by the Commissioner.*

(k) *A clinic treatment program that has been approved by the Office of Mental Health to provide services to children and adolescents during evening and weekend hours shall receive a rate enhancement for regular or collateral clinic visits provided to recipients under the age of 18 years, when such services are provided during weekdays commencing 6 p.m. or later, or on a Saturday or Sunday, provided, however, that the enhanced rate shall only be paid for one visit provided for a recipient on any given day.*

**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 December 18, 2006.

**Text of emergency 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

#### **Regulatory Impact Statement**

1. **Statutory Authority:** Subdivision (b) of 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.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

2. **Legislative Objectives:** Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. **Needs and Benefits:** These amendments increase the medicaid reimbursement associated with certain outpatient treatment programs consistent with the enacted 2005-2006 state budget. These changes will be targeted in such a way as to provide general fiscal relief to providers, as well as improve the quality and availability of services. They will also effectuate the provision of the 2005-2006 state budget that eliminates the exemption from medicaid utilization thresholds for continuing day treatment programs, and clarifies the minimum duration of a group or group collateral visit for a school-based clinic is the shorter of 60 minutes or the duration of a scheduled class period at the school.

4. **Costs:**

a) **Costs of regulated parties:** There are no costs to providers associated with these amendments.

b) **Costs to State and Local government and the agency:** Implementation of the children's day treatment initiatives has been budgeted to cost New York State \$200,000 annually, and appropriations for the state share of medicaid are included on page 273, line 20, of Chapter 54 of the Laws of 2005. Implementation of clinic fee initiatives has been budgeted to cost New York State \$6,000,000 annually, and appropriations for the state share of medicaid are included in the \$609,468,000 Aid to Localities Local Assistance Account 001, which is set forth on page 268, line 29 of Chapter

54 of the Laws of 2005. The costs to local governments, for the local share of medicaid, will be equal to the state costs listed above.

5. Local Government Mandates: Other than the required local share of medicaid, noted in Section 4, these regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected as inconsistent with statutory requirements of the enacted budget.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: These regulatory amendments will be effective upon their adoption, and shall be deemed to have been effective on and after April 1, 2005.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant economic impact on small businesses, or local governments. The rate increase associated with this rule is required by state statute, the enacted state budget for state fiscal year 2005-2006.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. This rule impacts outpatient treatment program rates of reimbursement. The impact of the rate change will be to increase the medicaid reimbursement rates associated with outpatient programs in rural and non-rural areas. This will support the continued provision of these vital programs which serve children, adolescents and adults.

**Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves adjustments to financing mechanisms for existing outpatient treatment programs and will not have a substantial adverse impact on jobs and employment activities.

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

**Life Safety Code**

**I.D. No.** OMH-41-06-00024-P

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

**Proposed action:** This is a consensus rule making to amend sections 594.16 and 595.15 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.03(a)

**Subject:** To update reference to the Life Safety Code in the Premises section of Part 594 - Operation of Licensed Housing Programs for Children and Adolescents and Part 595 - Operation of Residential Programs for Adults.

**Purpose:** To update certain citations.

**Text of proposed rule:** § 594.16(a)(3) of Part 594 is amended to read as follows:

(3) Each type of residence housing children and adolescents shall conform to the appropriate section of the [1991] 2000 edition of the National Fire Protection Association (NFPA) 101 Life Safety Code (LSC) as noted below. Said codes are published by the National Fire Protection Association, One Batterymarch Park, Quincy, MA 02269 and are available for review at the Department of State, Division of Information Services, 41 State Street, Albany, NY 12207 and the Office of Mental Health, Bureau of Inspection and Certification, 44 Holland Avenue, Albany, NY 12229.

(i) Family-based treatment, teaching family homes and community residences shall meet the requirements of chapter [21] 24 LSC for one- and two-family dwellings.

(a) Smoke detectors are required outside of each sleeping area in the immediate vicinity of the bedrooms and on each additional story of the living unit including basements, and smoke or heat detectors in those areas separated by a door from the above required detectors.

(b) With the approval of the Office of Mental Health, detectors may be battery-powered, provided that they emit a distinctive trouble signal before the battery is incapable of operating the device.

(c) Tests or inspections, as recommended by the manufacturer, shall be made not less than once a month for other than battery-powered detectors and not less than once a week for battery-powered detectors. A record of these tests shall be maintained for review.

(ii) Crisis residences for children and adolescents shall conform to the requirements of Chapter [22] 32 or Chapter [23] 33 of LSC for new or existing residential board and care occupancies as appropriate. In addition:

(a) Smoke detectors are required outside of each sleeping area in the immediate vicinity of the bedrooms and on each additional story of the living unit including basements, and smoke or heat detectors in those areas separated by a door from the above required detectors.

(b) Tests or inspections, as recommended by the manufacturer, shall be made not less than once a month for other than battery-powered detectors and not less than once a week for battery-powered detectors. A record of these tests shall be maintained for review.

(c) An automatic sprinkler system complying with NFPA 13D, Standard for the installation of Sprinkler Systems in One- and Two-Family Dwellings, is required. Said codes are published by the National Fire Protection Association, One Batterymarch Park, Quincy, MA 02269 and are available for review at the Department of State, Division of Information Services, 41 State Street, Albany, NY 12204 and the Office of Mental Health, Bureau of Inspection and Certification, 44 Holland Avenue, Albany, NY 12229.

§ 595.15(a)(2)(i) of Part 595 is amended to read as follows:

(i) Residential programs comprising the entire residential occupancy of a building, or programs in which the sponsoring agency or other Office of Mental Health approved entity otherwise controls the entirety of the building, shall meet the provisions of the appropriate chapter and section of the [1991] 2000 edition of the National Fire Prevention Association (NFPA) - 101 Life Safety Code (LSC) as noted in clauses (a)-(c) of the subparagraph. Said codes are published by the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269 and are available for review at the Department of State, Division of Information Services, 41 State Street, Albany, New York 12207 and the Office of Mental Health, Bureau of Inspection and Certification, 44 Holland Avenue, Albany, New York 12229.

(a) Newly constructed residences shall be governed by Chapter [22] 32 of Life Safety Code. New residential programs which house 16 or fewer persons (excluding staff) shall specifically meet the provisions of Chapter [22-2] 32-2, Small Facilities. New residences housing more than 16 residents shall specifically meet the provisions of Chapter [22-3] 32-3, Large Facilities.

(b) Existing buildings which are converted to use as residential programs shall be governed by Chapter [23] 33 of the Life Safety Code. Existing residences housing 16 or fewer persons (excluding staff) shall specifically meet the provisions of Chapter [23-2] 33-2, Small Facilities. Existing residences housing more than 16 residents shall specifically meet the provisions of Chapter [23-3] 33-3, Large Facilities.

(c) The applicable standards of Chapters [22 and 23] 32 and 33 of LSC shall be based upon the anticipated evacuation capability of the residents to be housed.

**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 updates out-of-date references in Parts 594 and 595 of 14 NYCRR. Currently, §§ 594.16(a)(3) and 595.15(a)(2)(i) contain references to the 1991 edition of the National Fire Prevention Association (NFPA) – 101 Life Safety Code (LSC). These references need to be changed to refer to the 2000 edition of NFPA 101 LSC.

The Life Safety Code is currently incorporated by reference in regulations adopted by the New York State Department of State, Division of Code Enforcement and Administration, in Part 1225 of Chapter XXXIII of Title 19 NYCRR. Part 1225 – Fire Code of New York State, Chapter 1 General Requirements, § 102.6 relates to “Referenced standards” and states that “ standards referenced in this code shall be those that are listed in Chapter 45 and such standards shall be considered part of the require-

ments of this code. . .” Chapter 45, pages 337-338, lists certain standards of the National Fire Protection Association, Batterymarch Park, Quincy, MA 02269, including, on page 338, standard reference number 101-00 Life Safety Code.

Copies of NFPA - 101 LSC are available for public review at the NYS Department of State, 41 State Street, Albany, New York 12207. (Filed at Division of Administrative Rules library number BC-00-07.)

Copies of NFPA - 101 LSC are also available for review at the Bureau of Inspection and Certification, NYS Office of Mental Health, 44 Holland Ave., Albany, New York 12229.

#### **Job Impact Statement**

It is evident from the nature of the proposed rule making, which merely updates references in Parts 594 and 595 to the current edition of the National Fire Prevention Association (NFPA) – 101 Life Safety Code (LSC), that the proposed amendments will not have a substantial impact on jobs and employment activities.

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## Office of Mental Retardation and Developmental Disabilities

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### EMERGENCY RULE MAKING

#### **Criminal History Record Checks**

**I.D. No.** MRD-41-06-00005-E

**Filing No.** 1141

**Filing date:** Sept. 21, 2006

**Effective date:** Sept. 21, 2006

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

**Action taken:** Addition of sections 633.22 and 633.98 and amendment of sections 635.5, 633.99, 635-10.5, 679.6, 680.12, 681.14, 687.4, 687.8, and 690.7 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b), and 16.33; and Executive Law, section 845-b

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

**Specific reasons underlying the finding of necessity:** The regulations require fingerprinting and criminal history record checks for various individuals who provide services to people with developmental disabilities in the OMRDD system. The regulations are necessary to keep certain convicted criminals, including violent felons and sexual predators, out of positions that include regular and substantial contact with people with developmental disabilities. If regulations were not adopted as an emergency measure, convicted criminals could have unrestricted and unsupervised contact with consumers as new employees or volunteers or family care providers, which would endanger the health, safety and general welfare of people receiving services. Consumers could be unnecessarily victimized by people with criminal history records for the period of time between April 1, 2005 and the earliest date that regulations could be finalized using the regular regulatory process.

**Subject:** Requirements related to criminal history record checks.

**Purpose:** To promulgate regulations necessary to implement chapter 575 of the Laws of 2004, concerning criminal history record checks. The regulations require that agencies, sponsoring agencies and providers of services request history record checks for specified employees, volunteers, family care providers and parties who are to reside in a family care home.

**Substance of emergency rule:** ● Effective September 21, 2006. Replaces similar emergency regulations that were effective April 1, June 30, September 28, December 27, 2005, March 27, and June 23, 2006.

● The following changes were made compared to the June 23 emergency regulations:

- The term, “approved provider” is changed to “registered provider.”

- A requirement is added that registered providers must give a copy of their annual statement to each relevant DDSO, voluntary agency and entity which contracts with the registered provider on behalf of the voluntary agency.
- New provisions are added to the required contents of the annual statement:
  - registered providers must include the names of all relevant DDSOs, voluntary agencies and entities which contract with the registered provider on behalf of the voluntary agency.
  - voluntary agencies must include the names of all registered providers with which they contract.
- New language clarifies that registered providers may contract with entities on behalf of the voluntary provider, in addition to voluntary providers and DDSOs.
- A technical change is made in the definition of “criminal history record information.”
  - Applies to *all* providers, including residences (ICFs, IRAs, and CRs), family care homes, day programs (day treatment, day habilitation, day training, sheltered workshops, prevocational services), HCBS waiver services, Article 16 clinics, family support services, and individualized support services.
  - Applies to some entities that have a contract with OMRDD.
  - Establishes a requirement that providers of services apply to become “registered providers” if they contract with a voluntary agency, entity on behalf of the voluntary agency or DDSO and provide transportation services or staff.
  - Requires agencies to appoint an “authorized party” to request criminal history record checks and receive the results.
  - Requires that prospective employees, volunteers, and operators that have “regular and substantial unsupervised or unrestricted physical contact” with people receiving services consent to a criminal history record check.
  - Requires that agencies ask applicants about pending criminal charges, in addition to convictions.
  - Defines employees of the provider that are subject to a criminal history record check to include people that are directly employed by the provider and other people providing similar services for the provider who are employed by other entities, such as temporary employment agencies or contractors.
  - Includes a list of jobs that are presumed to include this type of contact.
  - Provides that while the results of criminal history record checks are pending, employees and volunteers may not have unsupervised physical contact with people receiving services. Regulations specify restrictions placed on “temporarily approved provisional” employees and volunteers.
  - Provides that oversight of temporarily approved provisional employees and volunteers can be provided by an employee who has completed required training in incidents and abuse, and who was not subject to a criminal history record check or whose criminal history record check has been completed.
  - Provides that temporarily approved provisional employees and volunteers may not be assigned personal care activities which require privacy unless the employee providing oversight is in the same room.
  - Provides that temporarily approved provisional employees and volunteers may not work the night shift in a residence.
  - Requires that requests for criminal history record checks be made through OMRDD. If a person has already had a check through OMRDD or OMH, providers may be able to use an expedited process without additional fingerprinting if OMRDD criteria are met.
  - Provides that OMRDD will make a determination in each case either to issue a denial (or direct the provider to issue a denial) or not to issue a denial (or not direct the provider to issue a denial). The determination process is put on hold for pending felony charges and may be put on hold for misdemeanor charges.
  - Establishes standards for OMRDD determinations that replicate the standards in the statute, with certain specified crimes that are presumptive disqualifying crimes. A new section 633.98 lists these crimes.
  - Provides that OMRDD will send a summary of the criminal history record information to agencies, which can assist in further decision-making by the agency (such as evaluating whether the applicant provided false information about convictions or pending charges). Registered providers will not receive the summary unless OMRDD is issuing a denial.
  - Provides that once a person has had a criminal history record check, OMRDD will let the provider know about future arrests. When they are

notified, providers must take appropriate steps to protect people receiving services.

- Requires that providers notify OMRDD when employees and volunteers separate from service, so that OMRDD can remove the name from its database.

- Includes a requirement that agencies and providers of services submit an annual criminal history record check statement to OMRDD.

- Identifies actions that OMRDD may take for non-compliance.

- Makes minor changes in current requirements to assess applicant backgrounds.

Family care homes.

- Includes family care respite providers, and adults living in homes where respite is provided.

- Requires prospective family care providers and people who are to reside in a family care home and who are age 18 years and older to consent to a criminal history record check (except for individuals receiving family care services).

- Requires current family care providers and residents of a family care home to consent to a criminal history record check, at the time of recertification.

- Establishes that checks related to family care homes are requested by the sponsoring agency (DDSOs for most family care homes) and information is received by the sponsoring agency.

- Requires criminal history record checks for current residents at the time of their 18th birthday.

- Requires that a criminal history record check be conducted prior to or shortly after a new adult moves into the family care home. Additional processes are specified to safeguard people receiving services before the results of the criminal history record check are received.

- Requires notifications to OMRDD about residency and provider status so that names can be removed from the OMRDD database.

- Requires additional notifications by family care providers about changes in residents of the family care home and arrests of household members.

**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 December 19, 2006.

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

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

### Regulatory Impact Statement

#### 1. Statutory Authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in Section 13.07 of the New York State Mental Hygiene Law.

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

c. OMRDD's authority, as stated in Section 16.33 of the Mental Hygiene Law, to require providers of services to request that a criminal history record check be conducted in specified situations.

d. OMRDD's responsibility, pursuant to section 845-b of the Executive Law, to promulgate regulations concerning criminal history record checks.

#### 2. Legislative Objectives:

These amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 16.33 of the Mental Hygiene Law and section 845-b of the Executive Law. The promulgation of these amendments will enhance the safety of people with developmental disabilities who receive services certified, authorized, approved or funded by OMRDD. Providers of services, with some exceptions, are required to comply, including certified residences and day programs, HCBS waiver services, Medicaid Ser-

vice Coordination, family support services, and individual support services.

#### 3. Needs and Benefits:

The new law and these implementing regulations require fingerprinting and criminal history record checks for prospective employees and volunteers, family care providers and adults who are to reside in a family care home.

Based on the results of the criminal history record check, individuals who have been convicted of certain types of crimes will be denied positions which involve regular and substantial unsupervised or unrestricted physical contact with people receiving services. The results of the check will also enable providers (except for "registered providers") to verify criminal history record information provided in applications and make their own determinations about employment suitability, when OMRDD has not directed the denial of the application for the "subject party."

The regulations also include measures that can be used at the discretion of the provider (except for "registered providers") to temporarily approve new applicants while the results of the criminal history record check are pending. During this time, the activities of these employees and volunteers must be monitored. In this manner, new employees can be hired while people receiving services are safeguarded.

The new law and regulations will enhance consumer safety by keeping certain known offenders who have been convicted of certain crimes out of jobs that involve regular and substantial unsupervised or unrestricted physical contact with people receiving services.

The regulations extend requirements to employees of entities under contract with provider agencies.

In addition, the regulations establish mechanisms for some providers of services to become "registered providers." Providers of services that contract with agencies to provide transportation services or staff are required to apply to OMRDD to become "registered providers."

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: OMRDD estimates that the new requirements will result in approximately 48,000 requests for a criminal history record check on an annual basis. The total annual cost is estimated to be approximately \$6,130,000. This cost includes the costs of the processing fee charged by the Division of Criminal Justice Services, which is \$75 per check, and the related costs, including administrative costs, which are incurred by OMRDD.

OMRDD estimates that approximately 79 percent of the annual aggregate cost will be eligible for Medicaid funding. Therefore, approximately \$4,840,000 of the total costs will be subject to a 50 percent Federal share, and approximately \$1,290,000 will be borne entirely by the State. The new requirements will therefore result in the expenditure of approximately \$2,420,000 in Federal funds, and approximately \$3,710,000 in costs to the State.

There will be no cost to local governments as a result of the new requirements.

b. Costs to private regulated parties: There are no initial capital investment costs or initial non-capital expenses. The new requirements will not generally result in any costs to private regulated parties.

For programs eligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be a state-paid item, so that providers will not be incurring out-of-pocket expenses. These expenses will be considered an allowable cost in the rates and fees established for the programs.

For programs ineligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be borne by the State.

OMRDD will make facilities available for fingerprints to be taken at no out-of-pocket cost to the provider or subject party. However, OMRDD is permitting the provider or subject party to choose to use another entity to take the fingerprints (e.g. a local police department or some voluntary agencies) which may charge for that service. OMRDD is not providing reimbursement for those charges, so this cost must be borne by the provider.

#### 5. Local Government Mandates:

There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

#### 6. Paperwork:

Chapter 575 of the Laws of 2004 requires two forms to be developed for use in the process of requesting criminal history record information. The forms are an informed consent form to be completed by the subject party and the request form to be completed by the authorized party designated by the provider. Temporarily approved employees and volunteers

are required to complete an attestation regarding incidents/abuse. Adults who are to reside in a family care home must provide an attestation regarding convictions and pending charges. In addition, other forms will be required by OMRDD, such as a form to designate an authorized party, forms to be completed when someone who has had a criminal history record check is no longer subject to the check, and an annual statement completed by the chief executive officer.

The regulations also contain a requirement to keep a current roster of subject parties.

#### 7. Duplication:

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

It should be noted that the Office of Mental Health (OMH) has a similar statutory requirement and is promulgating its own regulations on this subject, as required via Chapter 575. Staff from OMRDD and OMH have met to explore opportunities to share fingerprint technology across both Agencies. 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 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. In addition, OMRDD has begun efforts with the Fingerprint technology vendor to electronically share between OMRDD and OMH. This would facilitate staff from OMRDD providers being printed at OMH locations, as well as staff from OMH providers being printed at OMRDD locations. OMRDD has had preliminary discussions with the vendor as to the architecture, software and connectivity required to accomplish this goal.

With the release of enhanced LiveScan stations and software, the capability exists to share fingerprints electronically through the NyeNet. As all NYS Agencies utilize the NyeNet, this capability provides for future expansion beyond OMH for State Agencies who also utilize this technology. In addition, this will also allow voluntary agencies that serve both OMH and OMRDD consumers to forward prints to the appropriate State Agency for processing.

OMRDD has also expanded the number of sites available for electronic fingerprinting by implementing fingerprint technology at a limited number of voluntary agencies. The technology utilized is equivalent to that being used at OMRDD DDSOs and increases the number of locations to serve large population centers, as well as more remote locations where there are no DDSO Livescan stations. Support is being provided by OMRDD to ensure the success of these new sites. Additional expansion in the future is anticipated in response to the numerous requests from voluntary agencies for this capability.

#### 8. Alternatives:

OMRDD had considered standards requiring that the oversight provided for temporarily approved provisional employees and volunteers could only be provided by a supervisor or someone with one year's experience. However, OMRDD determined that this requirement might be difficult for some providers to implement and would not enhance consumer safety.

#### 9. Federal Standards:

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

#### 10. Compliance Schedule:

OMRDD filed a similar emergency regulation on April 1, 2005 to implement Chapter 575 of the Laws of 2004, which became effective on April 1, 2005. Subsequent emergency regulations were filed June 30, 2005, September 28, 2005, December 27 2005, March 27, 2006, and June 23, 2006.

OMRDD intends to finalize the proposed amendments within the time frames provided for by the State Administrative Procedure Act (SAPA).

#### **Regulatory Flexibility Analysis**

1. Effect on small business: These regulatory amendments will apply to providers of services that operate all programs certified, authorized, approved or funded through contract by OMRDD, except for the State and some other specified entities. In addition, small businesses providing transportation services or staff that contract with voluntary agencies or NYS are required to comply with provisions related to "registered providers."

OMRDD has determined, through a review of the certified cost reports, that the organizations which operate the facilities or provide the developmental disabilities services employ fewer than 100 employees at the discrete certified or authorized sites and would, therefore, be classified as small businesses.

The 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 business providers due to increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The new law and implementing regulations require a variety of compliance activities. These activities include: developing policies and procedures, designating authorized parties, completing criminal history record check request forms, denying employment at the direction of OMRDD, reviewing the summary of criminal history record information, evaluating the safety of consumers when a subject party is subsequently arrested, developing and maintaining records, and notifying OMRDD when employees separate from service.

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

4. Compliance costs: There are no costs to local governments. For programs eligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be a state-paid item, so that providers will not be incurring out of pocket expenses. These expenses will be considered an allowable cost in the rates and fees established for the programs.

For programs ineligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be borne by the State.

OMRDD will make facilities available for fingerprints to be taken at no out-of-pocket cost to the provider or subject party. However, OMRDD is permitting the provider or subject party to choose to use another entity to take the fingerprints (e.g. a local police department or some voluntary agencies) which may charge for that service. OMRDD is not providing reimbursement for those charges, so this cost must be borne by the provider.

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 amendments impose no adverse economic impact on local governments. As mentioned in the Regulatory Impact Statement, OMRDD had considered requiring that oversight could only be provided by supervisors or employees with at least one year of experience. OMRDD determined that this requirement might be difficult for some providers to implement and would not enhance consumer safety, and has minimized any related adverse economic impact on providers of services by not incorporating these qualifications for the employees providing oversight.

7. Small business and local government participation: OMRDD convened a Criminal Background Check Advisory Group which included consumer representatives, family members, and provider representatives. The group met on Nov. 8, 2004 and on March 22, 2005. In addition, the OMRDD Criminal Background Check Regulations Workgroup included provider representatives, and met on four occasions beginning in December, 2004. Presentations were made to various affected groups including the Family Care Advisory Council and the Family Support Services Advisory Council. A series of informational mailings were sent to affected providers beginning in January, 2005. OMRDD also held a series of twelve Executive Overview sessions in February and March in various locations from Buffalo to Long Island and also presented six video conferences to locations throughout the State. A series of training sessions was conducted in September, 2005 related to contractors. OMRDD has also posted relevant information on its website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

OMRDD distributed similar emergency regulations in April, June, September and December of 2005, March and June of 2006. OMRDD also posted the regulations on the Agency website. No comments were received regarding the emergency regulations.

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

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas because of the location of their operations (rural/urban). The amendments are concerned with requiring that providers of services request criminal history record checks for prospective employees and volunteers, and that checks are requested for family care providers and adult household members of family care homes. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties because of the location of their operations. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations. Specific effects of the rule on providers of

services have been discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

**Job Impact Statement**

A Job Impact Statement for these amendments is not submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and/or employment opportunities. It is expected that the amendments will have a modest positive impact on jobs/employment opportunities because OMRDD anticipates creating new employment opportunities to take fingerprints, to process the results of the criminal history record check, and to make determinations based on the results.

## New York State 911 Board

### INFORMATION NOTICE NOTICE OF PROPOSED AMENDMENT

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

Proposed Amendments to Minimum Standards Regarding Jurisdictional Protocols. Summary. At its meeting of September 18, 2006, the Board proposed an amendment to the minimum standards regarding jurisdictional protocols. A jurisdictional protocol is a written agreement entered into by two or more law enforcement agencies setting forth procedures to ensure the organized, coordinated, and prompt mobilization of personnel, equipment, services, or facilities in order to achieve the fastest response to a 911 emergency. All jurisdictional protocols are currently required, at a minimum, to provide that dispatch procedures shall be reviewed on an ongoing basis to ensure that the most efficient procedures are being used. This amendment will replace that requirement with the more specific requirement that dispatch procedures must be reviewed at least annually. A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

Further information, contacts: Written comments may be submitted to Harry J. Willis, Esq., at the New York State Department of State, Office of Counsel, 41 State Street, Suite 830, Albany NY 12231, fax: 518-473-9211, phone: 518-474-6740.

Text of proposed rule: Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Section § 5250.3 is amended to read as follows:

§ 5250.3. Wireless 911 calls shall be routed pursuant to County Law § 330. The jurisdictional protocols utilized by the law enforcement agencies responding to such calls shall, at a minimum, include or provide:

- (a) a list of all participating law enforcement agencies;
- (b) a method of providing for the dispatch of the closest police unit, which may be via any of the following:
  - (1) AVL (CAD mapping);
  - (2) indirect polling (asking for any unit in the area);
  - (3) direct polling (determining the location of a unit by its number);
- (c) a method of transferring calls to the proper agency or jurisdiction after dispatching;
- (d) that the methods provided for pursuant to subparagraphs b and c above shall be used in the case of all 911 calls dispatched for service;
- (e) that in all other respects, the Direct Dispatch Protocol developed by the New York State 911 Board shall apply;
- (f) that dispatch procedures shall be reviewed [on an ongoing basis] at least annually to ensure that the most efficient procedures are being used;
- (g) that all investigative duties shall be conducted by the law enforcement agency having ordinary investigative jurisdiction in any area, regard-

less of initial response to an emergency, provided, that no law enforcement agency shall be prohibited from requesting assistance from any other agency as may be provided under current law or regulation; and

(h) a procedure for resolving all disputes among the parties relating to the operation of the protocol, which may include referral of such disputes to a body designated by agreement among the parties.

### INFORMATION NOTICE NOTICE OF PROPOSED AMENDMENT

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

Proposed Amendments to Minimum Standards Regarding Equipment, Facilities and Security for Public Safety Answering Points. Summary. At its meeting of September 18, 2006, the Board proposed an amendment to the minimum standards regarding equipment, facilities and security for public safety answering points (PSAPs). This amendment applies greater specificity to the requirement for updating mapping programs, in that all mapping programs other than those that are CAD-based will now have to be updated at least every three years. The current standard only requires that such mapping programs be updated "regularly". A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

Further information, contacts: Written comments may be submitted to Harry J. Willis, Esq., at the New York State Department of State, Office of Counsel, 41 State Street, Suite 830, Albany NY 12231, fax: 518-473-9211, phone: 518-474-6740.

Text of proposed rule: Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Section § 5203.2(c), is amended to read as follows:

- (c) Mapping program (Other than CAD based).
  - (1) All mapping programs shall be compatible with the IWS system.
  - (2) All mapping programs shall be able to plot and display X and Y coordinates provided by all wireless service providers.
  - (3) All mapping programs shall be [regularly] updated at least every three years to reflect changes in the PSAP's coverage area.
  - (4) All mapping systems shall display a map display which can be navigated based on address and location coordinates provided from the PSAP's ALI system.

## Power Authority of the State of New York

### NOTICE OF ADOPTION

**State Environmental Quality Review Act**

**I.D. No.** PAS-16-06-00008-A  
**Filing No.** 1152  
**Filing date:** Sept. 26, 2006  
**Effective date:** Oct. 11, 2006

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

**Action taken:** Amendment of Part 461 of Title 21 NYCRR.  
**Statutory authority:** Environmental Conservation Law, section 8-0113; Public Authorities Law, section 1004  
**Subject:** State Environmental Quality Review Act (SEQRA).

**Purpose:** To update and clarify the Power Authority’s SEQRA rules.  
**Text or summary was published** in the notice of proposed rule making, I.D. No. PAS-16-06-00008-P, Issue of April 19, 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 B. Cahill, Power Authority of the State of New York, 123 Main St., White Plains, NY 10601, (914) 390-8036, e-mail: anne.cahill@nypa.gov

**Assessment of Public Comment**

The Authority conducted a public hearing on June 6, 2006; no members of the public appeared to offer comments on the proposed revisions to 21 NYCRR Part 461. The public record was held open for five days and a letter was received on June 12, 2006 and was considered timely submitted by virtue of the fact that the final day of the comment period (June 11, 2006) fell on a Sunday.

The letter received was signed by Assemblyman Ruben Diaz, Jr. of the 85th Assembly District in the Bronx. The Diaz letter notes that the “changes that are actually proposed are worthwhile. . .” but also opines that the Authority has failed to incorporate “. . . principles of environmental justice into its SEQRA rules.”

The Diaz letter specifically comments that “[A]t a minimum, the Power Authority should adopt additional changes to its SEQRA rules by amending 21 NYCRR Part 461 to commit the Power Authority to following all aspects of DEC’s environmental justice policy when the authority is the lead agency” [page 2, lines 12 – 14]. The Authority has considered the recommendation and declined to make the modification suggested by the Diaz letter for the following reasons:

1. The Authority is committed to complete its SEQRA obligations in the most thorough manner possible and in full compliance with the law. An appropriate SEQRA review takes into consideration socioeconomic factors such as environmental justice. Furthermore, it is clearly in the Authority’s interest to ensure that its environmental assessment efforts will withstand the strictest standards of judicial review. Therefore, it is certain that the Authority will evaluate its actions against a wide range of Department of Environmental Conservation (“DEC”) regulations, standards and policies while completing its environmental assessments in those rare instances in which the Authority assumes the lead agency role. It can be safely presumed that the Authority will employ methods of evaluating environmental justice that are at least as stringent as those followed by DEC in such instances.

2. DEC’s environmental justice policy, which is not a regulation, only applies in instances in which DEC is issuing a permit or issuing a major modification to a permit in certain specific regulatory areas. It is an extremely rare circumstance under which the Authority will act as lead agency when a permit issuance action by DEC is contemplated. It would be counterproductive to the Authority’s mission to speculatively commit to certain processes for the future when the rare circumstances that trigger the principles of environmental justice may require other avenues of addressing this important topic.

3. In those instances in which the Authority is the lead agency, and a permit action on the part of DEC is contemplated (thus possibly triggering DEC’s environmental justice policy if DEC were to be lead agency), it is clear that DEC would be an “involved agency.” As an involved agency, DEC would be commenting on the Authority’s environmental assessment or environmental impact statement. In that role, DEC would certainly evaluate the Authority’s efforts to ensure that its environmental justice insights would be incorporated into the Authority’s final work product and findings.

For the foregoing reasons, the Authority has declined to make the specific changes recommended by Assemblyman Diaz, but takes note of such recommendations for future environmental assessments.

**NOTICE OF ADOPTION**

**Rates for the Sale of Power and Energy**

**I.D. No.** PAS-31-06-00018-A

**Filing date:** Sept. 26, 2006

**Effective date:** First full billing period following the date of filing this notice

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

**Action taken:** Revision in rate for Steuben Rural Electric Cooperative.

**Statutory authority:** Public Authorities Law, section 1005(5)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To maintain the system’s fiscal integrity. This increase is not the result of a Power Authority rate increase to the cooperative.

**Text or summary was published** in the notice of proposed rule making, I.D. No. PAS-31-06-00018-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:** Anne B. Cahill, Power Authority of the State of New York, 123 Main St., White Plains, NY 10601, (914) 390-8036, e-mail: anne.cahill@nypa.gov

**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.

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

**Rates for the Sale of Power and Energy**

**I.D. No.** PAS-41-06-00032-P

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

**Proposed action:** Increase in rates for sale of firm power and related tariff changes applicable to governmental customers located in Westchester County.

**Statutory authority:** Public Authorities Law, section 1005(6)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To recover the authority’s cost of providing firm power and energy services.

**Public hearing(s) will be held at:** 2:00 p.m., Nov. 15, 2006 at Power Authority of the State of New York, 123 Main St., Jaguar Rm., White Plains, NY.

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

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

**Substance of proposed rule:** Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the “Authority”) proposes to revise rates to the Westchester County Governmental Customers (“Westchester Customers”) and to reinstitute a monthly Energy Charge Adjustment (“ECA”) mechanism, effective January 1, 2007.

The Authority proposes to increase the base production rates by 25.8% on average compared to 2006 rates charged to the Westchester Customers. With respect to the ECA, the revised tariff provision would update the ECA mechanism that currently resides in the Westchester Customers tariff.

Written comments on the proposed revisions will be accepted through Monday, November 27, 2006, at the address below. For further information, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK  
 Anne B. Cahill, Corporate Secretary  
 123 Main Street, 15M  
 White Plains, New York 10601  
 (914) 390-8036  
 (914) 681-6949 (fax)  
 anne.cahill@nypa.gov

**WESTCHESTER COUNTY GOVERNMENTAL CUSTOMERS PRODUCTION RATES**

Service Class	Demand Rates \$/kW-mo.		Base Energy Rates Cents/kWh	
	Current	Proposed	Current	Proposed
62 General Small	n/a	n/a	67.52	8.494
64 Commercial & Industrial Redistribution	9.21	11.59	3.476	4.373
66 Westchester Streetlighting	n/a	n/a	5.676	7.140
68/82 Multiple Dwellings Redistribution	8.14	10.24	3.586	4.511
69 General Large	6.71	8.44	3.755	4.724

TIME-OF-DAY  Service Class	Demand Rates \$/kW-mo.		Base Energy Rates			
			On-Peak Cents/kWh		Off-Peak Cents/kWh	
	2007 Current	2007 Proposed	2007 Current	2007 Proposed	2007 Current	2007 Proposed
64 Commercial & Industrial Redistribution	7.56	9.51	5.011	6.304	2.771	3.486
68/82 Multiple Dwellings Redistribution	7.30	9.18	5.181	6.518	2.838	3.570
69 General Large	5.56	6.99	5.359	6.742	2.791	3.511

Notes:  
 In addition to the base energy rates, a monthly energy charge adjustment will apply.  
 The on-peak period for demand is weekdays from 8:00 AM to 6:00 PM, including holidays.  
 The on-peak period for energy is weekdays from 8:00 AM to 10:00 PM, including holidays.  
 The off-peak period for demand and energy is all other hours.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne B. Cahill, Power Authority of the State of New York, 123 Main St., White Plains, NY 10601, (914) 390-8036, e-mail: anne.cahill@nypa.gov

**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, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**  
 Statements and analyses are not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

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

**Rates for the Sale of Power and Energy  
 I.D. No. PAS-41-06-00033-P**

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

**Proposed action:** Increase in rates for sale of firm power to governmental customers located in New York City.

**Statutory authority:** Public Authorities Law, section 1005(6)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To recover the authority’s cost of providing firm power and energy services.

**Substance of proposed rule:** Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the “Authority”) proposes increased rates for the New York City Governmental Customers (“NYC Governmental Customers” or “Customers”) for Rate Year 2007.

The Authority proposes to increase the “Fixed Costs” component of the production rates by 1.8% compared to 2006 rates charged to the NYC Governmental Customers. This Fixed Costs increase will not, by itself, result in revised rates for the Customers. It will be combined with any modification in the “Variable Costs” component of the production rates determined by the close of 2006, which will result in revised overall production rates for 2007. The Variable Costs increase is established through a contractual rate-setting process and is not subject to the State Administrative Procedure Act.

Written comments on the proposed Fixed Costs revision will be accepted through Monday, November 27, 2006, at the address below. For further information, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK  
 Anne B. Cahill, Corporate Secretary  
 123 Main Street, 15M  
 White Plains, New York 10601  
 (914) 390-8036  
 (914) 681-6949 (fax)  
 anne.cahill@nypa.gov

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne B. Cahill, Power Authority of the State of New York, 123 Main St., White Plains, NY 10601, (914) 390-8036, e-mail: anne.cahill@nypa.gov

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

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

**Division of Probation and  
 Correctional Alternatives**

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

**Probation Investigations and Reports**

**I.D. No.** PRO-41-06-00008-EP  
**Filing No.** 1143  
**Filing date:** Sept. 25, 2006  
**Effective date:** Sept. 25, 2006

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

**Action taken:** Amendment of Part 350 of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 243(1); and Family Court Act, section 252-a

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

**Specific reasons underlying the finding of necessity:** It is imperative to immediately strengthen regulations governing probation investigations and reports to reflect recent statutory and/or regulatory changes in the area of sex offenses, DNA, ignition interlock, and better address issues relative to fingerprinting, citizenship, victim compensation and the unnecessary placement of children. The new rule addresses the important need for the verification of information and documented means by which information provided to courts is verified.

It provides clear guidance in identifying individuals subject to DNA sample collection and explains SORA applicability and the key factors for risk classification. It addresses the need to address citizenship and identify criminal aliens that may be subject to Federal deportation proceedings. New victim-related provisions will facilitate greater imposition of restitution and improve restitution collection. Other provisions relative to orders of protection safeguard domestic violence victims and promote batterer accountability. Fingerprinting provisions ensure that the court is aware of the complete criminal history of the offender or those seeking custody, adoption, visitation or the guardianship of children. Due to the myriad of public safety and general welfare issues addressed by this rule, DPCA has determined that the re-adoption of this important rule should proceed pursuant to emergency rule making.

**Subject:** Probation investigations and reports.

**Purpose:** To clarify existing laws governing the investigations and reports and to provide the court with relevant and reliable information for decisionmaking consistent with good probation practice.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.dpca.state.ny.us](http://www.dpca.state.ny.us)):**

The proposed revision amends Part 350 of Title 9 NYCRR to reflect current best practice and emphasize recent statutory changes and policy direction to promote greater offender/respondent accountability, interests and safety of victims and youth, as well as to provide key information regarding the individual who is the subject of a court-ordered investigation to ensure appropriate decisionmaking. These changes clarify and update certain existing provisions to ensure good professional practice, and provide flexibility in specific areas while maintaining quality service delivery. The proposed rule also better distinguishes and integrates provisions with respect to juvenile, criminal court, and other court investigations and reports.

The definitional section, Section 350.1 is retained. However it has been expanded to include and/or clarify particular terms, such as legal history, social circumstances, verification, victim, victim impact statement, and various types of interviews.

A newly added Section 350.2 clarifies the varied types of investigations which probation conducts and Section 350.4 governing applicability establishes the scope of the investigation and report rule consistent with this earlier noted section.

Section 350.3 entitled "Objective" delineates those dispositional and regulatory agencies that may or are required to receive probation reports for immediate or future decisionmaking.

Section 350.5 provides a general statement as to investigations and reports and clarifies the need to distinguish between fact and professional assessment, information sources, professional and other assessment protocols and observations, and to cite sources of information.

Section 350.6 governs the investigation process. Previous language in this area has been reworked and certain noteworthy provisions are highlighted below:

(a) Order for investigation and report. Refers to DPCA-2.2 Court Order for Investigation and Report to obtain the required information necessary to initiate the investigation and report process. The CJTN and NYSID are also required in this document. Allows for entry of information into an electronic case record management system.

(b) Scope of investigation. Refers to DPCA-221 Pre-Dispositional/Pre-Plea/Pre-Sentence Investigation Report Worksheet for the minimum required information, and articulates that this information is to be included where it has a bearing on the disposition of a case. This section organizes the format and contents of the report, incorporating areas to be addressed, both new and as previously described in various sections of the existing rule. It more clearly distinguishes the information required for juvenile and criminal court investigations, and incorporates more recent changes in law and probation practice (i.e. SORA eligibility, persistent and predicate felony status, immigration and alien status, juvenile placement considerations). This section specifies and expands the range of risk, need and protective factor information to be included. It requires victim information in all cases where there is a victim, and specifies and expands the types of information to be sought from and about the victim. It clarifies who can speak on the victim's behalf and addresses reimbursement received from Crime Victims Board.

(c) Conducting the investigation.

1. Obtaining basic legal information. This was moved to the top of this section to more accurately reflect actual workflow. Specifies and expands the legal information that should be gathered prior to the interview with the defendant.
2. Interviews with respondent/defendant, or subject(s) of the court order for investigation. Delineates what types of interviews are required and/or permissible. Recognizes procedures approved by DPCA and the NYS Division of Parole (DOP) for cases where the defendant is in the custody of the NYS Department of Correctional Services (DOCS). Provides relief from an in-person interview of defendant/respondent on a case-by-case basis where individual resides in a distant jurisdiction and probation director has determined exigent circumstances exist.
3. Other interviews/contacts. For juvenile cases, provides a requirement to interview parents/guardians for the purpose of gathering information relative to the parent's/guardian's perspective of the youth's legal and social circumstances, as well as the parent's/guardian's perceived ability and willingness to assist in meeting the goals of supervision of the youth in probation-bound cases. For youth eligible to receive youthful offender treatment, encourages such interviews, as appropriate. Requires communication with the victim/victim representative to inform them of their right to seek restitution and to attempt to secure a victim impact statement.
4. Types of Assessment. Incorporates financial, community, and institutional resource assessment from existing rule. Adds a requirement to assess a respondent/defendant risk and needs.
5. Verification. Expands the list of informational elements requiring verification to include: citizenship; place of birth; current address; alien status; and steps taken to verify the information. Expands the list of informational elements to be verified, when such is likely to have a bearing on recommendation, to include names of members of the household and their relationship to the respondent/defendant.

d. Preservation of investigation materials. Adds that the probation officer shall document the sources of information.

Section 350.7 governs preparation of reports and highlighted below are important features:

(a) Scope of report. Provides that the Investigation Facesheet must contain the information as provided for in DPCA-220 Pre-Dispositional/Pre-Plea/Pre-Sentence Investigation Report Facesheet.

(b) Informational contents of report and format. Provides for the following:

- Reorganizes into subsections content including legal history, current offense information, social circumstances, evaluative analysis, and recommendation.
- Incorporates some of the language from existing rule 350.6(b).
- Clarifies relevant information to be reported from various interviews, including arresting officer, respondent/defendant, victim(s), and parent(s).
- Distinguishes between required family court and criminal court legal history, and adds a requirement for order of protection information.
- Adds that a victim impact statement is always relevant to the recommendation or court disposition.
- Requires that the address of the victim or victim family member not be included in the report.
- Refers to new section 350.5(b)(2) for contents regarding social circumstances.
- The evaluative analysis section is significantly expanded to specify the elements requiring probation officer assessment and analysis.
- Adds that the recommendation must be consistent with law.
- Requires a recommendation for special conditions that address public safety, reparation, DNA collection, and offender accountability when probation or conditional discharge is recommended.
- Requires a recommendation for restitution, where such is being sought, that acknowledges the defendant's potential earnings/allowances while in the community or in prison.
- Where prison is anticipated, requires that the rate of payment shall not be specified, and that the start date for payment shall not be recommended for deferral.
- Adds provision for exception of portion of the report where disclosure would endanger the safety of any person.
- Provides for electronic signatures and date stamping as to when and by whom review was completed.
- For potential supervision transfer cases, adds requirement to secure all necessary information necessary to affect transfer at time of sentence.

Section 350.8 governs certificate of relief from disabilities investigations and reports and is similar to existing language, except for the new language which requires a recommendation be made as to the relief to be granted.

Section 350.9 pertains to special requirements for pre-plea investigations and reports which is similar in nature to existing language, yet clarifies in general the scope of pre-plea investigations and reports shall conform to pre-dispositional reports, that the recommendation shall take into account that there is no conviction, and recognizes situations where on advice of counsel or their own volition, the defendant declines to discuss the current offense.

Section 350.10 governs submission, transmittal and confidentiality of probation reports and while similar to existing language, it has been updated to conform to state law and reflect recent regulatory changes to DPCA's case record rule governing confidentiality and accessibility of probation reports.

Section 350.11 governs pre-disposition investigations and reports in all other family court cases and while similar to existing regulatory provisions, new language requires fingerprinting and criminal history search of the parties in custody, adoption, visitation, and guardianship investigations to conform to recent statutory changes in this area.

Lastly, Section 350.12 retains without change guidelines, as required by Family Court Act Section 252-a, for schedule of payments relating to family court custody investigation fees which have been authorized by law.

**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 November 23, 2006.

**Text of rule and any required statements and analyses may be obtained from:** Linda J. Valenti, Counsel, Division of Probation and Correctional Alternatives, 80 Wolf Rd., Suite 501, Albany, NY 12205, (518) 485-2394, e-mail: linda.valenti@dpc.state.ny.us

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

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

#### **Regulatory Impact Statement**

1. Statutory authority:

Article 12 of the Executive Law, specifically Section 243(1), authorizes the State Director of Probation and Correctional Alternatives to

“regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence, and children prior to adjudication . . . so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state.” Such rules are binding and have the force and effect of law. Further, Article 12-A of such law, specifically Section 256(1), requires probation agencies to perform investigations and reports assigned to them pursuant to law. Additionally, Section 252-a of the Family Court Act establishes parameters by which a probation department, whose jurisdiction has adopted a local law, may collect an investigation fee for Family Court custody investigations and also specifies that the schedule for payment shall be fixed by the court pursuant to guidelines issued by the State Director of Probation and Correctional Alternatives.

#### 2. Legislative objectives:

These regulatory amendments are consistent with legislative intent that the Director adopt regulations in areas relating to critical probation functions, to promote professional standards governing the administration, conducting, and delivery of probation services in the area of investigation and report preparation for courts, as well as to enhance numerous measures enacted into law to provide the courts and dispositional agencies with relevant and reliable information in a succinct, analytical presentation for decisionmaking. By vesting the State Director with rule making authority, the Legislature has authorized the Division of Probation and Correctional Alternatives (DPCA) to set minimum standards in the area of probation investigations and reports.

#### 3. Needs and benefits:

These amendments align with and conform to statutes that have been enacted since the last rule revision, clarifying rule language, and establishing and codifying elements of good probation practice to assist practitioners in fulfilling their legal responsibilities. Additional rule language specifies essential information elements as the field of probation: 1) increases its expertise concerning victims and victims’ issues; 2) incorporates research-supported strategies related to the gathering and reporting of information relevant to assessing risk of recidivism and criminogenic need areas; 3) provides information necessary to develop specific intervention strategies to target higher risk populations; 4) moves forward in the electronic compilation, storage, and exchange of information across the full spectrum of the justice system; 5) integrates new technologies utilized in community corrections. More comprehensive provisions will prove beneficial in terms of compliance with existing laws, promoting consistent communication for public safety and/or case management purposes, and incorporating best practices.

More specifically, there are a number of new provisions to ensure that important legal information and considerations are documented and conveyed to the court and all necessary parties. For criminal cases, the Criminal Justice Tracking Number (CJTN) and the New York State Identification Number (NYSID) are required to be obtained as part of the investigation as they are critical, person and event specific identifiers that ensure legal history is correctly associated with the subject of the investigation. Further, Sex Offender Registration Act (SORA) eligibility, persistent and predicate felony status, immigration and alien status, and juvenile placement considerations must be specifically documented in conformance with law and good probation practice.

There are new provisions related to victims of crime. These amendments clarify that a victim impact statement is always relevant to the recommendation or court disposition; address who can speak on the victim’s behalf; require victim information in all cases where there is a victim; and include specification of types of information to be sought from and about the victim. Further, it requires that information related to orders of protection be included in the report, and that address(es) of the victim or victim family member not be included. The amendments require probation to communicate with the victim as to their right to seek restitution and to attempt to secure a victim impact statement. It also requires probation to include any information regarding reimbursement from the Crime Victims Board. These changes are intended to support victim safety and the victim’s right to be heard, and to provide victim opportunity for input in this critical phase of the legal proceeding against their offender.

Where the defendant is in custody of the NYS Department of Correctional Services (DOCS) and is not reasonably accessible for interview, the amendments refer to procedures approved by DPCA and the NYS Division of Parole (DOP) for gathering of information by the institutional parole officer. Such procedures provide greater flexibility in obtaining information from the subject of the investigation.

For juvenile cases, a new provision requires probation to interview parents/guardians for the purpose of gathering information relative to their

perspective of the youth’s legal and social circumstances, as well as their perceived ability and willingness to assist in meeting the goals of supervision of the youth. This requirement ensures that parents/guardians have an opportunity for input into the assessment and decisionmaking process. Further, as parents/guardians tend to have valuable information and insight regarding their children, the requirement that the probation officer interview the parent(s) contributes significantly to investigations involving juveniles. For defendants eligible to receive youthful offender treatment, the amendments encourage such interviews, as appropriate.

As probation has traditionally been responsible to advise the court relative to the respondent/defendant’s capacity to lead a law-abiding life in the investigation report, it is essential that formal risk assessment be conducted at this stage. Further, for probation-bound cases, formal assessment is critical to develop recommendations for special conditions that target criminogenic risk and needs to effectively manage the offender and reduce the risk of recidivism. These amendments add a requirement to assess respondent/defendant risk and needs.

New requirements strengthen the justice system’s ability to accurately identify populations of concern to promote local, state, and national security. Additional items to be verified include citizenship, place of birth, current address, alien status; also, when likely to have a bearing on recommendation, the names of household members and their relationship to the respondent/defendant. These amendments also require the probation officer to document sources of information.

The evaluative analysis section is expanded to specify the primary elements requiring probation officer analysis. This ensures that key findings relative to decisionmaking are incorporated. There is a new requirement that when probation or conditional discharge is recommended, special conditions shall address public safety, reparation, DNA collection, and offender accountability. Where restitution is sought, there will be a recommendation for restitution that acknowledges the defendant’s potential earnings/allowances while in the community or in prison. Where prison is anticipated, it further requires that the rate of payment not be specified, and that the start date for payment not be recommended for deferral. Collectively, these changes are intended to promote consistency and good practice.

Recognizing the laws governing access to and confidentiality of the investigative report, a new provision requires probation to recommend exception of any portion of the report where disclosure of information would endanger the safety of any person.

There are a series of amendments to address finalization of the report, use of it at disposition/sentencing, and attention to transfer cases. These amendments recognize electronic document preparation while ensuring the security and integrity of the report by providing for electronic signatures and date stamping. For potential supervision transfer cases, language has been added to secure all information necessary to affect timely transfer. This provision is intended to assure that such individuals do not leave the court’s jurisdiction without obtaining necessary authorizations. Finally, there is a provision to promote the consistency of pre-plea reports for use after conviction, which requires that the investigation and body of the reports conform to pre-sentence reports and the recommendation takes into account that there is no conviction.

Overall, these regulatory amendments strengthen and promote effective probation practice by affording greater consistency through specific guidance in the investigation and report process. They establish appropriate guidelines to guarantee more uniform application, incorporate changes in law, address and optimize public and victim safety and reparation, and promote greater offender accountability by ensuring the gathering and reporting of accurate and relevant information to inform the decisionmaking process and post-dispositional service providers. It is in the best interests of state and local government that these regulatory amendments be adopted.

#### 4. Costs:

These changes articulate specific requirements of effective probation investigation and reporting practices. DPCA does not foresee that these reforms will lead to significant additional costs. The majority of probation departments are already participating or intend to participate in DPCA’s efforts to deploy the Caseload Explorer/ ProberWeb case management software, which makes available all DPCA-issued forms. Further, DPCA has made available at no costs to jurisdictions, risks and needs assessment tools for purposes of intake, investigation and supervision. Those few departments with locally developed caseload management systems may incur certain costs in modifying an automatically generated form (DPCA-220) to include the new data elements required through these amendments. However, departments instead can choose to utilize DPCA’s forms which

are available electronically. As to any anticipated in-service costs of educating staff, DPCA believes that orientation can be readily accomplished through a written memorandum by the probation department and supervisory oversight without incurring any direct costs. In conclusion, any minimal costs are outweighed by the significant benefits of increased public safety interests.

#### 5. Local government mandates:

These proposed regulatory amendments establish provisions for effective investigation and reporting protocols consistent with both traditional and emerging probation practices. We do not anticipate these new requirements will be burdensome. While this regulatory reform requires specific attention to particular key areas for investigation, it provides flexibility in determining which informational elements are relevant for presentation in the written report to the court and recognizes the role of professional judgment during the interview process. It further provides relief from an in-person interview of defendant/respondent on a case-by-case basis where an individual resides in a distant jurisdiction and the probation director has determined exigent circumstances exist.

Noteworthy, DPCA constituted a workgroup to initially draft a revised investigation and report rule, which was comprised of several representatives from local probation departments across all levels of staffing: director, supervisor, and line probation officers. DPCA circulated two refined drafts to all probation directors/commissioners, the Council of Probation Administrators, (the statewide professional association of probation administrators) which assigned it to a specific committee for review, and the State Probation Commission, DPCA's advisory body. Throughout, DPCA incorporated numerous suggestions and sought to clarify several additional issues raised, including greater recognition of flexibility in certain instances. Overall, DPCA has received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice.

#### 6. Paperwork:

The proposed rule, while requiring additional data elements as part of comprehensive investigation and report preparation, will not require the completion of additional forms or other paperwork.

#### 7. Duplication:

This proposed rule does not duplicate any State or Federal law or regulation. It clarifies and reinforces certain laws with respect to crime victims, juveniles, illegal aliens, DNA collection, restitution, and disposition/sentencing to promote and facilitate compliance.

#### 8. Alternatives:

Establishing stronger and more specific minimum standards relative to the core probation function of investigation and report preparation, promotes public and victim safety as well as offender and systems accountability by ensuring the provision of relevant and accurate information to the court for decisionmaking, and to post-dispositional agencies for appropriate service interventions. Additionally, DPCA is the state regulatory agency with respect to probation services and the Director has authority and responsibility to establish regulations in this area to achieve effective and consistent minimum standards for practice. Accordingly, it is not a viable alternative to have no investigation and report rule governing this important probation function.

#### 9. Federal standards:

There are no federal standards governing the probation investigation process.

#### 10. Compliance schedule:

Through past agency communication with probation departments on content of two earlier drafts and involvement of a cross-section of probation departments in the initial workings leading to the original draft, DPCA believes that these regulatory changes will not prove difficult to achieve. Through prompt dissemination to staff of the new rule and its summary, local departments should be able to promptly implement these amendments and comply with its provisions. These regulatory amendments shall take effect as soon as they are published in the State Register under a Notice of Adoption.

### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis for small businesses is not required by Section 202-a of the State Administrative Procedure Act; no small business recordkeeping requirements, needed professional services, or compliance requirements will be imposed on small businesses.

Any impact a local government is addressed in both the Regulatory Impact Statement and the Rural Area Flexibility Analysis.

### **Rural Area Flexibility Analysis**

#### 1. Types and estimated number of rural areas:

Forty-four local probation departments are located in rural areas and will be affected by the proposed rule amendments.

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

There are no current reporting requirements to our state agency, the Division of Probation and Correctional Alternatives (DPCA) associated with this new rule. While the proposed rule more comprehensively delineates the areas of investigation supporting the preparation of the probation report, DPCA believes new provisions update requirements of law as well as codify good probation practice. The proposed rule, while requiring additional data elements as part of comprehensive investigation and report preparation, will not require the completion of additional forms or other paperwork.

Any changes to specific local written policies and procedures governing probation investigation and report preparation are normal business activities and in keeping with good professional practice. There are no professional services necessitated in any rural area to comply with this rule. Lastly, DPCA does not believe that these regulatory changes will prove difficult to achieve. Through prompt dissemination to staff of this new rule and its summary, local probation departments should be able to promptly implement these amendments and comply with its provisions.

#### 3. Costs:

These changes articulate specific requirements of effective probation investigation and reporting practices. DPCA does not foresee that these reforms will lead to significant additional costs. The majority of probation departments already are participating or intending to participate in DPCA's efforts to deploy the Caseload Explorer/ ProberWeb case management software which makes available and retrievable all DPCA issued forms in this area. Further, DPCA has made available, at no cost to jurisdictions, risks and needs assessment tools for purposes of intake, investigation and supervision. Those few departments with locally developed software assisted caseload management systems may incur certain costs in modifying one automatically generated form (DPCA-220) to include the new data elements required through these amendments. However, alternatively, they can choose to utilize DPCA's forms which are available electronically. As to any anticipated in-service costs of educating staff, DPCA believes that orientation can be readily accomplished through a written memorandum by the probation department and supervisory oversight without incurring any direct costs. In conclusion, any minimal costs are outweighed by the significant benefits of increased public safety interests in all jurisdictions, including rural counties. These proposed regulatory amendments establish provisions for effective investigation and reporting protocols consistent with both traditional and emerging probation practices. We do not anticipate these new requirements will be burdensome.

#### 4. Minimizing adverse impact:

DPCA foresees that these regulatory amendments will have no adverse impact on rural areas and as indicated below, our agency collaborated with jurisdictions across the state in developing the proposed rule and incorporated numerous suggestions to clarify or address issues raised and to reflect good probation practice. DPCA embraced flexibility where consistent with good probation practice. Further details are more fully defined in the regulatory impact statement. While this regulatory reform requires specific attention to particular key areas for investigation, it provides flexibility in determining which informational elements are relevant for presentation in the written report to the court and recognizes the role of professional judgment during the interview process.

#### 5. Rural area participation:

DPCA constituted a workgroup to initially draft a revised investigation and report rule, which was comprised of several representatives from local probation departments across all levels of staffing: director, supervisor, and line probation officers and included rural county representatives. DPCA also circulated two refined drafts to all probation directors/commissioners, the Council of Probation Administrators, (the statewide professional association of probation administrators) which assigned it to a specific committee for review which includes rural representation, and the State Probation Commission, DPCA's advisory body. Throughout, DPCA incorporated numerous suggestions and sought to clarify several issues raised, including greater recognition of flexibility in certain instances. Overall, DPCA has received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice.

The proposed regulatory amendments incorporate many verbal and written suggestions from probation professionals, including rural entities, across the state to address problems which probation departments experi-

ence in the area of investigation and report preparation. Brief details of some of these changes are highlighted in the regulatory impact statement. Moreover, DPCA did not find significant differences among urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

#### **Job Impact Statement**

A job impact statement is not being submitted with these emergency regulations because it will have no adverse effect on private or public jobs or employment opportunities. The revisions are procedural in nature clarifying law and conforming with good probation practice as to investigations and reports. These changes are not onerous and can be implemented through correspondence and in-service training of probation staff.

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

#### **Case Record Management and Supervision**

**I.D. No.** PRO-41-06-00007-P

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

**Proposed action:** Amendment of Parts 348 and 351 of Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 243(1) and 257(4) and (5)

**Subject:** Case record management and supervision of those under probation supervision.

**Purpose:** To promote public/victim safety, increase offender accountability, facilitate appropriate communication and/or sharing by probation of certain case record information where deemed necessary and recognize instructions and/or supervisory directives pertaining to orders and conditions of probation.

**Text of proposed rule:** Section 348.4, Accessibility of case records, is amended to read as follows:

(a) *General.* Case records shall be accessible, in whole or in part, only by those authorized by law, court order and/or the Division of Probation and Correctional Alternatives (DPCA). DPCA has access to all case records and probation departments shall provide copies of any case records to DPCA upon request.

(b) *Mandatory Sharing of Case Record Information.*

(1) A probation director, or his/her designee, must make available a copy of its pre-plea/pre-sentence report and any medical, psychiatric or social agency report submitted in connection with its pre-sentence investigation or its supervision of a defendant, to any court or to the probation department of any court within the state, that subsequently has jurisdiction over such defendant for the purpose of pronouncing or reviewing sentence and to any state agency to which the defendant is subsequently committed or certified or under whose care and custody or jurisdiction the defendant subsequently is placed upon the official written request of the court or agency. In any such case, the court or agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

(2) A probation director, or his/her designee, must provide a copy of a pre-plea/pre-sentence report prepared in the case of an individual, other than a youthful offender, who is known to be licensed pursuant to title 8 of the education law to the state department of health if the licensee is a physician, a specialist's assistant or a physician assistant and to the state education department with respect to all such other licensees. Such reports must be in writing and shall be accumulated and forwarded every 3 months. They shall contain the following information:

(i) the name of the licensee and the profession in which the license is held,

(ii) the date of the conviction and the nature thereof,

(iii) the index or other identifying file number.

In any such case, the state department receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

(3) Upon a determination by a probation director, or his/her designee, that probation records regarding an individual presently under the supervision of the department are relevant to an investigation of child abuse or maltreatment conducted by a child protective service pursuant to title 6 of article 6 of the social services law, he/she shall provide the records, or portions thereof, determined to be relevant to the child protective service conducting the investigation. Each probation director, or his/her designee, shall make provisions for the transmission of those required records.

(4) A probation director, or his/her designee, must provide all requisite case record information with respect to interstate or intrastate transfer

of any probationer or former conditional releasee and, upon official written request, forward any additional case record information to the agency to which supervision has been transferred. In any such case, the court or agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available.

(c) *Discretionary Sharing of Case Record Information.*

(1) Public agencies outside this state. A probation director, or his/her designee, may disclose any information in its file as to an adult probationer, including youthful offender information, to any probation, parole, or public institutional agency outside this state, upon official written request. Any release of information shall be conditioned upon the agreement of the receiving agency to retain it under the same conditions of confidentiality as apply to the probation department that made it available. "Public institutional agency" shall mean any governmental entity which has the legal authority to detain and/or obtain custody over an individual charged or previously convicted of a criminal offense or adjudicated a youthful offender, or which has the responsibility to make a legal determination with respect to sex offender registration and/or DNA compliance.

(2) A probation director, or his/her designee, may disclose relevant case record information, other than the pre-plea/ pre-sentence/pre-dispositional report, not otherwise sealed or specifically restricted in terms of access by state or federal law, from its files concerning any adult offender (other than a youthful offender) or fingerprintable juvenile delinquent currently or previously under probation supervision or formerly under local conditional release supervision, to appropriate law enforcement authorities, school authorities, child protective services, public and/or treatment agencies, the judiciary, and victim(s)/ victim(s) family member(s), for public safety and/or case management purposes, including, but not limited to the following:

(i) national and homeland security;

(ii) criminal investigations and/or execution of warrants;

(iii) sex offender registration and/or DNA compliance;

(iv) victim safety, including matters pertaining to domestic violence, child protection, and sexual offense;

(v) national instant criminal background check system (NICS)/ weapons permits;

(vi) military eligibility;

(vii) professional licensing/certification;

(viii) monitoring of conditions of probation or conditional release;

(ix) risks and needs assessment;

(x) treatment or counseling services to a licensed or certified provider; and

(xi) probation or conditional release investigations;

In all such instances, those to whom access has been granted shall not secondarily redisclose such information without the express written permission of the probation director, or his/her designee, who authorized access.

(3) *Potential or Existing Employee/Volunteer.* A probation director or his/her designee may disclose to an existing or potential employer that an individual who is or may become an employee or a volunteer has been convicted of a crime or adjudicated a juvenile delinquent for a fingerprintable offense, the nature thereof, the terms and conditions of his/her release, and compliance under supervision, unless the records are otherwise sealed or restricted by federal or state law. In all such instances, those to whom access has been granted shall not secondarily redisclose such information without the express written permission of the probation director or his/her designee who authorized access.

(4) *Public Information.* A probation director, or his/her designee, may disclose relevant case record information (not including the Division of Criminal Justice Services criminal history record or any portion thereof) relative to an adult probationer (other than a youthful offender) or former conditional releasee, not otherwise sealed or restricted by state or federal law, for the purpose of apprehending a wanted person in connection with a crime, a violation of probation or conditional release, a probation or conditional release warrant, a violation of an order of protection, or in response to an incident wherein the department's, or any individual under probation supervision actions, are the subject of a media or news story. A probation director or his/her designee may disclose the name, gender, race, date of birth/age, height, weight, eye color, hair color, conviction offense, probation term, warrant/absconder status, and photograph of an adult probationer (other than a youthful offender).

(5) *Research.* Case records may be accessible, in whole or in part, for bona fide research conducted by a governmental entity or educational institution, where the probation director, or his/her designee, has made a

bona fide research determination and approved of the research project. In such instance, the probation director, or his/her designee, shall enter into a written agreement as to terms and conditions of the research, and keep a log of any research project, its purpose, and dates of research conducted and/or completed. The following confidentiality safeguards shall be observed:

(i) coding is required to ensure that any youth or adult receiving, or previously having received, probation services are not identified by name;

(ii) access is restricted to only those involved in the research whose responsibilities cannot be accomplished without such access and to secure written confidentiality agreements from any research project staff to adhere to all terms and conditions of the research, including confidentiality provisions herein stated;

(iii) researchers are not permitted to copy any case records in any manner with identifying information and each probation director shall take such precautionary departmental security measures to guarantee compliance;

(iv) that any project records copied shall be maintained in secure locked files;

(v) to retain any data received or copied only so long as necessary to effectuate the purposes of the research project and to return or destroy the data in such a way as to prevent their unauthorized use;

(vi) to guarantee that research performed or information accessed will not result in adverse action against the subject of the research;

(vii) the probation department has advance access to any preliminary findings and/or draft report prior to finalization, publication, or distribution and to furnish the probation director with any final project report or findings in a timely manner; and

(viii) no assignment of research shall occur without the written consent of the probation director or his/her designee.

The probation director, or his/her designee, shall promptly provide the State Director of Probation and Correctional Alternatives with a copy of the final project report from any bona fide research project for which a written agreement is entered into.

(6) **Data sharing.** A probation director, or his/her designee, may voluntarily submit data in its files to the Division of Criminal Justice Services (DCJS).

(7) **Freedom of Information Law.** A probation director, or his/her designee, may deny access to case records or portions thereof sought pursuant to article 6 of the public officers law (the freedom of information law) which meet the enumerated criteria established by subdivision two of section 87 of the public officers law. Criteria includes (a) records or portions that are specifically exempted by state or federal statute, (b) if disclosed would constitute an unwarranted invasion of personal privacy, (c) are compiled for law enforcement purposes and which if disclosed would (i) interfere with law enforcement investigations or judicial proceedings, (ii) deprive a person of a right to a fair trial or impartial adjudication, (iii) identify a confidential source or disclose confidential information relating to a criminal investigation, or (iv) reveal criminal investigative techniques or procedures, (d) are inter-agency or intra-agency materials (i) which are not statistical or factual tabulations or data, (ii) instructions to staff that affect the public, or (iii) final agency policy or determinations. Case records or portions thereof which are exempt from disclosure and not accessible include, but are not limited to pre-plea/pre-sentence/pre-dispositional reports, medical records, confidential HIV-related information, victim's name and address, youthful offender records, juvenile delinquency adjustment records, sex offender registration information, and DCJS criminal history records.

(d) **Policies and Procedures.** A local probation director shall establish written policies and procedures governing release of case records consistent with laws governing access and confidentiality and disseminate such policies and procedures to their agency staff.

Section 351.7 of 9 NYCRR is repealed. A new Section 351.7 is added to read as follows:

**351.7 Supervisory Directives/Instructions.** Courts are required to impose specific conditions relating to supervision and other conditions required by law, and may impose other conditions of probation relative to conduct, rehabilitation, movement, and controls, so as to ensure that the individual being supervised will lead a law abiding life or assist him/her in doing so, or to ameliorate the conduct which gave rise to the offense/petition or prevent incarceration/placement. Every probation director may establish written policies providing that additional supervisory directives and/or instructions are required for the individual to follow as part of his/her respective supervision plan. Any directives and/or instructions shall be

reviewed and approved by a supervisor within the department. Such directives or instructions shall relate to and clarify any general or specific conditions of probation imposed by the court relative to conduct, rehabilitation, movement, controls, assessment, needs, or classification relevant to the supervision plan of the individual. He/she shall be given written documentation of any such directives or instructions and the probation officer shall review its content with the individual being supervised to ensure that he/she is aware of and understands these supervisory requirements. The individual being supervised shall sign an acknowledgement that it has been provided and explained.

**Text of proposed rule and any required statements and analyses may be obtained from:** Linda J. Valenti, Counsel, Division of Probation and Correctional Alternatives, 80 Wolf Rd., Suite 501, Albany, NY 12205, (518) 485-2394, e-mail: linda.valenti@dpc.state.ny.us

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

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

#### **Regulatory Impact Statement**

##### **1. Statutory Authority:**

Executive Law Section 243(1) empowers the State Director of Probation and Correctional Alternatives to promulgate rules "which shall regulate methods and procedure in the administration of probation services", including but not limited to "supervision, case work, recordkeeping . . . and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state."

Executive Law Section 257(4) establishes that it is "the duty of every probation officer to furnish to each of his probationers a statement of the conditions of probation, and to instruct him with regard thereto; to keep informed concerning his conduct habits, associates, employment, recreation and whereabouts; to aid and encourage him by friendly advice and admonition; and by such other measures as may seem most suitable to bring about improvement in his conduct, condition and general attitude toward society." Further, Executive Law Section 257(5) recognizes that "[P]robation officers may require such reports by probationers as are reasonable or necessary."

##### **2. Legislative Objectives:**

These regulatory amendments are consistent with legislative intent that the State Director adopt regulations in areas relating to critical probation functions. It is in keeping with legislative intent to promote professional standards governing the administration and delivery of probation services in the area of case records management and enhance supervisory controls with respect to probationer's conduct, as well as enhance numerous legislative measures which have been enacted into law to promote greater offender accountability and safeguard the public and victims.

There exists various state and federal laws governing confidentiality, access and release of information which are typically contained in probation case records. Additionally there exists specific state laws and existing rules and regulations, having the force and effect of law, relative to conditions of release and delivery of supervision services. These regulatory amendments in this area conform with existing laws governing confidentiality of certain case record information and conditions of release, and provide probation departments with the necessary means and flexibility to communicate more effectively and better manage those under their supervision. Public safety and the general welfare of the public will be served by adoption of these regulatory amendments.

##### **3. Needs and Benefits:**

These regulatory amendments clarify rule language governing mandatory sharing of probation case record information in an effort to assist practitioners in fulfilling their responsibilities under law. Further, additional rule language clarify discretionary sharing of probation case record information authorized in existing law and also expands upon probation's ability to share and/or otherwise disclose certain case record information to particular individuals or entities for public safety and/or case management purposes. Specific parameters are established as to disclosure regarding a potential or existing employee/volunteer, as well as with respect to public information and research. Lastly, reinforced are the limitations which prevent disclosure of records sealed or otherwise restricted in terms of access by state and/or federal law.

More comprehensive provisions in the area of case record management, including establishment and dissemination to staff as to local policies and procedures will prove beneficial in terms of compliance with existing laws, improving professional communication for public safety and/or case management purposes, facilitating probation research, and addressing other areas of public concern.

Additionally, the regulatory language recognizing the ability of probation to require any individual under supervision to follow supervisory directives/instructions which relate to and clarify any general or specific conditions of probation imposed by the court relative to conduct, rehabilitation, movement, controls, assessment, needs or classification relevant to the supervision plan of the individual, reinforces laws governing conditions of release, and provides probation with a mechanism to better ensure those under supervision will lead a law abiding life and adhere to court conditions imposed. Requiring interested probation departments to establish written policies in this area, ensure supervisor approval, and require review of any such directives/instructions with the probationer coupled with their signature and receipt of such material strikes a fair balance to guard against arbitrary and indiscriminate application and foster better understanding by the individual under supervision.

Moreover, these regulatory amendments address a need to strengthen community corrections by affording greater flexibility in handling certain functions consistent with good professional practice. It is in the best interests of the state and local government that these regulatory amendments be adopted. These amendments will better address and optimize public and victim safety, promote greater offender accountability, facilitate better communication by probation departments, clarify certain constraints in law and establish appropriate safeguards to guarantee more uniform application.

#### 4. Costs:

These changes are procedural in nature and may require some additional training. However, we do not foresee these regulatory reforms leading to significant additional costs to probation departments. Clearly, any minimal costs are significantly outweighed by increased public safety interests and offender accountability provided by these new provisions.

#### 5. Local Government Mandates:

These regulatory amendments establishes that every local probation director must establish written policies and procedures governing release of case records consistent with laws governing access and confidentiality and disseminate such policies and procedures to their agency staff. Additional regulatory language provides that interested probation departments enter into a research agreement as to any bona fide research which they approve, and establish written policies if requiring any additional supervisory directives/instructions as part of an individual's supervision plan. While not expressly required before, it is consistent with routine business operations that state and local government agencies have established procedures governing key activities to ensure consistency in application and foster better understanding among staff. Accordingly, we do not anticipate these new requirements will be burdensome or costly.

The Division circulated two earlier drafts of these regulatory amendments to the Council of Probation Administrators, (the statewide professional association of probation administrators) who assigned it to a specific committee for review and the State Probation Commission, the state advisory body to the Division. All probation directors received the most recent prior draft language. We incorporated in these amendments certain verbal and written suggestions earlier raised by probation professionals to address problems which they previously experienced and to clarify certain provisions in law.

Overall, the Division has received favorable support from probation agencies that these new regulatory amendments are manageable and consistent with good professional practice.

#### 6. Paperwork:

The proposed rule will potentially lead to additional paperwork, although minimal in content with respect to establishing or expanding local procedures to address new regulatory language.

#### 7. Duplication:

This proposed rule does not duplicate any State or Federal law or regulation. It clarifies and reinforces certain laws with respect to confidentiality and access to probation case record and terms and conditions of release and supervision and helps achieve greater flexibility where necessitated.

#### 8. Alternatives:

In view of the need to establish stronger minimum standards relative to case records and strengthen probation management of those under supervision in order to achieve greater offender accountability, protect public and victim safety, and facilitate better case management, regulatory amendments in these two areas are critical and no other alternatives were determined appropriate.

#### 9. Federal Standards:

There are certain federal standards governing confidentiality and access of certain documents contained in case records and these regulatory amendments are consistent with these requirements.

#### 10. Compliance Schedule:

Through prompt dissemination and because amendments are not unduly burdensome, local departments should be able to promptly implement these amendments.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis for small businesses is not required by Section 202-a of the State Administrative Procedure Act, no small business recordkeeping requirements, needed professional services, or compliance requirements will be imposed on small businesses.

Any impact a local government is addressed in both the Regulatory Impact Statement and the Rural Area Flexibility Analysis.

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

##### 1. Types and estimated number of rural areas:

Forty-four local probation departments are located in rural areas and will be affected by the rule amendments.

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

These regulatory amendments strengthen procedural requirements and improves probation practice, yet should not impose significant additional local probation costs. There are no professional services likely to be needed in any rural area to comply with these regulatory changes. These regulatory amendments only refer to one reporting requirement with respect to a probation department approving a bona fide research project. Where this occurs, which we anticipate as infrequent, a copy of the final research project must be submitted to the Division. This requirement is not onerous. Specific written policies and procedures governing release of case records and a written policy as to any supervisory directives/instruction which a probation department may require are normal business activities and in keeping with good professional practice. While the former is mandatory and the latter conditioned only where a policy is instituted, the Division does not anticipate these requirements as costly or burdensome.

Moreover case record and supervision rule amendments will improve compliance with state laws governing access to records and conditions of release, enhance probation communications, achieve greater offender accountability, and enhance public and victim safety.

##### 3. Costs:

There are no significant additional costs or new annual costs required to comply with these regulatory changes. Clearly, any minimal costs, are significantly outweighed by increased public and victim safety interests and offender accountability provided by these new provisions.

##### 4. Minimizing adverse impact:

These regulatory amendments will have no adverse impact on rural areas.

##### 5. Rural area participation:

DPCA has discussed earlier proposed regulatory changes with the Executive Committee of the Council of Probation Administrators, which include a cross-section of urban, rural, and suburban jurisdictions, and we have circulated and submitted comments on a prior draft of this regulatory reform to all probation directors and the State Probation Commission. The current regulatory amendments incorporate many verbal and written suggestions from probation professionals, including rural entities, across the state to address problems which probation departments experience in the area of case records and supervision and to clarify certain procedural provisions and existing laws governing confidentiality and access to probation case records. More flexibility in disclosing certain case record information was sought and clearer explanation as to under what circumstances case record information must and in other instances can be disclosed. Brief details of some of these changes are highlighted in the regulatory impact statement. Moreover, DPCA did not find significant differences between urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

#### **Job Impact Statement**

A job impact statement is not being submitted with these regulations because it will have no adverse effect on private or public jobs or employment opportunities. The revisions are procedural in nature and clarify laws governing confidentiality and case records and provide for establishment of supervisory directives. These changes are not onerous in nature and can be implemented through correspondence and training of probation staff.

## Public Service Commission

### NOTICE OF ADOPTION

#### Performance Assurance Plan by Verizon New York Inc.

**I.D. No.** PSC-15-05-00016-A

**Filing date:** Sept. 25, 2006

**Effective date:** Sept. 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 Sept. 20, 2006, adopted an order approving modifications to Verizon New York Inc.'s (Verizon) Performance Assurance Plan (PAP).

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** Verizon's Performance Assurance Plan (PAP).

**Purpose:** To approve modifications to the PAP.

**Substance of final rule:** The Commission adopted an order approving modifications to Verizon New York Inc.'s (Verizon) Performance Assurance Plan (PAP) and directed Verizon to file its amended PAP within 30 days, 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.

(99-C-0949SA13)

### NOTICE OF ADOPTION

#### Major Rate Case by Consolidated Edison Company of New York, Inc.

**I.D. No.** PSC-10-06-00016-A

**Filing date:** Sept. 22, 2006

**Effective date:** Sept. 22, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order in Case 05-S-1376 approving 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 steam service—P.S.C. No. 3.

**Statutory authority:** Public Service Law, section 80(10)

**Subject:** Major rate case.

**Purpose:** To increase annual steam revenue.

**Substance of final rule:** The Commission adopted the terms of a negotiated joint proposal establishing a rate plan and other provisions, to remain in effect for at least two years beginning October 1, 2006 with respect to steam service provided by Consolidated Edison Company of New York, Inc. and directed the Company to file tariff amendments consistent with its findings, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(05-S-1376SA1)

### NOTICE OF ADOPTION

#### Electric Service Agreement between the City of Salamanca Board of Public Utilities and the Seneca Territory Gaming Corporation

**I.D. No.** PSC-19-06-00009-A

**Filing date:** Sept. 22, 2006

**Effective date:** Sept. 22, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order approving the City of Salamanca Board of Public Utilities' request for an electric service agreement between it and the Seneca Territory Gaming Corporation.

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

**Subject:** Individual service agreement.

**Purpose:** To approve an electric service agreement between the City of Salamanca Board of Public Utilities and the Seneca Territory Gaming Corporation.

**Substance of final rule:** The Commission adopted an order approving an Electric Service Agreement between the City of Salamanca Board of Public Utilities and the Seneca Territory Gaming Corporation, 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-0447SA1)

### NOTICE OF ADOPTION

#### Disposition of Refunds by Verizon New York Inc.

**I.D. No.** PSC-20-06-00012-A

**Filing date:** Sept. 21, 2006

**Effective date:** Sept. 21, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order allowing Verizon New York Inc. to retain \$2.0 million of the intrastate portion of a \$3.0 million tax refund received from the Town of Oyster Bay.

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** To determine the disposition of refunds received by regulated companies.

**Purpose:** To approve Verizon New York Inc.'s request to retain that portion of a tax refund allocable to its regulated, intrastate New York operation received on Feb. 17, 2006.

**Substance of final rule:** The Commission adopted an order allowing Verizon New York Inc. to retain \$2.0 million of the intrastate portion of a \$3.0 million tax refund received from the Town of Oyster Bay, 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-C-0480SA1)

## NOTICE OF ADOPTION

**New Billing System and Unbundled Rates by Rochester Gas and Electric Corporation****I.D. No.** PSC-28-06-00014-A**Filing date:** Sept. 25, 2006**Effective date:** Sept. 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 Sept. 20, 2006, adopted an order in Case 00-M-0504, approving Rochester Gas and Electric Corporation's request to make various changes in the rates, charges, rules and regulations contained in its schedules for electric service—P.S.C. Nos. 18 and 19 and schedule for gas service—P.S.C. No. 16 to become effective Oct. 2, 2006.

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

**Subject:** New billing system and unbundled rates.

**Purpose:** To conform to the billing specifications of RG&E's new billing system and further unbundled rates for full service customer bills pursuant to commission order issued Feb. 18, 2005 in Case 00-M-0504.

**Substance of final rule:** The Commission adopted an order approving Rochester Gas and Electric Corporation's request to revise language in its electric and gas tariff schedules to conform to the billing specifications for its new billing system Customer Care and Service System.

**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. (00-M-0504SA16)

## NOTICE OF ADOPTION

**Hourly Pricing Provision by Central Hudson Gas and Electric Corporation****I.D. No.** PSC-29-06-00008-A**Filing date:** Sept. 20, 2006**Effective date:** Sept. 20, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order approving the request of Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 15 to become effective Oct. 1, 2006.

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

**Subject:** Hourly pricing.

**Purpose:** To approve Central Hudson Gas and Electric Corporation's request to modify its hourly pricing provision applicable to Service Classification Nos. 2, 3 and 13.

**Substance of final rule:** The Commission adopted an order approving Central Hudson Gas and Electric Corporation's request to modify its Hourly Pricing Provision applicable to Service Classification Nos. 2, 3 and 13.

**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. (03-E-0641SA8)

## NOTICE OF ADOPTION

**Monthly Adjustment Clause by Consolidated Edison Company of New York, Inc.****I.D. No.** PSC-29-06-00010-A**Filing date:** Sept. 22, 2006**Effective date:** Sept. 22, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order approving 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 electric service—P.S.C. No. 9.

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

**Subject:** Monthly adjustment clause.

**Purpose:** To approve a provision in the monthly adjustment clause for the recovery of the costs for the 59th Street and 74th Street Steam Stations that are allocated to the electric department.

**Substance of final rule:** The Commission adopted an order approving Consolidated Edison Company of New York, Inc.'s request to add a provision in the Monthly Adjustment Clause for recovery of certain 59th and 74th Street Steam Station costs, subject to the terms 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-0762SA1)

## NOTICE OF ADOPTION

**Issuance of Securities by Central Hudson Gas & Electric Corporation****I.D. No.** PSC-30-06-00008-A**Filing date:** Sept. 21, 2006**Effective date:** Sept. 21, 2006

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

**Action taken:** The commission adopted an order on Sept. 20, 2006 approving Central Hudson Gas & Electric's request to enter into new revolving credit agreements and to issue and sell medium term notes.

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

**Subject:** Issuance of securities.

**Purpose:** To permit Central Hudson Gas & Electric Corporation to issue and sell securities.

**Substance of final rule:** The Commission adopted an order approving Central Hudson Gas & Electric Corporation's request to issue and sell \$140 million of Medium-Term Notes and to enter into revolving credit agreements for up to \$125 million, 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-M-0785SA1)

## NOTICE OF ADOPTION

**Entry into Debt Obligations by Noble Clinton Windpark I LLC, et al.****I.D. No.** PSC-31-06-00022-A**Filing date:** Sept. 25, 2006**Effective date:** Sept. 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 Sept. 20, 2006, adopted an order approving Noble Clinton Windpark I, LLC, Noble Altona Windpark, LLC, Noble Ellenburg Windpark, LLC and Noble Bliss Windpark, LLC for entry into debt obligations for the financing of the construction and operation of certain wind generation facilities.

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

**Subject:** Entry into debt obligations for the financing of the construction and operation of certain wind generation facilities.

**Purpose:** To approve the entry into debt obligations for the financing of the construction and operation of certain wind generation facilities.

**Substance of final rule:** The Public Service Commission adopted an order approving Noble Clinton Waterpark I, LLC, Noble Altona Windpark, LLC, Noble Ellenburg Windpark, LLC and Noble Bliss Windpark, LLC for entry into debt obligations for the financing of construction and operation of wind generation facilities, subject to the terms 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-0843SA1)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Electric Transmission Facilities****I.D. No.** PSC-41-06-00027-P

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

**Proposed action:** Addition of section 85-2.9 and amendment of sections 86.8 and 88.4 of Title 16 NYCRR.

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

**Subject:** Electric transmission facilities in national interest electric transmission corridors.

**Purpose:** To clarify and streamline the rules so that applications for certificates to construct and operate electric transmission facilities in national interest electric transmission corridors may be acted upon within one year of their filing because they contain all the information necessary for prompt environmental and engineering review to occur, thus avoiding preemption by the Federal Energy Regulatory Commission.

**Text of proposed rule:**

### SUBPART 85-2

#### PROCEDURES WITH RESPECT TO ALL ELECTRIC TRANSMISSION LINES AND FUEL GAS TRANSMISSION LINES [10] TEN OR MORE MILES LONG

*85-2.9 Filing and content of applications for electric transmission facilities in national interest electric transmission corridors. An application seeking approval of an electric transmission facility in a national interest electric transmission corridor as designated by the Secretary of the U.S. Department of Energy pursuant to Section 216 of the Federal Power Act (16 U.S.C. Section 824p) is considered filed on a date set forth in a letter to the applicant from the Secretary, namely, the date of receipt of the application and any supplemental information necessary to bring it into compliance with all the following requirements, except any such requirements where the Commission has granted permission to submit*

*unavailable information at a future specified date pursuant to Section 85-2.3(c) of this Subpart or which the Commission has waived pursuant to Section 85-2.4 of this Subpart:*

*(a) Section 122 of the Public Service Law;*

*(b) Sections 85-2.2 and 85-2.8 of this Subpart;*

*(c) Part 86 of this Subchapter, except that an application for the overhead portion of a transmission facility need not contain the information required by:*

*(1) Section 86.3(a)(1)(i), so long as recent edition topographic maps (at a scale of 1:24,000) for an area of at least five miles on either side of the proposed centerline are included in Exhibit 2 of the application;*

*(2) Section 86.3(a)(1)(iii), so long as Exhibit 2 maps show any known geologic, historic or scenic area, park, or untouched wilderness within three miles on either side of the proposed centerline;*

*(3) Section 86.3(a)(2)(i)-(iv), so long as Exhibit 2 maps show the relationship of the proposed facility to interconnected electric systems;*

*(4) Section 86.3(b)(2), so long as all Exhibit 2 aerial photographs reflect the current situation and specify the source and date of the photography; and*

*(5) Section 86.4(b), so long as recent edition topographic maps (at a scale of 1:24,000) are included in Exhibit 3 of the application and indicate any alternative route considered;*

*(d) Part 86 of this Subchapter, except that an application for the underground portion of a transmission facility need not contain the information required by:*

*(1) Section 86.3(a)(1)(i), so long as recent edition topographic maps (at a scale of 1:24,000) for an area of at least one mile on either side of the proposed centerline are included in Exhibit 2 of the application;*

*(2) Section 86.3(a)(1)(iii), so long as Exhibit 2 maps show any known geologic, historic or scenic area, park, or untouched wilderness within one mile on either side of the proposed centerline;*

*(3) Section 86.3(a)(2)(i)-(iv), so long as Exhibit 2 maps show the relationship of the proposed facility to interconnected electric systems;*

*(4) Section 86.3(b)(2), so long as all Exhibit 2 aerial photographs reflect the current situation and specify the source and date of the photography; and*

*(5) Section 86.4(b), so long as recent edition topographic maps (at a scale of 1:24,000) are included in Exhibit 3 of the application and indicate any alternative route considered;*

*(e) Part 86 of this Subchapter, except that an application for the submarine portion of a transmission facility need not contain the information required by:*

*(1) Section 86.3(a)(1)(i), so long as recent edition nautical charts (published by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration) depicting the location of the proposed facility are included in Exhibit 2 of the application;*

*(2) Section 86.3(a)(1)(iii), so long as Exhibit 2 nautical charts show any known historic resource within one mile on either side of the proposed centerline;*

*(3) Section 86.3(a)(2)(i)-(iv), so long as Exhibit 2 maps show the relationship of the proposed facility to interconnected electric systems;*

*(4) Section 86.3(b); and*

*(5) Section 86.4(b), so long as recent edition nautical charts are included in Exhibit 3 of the application and indicate any alternative route considered;*

*(f) Part 86 of this Subchapter, except that an application for a transmission facility not proposed to be included in utility rate base (either directly or indirectly through a contractual arrangement with a regulated utility) need not contain the information required by Section 86.10; provided, however, that if a regulated rate is sought after the filing of the application, the applicant shall provide the information required by that Section; and provided further that, if an applicant raises the issue of the cost of a particular alternative as a disadvantage, it shall provide sufficient cost information to enable a comparison to be made between the proposed facility and such alternative; and*

*(g) Part 88 of this Subchapter.*

*86.8 Exhibit 7: local ordinances.*

*(a) The applicant shall submit a list of all local [ordinances] ordinances, laws, resolutions, regulations, standards, and other requirements applicable to the proposed facility, together with a statement that the location of the facility as proposed conforms to all such local legal provisions, except [specifying] any [which] that the applicant requests the Commission to refuse to apply because, as applied to the proposed facility, such local legal provision is unreasonably [deems unduly restrictive.] restrictive in view of the existing technology, factors of costs or economics,*

or the needs of consumers whether located inside or outside any particular municipality. If the applicant desires [a waiver from compliance with any such] the Commission to refuse to apply one or more local [ordinance] legal provisions, it shall submit a statement justifying the request.

(b) The statement of justification shall show that the request cannot be obviated by design changes to the proposed facility, the request is the minimum necessary, and the adverse impacts of granting the request are mitigated to the maximum extent practicable. The statement shall include a demonstration:

(1) For requests grounded in the existing technology, that there are technological limitations (including governmentally imposed technological limitations) related to necessary facility component bulk, layout, process or materials that make compliance by the applicant technically impossible, impracticable or otherwise unreasonable;

(2) For requests grounded in factors of costs or economics (likely involving economic modeling), that the costs to consumers associated with applying the local legal provision outweigh the benefits of applying such provision; and

(3) For requests grounded in the needs of consumers, that the needs of consumers for the facility outweigh the impacts on the community that would result from refusal to apply the local legal provision.

88.4 Exhibit E-4: engineering justification. (a) The applicant shall: ...

(4) provide appropriate system studies, showing expected flows on the line under normal, peak and emergency conditions, including the system reliability impact study approved by the Transmission Planning Advisory Subcommittee of the New York Independent System Operator, which shows effects on stability of the interconnected system.

**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, Three Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaelyn A. Brillling, Secretary, Public Service Commission, Three 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

(a) Statutory authority

Public Service Law (PSL) § 4(1) grants the Commission all powers necessary or proper to enable it to carry out the purposes of the PSL (including Article VII, entitled Siting of Major Utility Transmission Facilities).

PSL § 20(1) authorizes the Commission to adopt regulations governing hearings before it and any employee authorized to conduct investigations or hearings.

PSL § 122(1)(f) authorizes the Commission to specify the content of applications for certificates of environmental compatibility and public need.

(b) Legislative objectives

The legislative objective of PSL § 4(1) is to give to the Commission necessary powers to regulate persons proposing electric and gas transmission facilities, among others.

The legislative intent of PSL § 20(1) is to allow the Commission to prescribe appropriate rules for the hearings it conducts.

The legislative intent of PSL § 122(1)(f), in Article VII, is to allow the Commission to set requirements for the content of applications for certificates.

(c) Needs and benefits

The purpose is to clarify and streamline the rules so that applications for certificates to construct and operate electric transmission facilities in national interest electric transmission corridors (NIETC) may be acted upon within one year of their filing. These rules identify all the information necessary for prompt environmental and engineering review, as well as subsequent Commission action, to occur within one year. This clarification and streamlining is necessary because, if the State does not act on an application within one year, the Energy Policy Act of 2005 authorizes the Federal Energy Regulatory Commission (FERC) to preempt State certification of NIETC transmission lines. The application requirements are also clarified and enhanced by requiring applicants to fully specify, up front, those local legal requirements that they do not want the Commission to apply. This will result in a more rapid review of the siting application. In addition, the rules are clarified to indicate that the study required to show the effects on stability of the interconnected system is the System Reliability Impact Study approved by the Transmission Planning Advisory Sub-

committee of the New York Independent System Operator. This clarification ensures that any statutory study submitted in an application will be an approved study—rather than a study subject to revisions. An applicant will benefit from a more complete application by making it easier for the Commission to analyze the filing in a timely manner.

(d) Costs

(i) Costs for implementation of, and continuing compliance with, the rules to regulated persons.

The costs will be no greater than those currently experienced by applicants in preparing their applications and in participating in certification proceedings. Indeed, some costs may decrease. Given the streamlining of the regulations to specify more precisely what information applications must contain, the application preparation and review process will be shorter and will likely result in less of a need for supplemental filings and discovery responses after the application is filed.

(ii) Costs to the agency, state or local governments.

The costs to the agency and state will not change from the present level and may even decrease because certification proceedings involving electric transmission facilities in NIETC will be shorter than they are generally. The cost to local governments that participate in such proceedings will similarly remain the same or decrease somewhat.

(iii) Information, including the source of information upon which cost analysis is based.

The proposed rules reduce some requirements. Commission staff have determined that costs will remain the same or decrease because of the streamlined and clarified requirements. Industry representatives with whom staff met agreed.

(e) Paperwork

The proposed rule does not contain reporting requirements or mandate forms or other paperwork. It does, however, clarify the content of applications that are required by existing regulations.

(f) Local government mandates

The proposed rule does not contain local government mandates; however, if a municipality were to apply for a certificate to construct a transmission facility, the proposed rule concerning the filing and content of applications would be binding upon it as an applicant.

(g) Duplication

The proposed rule does not duplicate state or federal requirements.

(h) Alternative approaches

Leaving the rules as they currently exist would make it much less likely that certification proceedings could conclude within one year after the filing of an application for an electric transmission facility in a NIETC. This would result in federal preemption of state siting. If these rules are not implemented, applicants seeking certificates for transmission facilities would not be given guidance on how to comply with PSL § 126(1)(f) and the Commission's standards for meeting the statute. Thus, it would be more likely that applicants would need to seek federal review after they had spent a year seeking state review. On May 9, 2006, the main transmission utilities in New York and other stakeholders (National Grid, Consolidated Edison Company of New York, Inc., New York Regional Interconnect Inc. and the Long Island Power Authority) met with agency staff to discuss the draft rules and provide comments. Feedback was incorporated into the revised draft. The participants generally support the proposal and requested that review of all Article VII applications be required to be completed in one year, as is the case for NIETC lines. As the purpose of this rulemaking is to protect the State against federal preemption for NIETC lines, any other changes to siting regulations require careful review and analysis by the Commission. As a result of the feedback, the regulations were amended to include a provision indicating that the Secretary to the Commission will notify the applicant in writing that the application is considered filed. The parties raised other issues related to siting, *i.e.*: whether the Commission can rule on alternatives before the application is considered filed; whether the Commission can reexamine its decisions on electric and magnetic fields; and whether the rules can favor applications proposed for existing rights-of-way. Examination of these complex issues now, however, would significantly slow the development of revised Article VII regulations because of the need for additional studies and input by parties with substantially differing views, thus defeating the objective of having these rules in place before the designation of NIETC, which is expected later this year.

(i) Federal standards

See 16 U.S.C. § 824p(b) which addresses federal preemption of state siting.

(j) Compliance schedule

Regulated parties should be able to review the rules and comply when notice of adoption is published in the *State Register*.

#### **Regulatory Flexibility Analysis**

(a) Description of types and estimate of number of small businesses and local governments to which rule will apply.

The rules apply to anyone proposing to construct and operate a major utility transmission facility (other than a fuel gas transmission line less than ten miles long) in the State. A significant number of applicants are likely to be small businesses. Applicants may include political subdivisions, government agencies and municipalities.

(b)(i) Reporting, recordkeeping and other compliance requirements of the rule. The rules contain requirements as to the content of applications.

(b)(ii) Kinds of professional services a small business or local government is likely to need to comply with the requirements.

Small businesses and local governments that are applicants will need to obtain the professional services of engineers, environmental scientists, lawyers and perhaps economists.

(c) Estimate of initial capital cost and annual cost of compliance with variations for small businesses and local governments of different types and sizes.

Costs will vary depending on the scope of the individual projects being proposed. They are likely to be less than or equal to the costs of complying with the existing rules regarding the content of applications.

(d) An assessment of economic and technological feasibility of compliance with the rules by small businesses and local governments.

The rules are economically and technologically feasible for compliance by small businesses and local governments because there are no new onerous requirements.

(e) How the rule is designed to minimize adverse impacts on small businesses and local governments.

Application content requirements were streamlined and clarified to benefit all regulated parties, including small businesses and local governments. Transmission providers seeking siting approval of electric transmission lines in NIETC under Article VII of the Public Service Law will know exactly which Commission rules will apply to them and what alternative information can be provided that will be acceptable to the Commission.

(f) Participation of small businesses and local governments in the rule making. Representatives of potential applicants, including a small business (New York Regional Interconnect Inc.), reviewed a draft of the rules. They met with agency staff on May 9, 2006 to discuss the draft rules and provide comments. Feedback was incorporated into the revised draft. The participants generally support the proposal and requested that review of all Article VII applications be required to be completed in one year, as is the case for NIETC lines. As the purpose of this rule making is to protect the State against federal preemption for NIETC lines, any other changes to siting regulations require careful review and analysis by the Commission. As a result of the feedback, the regulations were amended to include a provision indicating that the Secretary to the Commission will notify the applicant in writing that the application is considered filed. The parties raised other issues related to siting, i.e.: whether the Commission can rule on alternatives before the application is considered filed; whether the Commission can reexamine its decisions on electric and magnetic fields; and whether the rules can favor applications proposed for existing rights-of-way. Examination of these complex issues now, however, would significantly slow the development of revised Article VII regulations because of the need for additional studies and input by parties with substantially differing views, thus defeating the objective of having these rules in place before the designation of NIETC, which is expected later this year.

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

(a) Types and number of rural areas to which rule applies.

The rule applies to all rural areas in the State, since applicants may seek to construct transmission facilities throughout the State.

(b)(i) Reporting, recordkeeping and other compliance requirements of the rule.

Requirements as to the content of applications seeking authorization of proposed transmission facilities are tailored to the land uses, resources and features that would be traversed by such facilities.

(b)(ii) The kinds of professional services that are likely to be needed in a rural area to comply with requirements.

Professionals in the fields of environmental science, engineering and economics are likely to be needed in order for applicants to comply with application requirements regarding all areas of the State through which the facility would pass, including rural areas.

(c) Estimate of initial capital cost and annual costs of complying with the rule.

The cost of complying with the rule is expected to be no greater than the cost of complying with the existing application filing requirements.

(d) How the rule is designed to minimize any adverse impact on rural areas.

The rule describes application requirements designed to provide the agency the information it needs to ensure that adverse impacts (including those occurring in rural areas) are minimized to the extent possible.

(e) Participation in the rule making of public and private interests in rural areas.

National Grid, which serves customers in several municipalities in rural areas of the State, and New York Regional Interconnect Inc., which has proposed an electric transmission line that would traverse several municipalities in rural areas of the State, reviewed a draft of the rules and offered suggested revisions.

#### **Job Impact Statement**

The agency has determined that the rule will not have an adverse impact on jobs or employment opportunities in the State.

(06-M-1019SA1)

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

### **Deferral of Rate Impact by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-41-06-00028-P

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

**Proposed action:** The Public Service Commission is considering a request by Consolidated Edison Company of New York, Inc. for authorization to defer for customers' benefit the rate impact of correcting the deferred ADR tax balance not properly accounted for. The commission may approve, reject, or modify, in whole or in part, this request, and may consider other, related matters.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66(9)

**Subject:** Deferral of the rate impact of correcting the deferred ADR tax balance for the 2000 - 2004 period and related matters.

**Purpose:** To consider whether to authorize Consolidated Edison Company of New York, Inc. to defer for customers' benefit the rate impact of correcting the deferred ADR tax balance not properly accounted for.

**Substance of proposed rule:** Consolidated Edison of New York, Inc. filed a petition for authorization from the New York State Public Service Commission to defer for customers' benefit the rate impact of correcting the deferred ADR tax balance not properly accounted for during the 2000 - 2004 period. During Con Edison's 2005 year end accounting closing process, the Company discovered that deferred income taxes for several categories of plant created under the ADR tax law were not being amortized when the tax life expired. The error originated when the company installed a new tax system in 2000. The Company proposes to defer all tax benefits to customers not included in current rate plans as a result of the error made in the amortization of deferred ADR taxes. The proposal also includes the recalculation of the overearnings adjustments for 2000 - 2004. The recalculation results in additional amounts that are owed to customers for those years. The Commission may grant, deny, or modify, in whole or part, the petition, and it may consider other, related matters.

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

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

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

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

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

(06-E-0990SA1)

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

**Lease Expenses by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-41-06-00029-P

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

**Proposed action:** The Public Service Commission is considering a request by Consolidated Edison Company of New York, Inc. for approval to change its accounting treatment of lease expenses related to rental payments made to the City of New York for transformer vaults from actual to straight-line accrual (as required by SFAS No. 13, Accounting for Leases) on an earnings and rate making neutral basis.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** Authorization of accounting change and related matters.

**Purpose:** To consider a request for accounting change of lease expenses and related matters.

**Substance of proposed rule:** Consolidated Edison Company of New York, Inc. seeks authorization from the New York State Public Service Commission to change its accounting treatment of rental payments made to the City of New York for transformer vaults (and future lease obligations of similar nature) to recognize the rental expenses on a straight-line basis as contemplated by SFAS No. 13, Accounting for Leases. Con Edison recorded previous leases with scheduled increase as actually paid. To implement the accounting change from actual to straight-line accrual, the company seeks to record a regulatory asset to defer the difference between the actual rental payments and the straight-line rental accruals that would otherwise be chargeable to income in accordance with SFAS NO. 13, Accounting for Leases. The regulatory asset would reverse over a ten-year period. The Commission may grant, deny, or modify, in whole or part, the company's request, and it may consider other, related matters.

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

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

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

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

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

(06-E-1101SA1)

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

**Net Metering Tariff Charges by Central Hudson Gas and Electric Corporation**

**I.D. No.** PSC-41-06-00030-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 15 to become effective Jan. 1, 2007.

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

**Subject:** Net metering tariff changes.

**Purpose:** To modify net metering provisions applicable to Service Classification Nos. 1, 6 and 14.

**Substance of proposed rule:** The Commission is considering Central Hudson Gas and Electric Corporation's (Central Hudson) request to revise its electric tariff, P.S.C. No. 15, to increase the limit of the residential photovoltaic generation load on its system from 0.8 MW to 1.2 MW. Central Hudson also proposes that Special Provision 14.7, which expanded

net metering for residential and non-demand metered commercial photovoltaic and wind generation, be closed to new installations as of January 1, 2007. The Commission may approve, reject or modify, in whole or in part, Central Hudson's request.

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

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

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

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

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

(06-E-1146SA1)

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

**Rates and Terms of Electric Service for New York State Electric & Gas Corporation**

**I.D. No.** PSC-41-06-00031-P

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

**Proposed action:** The commission will consider various actions it took in its Aug. 23, 2006 order involving the rates and terms of electric service set for New York State Electric & Gas Corporation (NYSEG).

**Statutory authority:** Public Service Law, section 22

**Subject:** In Case 05-E-1222, the commission examined NYSEG's revenues and costs, and determined that rates should be reduced by \$36.2 million. The commission also established the commodity options, rate design changes, and retail access program for 2007.

**Purpose:** To consider all the petitions for rehearing or clarification of the Aug. 23, 2006 order. Such petitions have been filed by NYSEG, Multiple Intervenors, Direct Energy Services, LLC, the Small Customer Marketers Coalition and the Retail Energy Supply Association (jointly), the National Energy Marketers Association, the Public Utility Law Project, Constellation NewEnergy, Inc., and National Fuel Gas Distribution Corporation.

**Substance of proposed rule:** On August 23, 2006, the Public Service Commission issued its decision in Case 05-E-1222 and determined that New York State Electric & Gas (NYSEG) should reduce its electric delivery rates by \$36.2 million starting in 2007. The Commission also established the electric commodity options and retail access programs that NYSEG would support to foster competitive opportunities in its service area. Pursuant to Public Service Law § 22, the parties to Case 05-E-1222 have thirty (30) days to petition the Commission to rehear and change its actions. Petitions for rehearing or clarification have been filed by NYSEG, Multiple Intervenors, Direct Energy Services LLC, the Small Customer Marketer Coalition and the Retail Energy Supply Association (jointly), the National Energy Marketers Association, the Public Utility Law Project, Constellation NewEnergy, Inc., and National Fuel Gas Distribution Corporation. The Commission will reconsider the issues raised by these petitions and determine whether there are any errors of law or fact or any new circumstances to warrant a different determination or whether further clarification of its August 23, 2006 order is warranted. Among the matters the Commission will consider are the following: capital structure; return on equity; hydroelectric expenses; productivity; integrated back office and work management system costs; health care costs; pension and benefit costs; retail access credits, schedule for implementation of merchant function charges; delivery rate impacts; availability of a fixed price commodity offering; the nature of default commodity service; and estimation and collection of the non-bypassable charge.

**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. Brillong, 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-1222SA4)

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## Department of State

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### EMERGENCY RULE MAKING

#### Qualifying Courses for Home-Inspection Applicants

**I.D. No.** DOS-33-06-00004-E

**Filing No.** 1150

**Filing date:** Sept. 26, 2006

**Effective date:** Sept. 26, 2006

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

**Action taken:** Addition of Subpart 197-2 to Title 19 NYCRR.

**Statutory authority:** Real Property Law, sections 444-c(6)(A) and 444-1  
**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** This amendment was adopted on an emergency basis to preserve the public welfare by ensuring that schools and students will know what courses are required in order for an applicant to qualify for a home inspection license pursuant to article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law. Article 12-B provides, in part, that, on and after December 31, 2005, no person shall conduct a home inspection for compensation unless such person is licensed as a home inspector pursuant to article 12-B. To qualify for a license, an applicant must successfully complete a course of study to be prescribed and approved by the Department of State. Accordingly, in order to ensure that prospective applicants can obtain the required courses and to ensure that schools are prepared to offer approved courses, this rule has been adopted on an emergency basis.

**Subject:** Qualifying courses for home-inspection applicants.

**Purpose:** To establish standards for home-inspection courses, as well as procedures for course approval.

**Text of emergency rule:** A new Subpart 197-2 of Part 197 of Title 19 of the NYCRR is adopted to read as follows:

*Subpart 197-2*

*Home Inspection Qualifying Courses*

*§ 197-2.1 Approved entities.*

Home Inspection courses and offerings may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency accepted by said Commissioner of Education; public and private schools; and home inspection related professional societies and organizations.

*§ 197-2.2 Request for approval of courses of study.*

Applications for approval to conduct courses of study to satisfy the requirements for licensed home inspector shall be made at least 60 days before the proposed course is to be conducted. The application shall be prescribed by the Department to include the following:

(a) name and business address of the proposed school which will present the course;

(b) if applicant is a partnership, the names and home addresses of all the partners of the entity;

(c) if applicant is a corporation, the names and home addresses of persons who own five percent or more of the stock of the entity;

(d) the name, home and business address and telephone number of the education coordinator that will be responsible for administering the regulations contained in this part;

(e) locations where classes will be conducted;

(f) title of each course to be conducted;

(g) detailed outline of each module, together with the time sequence of each segment;

(h) final examination to be presented for each course, including the answer key;

(i) all times included on each test form must be consistent with content specifications indicated for each course. Weighing of significant content areas should fall within the weight ranges indicated. All reference sources used to support each correct answer must be included. Linkage to each answer must be indicated with a footnote showing page number, subject matter, etc.;

(j) description of materials that will be distributed;

(k) the books that will be used for the outline and the final exams; and

(l) a detailed description of the means of providing the 40 hour field based training.

*§ 197-2.3 Subjects for study - home inspection.*

The following are the required subjects to be included in the course of study in home inspection for licensure as a home inspector, and the required number of hours to be devoted to each such subject. All approved schools must follow this course syllabus in conducting their program.

*Home Inspection Course Modules - 140 hours*

*Module 1*

*Structural*

*Exterior*

*Roof*

*25 hours*

*Final Exam*

*Module 2*

*Interior*

*Insulation and Ventilation*

*Electrical*

*25 hours*

*Final Exam*

*Module 3*

*Heating*

*Cooling*

*Plumbing*

*25 hours*

*Final Exam*

*Module 4*

*Overview of Profession*

*NYS License Law*

*Report Writing*

*25 hours*

*Final Exam*

*Module 5 40 hours*

(1) 40 hours of unpaid field-based training in the presence of and under the direct supervision of a home inspector licensed by New York State, or a professional engineer or architect regulated by New York State who oversees and takes full responsibility for the inspection and any report produced.

(2) Students have the option of not completing the field-based training by an approved school; however, all entities requesting approval for the Home Inspection qualifying curriculum must be approved for and make available to their students the 40 hours of unpaid field-based training and provide the Department of State with a detailed description of the means for providing the training.

(3) Schools must maintain a log of all inspections completed for purposes of providing proof of each student's field based training. The log must contain the following information:

(a) the student's name;

(b) the date of the home inspection;

(c) the address of the property inspected;

(d) the name of the client;

(e) the amount of time that was spent on the inspection; and

(f) the name, unique identification number and signature of the licensed home inspector, professional engineer or architect.

(4) Approved entities must verify hours of training and provide the student with a certificate of completion.

(5) If field-based training is not completed by an Approved Home Inspection School, the student must maintain a log of all inspections completed for purposes of providing proof of their field based training. The log must contain the following information:

- (a) the date of the inspection;
- (b) the address of the property inspected;
- (c) the name of the client;
- (d) the amount of time that was spent on the inspection; and
- (e) the name, unique identification number and signature of the licensed home inspector, professional engineer or architect.

(6) Completed home inspections must be maintained by the licensed home inspector, professional engineer or architect, and are subject to review by the Department of State.

§ 197-2.4 Equivalency pre-licensing education courses completed prior to January 1, 2006.

(a) The criteria for approval of courses completed prior to the January 1, 2006, shall be that the course or courses have substantially covered the same subject matter, classroom hours of attendance and completed standards as prescribed by this Subpart as a prerequisite of licensing.

(b) Application for course evaluation must be accompanied by an official transcript or other documentation showing the subjects taken, the hours of instruction devoted to each subject and the hours attended by said applicant together with the date completed. In addition, a course description or outline must be provided by the school along with an applicant's equivalency request.

(c) The Department may request additional supportive documentation to determine course equivalency.

§ 197-2.5 Computation of instruction time.

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling 50 minutes. For every 50 minutes of instruction there shall be an additional 10 minute break. The time of the breaks shall be left to the discretion of the individual education coordinator. Breaks shall not be considered optional, nor are they to be used to release the class earlier than scheduled.

§ 197-2.6 Attendance and examinations.

(a) No person shall receive credit for any course module presented in a class-room setting if he or she is absent from the class room, during any instructional period, for a period or periods totaling more than 10 percent of the time prescribed for the course module pursuant to section 197-2.3 of this Subpart, and no person shall be absent from the class room except for a reasonable and unavoidable cause.

(b) Students who fail to attend the required scheduled class hours may, at the discretion of the approved entity, make up the missed subject matter during subsequent classes presented by the approved entity.

(c) Final examinations may not be taken by any student who has not satisfied the attendance requirement.

(d) A make up examination may be presented to students at the discretion of the approved entity. Make up examinations must be submitted for approval to the Department in accordance with guidelines noted in section 197-2.2 of this Subpart.

(e) All examinations required for course work shall be written and given within a reasonable time after the course work has been conducted. The failure of the final exam shall constitute failure of the course module.

§ 197-2.7 Facilities.

Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course.

§ 197-2.8 Record retention.

All organizations conducting approved courses of study shall retain the attendance records, the final examinations and a list of students who successfully complete each course module for a period of three years after completion of each course module. All documents shall at all times during such period be available for inspection by duly authorized representatives of the Department of State.

§ 197-2.9 Faculty.

(a) Each instructor for an approved home inspection course of study must be approved by the Department of State. To be approved, an instructor must submit an application along with a resume reflecting three years of experience as a home inspector during which time the applicant has completed at least 250 home inspections.

(b) An instructor who does not qualify under subdivision (a) of this section may be approved as a technical expert if the instructor submits an application and resume establishing, to the satisfaction of the Department of State, that the applicant is an expert in and has at least three years' experience in a specific technical subject related to home inspection. Approval by the Department of State shall specify the subject(s) within the home inspection course or course module for which approval is given.

§ 197-2.10 Policies concerning course cancellation and tuition refund.

Any educational institution or other organization requesting from the Department of State approval for home inspection courses must have a

policy relating to course cancellation and tuition refunds. Such policy must be provided in writing to prospective students prior to the acceptance of any fees.

§ 197-2.11 Revocation, suspension and denial of course approval.

The Department of State may deny, suspend, or revoke the approval or renewal of a home inspection course or a home inspection instructor, if it is determined that they are not in compliance with applicable law and rules, or if the offering does not adequately reflect and present current home inspection knowledge as a basis for a level of home inspection practice, or if the course provider or instructor has obtained, used or attempted to obtain or use the Department of State's home inspection examination questions. Prior to the denial of an application, suspension or revocation, the course provider or instructor shall have the opportunity to be heard by the Secretary of State or his designee.

§ 197-2.12 Advertisements.

Any education institution or other organization offering approved courses may not make or publish any false or misleading statement regarding employment opportunities which may be available as a result of the successful completions of a course or as a result of acquisition of a home inspector license.

§ 197-2.13 Auditing.

A duly authorized representative of the Department of State may audit any course offered, and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

§ 197-2.14 Open to public.

All courses approved pursuant to this Subpart shall be open to all members of the public regardless of the membership of the prospective student in any home inspection related professional society or organization.

§ 197-2.15 Certificates of completion and student lists.

(a) Evidence of successful completion of a course module must be furnished to students in certificate form. The certificate must indicate the following: name of the student; name of the course provider; title of the home inspection module; number of hours; code number of the module; a statement that the student, who shall be named, has satisfactorily completed a course of study in home inspection subjects or unpaid field-based training approved by the Secretary of State in accordance with the provisions of section 197-2.3 of this Subpart, and that his or her attendance record was satisfactory and in conformity with the law, and that such module was completed on a stated date. The certificate must be signed and dated with an original signature by the owner or course coordinator.

(b) A list of the names and addresses of students who successfully complete each course module must be submitted to the Department of State within 15 days of completion of a course module.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. DOS-33-06-00004-EP, Issue of August 16, 2006. The emergency rule will expire November 24, 2006.

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law was enacted as Chapter 461 of the Laws of 2004 and subsequently amended by Chapter 225 of the Laws of 2005. Section 444-d of Article 12-B provides, in part, that on and after December 31, 2005, no person shall perform a home inspection for compensation unless such person is licensed as a home inspector. Section 444-e(b)(l) of Article 12-B provides that an applicant for a home inspection license must have successfully completed a course of study of not less than 140 hours approved by the Secretary of State. Section 444-c(6)(A) of Article 12-B authorizes the Secretary of State to adopt standards for home-inspection training, including standards for course approval. In addition, section 444-l, authorizes the Secretary of State to adopt such rules and regulations as shall be necessary to implement the home-inspection licensing program. This rule establishes standards for home-inspection training and procedures for course approval. Accordingly, the Secretary of State has express authority to adopt this rule.

##### 2. Legislative objectives:

By enacting Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, the Legislature sought, in part, to ensure that home inspectors would be qualified by training and experience. As required by Article 12-B, this rule establishes standards for home-inspec-

tion training, as well as procedures for course approval. Accordingly, this rule advances the objectives that the Legislature sought to advance when it enacted Article 12-B.

### 3. Needs and benefits:

This rule is needed to ensure that schools can offer and that prospective license applicants can obtain the approved courses that will be needed to qualify for a home inspection license. Without this rule, courses cannot be approved. If no courses are approved, prospective applicants will be unable to qualify for home inspection licenses.

### 4. Costs:

#### a. Costs to regulated parties:

The Department of State solicited comments and costs from nine schools. Three schools responded with estimates of anticipated costs of complying with the rule. The following costs are based on those responses:

Estimated cost of preparing an application for course approval: \$750 to \$2,500.

Estimated cost per module for students: \$400 to \$600 per module.

Estimated cost of providing student with a certificate of completion: \$5 to \$10 per certificate.

Estimated cost of submitting names and addresses to the Department of State: \$10 to \$20 per student.

#### b. Costs to the Department of State:

The Department of State anticipates that the cost of implementation and continued administration of this rule will be minimal and that the Department's role in approving courses can be accomplished using existing staff and resources.

#### c. Cost to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

### 5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

### 6. Paperwork:

The following sections of the rule have paperwork requirements:

§ 197-2.2 requires the submission of an application for approval of home inspection courses. Submission of an application is necessary if the Department of State is to evaluate and approve courses.

§ 197-2.3, Module 5(3), requires that an approved school maintain a log of all home inspections completed by each student as proof of the student's field-based training. The log is necessary for audit purposes and will be used as a means of providing proof that the student has completed his or her field-based training.

§ 197-2.3, Module 5(5), requires that a student maintain a log of all home inspections completed if the student's field-based training is not completed with an approved school. The log is necessary for audit purposes and will be used as a means of providing proof that the student has completed his or her field-based training.

§ 197-2.4 requires that an application for evaluation be filed if an applicant is claiming credit for unapproved courses that were taken prior to January 1, 2006. Submission of this application will provide an applicant with a means to obtain credit for a course taken prior to January 1, 2006, if the course is equivalent to the course curriculum prescribed in § 197-2.3 of this rule.

§ 197-2.8 requires that an approved school shall retain attendance records, final examinations, and a list of students who successfully complete each course module for a period of three years. The rule is required for audit purposes and, this rule will benefit any student who may need a duplicate certificate of completion because he or she may have lost or misplaced the original certificate prior to filing their application with the Department of State.

§ 197-2.9 requires that each instructor file an application for approval before teaching an approved course. The rule is necessary to ensure that instructors are qualified by training and experience to teach the approved home-inspection courses.

§ 197-2.10 requires that an approved school shall, prior to accepting any fee from a student, provide to the student a written statement of the school's policy regarding cancellations and refunds. The rule is necessary to ensure that a student knows the school's cancellation and refund policy before paying any fee or tuition to a school.

§ 197-2.15(a) requires an approved school provide each student with a certificate of completion for each course module successfully completed by the student. The rule is necessary to ensure that students have proof of their having successfully completed an approved course.

§ 197-2.15(b) requires that an approved school submit to the Department of State a list of the names and addresses of the students who have

successfully completed a course module and that such list be submitted within 15 days of completion of the course module. The rule is necessary for audit purposes.

### 7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

### 8. Alternatives:

The Department of State consulted with numerous individuals representing the home inspection industry, as well as industry teachers and building code officials. All parties were in general agreement that the proposed topics are standard topics for the industry. There was some interest in including certain environmental topics. However, in order to keep the required curriculum at 140 hours, it was decided not to include those topics, which can be offered at the desecration of the schools as addition, unmandated topics or as a continuing education offering.

### 9. Federal standards:

There are no federal standards for the training of prospective home inspectors. Accordingly, this rule does not exceed any existing federal standard.

### 10. Compliance schedule:

The Department of State anticipates that schools will be able to immediately comply with this rule. The schools that commented on the draft for this rule did not note any compliance difficulties.

## **Regulatory Flexibility Analysis**

### 1. Effect of rule:

The rule will affect schools that offer approved courses for home inspectors. The Department of State is aware of nine schools that may offer approved courses. The Department anticipates that other schools may decide to offer such courses. The Department believes that all of these schools can be classified as small businesses for the purpose of this analysis.

The rule will also affect persons wishing to be come licensed as home inspectors. The Department of State is able to predict how many persons intend to become licensed as home inspectors. The Department believes that all such persons can be classified as small businesses for the purpose of this analysis.

The rule does not apply to local governments.

### 2. Compliance requirements:

The reporting and recordkeeping requirements for are detailed in section 6 of the Regulatory Impact Statement. Those requirements will affect the small businesses identified in section 1 of this Analysis.

The rule does not impose any compliance requirements on local governments.

### 3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

The rule does not impose any compliance requirements on local governments.

### 4. Compliance costs:

Estimates of the costs of compliance are detailed in section 4 of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

### 5. Economic and technological feasibility:

The estimated costs of compliance, as set forth in section 6 of the Regulatory Impact Statement, suggest that it will be economically feasible for small businesses to comply with the rule. The rule does not require any technical expertise in order to comply with the rule.

The rule does not affect local governments.

### 6. Minimizing adverse economic impact:

Since all of the regulated parties are small businesses, the rule does not adversely impact small businesses relative to large businesses. Accordingly, differing reporting or compliance requirements were not a practical option. The nature of the rule does not lend itself to the adoption of performance standards, and the rule, which follows a statutory mandate, does not allow for exceptions. Accordingly, although the Department considered the approaches suggested in State Administrative Procedure Act, § 202-b(1), the Department did not adopt any of those approaches.

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

The Department of State solicited and received comment from schools that are likely to offer home-inspection courses, as well as comment from the New York State Association of Home Inspectors.

Since the rule would not affect local governments, the Department did not solicit comment from local governments.

## **Rural Area Flexibility Analysis**

(a) This rule will apply equally to all home-inspector applicants and all home-inspector schools in all areas of the State—urban, suburban and rural.

(b) (1) The reporting, recordkeeping and other compliance requirements are set forth fully in Section 6 of the Regulatory Impact Statement.

(2) Home-inspector applicants and home-inspector schools in rural areas will not need to employ any professional services in order to comply with this rule.

(c) The compliance costs are set forth in Section 4 of the Regulatory Impact Statement. The Department of State does not anticipate that those estimated costs will vary significantly for different types of public or private entities in rural areas.

(d) Article 12-B (Home Inspection Professional Licensing) of the Real Property Law seeks to establish minimum qualifications for home inspectors throughout the State. In doing so, Article 12-B prescribes that an applicant must complete a course of study consisting of at least 140 hours of study approved by the Secretary of State. In developing this rule, the Department of State did not identify any areas of study that were unique to home inspectors in rural areas. Accordingly, the rule prescribes a course of study that will be required of all prospective applicants, including those in rural areas. In addition, Article 12-B does not provide the Department of State with authority to exempt applicants who live in rural areas of the State.

(e) Because the rule will apply in all areas of the State, the Department of State could not identify any practical way to notify interested parties in rural areas of the State. However, the Department of State worked closely with New York State Association of Home Inspectors, many of whose members practice as home inspectors in rural areas of the State to develop this rule.

**Job Impact Statement**

This rule will not have any substantial adverse impact on jobs and employment opportunities. Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law requires that an applicant for a home inspection license provide proof of having completed a course of study of at least 140 hours approved by the Secretary of State. If this rule was not adopted, home-inspector schools would not be able to offer approved courses and, accordingly, students would be unable to obtain the required 140 hours of study required of an applicant for a home inspector's license. Therefore, this rule will promote employment opportunities for those who will teach the courses and for those students who aspire to become licensed home inspectors.

**Assessment of Public Comment**

The agency received no public comment.

**EMERGENCY  
RULE MAKING**

**General Liability Insurance for Licensed Home Inspectors**

**I.D. No.** DOS-33-06-00005-E

**Filing No.** 1149

**Filing date:** Sept. 26, 2006

**Effective date:** Sept. 26, 2006

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

**Action taken:** Addition of Part 197 and Subpart 197-1 to Title 19 NYCRR.

**Statutory authority:** Real Property Law, sections 444-k and 444-l

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

**Specific reasons underlying the finding of necessity:** This rule was adopted on an emergency basis to preserve the public welfare. Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law provides, in part, that, on and after December 31, 2005, no person shall conduct a home inspection for compensation unless such person is licensed as a home inspector pursuant to article 12-B. Further, section 444-k of article 12-B provides that every licensed home inspector shall secure, maintain and file with the Secretary of State proof of a certificate of liability coverage, the terms and conditions of which shall be determined by the Secretary of State. Accordingly, in order to ensure that prospective applicants will know the terms and conditions of the required liability coverage before this rule is adopted on a permanent basis, this rule has been adopted on an emergency basis.

**Subject:** General liability insurance for licensed home inspectors.

**Purpose:** To establish the type and amount of liability coverage that will be required of licensed home inspectors.

**Text of emergency rule:** A new Part 197 and Subpart 197-1 of Title 19 of the NYCRR are adopted to read as follows:

*Part 197*

*Home Inspectors*

*Subpart 197-1 Business practices and standards*

*Section 197-1.1 Liability Coverage*

(a) Every applicant and every licensed home inspector shall secure, maintain, and file with the Department of State proof of general liability insurance of at least \$150,000 per occurrence and \$500,000 in the aggregate.

(b) Every proof of liability coverage shall provide that cancellation or nonrenewal of the policy shall not be effective unless and until at least ten days' notice of intention to cancel or nonrenew has been received in writing by the Secretary of State.

(c) In addition, every proof of liability coverage shall include the following information:

(1) the name and business address of the insured;

(2) the name, business address and telephone number of insurance company;

(3) the policy number;

(4) the term of the policy; provided, however, that the proof of liability coverage shall provide that the coverage shall not expire until a notice of intention to cancel or non-renewal has been received in writing by the Secretary of State at least ten days prior to the date of cancellation or non-renewal;

(5) a statement indicating that the policy provides general liability coverage of at least \$150,000 per occurrence and \$500,000 in the aggregate.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. DOS-33-06-00005-EP, Issue of August 16, 2006. The emergency rule will expire November 24, 2006.

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

**Regulatory Impact Statement**

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law was enacted as Chapter 461 of the Laws of 2004 and subsequently amended by Chapter 225 of the Laws of 2005. Section 444-d of Article 12-B provides, in part, that on and after December 31, 2005, no person shall perform a home inspection for compensation unless such person is licensed as a home inspector. Further, § 444-k of Article 12-B provides that every licensed home inspector shall secure, maintain and file with the Secretary of State proof of a certificate of liability coverage, the terms and conditions of which shall be determined by the Secretary of State. In addition, the Real Property Law, § 444-l, authorizes the Department of State to adopt such rules and regulations as shall be necessary to implement the home-inspection licensing program. This rule establishes the type and amount of the liability coverage that will be required of licensed home inspectors. Accordingly, the Department of State has express authority to adopt this rule.

2. Legislative objectives:

By enacting Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, the Legislature sought, in part, to ensure that home inspectors would be qualified by training and experience and that home inspectors would maintain liability coverage, the terms and conditions of which would be determined by the Department of State. This rule establishes the type and amount of the liability coverage that will be required of licensed home inspectors. Accordingly, this rule advances the objectives that the Legislature sought to advance when it enacted Article 12-B.

3. Needs and benefits:

The rule is needed because, without the rule, home-inspector applicants could not comply with Real Property Law, § 444-k, which requires that an applicant obtain and file with the Department of State proof of liability coverage, the terms and conditions of which shall be prescribed by the Department of State. By adopting this rule, the Department of State has ensured that home-inspector applicants can obtain liability coverage that will allow the applicants to comply with § 444-k.

4. Costs:

a. Costs to regulated parties:

The Department of State solicited comments and costs from several insurance agents, and the estimated cost was \$500 per year for general liability insurance in the amount of \$150,000 per occurrence and \$500,000 in the aggregate.

b. Costs to the Department of State:

The Department of State anticipates that the cost of implementation and continued administration of this rule will be minimal and that implementation and administration will be accomplished using existing resources.

c. Cost to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The Real Property Law, § 444-k, provides that every licensed home inspector shall secure, maintain and file with the Department of State proof of liability coverage. This rule provides that the proof of liability coverage shall contain the following information:

- (1) the name and business address of the insured;
- (2) the name, business address and telephone number of insurance company;
- (3) the policy number;
- (4) the term of the policy; provided, however, that the proof of liability coverage shall provide that the coverage shall not expire until a notice of intention to cancel or non-renewal has been received in writing by the Secretary of State at least ten days prior to the date of cancellation or non-renewal;

(5) a statement indicating that the policy provides general liability coverage of at least \$150,000 per occurrence and \$500,000 in the aggregate.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state of federal requirement.

8. Alternatives:

The Department of State was advised by several insurance agents that there are three basic forms of liability coverage available to businesses. They are automobile liability insurance, general liability insurance, and errors-and-omissions liability insurance. The Department of State decided to require general liability insurance. Automobile liability insurance was rejected as an option because it is already required by State law for any vehicle registered in the State of New York. Errors-and-omissions liability insurance was rejected because the Legislature had not specified errors-and-omissions liability insurance. An early version (A. 76-A) of Article 12-B had specified errors-and-omissions insurance in the amount of \$500,000 per occurrence. However, the final version (A. 76-B) dropped the errors-and-omissions liability insurance and substituted "liability coverage, which terms and conditions shall be determined by the Secretary of State . . ." Accordingly, the Department of State interpreted that change as an indication that the Legislature did not intend to require that home inspectors obtain errors-and-omissions liability insurance.

9. Federal standards:

There are no federal standards prescribing insurance for licensed home inspectors. Accordingly, this rule does not exceed any existing federal standard.

10. Compliance schedule:

The Department of State anticipates that home inspectors will be able to immediately comply with this rule.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The rule will affect persons wishing to be come licensed as home inspectors. However, the Department of State is not able to predict how many persons intend to become licensed as home inspectors. The Department believes that all such persons can be classified as small businesses for the purpose of this analysis.

The rule does not apply to local governments.

2. Compliance requirements:

The reporting and recordkeeping requirements are detailed in section 6 of the Regulatory Impact Statement. Those requirements will affect the small businesses identified in section 1 of this Analysis.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

Estimates of the costs of compliance are detailed in section 4 of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

The estimated cost of compliance, as set forth in section 6 of the Regulatory Impact Statement, suggests that it will be economically feasible for small businesses to comply with the rule. Compliance with the rule will not require any technical expertise.

The rule does not affect local governments.

6. Minimizing adverse economic impact:

Since all of the regulated parties are assumed to be small businesses, the rule does not adversely impact small businesses relative to large businesses. Accordingly, differing reporting or compliance requirements for small businesses was not a practical option. In addition, the nature of the rule does not lend itself to the adoption of performance standards, and the rule, which follows a statutory mandate, does not allow for exceptions. Accordingly, although the Department considered the approaches suggested in State Administrative Procedure Act, Section 202-b(1), the Department did not adopt any of those approaches.

7. Small business and local government participation:

The Department of State solicited and received comment from the New York State Association of Home Inspectors, which has members who work in rural areas.

Since the rule would not affect local governments, the Department did not solicit comment from local governments.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

This rule will apply equally to all home-inspector applicants in all areas of the State—urban, suburban and rural.

2. Reporting, recordkeeping and other compliance requirements:

(1) The reporting, recordkeeping and other compliance requirements are set forth fully in Section 6 of the Regulatory Impact Statement.

(2) Home-inspector applicants in rural areas will not need to employ any professional services in order to comply with this rule.

3. Costs:

The estimated compliance cost is set forth in Section 4 of the Regulatory Impact Statement. The Department of State does not anticipate that the estimated cost will vary significantly for different types of public or private entities in rural areas.

4. Minimizing adverse impact:

The Real Property Law, Section 444-k, requires that a licensed home inspector file with the Department of State proof of liability coverage, the terms and conditions of which shall be determined by the Secretary of State. Since a home inspector can inspect homes in any part of the State, the rule prescribes the same insurance requirement for all home inspectors. Further, Article 12-B does not provide the Department of State with authority to exempt home inspectors who live and work in rural areas.

5. Rural area participation:

Because the rule will apply in all areas of the State, the Department of State could not identify any practical way to notify interested parties in all of rural areas of the State. However, the Department of State worked closely with New York State Association of Home Inspectors, many of whose members practice as home inspectors in rural areas of the State.

**Job Impact Statement**

This rule will not have any substantial adverse impact on jobs and employment opportunities. Section 444-k of the Real Property Law requires that an applicant for a home inspection license provide the Department of State with proof of having liability coverage, the terms and conditions of which shall be determined by the Secretary of State. If this rule were not adopted, prospective applicants could not comply with Section 444-k. Therefore, this rule will promote employment opportunities by ensuring that applicants can comply with Section 444-k and, thereby, qualify for a license as a home inspector.

**Assessment of Public Comment**

The agency received no public comment.

## Office of Temporary and Disability Assistance

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

**Child Support Standards Chart**

**I.D. No.** TDA-41-06-00034-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 347.10(a)(9), (b) and (c) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 111-a and 111-i

**Subject:** Child support standards chart.

**Purpose:** To update the child support calculations formula as reflected in the child support standards chart.

**Text of proposed rule:** Paragraph (9) of subdivision (a) of section 347.10 is amended to read as follows:

(9) "Self-support reserve" means 135 percent of the poverty income guidelines amount, which is updated annually by the Federal Department of Health and Human Services, and which will be provided by the office annually. For calendar year [2005] 2006, the self-support reserve is [\$12,920] \$13,230.

Items 18, 20 and 21 of the child support guidelines worksheet contained in subdivision (b) of section 347.10 are amended to read as follows:

18. Subtract line 17 from line 16. 18. \$ \_\_\_\_\_

a. If line 18 is greater than or equal to [\$12,920] \$13,230 (the self-support reserve) enter the line 17 amount on line 22 below.

No further calculations are necessary.

b. If line 18 is less than [\$12,920] \$13,230, proceed to step 19.

20. Self-Support Reserve. 20. [\$ 12,920] \$ 13,230

21. Subtract line 20 from line 19. 21. \$ \_\_\_\_\_

a. If line 18 is less than [\$9,570] \$9,800 (poverty level), enter on line 22 the greater of \$300 or the amount from line 21.

b. If line 18 is greater than or equal to [\$9,570] \$9,800 (poverty level), but less than [\$12,920] \$13,230 enter on line 22 the greater of \$600 or the amount from line 21.

The text of section 347.10(c) is amended and the chart sections for annual incomes from \$0 to \$10,999 and from \$13,000 to \$20,999 contained in that subdivision are repealed and replaced with the following chart sections reflecting the 2006 federal poverty income guidelines amount and the self support reserve:

(c) The following child support standards chart sets forth annual obligation amounts yielded by annual absent parent income levels, up to \$200,000, through application of the child support percentages as defined in this section:

Released CHILD SUPPORT STANDARDS CHART

[April 1, 2005] April 1, 2006 PREPARED BY

NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE DIVISION OF CHILD SUPPORT ENFORCEMENT

The tables provided as part of the Child Support Standards Chart should be used to determine the annual child support obligation amount pursuant to the provisions of Chapter 567 of the Laws of New York of 1989. The current poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services is [\$9,570] \$9,800, and the self-support reserve for [2005] 2006 is [\$12,920] \$13,230.

How to use the Chart:

1. Locate the "Income Range" you are looking for in the upper right hand corner of each page.
2. Locate the row labeled "Annual Income" on one of the tables of that page.
3. Go across the top of the table to the column corresponding to the "Number of Children" for whom support is sought.

4. The dollar amount listed where the "Annual Income" row and the "Number of Children" column meet is the amount of the basic child support obligation, where additional amounts are not applicable for the child care, health care and education for the children for whom support is sought.
5. Where additional amounts for child care, health care and/or educational expenses are appropriate, see the worksheet on page 21.

Please note: Where the total income of both parents exceeds \$80,000, the law permits, but does not require, the use of the Child Support Percentages in calculating the annual child support obligation amount on the income above \$80,000.

THE CHILD SUPPORT STANDARDS CHART

Child Support Percentages	
One Child	17% of combined parental income
Two Children	25% of combined parental income
Three Children	29% of combined parental income
Four Children	31% of combined parental income
Five Children	no less than 35% of combined parental income

		INCOME RANGE				
		0 – 10,999				
		NUMBER OF CHILDREN				
		1	2	3	4	5+
ANNUAL INCOME	FROM THRU	ANNUAL OBLIGATION AMOUNT				
000	10,999	300	300	300	300	300

		NUMBER OF CHILDREN				
		1	2	3	4	5+
ANNUAL INCOME	FROM THRU	ANNUAL OBLIGATION AMOUNT				
11,000	11,099	300	300	300	300	300
11,100	11,199	300	300	300	300	300
11,200	11,299	300	300	300	300	300
11,300	11,399	300	300	300	300	300
11,400	11,499	300	300	300	300	300
11,500	11,599	300	300	300	300	300
11,600	11,699	600	300	300	300	300
11,700	11,799	600	300	300	300	300
11,800	11,899	600	300	300	300	300
11,900	11,999	600	300	300	300	300

		NUMBER OF CHILDREN				
		1	2	3	4	5+
ANNUAL INCOME	FROM THRU	ANNUAL OBLIGATION AMOUNT				
12,000	12,099	600	300	300	300	300
12,100	12,199	600	300	300	300	300
12,200	12,299	600	300	300	300	300
12,300	12,399	600	300	300	300	300
12,400	12,499	600	300	300	300	300
12,500	12,599	600	300	300	300	300
12,600	12,699	600	300	300	300	300
12,700	12,799	600	300	300	300	300
12,800	12,899	600	600	300	300	300
12,900	12,999	600	600	300	300	300

		NUMBER OF CHILDREN				
		1	2	3	4	5+
ANNUAL INCOME	FROM THRU	ANNUAL OBLIGATION AMOUNT				
13,000	13,099	600	300	300	300	300
13,100	13,199	600	600	300	300	300
13,200	13,299	600	600	300	300	300
13,300	13,399	600	600	300	300	300
13,400	13,499	600	600	300	300	300
13,500	13,599	600	600	300	300	300
13,600	13,699	600	600	370	370	370
13,700	13,799	600	600	470	470	470
13,800	13,899	600	600	570	570	570
13,900	13,999	670	670	670	670	670

		NUMBER OF CHILDREN				
		1	2	3	4	5+
ANNUAL INCOME	FROM THRU	ANNUAL OBLIGATION AMOUNT				
14,000	14,099	770	770	770	770	770
14,100	14,199	870	870	870	870	870
14,200	14,299	970	970	970	970	970
14,300	14,399	1,070	1,070	1,070	1,070	1,070
14,400	14,499	1,170	1,170	1,170	1,170	1,170
14,500	14,599	1,270	1,270	1,270	1,270	1,270

14,600	14,699	1,370	1,370	1,370	1,370	1,370
14,700	14,799	1,470	1,470	1,470	1,470	1,470
14,800	14,899	1,570	1,570	1,570	1,570	1,570
14,900	14,999	1,670	1,670	1,670	1,670	1,670

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
15,000	15,099	1,770	1,770	1,770	1,770	1,770
15,100	15,199	1,870	1,870	1,870	1,870	1,870
15,200	15,299	1,970	1,970	1,970	1,970	1,970
15,300	15,399	2,070	2,070	2,070	2,070	2,070
15,400	15,499	2,170	2,170	2,170	2,170	2,170
15,500	15,599	2,270	2,270	2,270	2,270	2,270
15,600	15,699	2,370	2,370	2,370	2,370	2,370
15,700	15,799	2,470	2,470	2,470	2,470	2,470
15,800	15,899	2,570	2,570	2,570	2,570	2,570
15,900	15,999	2,670	2,670	2,670	2,670	2,670

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
16,000	16,099	2,720	2,770	2,770	2,770	2,770
16,100	16,199	2,737	2,870	2,870	2,870	2,870
16,200	16,299	2,754	2,970	2,970	2,970	2,970
16,300	16,399	2,771	3,070	3,070	3,070	3,070
16,400	16,499	2,788	3,170	3,170	3,170	3,170
16,500	16,599	2,805	3,270	3,270	3,270	3,270
16,600	16,699	2,822	3,370	3,370	3,370	3,370
16,700	16,799	2,839	3,470	3,470	3,470	3,470
16,800	16,899	2,856	3,570	3,570	3,570	3,570
16,900	16,999	2,873	3,670	3,670	3,670	3,670

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
17,000	17,099	2,890	3,770	3,770	3,770	3,770
17,100	17,199	2,907	3,870	3,870	3,870	3,870
17,200	17,299	2,924	3,970	3,970	3,970	3,970
17,300	17,399	2,941	4,070	4,070	4,070	4,070
17,400	17,499	2,958	4,170	4,170	4,170	4,170
17,500	17,599	2,975	4,270	4,270	4,270	4,270
17,600	17,699	2,992	4,370	4,370	4,370	4,370
17,700	17,799	3,009	4,425	4,470	4,470	4,470
17,800	17,899	3,026	4,450	4,570	4,570	4,570
17,900	17,999	3,043	4,475	4,670	4,670	4,670

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
18,000	18,099	3,060	4,500	4,770	4,770	4,770
18,100	18,199	3,077	4,525	4,870	4,870	4,870
18,200	18,299	3,094	4,550	4,970	4,970	4,970
18,300	18,399	3,111	4,575	5,070	5,070	5,070
18,400	18,499	3,128	4,600	5,170	5,170	5,170
18,500	18,599	3,145	4,625	5,270	5,270	5,270
18,600	18,699	3,162	4,650	5,370	5,370	5,370
18,700	18,799	3,179	4,675	5,423	5,470	5,470
18,800	18,899	3,196	4,700	5,452	5,570	5,570
18,900	18,999	3,213	4,725	5,481	5,670	5,670

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+
19,000	19,099	3,230	4,750	5,510	5,770	5,770
19,100	19,199	3,247	4,775	5,539	5,870	5,870
19,200	19,299	3,264	4,800	5,568	5,952	5,970
19,300	19,399	3,281	4,825	5,597	5,983	6,070
19,400	19,499	3,298	4,850	5,626	6,014	6,170
19,500	19,599	3,315	4,875	5,655	6,045	6,270
19,600	19,699	3,332	4,900	5,684	6,076	6,370
19,700	19,799	3,349	4,925	5,713	6,107	6,470
19,800	19,899	3,366	4,950	5,742	6,138	6,570
19,900	19,999	3,383	4,975	5,771	6,169	6,670

ANNUAL INCOME		NUMBER OF CHILDREN				
FROM	THRU	1	2	3	4	5+

20,000	20,099	3,400	5,000	5,800	6,200	6,770
20,100	20,199	3,417	5,025	5,829	6,231	6,870
20,200	20,299	3,434	5,050	5,858	6,262	6,970
20,300	20,399	3,451	5,075	5,887	6,293	7,070
20,400	20,499	3,468	5,100	5,916	6,324	7,140
20,500	20,599	3,485	5,125	5,945	6,355	7,175
20,600	20,699	3,502	5,150	5,974	6,386	7,210
20,700	20,799	3,519	5,175	6,003	6,417	7,245
20,800	20,899	3,536	5,200	6,032	6,448	7,280
20,900	20,999	3,553	5,225	6,061	6,479	7,315

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeanine Stander Behuniak, Office of Temporary and Disability Assistance, 40 N. Pearl St., 16C, Albany, NY 12243-0001, (518) 474-9779, e-mail: jeanine.behuniak@otda.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**

The Office of Temporary and Disability Assistance (OTDA) is proposing amendments to 18 NYCRR 347.10 to reflect the revised self-support reserve and the updated child support standards chart, which are used to calculate child support obligations. OTDA has determined that no person is likely to object to the adoption of the proposed rule as written.

The proposed amendments to 18 NYCRR 347.10 are necessary to conform the regulation to the requirements of section 111-i(2) of the Social Services Law (SSL). Section 111-i(2)(a) of the SSL provides that OTDA shall publish annually in its regulations the revised self-support reserve to reflect the annual updating of the poverty income guidelines amount for a single person, and section 111-i(2)(b) of the SSL provides that OTDA shall publish in its regulations a child support standards chart to reflect the dollar amounts yielded through application of the child support percentage. Thus OTDA is required by State statute to update its regulatory provisions on an annual basis.

The updated financial information does not reflect discretion exercised by OTDA. The self-support reserve and the child support percentage are defined in the Domestic Relations Law, and the poverty income guidelines amount for a single person is reported by the federal Department of Health and Human Services. Thus the proposed amendments are not establishing new financial criteria. Instead they are setting forth existing requirements.

The proposed child support standards chart presently is being utilized by the local child support enforcement units to calculate child support obligations. Thus the proposed amendments will conform 18 NYCRR 347.10 to reflect the actual practices of the local child support enforcement units in the State.

It is expected that no person will object to the proposed amendments contained in this consensus rule since the amendments are necessary to comply with the SSL, and the amendments reflect updated financial information which is being used to calculate child support obligations.

**Job Impact Statement**

A job impact statement has not been prepared for the proposed regulatory amendments. It is evident from the subject matter of the amendments that the job of the worker making the decisions required by the proposed amendments will not be affected in any real way. Thus, the changes will not have any impact on jobs and employment opportunities in the State.