

# 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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## Office of Alcoholism and Substance Abuse Services

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

#### Chemical Dependence Outpatient Services

I.D. No. ASA-42-06-00017-P

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

**Proposed action:** Amendment of Part 822 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(e), 19.09(b), 19.15(a), 19.40, 32.01 and 32.07(a)

**Subject:** Chemical dependence outpatient services.

**Purpose:** To amend utilization review and add excessive services criteria for chemical dependence outpatient services and add treatment of compulsive gambling.

**Substance of proposed rule (Full text is posted at the following State website: [www.oasas.state.ny.us](http://www.oasas.state.ny.us)):** The New York Office of Alcoholism and Substance Abuse Services proposes to amend Part 822 of 14 NYCRR, Chemical Dependence Outpatient Services. This amendment will add a provision for treating individuals who are compulsive gamblers as well as have chemical dependence. It will also add provisions relating to utilization review, excessive provision of services, and clarify requirements relating to group and individual counseling.

Section 822.2 is amended to clarify policies and procedures requirements and service provision requirements. Subdivision (c) of section 822 is amended to add a requirement that every patient have at least one individual counseling session for every ten counseling sessions unless otherwise determined by the interdisciplinary team. In addition this section specifies that providers are required to meet the requirements of Part 96 of the Code of Federal Regulations which deals with the federal substance abuse and treatment block grant.

Section 822.3 clarifies admission procedures and procedures to follow where a provider objects to a patient's continued use of prescription drugs.

Section 822.4 adds a review of a patient's drug use and gambling history be added to the comprehensive evaluation. A provision is added which describes the required contents of a patient's progress note and the manner in which a case record must record a transfer between an outpatient and outpatient rehabilitation program.

Section 822.6 adds a provision for utilization review including minimum review requirements for patients based upon their length of stay in the service. This includes the frequency of utilization review and documentation requirements.

Section 822.7 amends the staffing requirements in relation to staff training. It provides a description of the types of staff training.

Section 822.10 is added to describe the standards applicable outpatient programs that provide compulsive gambling treatment for individuals who are chemically dependent and who also are compulsive gamblers. This includes treatment planning, individual counseling and group counseling sessions.

Section 822.11 is amended to add a provision relating to the excessive provision of services. This provision describes the indicators by which the Office will determine whether a service provider may providing excessive services. This provision also includes a unit of service threshold that would require the Office to inspect a service provider to determine whether excessive services are being provided. The provision also describes the actions that the Office may take when it determines that there is excessive provision of services and the rights of providers when an action is taken by the Office as a result of this determination.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth Hoffman, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203-3526, (518) 485-2317, e-mail: [kenhoffman@oasas.state.ny.us](mailto:kenhoffman@oasas.state.ny.us)

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

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

#### Regulatory Impact Statement

1. Statutory Authority: Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction. In addition, the regulations were submitted to the Advisory Council on Alcoholism and Substance Abuse Services in accordance with section 19.09(d) of the Mental Hygiene Law.

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and

effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09(a) gives the Commissioner the authority to issue operating certificates to chemical dependence services providers.

2. **Legislative Objectives:** Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The proposed amendments to Part 822, Chemical Dependence Outpatient Services, will assure that the duration, frequency, and intensity of services to addicted individuals admitted to this service are limited to appropriate levels.

3. **Needs and Benefits:** As part of the State's Medicaid reform initiatives, these amendments will strengthen provider utilization review requirements; reduce excessive and unnecessary services; and ensure the appropriate ratio of group to individual counseling sessions. The proposed amendments will advance the agency's commitment to promote appropriate and needed services to addicted individuals, while at the same time ensuring effective and efficient use of Medicaid. The Office determined that it was necessary to implement these standards to address the excessive provision of services by a very small number of providers. In a review of Medicaid claims per patient in 2003-2004 it was determined that a small number of providers were billing for service greatly in excess of what the majority of providers were providing. In many cases, the Office determined that these excess services were not appropriate and patients were not achieving the goals of their treatment plans. The excessive services standards, and utilization control, will ensure that patients are receiving a therapeutically appropriate level of services, which is essential for the patient's recovery. The most appropriate method of ensuring appropriate levels of services is through the provision of utilization control which, through the use of random sampling, requires a review of the appropriateness of the care a patient is receiving. It also enables the program to review the effectiveness of the treatment plan. In addition, to assure that patients do not receive an excessive level of group counseling sessions versus individual counseling sessions during their treatment in a program, the program will be required to provide a minimum of one individual counseling session for every ten group sessions unless the program's multidisciplinary team documents that a different frequency of individual session best meets the patient's needs. Individual counseling sessions are necessary to assure that patients' needs are being met and monitored. In addition, in 2005 the Office was given authority to develop standards and certify treatment programs for individuals who are compulsive gamblers. This regulation will provide standards for chemically dependent individuals who are also compulsive gamblers.

#### 4. Costs:

a. **Costs to regulated parties:** The only regulated party that will be impacted by the excessive services provision to the regulations will be those providers that provide services which are far in excess of what an efficient and effectively operated program should provide. It is estimated that only 15 of the 313 clinic programs certified under Part 822 will be impacted. Only 4 of the 57 outpatient rehabilitation programs certified under Part 822 will be impacted. The estimated State share savings of the group to individual counseling sessions will be approximately \$600,000 annually. It is expected that about 40 providers will be impacted by this provision. It is not expected that there will be extra costs relating to utilization review since this is already required under current regulations. Any costs relating to the individual and group counseling requirements are already reimbursed in the fee, however the Office expects some providers may need additional staff, it is expected that current staffing ratios are sufficient to meet this requirement.

b. **Costs to the agency, state and local governments:** It is estimated that these regulations will reduce the State share of Medicaid billings by approximately \$5 million per year for clinics and \$340,000 per year for outpatient rehabilitation programs. There will be no additional costs to counties.

5. **Local Government Mandates:** There are no new mandates or administrative requirements placed on local governments.

6. **Paperwork:** The amendments to Part 822 will require some paperwork for certified providers in order to ensure that utilization review requirements are met. However, since utilization control is presently required and providers are already familiar with utilization control record-

keeping, it is not expected that new recordkeeping requirements will be excessive.

7. **Duplications:** There is no duplication of other state or federal requirements.

8. **Alternatives:** The only other alternative is to keep the existing procedures in place. The current absence of a specific standard for the frequency of services places burdens both on providers and OASAS. OASAS surveyors must rely upon records and other data that is obtained from the provider which places a recordkeeping burden on providers who should be using this staff time to serve patients. The excessive services provisions of the proposed regulation along with the new utilization review standards will allow providers will provide clinically sound determinations for the frequency of client service. Keeping the existing regulations is also harmful to patients who are receiving an inappropriate amount of services which are not helping them towards recovery. The proposed utilization review standards will ensure that patients are receiving the services they need. In addition, not implementing these amendments to the regulations would allow inefficient and ineffective providers to continue to expend funds without providing appropriate services to patients. In an effort to elicit comments on the proposed regulations and possible alternatives, these amendments were shared with New York's treatment provider community and included a cross-section of upstate and downstate, as well as urban and rural programs. Draft regulations and a question and answer document were posted on the OASAS web site. In addition individual meetings were held with providers and provider associations. Numerous changes to the draft regulation were made based on comments received from the provider community. A presentation on the proposed regulations was made to the provider association annual conference. These regulations were also discussed with the Council of Local Mental Hygiene Directors and the Advisory Council.

9. **Federal Standards:** There are no specific federal standards or regulations that apply to this amendment.

10. **Compliance Schedule:** It is expected that full implementation of Part 822 will be completed within one year of the adoption of the regulation.

#### **Regulatory Flexibility Analysis**

**Effect of the Rule:** The proposed amendments to Part 822 will impact certified providers of Part 822 outpatient chemical dependence services. It is expected that utilization control requirements may require additional staff time but the benefits will result in better patient care. The excessive services requirement will only impact providers who are determined, after an inspection by the Office, to be providing excessive services and who cannot justify the provision of such services. This will not only result in better patient treatment, but more efficient and effective programs. Medicaid revenue comprises a significant part of reimbursement for program costs and is traditionally reimbursed at 50 percent federal, 25 percent state, and 25 percent local shares. State savings for the proposed amendments is estimated to be approximately \$5.94 million annually, or 50% of the total savings due to the takeover of local share.

**Compliance Requirements:** It is not expected that there will be significant changes in compliance requirements. Since providers are already required to provide utilization review, it is not expected that this regulation, which provides additional guidance on good utilization review practices, will have additional costs. Both the utilization control and individual and group counseling requirements represent best professional practice and will provide better services to patients.

**Professional Services:** It is expected that some programs may need additional staff to meet the individual and group counseling requirements.

**Compliance Costs:** Some programs may need additional staff to meet the individual and group counseling requirements, however existing fees reimburse a sufficient staffing ratio to meet this requirement.

**Economic and Technological Feasibility:** Compliance with the record-keeping and reporting requirements of the Part 822 amendments are not expected to have an economic impact or require any changes to technology for small businesses and government.

**Minimizing Adverse Impact:** The amendments to Part 822 have been carefully reviewed to ensure minimum adverse impact to providers. The excessive services provision has procedures that will allow providers to submit justification to the Office to support levels of services. In addition the Office will implement a system whereby a provider who is approaching an excessive service target will be given notice that it is approaching the excessive services threshold.

**Small Business and Local Government Participation:** These amendments were shared with New York's treatment provider community. Presentations were given at provider meetings to explain the proposal and

give providers the opportunity to provide feedback. In addition the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services were briefed on this proposal.

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas: Certified providers of services that will be impacted by the amendments to Part 822 are located in rural as well as suburban and metropolitan areas of the State. It is estimated that there are 43 providers in rural counties. A survey of providers in rural areas indicates that none of these providers approaches the excessive service threshold and will not be impacted by this amendment.

2. Reporting: There will be no new reporting requirements that will impact rural providers.

3. Costs: There will be minimum impact for rural providers. Costs may be incurred relating to group and individual counseling session requirements, however existing reimbursement fees reflect these staffing ratios.

4. Minimizing adverse impact: It is not expected that there will be any adverse impact to rural areas.

5. Rural area participation: These amendments were shared with New York's treatment provider community and included a cross-section of upstate and downstate, as well as urban and rural programs. Draft regulations and a question and answer document were posted on the OASAS web site. In addition these regulations were discussed with the Council of Local Mental Hygiene Directors and the Advisory Council.

**Job Impact Statement**

The implementation of the amendments to Part 822 will not have an impact on jobs in that the amendments will improve program quality, efficiency and effectiveness with existing staff. Utilization review is intended to ensure that patients of outpatient services are receiving the appropriate amount of service and should not impact jobs since utilization review is already required in the regulations and these amendments will provide better guidance on how to have more effective utilization review using existing staff. The requirement relating to group and individual counseling sessions may require additional staff, however since the multidisciplinary team may modify this requirement where clinically necessary it should not have a significant effect on staffing. In addition, existing funding reimburses staffing ratios at a sufficient level to reimburse any additional staffing costs.

regulations are also necessary to satisfy federal Title IV-E State Plan requirements that impact the availability of federal funding for foster care and adoption assistance.

**Subject:** Home studies for adoptive and foster placements for out-of-state children and for inter-county placements; child abuse and maltreatment screening for prospective adoptive and foster parents

**Purpose:** To implement the requirements of the Federal Safe and Timely Interstate Placement of Foster Children Act of 2006 (Public Law 109-239).

**Substance of emergency rule:** Section 357.3 (Access to Medical and Education Records)

The amendment provides for access to education and medical information at no cost to a foster child who is discharged to his or her own care.

Part 421 (Standards of Practice for Adoption Services)

The amendment clarifies who may adopt a child. The amendment requires authorized agencies to seek child protective services information from other states regarding a person applying for approval as an adoptive parent and any other person who resides with the applicant where such applicant or other person resided in the other state within 5 years of the application for approval. The amendment establishes timeframes for the completion of home studies for a person seeking to be approved as an adoptive parent to receive a child from another state or social services district. The amendment also sets forth who may perform such home studies. The amendment clarifies that a social services district or a voluntary authorized agency may not delay or deny an application or the conducting of a home study of a person seeking to adopt a child in the custody of another authorized agency.

Sections 428.5 and 428.6 (Standards for Uniform Case Recording)

The amendment clarifies that when reunification with the parent is not the child's permanency planning goal, the social services district or the voluntary authorized agency must document the reasonable efforts made to finalize the child's permanency plan, including the identification of both in-state and out-of-state placement options. The amendment provides that when concurrently planning for the permanency of a child in foster care, the social services district or the voluntary authorized agency must document the description of the alternative plan to achieve permanency for the child which must include identification of appropriate in-state and out-of-state placements, if the child can not be safely returned home to his or her parents.

Section 430.12 (Diligence of Effort) The amendment clarifies that if the child's permanency planning goal is adoption or placement in a permanent home other than that of the child's parent, the social services district or the voluntary authorized agency must document the reasonable efforts made to place the child in-state or out-of-state in a timely and orderly manner.

Section 441.22 (Health and Medical Services)

The amendment provides for access to health information at no cost to a foster child who is discharged to his or her own care.

Part 443 (Certification, Approval and Supervision of Foster Boarding Homes)

The amendment requires authorized agencies to seek child protective services information from other states regarding a person applying for certification or approval as a foster parent and any other person who resides with the applicant where the applicant or other person resided in another state within 5 years of the application for certification or approval. The amendment establishes timeframes for the completion of home studies for a person seeking to be certified or approved as a foster parent to receive a child from another state or social services district. The amendment also sets forth who may perform such home studies. The amendment clarifies that a social services district or a voluntary authorized agency may not delay or deny an application or the conducting of a home study of a person seeking to care for a foster child in the custody of another authorized agency.

**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 27, 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 powers and duties pursuant to the provisions of the SSL.

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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

**Home Studies for Adoptive and Foster Placements**

**I.D. No.** CFS-42-06-00004-E

**Filing No.** 1163

**Filing date:** Sept. 29, 2006

**Effective date:** Oct. 1, 2006

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

**Action taken:** Amendment of sections 357, 421, 428, 430, 441 and 443 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 374-a and 378-(5)

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

**Specific reasons underlying the finding of necessity:** To enhance permanency for foster children by expediting the home study process and by requiring agencies to consider all viable placement options where a child may not return home, including out of state options. The regulations will enhance the health and well-being of former foster children by providing them with relevant available health and education information where the child is discharged to his or her own care. The regulations will also enhance the safety of foster and adoptive children by broadening the scope of screening prospective foster and adoptive parents and other adults residing in the home of the prospective foster or adoptive parents. The

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 372-b(3) of the SSL requires OCFS to promulgate regulations to maintain enlightened adoption policies and to establish standards and criteria for adoption practices.

Section 374-a of the SSL sets forth the standards and procedures relating to the Interstate Compact on the Placement of Children (ICPC) that involve the placement of children from one state to another for the purpose of foster care or adoption.

Section 378(5) of the SSL authorizes OCFS to establish and amend regulations governing the issuance and revocation of a certificate to board foster children and to prescribe standards for the care of foster children.

Section 471(a) of the Social Security Act provides that in order for a state to be eligible for federal Title IV-E funding for foster care and adoptions assistance, the state must have a State Plan approved by the federal Department of Health and Human Services which reflects the standards set forth in such section.

#### 2. Legislative objectives:

The regulations implement the requirements of the federal Safe and Timely Interstate Placement of Foster Children Act of 2006 (Interstate Placement Act) that takes effect on October 1, 2006. The Interstate Placement Act establishes timeframes for the completion and submission of home studies of prospective foster or adoptive parents who are being considered as potential resources for foster children from other states. The regulations impose standards on the content and timeframes for the completion of such home studies.

The regulations also implement federal requirements for the dissemination of health and education records of a foster child when the child is being discharged from care. Such records will be provided at no cost to the child when he or she is discharged to his or her own care. Furthermore, the regulations implement federal requirements relating to the documentation of reasonable efforts to finalize a child's permanency plan, including consideration of both in-state and out-of-state placement options.

The regulations implement the requirements of the federal Adam Walsh Child Protection Act of 2006 (Walsh Protection Act), parts of which also take effect on October 1, 2006. The Walsh Protection Act requires that whenever a person applies for certification or approval as a foster or adoptive parent, or any other person over the age of 18 who resides in the home of such applicant resided in another state or states in the five years preceding the application for certification or approval, the licensing or approving agency must request child abuse and maltreatment information maintained by the child abuse and maltreatment registry administered in the previous state(s) of residence.

#### 3. Needs and benefits:

The regulations will enhance permanency for foster children by expediting the home study process and by requiring agencies to consider all viable placement options where a child may not return home, including out-of-state options. Currently, the ICPC does not set forth any timeframes for the conducting of home studies of persons seeking to be foster parents or adoptive parents of foster children. Regarding the consideration of out-of-state options for children in foster care, current regulatory standards do not expressly refer to out-of-state placement options.

The regulations establish that a social services district who receives a referral from the ICPC may conduct such home study directly or may use a voluntary authorized agency under contract with the social services district or a voluntary authorized agency under contract with the OCFS to conduct the home study, and that if the latter option is selected, the costs of the home study will be charged back to the social services district in which the prospective foster or adoptive parent(s) reside.

The regulations will enhance the health and well-being of former foster children by providing them with relevant available health and education information where the child is discharged to his or her own care.

The regulations will also enhance the safety of foster and adoptive children by broadening the scope of screening prospective foster and adoptive parents and other adults residing in the home of the prospective foster or adoptive parents. Given the transient nature of American society, it is not uncommon for persons to move from one state to another. It is possible that such persons may have a child abuse or maltreatment history in their prior state of residence. Such information is highly relevant to whether a foster or adoptive child may be safely cared for in such home. The regulations provide that child abuse or maltreatment information received from another state must be safeguarded and maintained in a confidential manner. The regulations, however, establish that if any other state in which the prospective foster or adoptive parent (or other adults

residing in the home) formerly lived does not have sufficient statutory authority in that state to share child abuse or maltreatment history, then the certification or approval process may go forward in New York State without such information. As of October 1, 2008, all states must revise applicable statutes to fully comply with the Walsh Protection Act.

The regulations are also necessary to satisfy Federal Title IV-E State Plan requirements that impact the availability of federal funding for foster care and adoption assistance.

The regulations also codify the policies regarding the time frames for completion of a home study and which entity is permitted to do a home study to apply to New York State inter-county placements, when an inter-county placement is sought for a foster child for the purposes of foster care in another county or to make an adoptive placement in another county.

#### 4. Costs:

Local social services districts or voluntary authorized agency under contract with social services districts are already required to complete a home study; therefore, this does not represent an additional workload. It is unknown if social services districts or voluntary authorized agency under contract with social services districts are currently completing the home study within 60 days (or 75 days in certain circumstances) of the receipt of the request. Therefore, to facilitate compliance with the timeframes, the Office of Children and Family Services will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct the home study.

Minimal costs are expected related to the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. It is expected that this activity will be completed through routine correspondence to such state(s).

There is no additional cost anticipated for the dissemination of health and education records when the child is being discharged from foster care since this activity is the current practice.

There is no cost related to any of the documentation requirements contained in these regulations since this information will be recorded in the CONNECTIONS where this functionality already exists or is under development.

#### 5. Local government mandates:

When the ICPC office of OCFS receives a request from another state seeking to place a foster child from the other state with a person in New York State as a foster or adoptive parent, the social services district or voluntary authorized agency under contract with the social services district is required to commence and complete a home study within 60 days of the receipt of such request. An additional 15 days to complete the home study is allowed for circumstances outside of the control of the social services district or voluntary authorized agency if a timely request for such documentation was made by the district or agency.

Currently, social services districts and voluntary authorized agencies are required pursuant to 18 NYCRR 357.3 to provide a foster child with his or her comprehensive health history when the foster child is discharged to his or her own care. The regulations clarify that this history must include the child's current health providers and clarify that there is no cost to the child for these records. The regulations also require the provision of the child's education record at the time of the child's discharge to his or her own care, also at no cost to the child.

Social services districts are currently required to assess the appropriateness of placement of children in foster care pursuant to 18 NYCRR 430.11. Each foster child must have periodic assessments performed to address the issue of permanency, including whether the child will be returned home or to another placement resource (see section 409-e of the SSL and 18 NYCRR Part 428). The regulations require the social services district to expressly document the consideration of out-of-state placement options if the child will not be returned to his or her parent.

Current law and regulations in section 424-a of the SSL and 18 NYCRR Parts 421 and 443 require data base checks of New York's Statewide Central Register of Child Abuse and Maltreatment for all persons applying for certification or approval as foster or adoptive parents and for any other persons over the age of 18 who reside in the home of such applicants, irrespective of how long such persons resided in New York State. The regulations expand the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states.

#### 6. Paperwork:

The regulations will require the specific documentation of the consideration of out-of-state placement as an option for foster children who do not have the permanency goal of return to the parent. Such documentation will be recorded in the CONNECTIONS system in the Family Assessment and Service Plan and/or Progress Notes kept for the case.

Documentation relating to home studies for the certification or approval of a foster or adoptive parent will be maintained in the state's CONNECTIONS system. This reflects current standards.

Documentation of health information is already mandated by OCFS regulations 18 NYCRR 357.3 and 441.22 and certain components of the child's medical history will be recorded in CONNECTIONS beginning in late 2006. Documentation of educational information is already mandated by OCFS regulation 18 NYCRR 428.5 and certain components of the child's education record will be recorded in CONNECTIONS beginning in late 2006.

The regulations require the documentation of requests to appropriate child welfare agencies in the prior state(s) of residence (5 years preceding the date of the application for certification or approval) of prospective foster or adoptive parents and/or any other persons over the age of 18 who resides in the home of the applicant and the results of such requests. As is currently required for in-State inquiries made pursuant to section 424-of the SSL, if the agency decides to certify or approve an applicant where there is a history of abuse or maltreatment, the agency must document the basis for making such decision.

#### 7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives: These regulations are necessary to comply with federal statutory mandates. Therefore, there are no alternatives to these regulations.

#### 9. Federal standards:

The regulations are required to implement the federal Safe and Timely Interstate Placement of Foster Children Act of 2006 and the federal Adam Walsh Child Protection Act of 2006 and to maintain compliance with federal Title IV-E State Plan requirements.

#### 10. Compliance schedule:

Compliance with the regulations must begin immediately upon emergency filing.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

Social services districts will be affected by the regulations. There are 58 social services districts and the St. Regis Mohawk Tribe which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with the Office of Children and Family Services (OCFS). Most voluntary foster care and adoption agencies also will be affected by portions of the regulations. There are approximately 114 voluntary agencies operating foster care programs. Of those, 68 such agencies operate foster boarding home programs. There are 119 voluntary agencies authorized that operate adoption programs, including 19 agencies located out-of-state and approved to do adoptions in New York State pursuant to Article 13 of the Not-For-Profit Corporation Law.

#### 2. Compliance Requirements:

When the Interstate Compact on the Placement of Children (ICPC) office of OCFS receives a request from another state seeking to place a foster child from the other state with a person in New York State as a foster or adoptive parent, the social services district or voluntary authorized agency under contract with the social services district or under contract with OCFS is required to commence and complete a home study within 60 days of the receipt of such request. An additional 15 days to complete the home study is allowed for circumstances outside of the control of the social services district or voluntary authorized agency if a timely request for such documentation was made by the district or agency.

Currently, social services districts and voluntary authorized agencies are required pursuant to 18 NYCRR 357.3 to provide a foster child with his or her comprehensive health history when the foster child is discharged to his or her own care. The regulations clarify that this history must include the child's current health providers and clarify that there is no cost to the child for these records. The regulations also require the provision of the child's education record at the time of the child's discharge to his or her own care, also at no cost to the child.

Social services districts are currently required to assess the appropriateness of placement of children in foster care pursuant to 18 NYCRR 430.11. Each foster child must have periodic assessments performed to address the issue of permanency, including whether the child will be returned home or to another placement resource (see section 409-e of the SSL and 18

NYCRR Part 428). The regulations require the social services district to expressly document the consideration of out of state placement options if the child will not be returned to his or her parent.

Current law and regulations in section 424-a of the SSL and 18 NYCRR Parts 421 and 443 require data base checks of New York's Statewide Central Register of Child Abuse and Maltreatment for all persons applying for certification or approval as foster or adoptive parents and for any other persons over the age of 18 who reside in the home of such applicants, irrespective of how long such persons resided in New York State. The regulations expand the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states.

#### 3. Professional Requirements:

The regulations would not require social services districts or voluntary authorized agencies to hire additional staff in order to implement them. Current training programs will be enhanced to emphasize the casework support that these amendments bring. In addition, OCFS will issue a request for applications in order to make available the services of one or more voluntary authorized agencies to conduct home studies for out-of-state placements or inter-county placements, in accordance with these regulations.

#### 4. Compliance Costs:

Local social services districts or voluntary authorized agency under contract with social services districts are already required to complete a home study; therefore, this does not represent an additional workload. It is unknown if social services districts or voluntary authorized agency under contract with social services districts are currently completing the home study within 60 days (or 75 days in certain circumstances) of the receipt of the request. Therefore, to facilitate compliance with the timeframes, the Office of Children and Family Services will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct the home study.

Minimal costs are expected related to the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. It is expected that this activity will be completed through routine correspondence to such state(s).

There is no additional cost anticipated for the dissemination of health and education records when the child is being discharged from foster care since this activity is the current practice.

There is no cost related to any of the documentation requirements contained in these regulations since this information will be recorded in the CONNECTIONS where this functionality already exists or is under development.

#### 5. Economic and Technological Feasibility:

The regulations will not impose additional economic or technological burdens on social services districts or voluntary authorized agencies.

#### 6. Minimizing Adverse Impact:

The aforementioned request for applications will be issued by OCFS in order to provide an additional resource to the field for the purpose of conducting home studies in accordance with these regulations, including meeting the new timeframes prescribed by the federal law.

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

The timeframes prescribed by the federal legislation precluded the participation of small businesses in the development of these regulations. They are being filed on an emergency basis in order to meet the federal timeframes; those affected will have an opportunity to comment upon publication of a Notice of Proposed Rule Making in the State Register.

### **Rural Area Flexibility Analysis**

#### 1. Effect on Rural Areas:

The regulations will affect the 44 social services districts that are in rural areas and the St. Regis Mohawk Tribe, which is authorized by section 371(10)(b) of the Social Services Law to provide child welfare services pursuant to its State/Tribal Agreement with the Office of Children and Family Services (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 proposed regulations. Currently, there are approximately 85 such agencies.

#### 2. Compliance Requirements:

When the Interstate Compact on the Placement of Children (ICPC) office of OCFS receives a request from another state seeking to place a foster child from the other state with a person in New York State as a foster or adoptive parent, the social services district or voluntary authorized

agency under contract with the social services district or under contract with OCFS is required to commence and complete a home study within 60 days of the receipt of such request. An additional 15 days to complete the home study is allowed for circumstances outside of the control of the social services district or voluntary authorized agency if a timely request for such documentation was made by the district or agency.

Currently, social services districts and voluntary authorized agencies are required pursuant to 18 NYCRR 357.3 to provide a foster child with his or her comprehensive health history when the foster child is discharged to his or her own care. The regulations clarify that this history must include the child's current health providers and clarify that there is no cost to the child for these records. The regulations also require the provision of the child's education record at the time of the child's discharge to his or her own care, also at no cost to the child.

Social services districts are currently required to assess the appropriateness of placement of children in foster care pursuant to 18 NYCRR 430.11. Each foster child must have periodic assessments performed to address the issue of permanency, including whether the child will be returned home or to another placement resource (see section 409-e of the SSL and 18 NYCRR Part 428). The regulations require the social services district to expressly document the consideration of out-of-state placement options if the child will not be returned to his or her parent.

Current law and regulations in section 424-a of the SSL and 18 NYCRR Parts 421 and 443 require data base checks of New York's Statewide Central Register of Child Abuse and Maltreatment for all persons applying for certification or approval as foster or adoptive parents and for any other persons over the age of 18 who reside in the home of such applicants, irrespective of how long such persons resided in New York State. The regulations expand the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states.

### 3. Professional Services:

The regulations would not require social services districts or voluntary authorized agencies to hire additional staff in order to implement them. Current training programs will be enhanced to emphasize the casework support that these amendments bring. In addition, OCFS will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct home studies for out-of-state placements or inter-county placements, in accordance with these regulations.

### 4. Compliance Costs:

Local social services districts or voluntary authorized agency under contract with social services districts are already required to complete a home study; therefore, this does not represent an additional workload. It is unknown if social services districts or voluntary authorized agency under contract with social services districts are currently completing the home study within 60 days (or 75 days in certain circumstances) of the receipt of the request. Therefore, to facilitate compliance with the timeframes, the Office of Children and Family Services will issue a request for applications in order to make available the services of one or more voluntary agencies to conduct the home study.

Minimal costs are expected related to the requirements to check with the appropriate child welfare agency in any state where the applicant(s) or other persons over the age of 18 in the household resided within the previous five years for any child abuse or maltreatment history in such states. It is expected that this activity will be completed through routine correspondence to such state(s).

There is no additional cost anticipated for the dissemination of health and education records when the child is being discharged from foster care since this activity is the current practice.

There is no cost related to any of the documentation requirements contained in these regulations since this information will be recorded in the CONNECTIONS where this functionality already exists or is under development.

### 5. Minimizing Adverse Impact:

The aforementioned request for applications will be issued by OCFS in order to provide an additional resource to the field for the purpose of conducting home studies in accordance with these regulations, including meeting the new timeframes prescribed by the federal law.

### 6. Small Business Participation:

The timeframes prescribed by the federal legislation precluded the participation of small businesses in the development of these regulations.

They are being filed on an emergency basis in order to meet the federal timeframes; those affected will have an opportunity to comment upon publication of a Notice of Proposed Rule Making in the State Register.

### Job Impact Statement

A full job statement has not been prepared for the proposed regulations implementing the federal Safe and Timely Interstate Placement of Foster Children Act of 2006, and portions of the federal Adam Walsh Child Protection Act of 2006. The proposed regulations would not have a substantial adverse impact on jobs or employment opportunities and in fact would not result in the loss of any jobs. This finding is based upon the fact that the regulations prescribe additional duties for child welfare staff. In addition, these regulations allow for a potential increase in jobs based upon the contracting authority granted by these regulations, if the social services district so chooses to contract for certain activities.

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## Department of Civil Service

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### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-31-06-00003-A

**Filing No.** 1161

**Filing date:** Sept. 28, 2006

**Effective date:** Oct. 18, 2006

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

**Action taken:** 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 was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00003-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-31-06-00005-A

**Filing No.** 1155

**Filing date:** Sept. 28, 2006

**Effective date:** Oct. 18, 2006

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

**Action taken:** 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 was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00005-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-31-06-00006-A  
**Filing No.** 1159  
**Filing date:** Sept. 28, 2006  
**Effective date:** Oct. 18, 2006

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

**Action taken:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00006-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-31-06-00007-A  
**Filing No.** 1162  
**Filing date:** Sept. 28, 2006  
**Effective date:** Oct. 18, 2006

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

**Action taken:** 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 New York State Thruway Authority.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00007-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-31-06-00008-A  
**Filing No.** 1158  
**Filing date:** Sept. 28, 2006  
**Effective date:** Oct. 18, 2006

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

**Action taken:** 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 was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00008-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-31-06-00009-A  
**Filing No.** 1156  
**Filing date:** Sept. 28, 2006  
**Effective date:** Oct. 18, 2006

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

**Action taken:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class in the Department of Economic Development.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00009-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-31-06-00010-A  
**Filing No.** 1157  
**Filing date:** Sept. 28, 2006  
**Effective date:** Oct. 18, 2006

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

**Action taken:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00010-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-31-06-00011-A  
**Filing No.** 1160  
**Filing date:** Sept. 28, 2006  
**Effective date:** Oct. 18, 2006

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

**Action taken:** 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 class and to classify positions in the non-competitive class in the Executive Department.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-31-06-00011-P, Issue of August 2, 2006.

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

**Text of rule may be obtained from:** Stella Chen Harding, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: stella.harding@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## State Commission of Correction

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

#### Reportable Incidents

**I.D. No.** CMC-42-06-00006-P

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

**Proposed action:** Amendment of sections 7022.3 and 7022.4 of Title 9 NYCRR.

**Statutory authority:** Correction Law, sections 45(6), (15), 46(1) and 47(2)

**Subject:** Reportable incidents.

**Purpose:** To amend the manner in which county correctional facilities must report significant events and incidents.

**Text of proposed rule:** Subdivision (a) of section 7022.3 is amended to read as follows:

(a) Except in the case of inmate deaths, whenever a reportable incident occurs, each facility shall [initially] report such incident [by telephone] to the commission's Albany office, regardless of the time of day or day of the week, pursuant to the following requirements:

(1) all major disturbances, escapes, inmate group actions, personnel group actions, hostage situations, firearm discharges, natural/civil emergencies, and major maintenance/service disruptions shall be reported by telephone immediately upon occurrence or discovery, *and all completed report forms required by the commission's Reportable Incident Guidelines for County Correctional Facilities shall be transmitted by facsimile within 24 hours thereafter*; and

(2) all other reportable incidents shall be reported by [telephone] *transmitting all report forms required by the commission's Reportable Incident Guidelines for County Correctional Facilities by facsimile within 24 hours of occurrence or discovery.*

Subdivision (b) of section 7022.3 is amended to read as follows:

(b) [The initial telephone] *Every* report required pursuant to subdivision (a) of this section shall include all information required in the commission's *Reportable Incident Guidelines for County Correctional Facilities*.

Subdivisions (c) and (d) of section 7022.3 are repealed.

Subdivision (e) of section 7022.3 is renumbered subdivision (c) and amended to read as follows:

(c) When additional facts of an important or critical nature are discovered about an incident after a facility has submitted [the follow-up] a report to the commission *pursuant to subdivision (a) of this section*, such information shall be forwarded in writing to the commission as soon as practicable, but no later than 14 days following discovery.

Subdivision (a) of section 7022.4 is amended to read as follows:

(a) Each facility shall report the death of any inmate [listed on its official count of inmates] *committed thereto, whether or not such death actually occurs at the facility*, to:

(1) the coroner or medical examiner of the county in which the facility is located, within one hour of pronouncement of death;

(2) the commission [by telephone], within six hours of pronouncement of death, regardless of the time of day or day of week, *by both telephone and report submitted by facsimile* in a form and manner prescribed by the commission's medical review board as described in the commission's *Reportable Incident Guidelines for County Correctional Facilities*.

Subdivision (c) of section 7022.4 is amended to read as follows:

(c) Within three days after the pronouncement of an inmate's death, a copy of the deceased's entire correctional medical *and mental health* record shall be forwarded to the commission.

Subdivision (g) of section 7022.4 is amended to read as follows:

(g) When additional facts of an important or critical nature are discovered about an [incident] *inmate's death* after the facility has submitted [the follow-up] a report to the commission *pursuant to this section*, such information shall be forwarded in writing to the commission as soon as practicable, but no later than 14 days following discovery.

**Text of proposed rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Office of Counsel, Commission of Correction, 80 Wolf Rd., 4th Fl., Albany, NY 12205, (518) 485-2346, e-mail: brian.callahan@scoc.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

The New York State Commission of Correction ("Commission") seeks to amend subdivisions (a) and (b) of section 7022.3, repeal subdivisions (c) and (d) of section 7022.3, renumber and amend subdivision (e) of section 7022.3, and amend subdivisions (a), (c) and (g) of section 7022.4 of Title 9 NYCRR.

1.) Statutory authority:

Subdivision (6) of section 45 of the Correction Law authorizes the Commission of Correction to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities in New York State. Correction Law section 46(1) permits the Commission to require from the officers or employees of a correctional facility any information deemed necessary for the purpose of carrying out the Commission's functions, powers and duties. Lastly, Correction Law section 47(2) requires every administrator of a correctional facility to report the death of an inmate in the manner and form required by the Commission.

2.) Legislative objectives:

By vesting the Commission with this rule making and oversight authority, the Legislature intended the Commission to set minimum standards to insure that events and incidents significant to the safety, security and well being of a county correctional facility and its inmates are reported in a thorough and timely manner.

3.) Needs and benefits:

Sections 7022.3 and 7022.4 of Title 9 set forth the manner and schedule with which county correctional facilities must report to the Commission following significant events and incidents, such as an inmate death, escape, hostage situation, natural or civil emergency, maintenance or service disruption, or assault. Both sections make numerous references to the Reportable Incident Guidelines for County Correctional Facilities, a Commission-issued manual that provides more specific information and resources, such as definitions, reporting requirements and categories, and required forms.

Originally promulgated and unchanged since 1987, sections 7022.3 and 7022.4 of Title 9 contemplate only the use of telephone and regular mail as a means of fulfilling a facility's reporting requirements to the Commission. Upon its revision in 1998, the Reportable Incident Guidelines mandated all written report forms to be submitted by facsimile within 24 hours of the incident, except an inmate death, which must be submitted within 6 hours. Despite a lack of regulatory amendment, the present system of submitting incident reports by facsimile has continued without issue or complaint since 1998, the result being a more timely and efficient system of exchanging critical information concerning county correctional facilities. As such, the proposed amendment would serve only to conform the regulation to current practice.

Lastly, section 7022.4(a) is amended to clarify a county correctional facility's statutory obligation, pursuant to Correction Law section 47(2), to report the death of a committed inmate. As held in *State Commission of Correction v. Nassau County Medical Center*, 137 A.D.2d 127 (3d Dept. 1988), appeal denied, 72 N.Y.2d 810 (1988), the Commission's duties and a facility's obligations set forth in Correction Law section 47 arise from the death of any inmate, regardless of where the death occurred or by whom medical care was provided.

4.) Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None. The proposed amendment would serve only to conform the regulation to current reporting practices.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The proposed amendment would serve only to conform the regulation to current reporting practices.

c. This statement detailing the projected costs of the rule is based upon the Commission's past oversight and experience relative to the operation and function of a county correctional facility.

5.) Local government mandates:

The proposed regulation would amend the required manner in which county jails and penitentiaries report specified incidents to the Commission of Correction. The amendment will not require facilities to undertake

additional reporting, but will rather update the regulation to reflect how incidents are currently reported, such as by facsimile instead of telephone and mail.

6.) Paperwork:

As set forth above, the proposed regulation would amend the required manner in which county jails and penitentiaries report specified incidents to the Commission of Correction. The amendment will not require facilities to undertake additional reporting, but will rather update the regulation to reflect how incidents are currently reported, such as by facsimile instead of telephone and mail.

7.) Duplication:

This rule does not duplicate any existing State or Federal requirement.

8.) Alternatives:

The alternative, maintaining the incident reporting regulations in their current form, was explored by the Commission. This alternative was rejected upon the Commission's finding, as set forth above, that the present regulations do not reflect the current and more efficient practice of county correctional facilities in reporting significant events and incidents to the Commission.

9.) Federal standards:

There are no applicable minimum standards of the federal government.

10.) Compliance schedule:

Each county correctional facility is expected to be able to achieve compliance with the proposed rule immediately.

### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required pursuant to subdivision three of section 202-b of the State Administrative Procedure Act because the rule does not impose an adverse economic impact on small businesses or local governments. The proposed rule seeks only to amend the manner in which county jails and penitentiaries must report specified incidents to the Commission of Correction. The amendment will not require facilities to undertake additional reporting, but will rather update the regulation to reflect how incidents are currently reported, such as by facsimile instead of telephone and mail. Accordingly, it will not have an adverse impact on small businesses or local governments, nor impose any additional reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

### Rural Area Flexibility Analysis

A rural area flexibility analysis is not required pursuant to subdivision four of section 202-bb of the State Administrative Procedure Act because the rule does not impose an adverse impact on rural areas. The proposed rule seeks only to amend the manner in which county jails and penitentiaries must report specified incidents to the Commission of Correction. The amendment will not require facilities to undertake additional reporting, but will rather update the regulation to reflect how incidents are currently reported, such as by facsimile instead of telephone and mail. Accordingly, it will not impose an adverse economic impact on rural areas, nor impose any additional recordkeeping, reporting, or other compliance requirements on private or public entities in rural areas.

### Job Impact Statement

A job impact statement is not required pursuant to subdivision two of section 201-a of the State Administrative Procedure Act because the rule will not have a substantial adverse impact on jobs and employment opportunities, as apparent from its nature and purpose. The proposed rule seeks only to amend the manner in which county jails and penitentiaries must report specified incidents to the Commission of Correction. Accordingly, there will be no impact on jobs and employment opportunities.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Disciplinary Sanctions

I.D. No. CMC-42-06-00007-P

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

**Proposed action:** Amendment of section 7006.9 of Title 9 NYCRR.

**Statutory authority:** Correction Law, sections 45(6) and (15)

**Subject:** Disciplinary sanctions.

**Purpose:** To expand and augment the list of allowable sanctions of county jail inmates found guilty of violating disciplinary rules following a disciplinary hearing.

**Text of proposed rule:** Paragraphs (4), (5) and (6) of subdivision (a) of section 7006.9 are renumbered paragraphs (5), (6) and (7), and a new paragraph (4) is added to read as follows:

(4) *restitution, not to exceed one hundred (\$100.00) dollars, for facility expenditures related to the medical treatment of facility staff, made from existing or future funds in the inmate's account;*

Subdivision (c) of section 7006.9 is amended to read as follows:

(c) If an inmate is found guilty of a charge of misbehavior, a disciplinary surcharge not to exceed [\$5] *twenty five (\$25.00) dollars* may be imposed upon the inmate in addition to the sanctions authorized pursuant to subdivision (a) of this section. All moneys collected shall be deposited in the county general fund and not specifically allocated to the facility.

**Text of proposed rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Office of Counsel, Commission of Correction, 80 Wolf Rd., 4th Fl., Albany, NY 12205, (518) 485-2346, e-mail: brian.callahan@scoc.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

The New York State Commission of Correction ("Commission") seeks to renumber paragraphs (4), (5) and (6) of subdivision (a) to paragraphs (5), (6) and (7), add a new paragraph (4) of subdivision (a), and amend subdivision (c) of section 7006.9 of Title 9 NYCRR.

1.) Statutory authority:

Subdivision (6) of section 45 of the Correction Law authorizes the Commission of Correction to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities in New York State.

2.) Legislative objectives:

By vesting the Commission with this rule making authority, the Legislature intended the Commission to set minimum standards regarding various aspects of inmate discipline in local correctional facilities, including the allowable disciplinary sanctions to be imposed.

3.) Needs and benefits:

By adding subdivision (c) of section 7006.9, effective June 2, 1999, county jail administrators were authorized to begin imposing a five (\$5.00) dollar surcharge on inmates found guilty of misbehavior following a disciplinary hearing. This regulation was based upon a similar surcharge imposed by the New York State Department of Correctional Services, the legality of which has been consistently upheld. *Allah v. Coughlin*, 190 A.D.2d 233, 599 N.Y.S.2d 651 (3d Dept. 1993), appeal denied 82 N.Y.2d 659, 605 N.Y.S.2d 5 (1993); *Allen v. Cuomo*, 100 F.3d 253 (2d Cir. 1996).

Local correctional facility officials originally requested the availability of a disciplinary surcharge because other allowable sanctions were not always sufficient to deter inmate misbehavior. This is particularly true with regard to pretrial detainees and inmates sentenced to indeterminate and determinate sentences to be served in state facilities, as one of the most effective sanctions, loss of good behavior allowances, is generally not applicable to these prisoners. Only prisoners serving a definite sentence of imprisonment in a county jail may earn good behavior allowances, and thus, have it taken away for misbehavior.

While local correctional administrators have advised the Commission that the current five dollar surcharge has been a somewhat effective tool in deterring inmate misbehavior, it has been proposed that raising the surcharge limit to twenty five (\$25.00) would constitute an increased and effective deterrent. The Commission agrees with this assessment and is of the opinion that this proposal will result in a powerful tool to encourage good inmate behavior.

Section 7006.9(a)(3) of Title 9 currently allows county jails to collect restitution, as a disciplinary sanction, only "for the loss or damage of property." Following assaults and other instances during which an officer or other facility staff is injured as a result of inmate misbehavior, such staff are thereafter evaluated and treated by facility health personnel. In local correctional facilities where medical services are provided by a contracted, private entity, the facility is often thereafter contractually responsible to reimburse the health service provider for such treatment. The Commission is of the opinion that allowing a local correctional facility to collect restitution for such medical treatment as a disciplinary sanction following a hearing serves as both a deterrent to violent misbehavior and an equitable compensation.

4.) Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None. The only new requirement for county

correctional facilities will be to amend existing disciplinary policies and rulebooks to provide for such allowable surcharges and restitution.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The proposed regulation would not apply to state agencies or governmental bodies. As set forth above in subdivision (a), there would be no additional costs to local governments.

c. This statement detailing the projected costs of the rule is based upon the Commission's oversight and experience relative to the operation and function of a county correctional facility.

5.) Local government mandates:

None. The proposed regulation seeks only to expand and augment the list of allowable sanctions of county jail inmates found guilty of violating disciplinary rules following a disciplinary hearing.

6.) Paperwork:

Disciplinary hearing officers, as currently required, will need to document all disciplinary sanctions in a hearing record.

7.) Duplication:

This rule does not duplicate any existing State or Federal requirement.

8.) Alternatives:

The alternative, namely the current regulations that allow for only a five dollar surcharge and do not allow for restitution for facility expenditures related to the medical treatment of staff, was explored by the Commission. This alternative was rejected upon the Commission's finding, as set forth above, that expanding and augmenting the list of allowable sanctions of county jail inmates found guilty of violating disciplinary rules following a disciplinary hearing would serve to deter inmate misbehavior and increase facility safety and security.

9.) Federal standards:

There are no applicable minimum standards of the federal government.

10.) Compliance schedule:

Each county correctional facility is expected to be able to achieve compliance with the proposed rule immediately.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required pursuant to subdivision three of section 202-b of the State Administrative Procedure Act because the rule does not impose an adverse economic impact on small businesses or local governments. The proposed rule seeks only to expand and augment the list of allowable sanctions of county jail inmates found guilty of violating disciplinary rules following a disciplinary hearing. Accordingly, it will not have an adverse impact on small businesses or local governments, nor impose any additional reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not required pursuant to subdivision four of section 202-bb of the State Administrative Procedure Act because the rule does not impose an adverse impact on rural areas. The proposed rule seeks only to expand and augment the list of allowable sanctions of county jail inmates found guilty of violating disciplinary rules following a disciplinary hearing. Accordingly, it will not impose an adverse economic impact on rural areas, nor impose any additional recordkeeping, reporting, or other compliance requirements on private or public entities in rural areas.

#### Job Impact Statement

A job impact statement is not required pursuant to subdivision two of section 201-a of the State Administrative Procedure Act because the rule will not have a substantial adverse impact on jobs and employment opportunities, as apparent from its nature and purpose. The proposed rule seeks only to expand and augment the list of allowable sanctions of county jail inmates found guilty of violating disciplinary rules following a disciplinary hearing. Accordingly, there will be no impact on jobs and employment opportunities.

## Department of Health

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

#### Serialized Official New York State Prescription Form

**I.D. No.** HLT-42-06-00005-P

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

**Proposed action:** Addition of new Part 910, amendment of Part 80 and sections 85.21 and 85.22, repeal of sections 85.23 and 85.25 of Title 10 NYCRR; amendment of section 505.3 and repeal of sections 528.1 and 528.2 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 21 and 3308

**Subject:** Enactment of a serialized official New York State prescription form.

**Purpose:** To implement section 21 of the Public Health Law.

**Substance of proposed rule (Full text is posted at the following State website: [www.health.state.ny.us](http://www.health.state.ny.us)):** Part 910 (10 NYCRR)

These regulations are being proposed on an emergency basis to implement Section 21 of the Public Health Law. The purpose of the law is to combat and prevent prescription fraud by requiring the use of an official New York State prescription for all prescribing done in this state. Official prescriptions contain security features that will curtail alterations and forgeries that divert drugs to black market sale to unsuspecting patients and cost New York's Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

The emergency regulations consist of a new Part 910 to Title 10 NYCRR. Section 910.1 defines terms used in the Part. Section 910.2 states requirements for practitioner prescribing, including that, until April 19, 2007, hospitals and comprehensive voluntary non-profit community diagnostic and treatment centers designated by the Department are exempted from the requirement for their staff practitioners to prescribe non-controlled substances on an official prescription form. The exemption will continue beyond April 19, 2007 if the hospital and comprehensive voluntary non-profit community diagnostic and treatment center implements and utilizes an electronic prescribing system to transmit prescriptions to pharmacies capable of receiving them. Section 910.3 covers registration with the Department, which practitioners and healthcare facilities are required to do to order official prescriptions. Section 910.4 states the manner in which official prescriptions will be issued by the Department, while section 910.5 lists the practitioner and facility requirements for safeguarding the official prescriptions against theft, loss or unauthorized use. Section 910.6 states pharmacy requirements for dispensing official prescriptions and out-of-state prescriptions, which may be dispensed in lieu of an official prescription. Section 910.6 also states pharmacy requirements for submission of official prescription data to the Department. Section 910.6 also authorizes pharmacies to fill prescriptions for non-controlled substances until October 19, 2006 that are not written on an official prescription provided that the pharmacy notify the Department of the prescribing practitioner so that the practitioner may be contacted and issued official prescriptions for subsequent prescribing.

Both 10 NYCRR and 18 NYCRR have been revised to reflect the above regulations, update outdated/obsolete sections and to allow for greater flexibility for changes in law. The following changes have been proposed:

Section 505.3 (18 NYCRR)

- Language included to reflect use of facsimile prescriptions.
- Language included to allow electronically transmitted prescriptions.
- Language included to mandate that all claims for payments of drugs or supplies under the MA program shall contain the serial number of the Official NYS Prescription Form.
- Delete language prohibiting telephone orders for OTCs.
- Language amended—telephone prescriptions for non-controlled substances WILL NOT require a follow-up hard copy prescription (even with refills).
- Delete Estimated Acquisition Cost—defined in Social Services Law 367-a(9)(b)(ii).

- Delete language referencing “triplicate” prescriptions and update to language consistent with Official NYS Prescription Form and Article 33 of the Public Health Law.
  - Delete language referencing other Sections that have been deleted (i.e. 10 NYCRR 85.25).
  - Delete language referencing dispensing fees—in Social Services Law 367-a(9)(d).
  - Language is added to reference prescription drugs filled in compliance with 6810 of the Education Law, Article 33 of the Public Health Law and new 10 NYCRR Part 910.
  - A change has been made to the prior version of the emergency filing for 18 NYCRR 505.3(b)(7). The words “or supplies” has been deleted since the enacting legislation (Section 21 of the Public Health Law) only mandated that forged proof prescriptions be utilized for prescription drugs. This change conforms the regulations to the law.
- Part 528 (18 NYCRR)
- Section 528.1 is deleted—obsolete listing of non-prescription drugs covered under the MA program. Listing of reimbursable drugs and rate is available on-line at the NYS eMedNY website.
  - Section 528.2 is deleted—language regarding “dispensing fees include routine delivery charges” is moved to 18 NYCRR 505.3(f)(6). Compounding fee language in 18 NYCRR 505.3[6](3).
- Part 85 (10 NYCRR)
- Section 85.21 amended—OTC List—quantities and dosage forms have been deleted to allow greater flexibility in coverage. Remove OTC categories that are no longer marketed.
  - Section 85.22 amended—establishment of OTC prices amended to more accurately reflect OTC pricing (Ad Hoc Committee is obsolete) and removal of references to deleted Sections (i.e., 18 NYCRR 528.2 and 10 NYCRR 85.25)
  - Section 85.23 deleted—Revisions to list of OTCs and Maximum Reimbursable Prices—in Social Services Law 365-a(4)(a).
  - Section 85.25 deleted—Prescription drug list covered under MA—obsolete. Drug list available on line at NYS eMedNY website.
- Part 80 (10 NYCRR)
- Part 80 table of contents has been revised to reflect amendments in titles of sections of regulations.
  - Sections have been amended throughout Part 80 to revise the previous title of ‘Bureau of Narcotic Control’ and ‘Bureau of Controlled Substances’ to the current title of ‘Bureau of Narcotic Enforcement’.
  - Sections have been amended throughout Part 80 to revise the previous title of ‘Bureau of Narcotics and Dangerous Drugs’ to the current title of ‘Drug Enforcement Administration’.
  - Section 80.1—language added to define ‘automated dispensing system’.
  - Section 80.5—language deleted for 3b Institutional Dispenser license due to registration of facilities to be issued official prescriptions. Language added for retail pharmacy license, installation, and operation of automated dispensing system in Residential Healthcare Facility (RHCF).
  - Section 80.11—language added to make requirements for supervising pharmacist of controlled substance manufacturer and distributor consistent with pharmacist licensure requirements in New York State Education Law.
  - Section 80.46—language added to require supervising physician countersignature of medical order of physician’s assistant if deemed necessary by supervising physician or hospital to bring regulation into consistency with PHL 3703.
  - Section 80.47—language revised to except administration of controlled substances in emergency kits to patients in Title 18 adult care facilities.
  - Section 80.49—language revised from prescription serial number to pharmacy prescription number.
  - Section 80.50—language added to require pharmacies to maintain separate stocks of controlled substances received for use in automated dispensing system in RHCF and to authorize storage of non-controlled substances in such system.
  - Section 80.60—language added for female gender reference to practitioner.
  - Section 80.63—deleted definition of written prescription and added definition of out-of-state prescription. Language added to authorize printed prescriptions generated by computer or electronic medical record system. Language added regarding practitioner oral prescribing requirement.
- Section 80.67—midazolam and quazepam added to list of benzodiazepine controlled substances, as per PHL 3306. Language added requiring quantity of dosage units to be indicated in both numerical and written word form. Language amended to include chorionic gonadotropin as controlled substance for prescribing up to a 3-month supply. Language added to assign code letters to medical conditions for prescribing more than a 30-day supply.
  - Section 80.67(con’t)—language deleted regarding Department’s issuance of official New York State prescriptions, due to added language in section 80.72. Language deleted for face and back of prescription to facilitate timely pharmacist dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.
  - Section 80.68—language added for certain other controlled substances. Language deleted requiring pharmacist to endorse pharmacy DEA number on official NYS prescription to facilitate timely dispensing. Language added requiring electronic transmission of prescription data to Department.
  - Section 80.69—language added requiring quantity of dosage units to be indicated in numerical and written word form. Language added to assign letters for condition codes. Deleted reference to PHL sections 3335 and 3336, which were deleted by PHL 21, and added reference PHL sections 3332 and 3333, which are now the relevant sections. Deleted written prescription and added official prescription. Deleted back of the prescription and face of the prescription to facilitate timely dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.
  - Section 80.70—Language added specifying oral prescriptions for 30-day supply or 100 dosage units does not apply to substance limited to 5-day supply by section 80.68. Deleted serial prescription number and added pharmacy prescription number. Added female gender language in reference to pharmacist. Language added requiring filing of prescription information with Department.
  - Section 80.71—Deleted section (b) to reflect that practitioners are no longer required by PHL 3331 to complete an official prescription when dispensing controlled substances. Corrected spelling of chorionic gonadotropin. Added reference to condition codes in sections 80.67 and 80.69. Added packaging and labeling requirements for practitioner dispensing of controlled substances. Added requirement for practitioners to submit dispensing information to Department by electronic transmission.
  - Section 80.72—deleted all references to practitioner dispensing and labeling requirements because practitioner dispensing now covered by section 80.71. Language added regarding practitioner registration with Department and Department issuance of official NYS prescription forms.
  - Section 80.73—added language specifying pharmacist dispensing of schedule II and controlled substances listed in section 80.67. Added female gender language in reference to pharmacist. Deleted requirement for pharmacist to endorse pharmacy DEA number on prescription for timely dispensing. Language added requiring pharmacy to verify identity of person picking up dispensed prescription. Language added requiring pharmacy electronic transmission of prescription data to Department.
  - Section 80.73(con’t)—language added specifying emergency oral prescriptions for schedule II and controlled substances listed in section 80.67 and filing of emergency oral prescription memorandum. Language added requiring pharmacy electronic transmission of oral prescription data to Department. Language added specifying partial filling of official prescription for schedule II and controlled substances listed in section 80.67. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.
  - Section 80.74—language added in section title specifying pharmacist dispensing of controlled substances. Language added for prescription labeling requirements. Added female gender reference to pharmacist. Added requirement for filing prescription data with Department. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.

- Section 80.74(con't)—language added for pharmacy requirement to verify identification of person picking up prescription. Deleted reference to schedule II controlled substances and those substances listed in section 80.67 because all controlled substances now require official NYS prescription. Deleted labeling requirement reference to section 80.72 and added reference to section 80.71.
- Section 80.75—deleted language regarding requirement to purchase official prescriptions. Added language regarding registration and issuance of official prescriptions for institutional dispenser.
- Section 80.78—Added a new section regarding pharmacist requirements for dispensing of out-of-state prescriptions for controlled substances, to be dispensed in conformity with provisions set forth for official prescriptions.
- Section 80.84—deleted language requiring group practice providing treatment of opiate dependence with buprenorphine to be limited to 30 patients at any one time, making New York State regulations consistent with the federal Drug Addiction Treatment Act. Deleted language requiring practitioners and pharmacies to register with Department to prescribe and dispense buprenorphine. Deleted language requiring pharmacy to file prescription data and report loss of controlled substances because redundant. Deleted reference to PHL 3335 and 3336 because deleted by PHL 21 and added reference to PHL 3332 and 3333 because now relevant sections.
- Section 80.106—added language requiring separate record-keeping for pharmacies installing automated dispensing system in RHCF.
- Section 80.107—added language authorizing Department to notify practitioner of patient treatment with controlled substances by multiple practitioners, consistent with PHL 3371.
- Section 80.131—deleted written prescription, added official prescription and out-of-state prescription. Language added increasing oral prescription for hypodermic needles and syringes to quantity of one hundred hypodermic needles and syringes.

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

The state budget for SFY 2004-2005 enacted new Section 21 of the Public Health Law which mandates a statewide official prescription form for all prescriptions written in New York for the purpose of curtailing prescription fraud and enhancing patient safety. The law, Chapter 58 of the Laws of 2004, permits the Commissioner to promulgate emergency regulations in furtherance of this new section of law.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering and distribution of controlled substances within New York. New Section 21 of the Public Health law mandates a statewide official prescription, supports electronic prescribing and facilitates the dispensing process.

Needs and Benefits:

This regulation will support the enactment of an official New York State prescription form, which will deter fraud by curtailing theft or copying of prescriptions by individuals engaged in drug diversion. These regulations have been drafted after discussions with such provider groups as the State Health Plan Association, Medical Society of the State of New York and the Pharmacist Society of the State of New York.

Regulations are being proposed to implement Section 21 of the Public Health Law (PHL). The purpose of the law is to combat and prevent prescription fraud by requiring an official New York State prescription for every prescription written in New York. Official prescriptions contain security features designed specifically to curtail alterations, counterfeiting, and forgeries, all of which divert drugs to black market sale to unsuspecting patients and cost New York's Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

Regulations have been amended to reflect the implementation of the above Public Health Law and to update obsolete or outdated language in the existing regulations. The proposed regulations also include amendments to authorize a practitioner to deliver a controlled substance prescription to a pharmacy by facsimile transmission in specified circumstances and to authorize a pharmacist to dispense such faxed prescription. By facilitating timely prescribing and dispensing, such facsimile transmission will enhance healthcare for patients enrolled in hospice programs or residing in a Residential Healthcare Facility (RHCF) and for patients who require controlled substance prescriptions to be compounded for administration by parenteral infusion.

Regulations have also been amended to authorize the Department to license a retail pharmacy to install and operate an automated dispensing system in a RHCF, which will bring New York regulations into consistency with federal regulations. The installation and operation of such systems will significantly benefit patient care through timely and efficient dispensing of prescriptions for controlled substances. Automated dispensing systems will also lessen the cost of medications remaining from waste due to discontinued drug therapy and will simultaneously decrease the amount of such controlled substances that are susceptible to diversion.

These regulations are found in amendments to 10 NYCRR Part 80 and in the newly promulgated regulations in 10 NYCRR Part 910. Included in the Part 910 regulations is an exemption allowing hospital practitioners or practitioners in a comprehensive voluntary non-profit diagnostic and treatment center designated by the Department to prescribe non-controlled substances on a non-official hospital prescription until April 19, 2007. The exemption will continue beyond April 19, 2007 for hospitals and designated comprehensive voluntary non-profit diagnostic and treatment center that implement and utilize an electronic prescription system to transmit prescriptions to pharmacies capable of receiving them.

Also included in the Part 910 regulations is an exemption allowing pharmacies to dispense prescriptions for non-controlled substances that are not issued on an official prescription until October 19, 2006 in order that optimum care may continue to be provided to patients. The regulation requires pharmacies to notify the Department so that the practitioner may be contacted and issued official prescriptions for all subsequent prescribing.

Costs:

Costs to Regulated Parties:

This program is being funded by an annual assessment on the State Insurance Department of \$16.9 million. The assessment funds the costs of providing 180 million official prescriptions annually as well as administrative and enforcement staffing to operate and enforce the program. The current fee to practitioners and institutions for the official prescription has been eliminated. Private insurers and the Medicaid program will realize, respectively, an estimated \$75 million and \$25 million in annual savings due to the reduction of fraudulent prescription claims.

The \$25 million estimated saving for the Medicaid program represents the 25% New York State share. \$50 million in estimated savings would accrue to the 50% federal government share of Medicaid, while \$25 million in estimated savings would accrue to the 25% local government share of Medicaid.

The allowance for electronic prescribing in the Medicaid program and the expedition of the dispensing process through the use of bar coding will save valuable professional time for practitioners and pharmacists.

There will be a slight expenditure to pharmacies for software adjustments, due to minor changes in reporting requirements for controlled substance prescriptions.

Costs to State and Local Government:

There will be no costs to state or local government. Savings to State government are estimated at \$25 million to the 25% New York State share of Medicaid. Savings to local government, from reduction in subsidizing of prescription costs for patients in their Medicaid population, will result in an estimated \$25 million to the 25% local government share of Medicaid.

Costs to the Department of Health:

There will be no additional costs to the Department. The decrease in prescription fraud as a result of use of the official prescription will result in savings for the Department for the Medicaid, EPIC, and Empire programs. An increase in the efficiency of investigations made possible by the official prescription program will result in additional savings for the Department.

Local Government Mandates:

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

Paperwork:

No additional paperwork is required. The use of a single prescription form for controlled substances and non-controlled substances will simplify paperwork and recordkeeping for practitioners and institutions. Currently, practitioners use their own prescription form as well as the official prescription. The official prescription will replace existing prescriptions that are currently used in addition to the official prescription. Encouragement of electronic prescribing will significantly reduce paperwork requirements for practitioners, institutions and pharmacists.

#### Duplication:

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

#### Alternatives:

There are no alternatives that would support the approach to be taken under the regulations. The limitation on reporting requirements by pharmacies (only for controlled substances as opposed to requiring reporting on all prescriptions) was done after consultation with affected provider organizations.

As a result of consultations with the hospital community, hospitals were granted a one-year exemption, until April 19, 2007, from the requirement for their staff practitioners to prescribe non-controlled substance medications on the official prescription. The purpose of the exemption is to serve as an incentive for hospitals to develop electronic prescription systems. The exemption will be extended if the hospital implements and utilizes an electronic prescription system to transmit such prescriptions directly to a pharmacy in lieu of an official prescription.

#### Federal Standards:

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

#### Compliance Schedule:

These regulations will become effective upon publication of the Notice of Adoption in the New York State Register.

#### **Regulatory Flexibility Analysis**

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

This proposed rule will affect practitioners, pharmacists, retail pharmacies, hospitals and nursing homes.

According to the New York State Department of Education, Office of the Professions, there are approximately 120,000 licensed and registered practitioners authorized to prescribe and order prescription drugs. According to the New York State Board of Pharmacy, there are a total of approximately 4,500 pharmacies in New York State. According to the New York State Education Department's Office of the Professions, there are approximately 18,000 licensed and registered pharmacists in New York.

##### Compliance Requirements:

The regulations follow the newly enacted Section 21 of the Public Health Law and require the use of the official New York State Prescription form. In addition to curtailing fraud and diversion, these regulations will expedite the prescribing and dispensing process. Practitioners, institutions and pharmacists will benefit from the following amendments;

- (1) Eliminating the fee to practitioners and institutions for official prescriptions;
- (2) Eliminating the requirement that pharmacists write the DEA number of the pharmacy on the official prescription;
- (3) Bar coding of the serial number on the official prescription to expedite the dispensing process; and
- (4) Eliminating multiple prescription forms practitioners currently use to prescribe drugs.

Currently, dispensing data is required from all Schedule II and benzodiazepines prescriptions. The only new requirement is the submission of dispensing data from the original dispensing of all prescriptions for controlled substances.

##### Professional Services:

No additional professional services are necessary.

##### Compliance Costs:

Pharmacies may require minor adjustments in computer software programming due to additional prescription data submission requirements.

##### Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process utilizes existing electronic systems for reporting of dispensing by pharmacies. The regulations encourage the use of electronic prescribing by practitioners. Electronic prescribing is not only more efficient than the

current paper process, it is also a secure procedure that will reduce prescription fraud. Electronic prescribing will protect the public health and result in substantial savings to the Medicaid program and private insurance as well as enhancing public safety.

##### Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. These requirements were negotiated with organizations representing the affected groups. The use of bar coding and the encouragement of electronic prescribing minimize any adverse impact.

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

During the drafting of the statute which is the basis of these regulations, the Department met with the Pharmacist Society of the State of New York (PSSNY), the Medical Society of the State of New York (MSSNY) and the Health Plan Association of New York. The regulations were drafted considering their comments. Local governments are not affected.

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

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

The proposed rule will apply to participating pharmacies, practitioners and institutions located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain rural areas. These can range in extent from small towns and villages and their surrounding areas, to locations that are sparsely populated.

##### Compliance Requirements:

The only compliance requirements are the use of the official prescription provided free of charge and additional minimal reporting requirements by pharmacies. The regulations are in furtherance of new Section 21 of the Public Health Law authorizing a statewide official prescription aimed at reducing fraud. Additionally, the regulations assist practitioners and pharmacies by making the prescribing and dispensing process more efficient through the use of electronic prescribing.

##### Professional Services:

None necessary.

##### Compliance Costs:

The new law requires all pharmacies in New York State to electronically transmit information from controlled substance prescriptions to the Department on a monthly basis, for monitoring and analysis purposes in combating prescription fraud. Pharmacies may require minor adjustments in computer software programming due to this additional prescription data submission requirement.

##### Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process will utilize existing electronic systems for reporting of dispensing information by pharmacies. The regulations encourage the use of electronic prescribing, which is more efficient and more secure than a paper process. Electronic prescribing will also enhance patient safety through a reduction in medication error due to legibility issues.

##### Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. This requirement is minimized by permitting pharmacies to scan the bar code of the prescription serial number onto the Medicaid claim form also through the allowance of electronic prescribing. Additionally, the benefits on regulated entities resulting from these regulations and described herein outweigh any adverse impact.

##### Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comments from pharmacist, health plan and practitioner associations who represent these professions in rural areas. No particular issues relating to the effect of this program on rural areas was expressed.

#### **Job Impact Statement**

##### Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. In benefitting the public health by ensuring that drug diversion does not occur through the use of forged or stolen prescriptions, the proposed amendments are not expected to either increase or decrease jobs overall. The fiscal savings to public and private insurers will result in an economic benefit to these groups and could have a positive influence on jobs. Additionally, the anticipated time saved by practitioners and pharmacists will benefit all parties involved as well as patients.

## Division of Housing and Community Renewal

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### New York City Rent and Eviction Regulations

I.D. No. HCR-42-06-00018-P

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

**Proposed action:** Amendment of Parts 2202, 2204, 2208 and 2209 of Title 9 NYCRR.

**Statutory authority:** Omnibus Housing Act, L. 1983, ch. 403, section 28 (not subdivided); and Administrative Code of the City of New York, section 26-405(g)(1)

**Subject:** New York City rent and eviction regulations (CRER).

**Purpose:** To conform CRER to Yr.-2005 amendments to the RPTL and the NYC Admin. Code adopting DRIE, and to the Court of Appeals holding in *ATM v. Landaverde*, 779 NYS2d 808 (2004).

**Public hearing(s) will be held at:** 9 a.m. to 5 p.m., December 4, 2006 at FIT, C Building, 27th St., between 7th and 8th Ave., New York, 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.

**Text of proposed rule:** The New York City Rent and Eviction Regulations as promulgated and adopted by the Division of Housing and Community Renewal pursuant to Omnibus Housing Act, Chap. 403, Laws of 1983, Section 28, are amended to read as follows:

#### PART 2202 ADJUSTMENTS; DETERMINATION OF RENTS AND SERVICES

##### Section 1

Section 2202.6 of this Part is repealed, and a new section 2202.6 is hereby adopted to read as follows:

##### 2202.6 Increase in subtenants or occupants

(a) *The administrator may grant an appropriate adjustment of a maximum rent where he finds that there has been, since March 1, 1959, a subletting without written consent from the landlord or an increase in the number of adult occupants who are not members of the immediate family of the tenant, and the landlord has not been compensated therefor by adjustment of the maximum rent by lease, or by order of the administrator, or pursuant to the State Rent Act or the Federal Act. Such adjustment shall be effective only during the period of subletting or increase in the number of tenants.*

(b) *The rental amount that a tenant may charge a person in occupancy pursuant to section 235-f of the Real Property Law shall not exceed such occupant's proportionate share of the maximum rent charged to and paid by the tenant for the subject housing accommodation. For the purposes of this subdivision, an occupant's proportionate share shall be determined by dividing the maximum rent by the total number of tenants and the total number of occupants residing in the subject housing accommodation. However, the total number of tenants shall not include a tenant's spouse, and the total number of occupants shall not include a tenant's family member or an occupant's dependent child. Regardless of the number of occupants, tenants shall remain responsible for payment to the owner of the entire maximum rent. The charging of a rental amount to an occupant that exceeds that occupant's proportionate share shall be deemed to constitute a violation of these regulations.*

##### Section 2

Paragraph (3) of subdivision (e) of section 2202.16 of this Part is amended to read as follows:

(3) Recipients of senior citizen rent increase exemptions (SCRIE) or disability rent increase exemptions (DRIE). For a tenant who on the date of the conversion is receiving a SCRIE or DRIE authorized by section 26-405(m) of the City Rent and Rehabilitation Law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommoda-

tion as is required for effectuation of electrical conversion pursuant to this subdivision.

(i) After the conversion, upon the vacancy of the tenant, the owner, without making application to the city rent agency, is required to reduce the maximum rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter [the] *any subsequent* tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(ii) After the conversion, if a tenant ceases to receive a SCRIE or DRIE, the owner, without making application to the city rent agency, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE or DRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE or DRIE, the owner, without making application to the city rent agency, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

#### PART 2204 EVICTIONS

##### Section 1

Paragraph (1) of subdivision (a) of section 2204.2 is amended to read as follows:

(1) The tenant is violating a substantial obligation of his tenancy, other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice by the landlord that the violation cease within 10 days; or within a three-month period immediately prior to the commencement of the proceeding, the tenant has willfully violated such an obligation inflicting serious and substantial injury to the landlord. *If the written notice by the landlord that the violations cease within ten days is served by mail, then five additional days, because of service by mail, shall be added, for a total of 15 days, before an action or proceeding to recover possession may be commenced after service of the notice required by section 2204.3 of this Part.*

#### PART 2208 ADMINISTRATIVE REVIEW

##### Section 1

Section 2208.12 of this Part is amended to read as follows:

The filing and determination of a PAR is a prerequisite to obtaining judicial review of any provision of these regulations or any order issued thereunder, except as provided by section 26-410 of the Rent Law. A proceeding for review may be instituted under article 78 of the Civil Practice Law and Rules provided the petition in the Supreme Court is filed within 60 days after the [final determination] *issuance* of the PAR. *Issuance date is defined as the date of mailing of the order; no additional time is allowed by virtue of mailing.* Service of the petition upon the Division of Housing and Community Renewal shall be made by either:

(a) personal delivery of the notice of petition and petition to counsel's office at the division's office, 25 Beaver Street, New York, New York 10004, or such other address as may be designated by the administrator, and delivering a copy thereof to an Assistant Attorney General at an office of the New York State Attorney General within the state; or

(b) by such other method as is authorized by the Civil Practice Law and Rules.

#### PART 2209 MISCELLANEOUS PROCEDURAL MATTERS

##### Section 1

Section 2209.1 of this Part is amended by adopting new subdivisions (d) and (e) to read as follows:

(d) *Unless otherwise expressly provided in these regulations, no additional time is required or allowed for service by mail of any notice, order, answer, lease offer or other papers, beyond the time period set forth in these regulations and such time period provided is inclusive of the time for mailing.*

(e) *Unless otherwise expressly provided in these regulations, no additional time is required or allowed to respond or to take any action when served by mail with any notice, order, answer, lease offer, or other papers, beyond the time period set forth in these regulations and the time to respond is commenced upon mailing of said notice, order, answer, lease offer, or other paper.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Maurice Jamison, Special Assistant to the Deputy Commissioner, Department of Housing and Community Renewal, Office

of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4816

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

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

#### **Regulatory Impact Statement**

##### 1. STATUTORY AUTHORITY

The Omnibus Housing Act, Laws of 1983, Chap 403, section 28, (not subdivided), and section 26-405g(1) of the Administrative Code of the City of New York provide authority to the Division of Housing and Community Renewal (DHCR) to amend the City Rent and Eviction Regulations (CRER).

##### 2. LEGISLATIVE OBJECTIVES

The proposed rule making is necessary to implement Chapter 188 of the Laws of 2005 (New York State) and Local Law 76 of 2005 (New York City), adopting the Disability Rent Increase Exemption (DRIE).

##### 3. NEEDS AND BENEFITS

In addition to the Legislative Objectives detailed in item 2 above, the subject amendments are also necessary to implement the New York State Court of Appeals' holding in *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004), wherein the Court held that a landlord's written notice of default to a rent stabilized tenant, if served by mail, must add five days to the cure period.

Affected tenants benefit from the proposed DRIE revisions because they qualify for exemption from future Maximum Base Rent increases, fuel cost adjustments, and increases based on the owner's economic hardship or major capital improvements (MCI's). Affected owners may offset any loss in rental income resulting from DRIE, through a dollar-for-dollar reduction in real estate taxes. Thus owners are not penalized in order for the exemption to be realized.

The proposed regulations provide additional protection to occupants of housing accommodations against "rent-gouging" by tenants. In addition to occupants addressing such actions in a court of competent jurisdiction, the proposed amendments would also provide owners an avenue of recourse against such activities.

##### 4. COSTS

a. The regulated parties are residential tenants and the owners of the rent controlled buildings in which such tenants reside.

Neither tenants nor owners are expected to experience any increase in costs associated with implementing DRIE regulations. In fact, affected tenants will experience a "rent freeze," as they would be exempt from certain rent increases. Nor are tenants or owners expected to experience any increase in costs associated with implementing regulations adding five days to certain notices sent by mail, excluding certain other notices from any additional time if mailed, terminating the necessity of filing a copy of an agency Order with a Petition for Administrative Review, or preventing tenants from overcharging roommates.

b. DHCR costs are expected to be negligible. Otherwise, no additional costs are expected to be incurred by state or local governments as a result of adopting the proposed amendments.

c. Existing laws, regulations, agency policies and procedures form the basis upon which the above analysis is based.

##### 5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

##### 6. PAPERWORK

It is anticipated that the proposed amendments will result in some increase in paperwork with regard to the submission of DRIE applications (the New York City Department of Finance will process DRIE applications from tenants residing within the New York City area).

##### 7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

##### 8. ALTERNATIVES

The proposed amendments implement statutory provisions and court decisions not yet reflected in the regulations. Additionally, the proposed amendments protect occupants from overcharging by tenants. As indicated and discussed in the "NEEDS AND BENEFITS" and "COSTS" sections, absent these proposed modifications, there are no other significant viable alternatives.

##### 9. FEDERAL STANDARDS

The proposed amendments do not exceed any known minimum federal standards.

##### 10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant time to comply with the proposed rules.

#### **Regulatory Flexibility Analysis**

##### 1. EFFECT OF RULE

The City Rent and Eviction Regulations (CRER) apply only to housing units located in New York City that are subject to the City Rent and Rehabilitation Law. The small businesses that would be affected by these proposed amendments are the owners of small numbers of regulated housing units, at least one of which is rent controlled. The amended regulations are expected to have no burdensome impact on such small businesses.

These amendments to the CRER, which apply exclusively in New York City, are expected to have no impact on the local government thereof.

##### 2. COMPLIANCE REQUIREMENTS

Tenants located in New York City must submit their respective Disability Rent Increase Exemption applications to the New York City Department of Finance.

The proposed amendments do not otherwise require regulated parties to perform any additional recordkeeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

##### 3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services.

##### 4. COMPLIANCE COSTS

There is no indication that this action will impose any significant costs upon small businesses or upon local governments.

##### 5. ECONOMIC AND TECHNOLOGY FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

##### 6. MINIMIZING ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or the local government. Consequently, it was not necessary to consider the approaches suggested in SAPA section 202-b(1).

##### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

To assure that regulated and other interested parties were given an opportunity to participate in the rule making process, the DHCR provided several parties and organizations with a demonstrated interest in rent regulation with the opportunity to make regulatory amendment suggestions. The DHCR provided opportunity for comment to such organizations as the London Terrace Tenants Association, Community Housing Improvement Program, Inc., Legal Services of New York City, New York City Commission on Human Rights, City-Wide Tenants Coalition, and the Council of New York Cooperatives.

In addition, a Regulatory Agenda was both published in the State Register on June 29, 2005, and placed on DHCR's website, indicating that the agency was considering this proposed rule making, and all interested parties were given an opportunity to comment. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the State Register, at which all interested parties will have an opportunity to comment, and all such comments will be reviewed.

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

The City Rent and Eviction Regulations apply exclusively to New York City, and therefore the proposed rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities located in any rural area pursuant to Subdivision 10 of SAPA Section 102.

#### **Job Impact Statement**

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

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

### **Emergency Tenant Protection Regulations**

**I.D. No.** HCR-42-06-00019-P

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

**Proposed action:** Amendment of parts 2502, 2504, 2505, 2508 and 2510 of Title 9 NYCRR.

**Statutory authority:** Emergency Tenant Protection Act, section 10; and L. 1974, ch. 576

**Subject:** Emergency tenant protection regulations (TPR).

**Purpose:** To conform the TPR to the 2005 amendments to the RPTL adopting DRIE and to the Court of Appeals holding in *ATM One, LLC v. Landaverde*, 2 NY3d 472, 779 NYS2d 808 (2004).

**Public hearing(s) will be held at:** 9 a.m. to 5 p.m., December 4, 2006 at Westchester County Supreme Court, 9th Fl., 111 Dr. Martin Luther King, Jr. Blvd., White Plains, NY; and 10 a.m. to 2 p.m., December 5, 2006 at Nassau County Legislative Bldg., Legislative Meeting Rm., One West St., Mineola, 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.

**Text of proposed rule:** The Emergency Tenant Protection Regulations as promulgated and adopted by the Division of Housing and Community Renewal pursuant to the Emergency Tenant Protection Act of Nineteen Seventy-four, section 4 of Chap. 576, Laws of 1974, section 10(a), as amended, are amended to read as follows:

#### PART 2502 ADJUSTMENTS

##### Section 1

Subparagraph (iii) of paragraph (3) of subdivision (b) of section 2502.4 of this Part is amended to read as follows:

(iii) Recipients of senior citizen rent increase exemptions (SCRIE) or disability rent increase exemptions (DRIE). For a tenant who on the date of the conversion is receiving a SCRIE or DRIE authorized by local law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to the Division, is required to reduce the legal regulated rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter [the] any subsequent tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE or DRIE, the owner, without making application to the Division, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE or DRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE or DRIE, the owner, without making application to the Division, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

#### PART 2504 EVICTIONS

##### Section 1

Clause (c) of subparagraph (i) of paragraph (1) of subdivision (d) of section 2504.1 of this Part is amended to read as follows:

(c) the date certain by which the tenant must cure said wrongful acts or omission, which date shall be no sooner than 10 days following the date such notice to cure is served upon the tenant. *However, if the notice to cure is served by mail, then the date by which the tenant must cure said wrongful acts or omissions is extended by five more days, because of mailing, for a total of fifteen days.*

##### Section 2

A new subdivision (h) of section 2504.2 of this Part is adopted to read as follows:

(h) *The tenant, not including subtenants or occupants, does not occupy the housing accommodation as his or her primary residence. Except as otherwise provided in these Regulations, this provision shall not preclude an owner from refusing to renew a lease pursuant to subdivision (d) of section 2504.4 of this Part.*

##### Section 3

Paragraph (2) of subdivision (c) of section 2504.3 of this Part is amended to read as follows:

(2) in the case of a notice on any other ground pursuant to section 2504.2 of this Part, at least seven calendar days prior to the date specified therein for the surrender of possession; and, in any event, prior to the commencement of any proceeding for removal or eviction. Such notice may be combined with a notice to cure if required by section [2504.2]

2504.1 of this Part and, in such case, the 7-day period provided herein may, if the notice so provides, be included in the 10-day period specified in the notice to cure. *Such 10-day period is extended by five days, for a total of 15 days, where the notice to cure is served on the tenant by mail.*

##### Section 4

Subdivision (d) of section 2504.4 of this Part is amended to read as follows:

(d) Primary residence. The housing accommodation is not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction. *Except as otherwise provided in these Regulations, this provision shall not preclude an owner from commencing a proceeding pursuant to subdivision (h) of section 2504.2 of this Part.*

#### PART 2505 PROHIBITIONS

##### Section 1

Section 2505.4 of this Part is amended to read as follows:

Regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, no person shall demand, receive or retain a security deposit for or in connection with the use or occupancy of housing accommodations, which exceeds the rent for one month in addition to the authorized collection of rent; provided, however, that where a lease in effect on December 1, 1983 validly required a greater security deposit, such requirement may continue in effect during the term of such lease and any renewals thereof with the same tenant. However, no owner shall demand, receive or retain a security deposit or advance payment for or in connection with the use or occupancy of a housing accommodation by any tenant who is sixty-five years of age or older, which exceeds the rent for one month for any lease or lease renewal entered into after July 1, 1996. *However, with respect to initial leases entered into after October 1, 2006, and any renewals thereof, no owner shall demand, receive or retain a security deposit or advance payment for or in connection with the use or occupancy of a housing accommodation which exceeds the rent for two months, except where the use or occupancy of a housing accommodation is by a tenant who is 65 years of age or older, the rent for such housing accommodation is paid in part or in full by a governmental entity, or the tenant is receiving disability retirement benefits or supplemental security income pursuant to the federal social security act. Under such exceptions, the security deposit shall not exceed the rent for one month, for so long as the subject exceptions exist.* Such security deposits shall be subject to the following conditions:

(a) the security deposit shall be deposited in an interest-bearing account in a banking organization;

(b) the person depositing such security deposit shall be entitled to receive, as administrative expenses, a sum equivalent to one percent per annum upon the security money so deposited;

(c) at the tenant's option, the balance of the interest paid by the banking organization shall be applied for the rental of the housing accommodation, or held in trust until repaid, or annually paid to the tenant; and

(d) the owner otherwise complies with the provisions of Article 7 of the General Obligations Law.

#### PART 2506 MISCELLANEOUS PROCEDURAL MATTERS

##### Section 1

Section 2508.1 of this Part is amended by adopting new subdivisions (c) and (d) to read as follows:

(c) *Except as otherwise provided in these Regulations, no additional time is required for service by mail of any notice, order, answer, lease offer or other papers, beyond the time period set forth in these Regulations and such time period provided is inclusive of the time for mailing.*

(d) *Unless otherwise expressly provided in these Regulations, no additional time is required to respond or to take any action when served by mail with any notice, order, answer, lease offer, or other papers, beyond the time period set forth in these Regulations and the time to respond is commenced upon mailing of said notice, order, answer, lease offer, or other paper.*

#### PART 2510 ADMINISTRATIVE REVIEW

##### Section 1

Section 2510.2 of this Part is amended to read as follows:

A PAR against an order of a rent administrator must be filed in person, by mail, or as otherwise provided by operational bulletin with the division within 35 days after the [date] issuance of such order [is issued]. *Issuance date is defined as the date of mailing.* A PAR served by mail must be postmarked not more than 35 days after the [date] issuance of such order, to be deemed timely filed. If the prepaid postage on the envelope in which the PAR is mailed is by private postage meter, and the envelope does not have an official U.S. Postal Service postmark, then the PAR will not be

considered timely filed unless received within the aforementioned 35 days or the petitioner submits other adequate proof of mailing within said 35 days, such as an official postal service receipt or certificate of mailing.

#### Section 2

Subdivision (a) of section 2510.12 of this Part is amended to read as follows:

(a) A proceeding for judicial review pursuant to article 78 of the Civil Practice Law and Rules may be instituted only to review a final order of the commissioner pursuant to section 2510.8 of this Part, or after the expiration of the 90 day or extended period within which the commissioner may determine a PAR pursuant to section 2510.10 of this Part, and which, therefore, may be “deemed denied” by the petitioner. For the purposes of this section, an order of remand to a district rent administrator, unless for limited or ministerial purposes only, and which the commissioner has designated as a final determination, and orders reopening a PAR proceeding, are not final orders. The petition for judicial review shall be brought within 60 days after the issuance of such order, in the Supreme Court in the county in which the subject housing accommodation is located and shall be served upon the division and the Attorney General. Issuance date is defined as the date of mailing of the order[ plus 5 days]; *no additional time is allowed by virtue of mailing.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Maurice Jamison, Special Assistant to the Deputy Commissioner, Department of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4816

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY

The Emergency Tenant Protection Act of 1974 (ETPA), Laws of 1974 Chap. 576, section 10a provides authority to the Division of Housing and Community Renewal (DHCR) to amend the Tenant Protection Regulations (TPR).

##### 2. LEGISLATIVE OBJECTIVES

The proposed rule making is necessary to implement Chapter 188 of the Laws of 2005 (New York State) adopting the Disability Rent Increase Exemption (DRIE).

##### 3. NEEDS AND BENEFITS

In addition to the Legislative Objectives detailed in item 2 above, the subject amendments are also necessary to implement the New York State Court of Appeals’ holding in ATM One, LLC v. Landaverde, 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004), wherein the Court held that a landlord’s written notice of default to a rent stabilized tenant, if served by mail, must add five days to the cure period.

Affected tenants benefit from the proposed DRIE revisions because they qualify for exemption from future guidelines increases and increases based on the owner’s economic hardship or major capital improvements (MCI’s). Affected owners may offset any loss in rental income resulting from DRIE, through a dollar-for-dollar reduction in real estate taxes. Thus owners are not penalized in order for the exemption to be realized.

Allowing owners the option of collecting a two-month security deposit for new tenancies provides for the continued viability of the housing stock for future tenancies. However, an owner would not be required to demand security deposits of up to two months and could not charge it for existing tenancies.

##### 4. COSTS

a. The regulated parties are residential tenants and the owners of the rent stabilized buildings in which such tenants reside.

Neither tenants nor owners are expected to experience any increase in costs associated with implementing DRIE regulations. In fact, affected tenants will experience a “rent freeze,” as they would be exempt from certain rent increases. Nor are tenants or owners expected to experience any increase in costs associated with implementing regulations adding five days to certain notices sent by mail, excluding certain other notices from any additional time if mailed, or terminating the necessity of filing a copy of an agency Order with a Petition for Administrative Review.

A two-month security deposit for new tenancies does not affect current tenancies and therefore, is not an increase in costs for owners or tenants. Such deposits remain subject to, and refundable per, article 7 of the General Obligations Law and the subject lease agreements.

b. DHCR costs are expected to be negligible. Otherwise, no additional costs are expected to be incurred by state or local governments as a result of adopting the proposed amendments.

c. Existing laws, regulations, agency policies and procedures form the basis upon which the above analysis is based.

##### 5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

##### 6. PAPERWORK

It is anticipated that the proposed amendments will result in paperwork associated with the submission of DRIE applications to DHCR from tenants in localities which adopt DRIE.

##### 7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

##### 8. ALTERNATIVES

The proposed amendments implement enacted statutory provisions and court decisions not yet reflected in the regulations. As indicated and discussed in the “NEEDS AND BENEFITS” and “COSTS” sections, absent these proposed modifications, there are no other significant viable alternatives.

##### 9. FEDERAL STANDARDS

The proposed amendments do not exceed any known minimum federal standards.

##### 10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules. Should the DHCR determine that delayed implementation is appropriate, section 2507.11 of the TPR authorizes the agency to take such action.

#### Regulatory Flexibility Analysis

##### 1. EFFECT OF RULE

The Emergency Tenant Protection Regulations (TPR) apply only to rent stabilized housing units located in those communities in Westchester, Rockland and Nassau Counties that are subject to the Emergency Tenant Protection Act. The class of small businesses affected by these proposed amendments would be limited to small building owners, those who own small numbers of rent stabilized units. The amended regulations are expected to have no burdensome impact on such small businesses.

These amendments to the TPR apply only in the aforementioned communities, and are expected to have no impact on the local governments thereof.

##### 2. COMPLIANCE REQUIREMENTS

The Division of Housing and Community Renewal will design and process Disability Rent Increase Exemption (DRIE) applications for those localities outside New York City which adopt DRIE.

The proposed amendments do not otherwise require regulated parties to perform any additional recordkeeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

##### 3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services.

##### 4. COMPLIANCE COSTS

There is no indication that this action will impose any significant costs upon small businesses or upon local governments.

##### 5. ECONOMIC AND TECHNOLOGY FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

##### 6. MINIMIZING ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or the local government. Consequently, it was not necessary to consider the approaches suggested in SAPA section 202-b(1).

##### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

To assure that regulated and other interested parties were given an opportunity to participate in the rule making process, the DHCR provided several parties and organizations with a demonstrated interest in rent regulation with the opportunity to make regulatory amendment suggestions. The DHCR provided opportunity for comment to such organizations as the London Terrace Tenants Association, Community Housing Improvement Program, Inc., and the Council of New York Cooperatives.

In addition, a Regulatory Agenda was both published in the State Register on June 29, 2005, and placed on DHCR’s website, indicating that the agency was considering this proposed rule making, and all interested parties were given an opportunity to comment. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the State Register, at which all interested

parties will have an opportunity to comment, and all such comments will be reviewed.

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

The proposed rules are not anticipated to impose any new adverse reporting, recordkeeping or other compliance requirements on public or private entities in any rural area that is subject to these regulations.

#### **Job Impact Statement**

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

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

### **State Rent and Eviction Regulations**

**I.D. No.** HCR-42-06-00020-P

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

**Proposed action:** Amendment of Parts 2102, 2104, 2108 and 2109 of Title 9 NYCRR.

**Statutory authority:** Emergency Housing Rent Control Law, L. 1946, ch. 274, subd. 4(a), as amended, as transferred to the DHCR by L. 1964, ch. 244

**Subject:** State rent and eviction regulations (SRER).

**Purpose:** To conform the SRER to the 2005 amendments to the RPTL adopting DRIE and to the Court of Appeals holding in *ATM One, LLC v. Landaverde*, 2 NY3d 472, 779 NYS2d 808 (2004).

**Public hearing(s) will be held at:** 9 a.m. to 5 p.m., December 4, 2006 at Westchester County Supreme Court, 9th Fl., 111 Dr. Martin Luther King, Jr. Blvd., White Plains, NY; and 10 a.m. to 2 p.m., December 5, 2006 at Nassau County Legislative Bldg., Legislative Meeting Rm., One West St., Mineola, 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.

**Text of proposed rule:** The State Rent and Eviction Regulations as promulgated and adopted by the Temporary State Housing Rent Commission, pursuant to the Emergency Housing Rent Control Law, Chap. 274 of the Laws of 1946, section 4, subdivision (4)(a), as amended by Chap. 250, Laws of 1950, as amended, and transferred to the Division of Housing and Community Renewal by Chap. 244, Laws of 1964, are amended to read as follows:

#### **PART 2102 ADJUSTMENTS**

##### **Section 1**

Paragraph (3) of subdivision (b) of section 2102.3 of this Part is amended by adopting a new subparagraph (iii) to read as follows:

*(iii) The rental amount that a tenant may charge a person in occupancy pursuant to section 235-f of the Real Property Law shall not exceed such occupant's proportionate share of the maximum rent charged to and paid by the tenant for the subject housing accommodation. For the purposes of this subparagraph, an occupant's proportionate share shall be determined by dividing the maximum rent by the total number of tenants and the total number of occupants residing in the subject housing accommodation. However, the total number of tenants shall not include a tenant's spouse, and the total number of occupants shall not include a tenant's family member or an occupant's dependent child. Regardless of the number of occupants, tenants shall remain responsible for payment to the owner of the entire maximum rent. The charging of a rental amount to an occupant that exceeds that occupant's proportionate share shall be deemed to constitute a violation of these regulations.*

##### **Section 2**

Paragraph (3) of subdivision (h) of section 2102.4 of this Part is amended to read as follows:

(3) Recipients of senior citizen rent increase exemptions (SCRIE) or disability rent increase exemptions (DRIE). For a tenant who on the date of the conversion is receiving a SCRIE or DRIE authorized by local law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(i) After the conversion, upon the vacancy of the tenant, the owner, without making application to the Commission, is required to reduce the maximum rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter [the] any subsequent tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(ii) After the conversion, if a tenant ceases to receive a SCRIE or DRIE, the owner, without making application to the Commission, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE or DRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE or DRIE, the owner, without making application to the Commission, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

#### **PART 2104 EVICTIONS**

##### **Section 1**

Subdivision (a) of section 2104.2 of this Part is amended to read as follows:

(a) The tenant is violating a substantial obligation of his tenancy other than the obligation to surrender possession of such housing accommodation and has failed to cure such violation after written demand by the landlord that the violation cease within 10 days; or within the three-month period immediately prior to the commencement of the proceeding the tenant has [willfully] willfully violated such an obligation inflicting serious and substantial injury to the landlord. *If the written demand by the landlord that the violations cease within ten days is served by mail, then five additional days, because of service by mail, shall be added, for a total of 15 days, before an action or proceeding to recover possession may be commenced after service of the notice required by section 2104.3 of this Part.*

#### **PART 2108 ADMINISTRATIVE REVIEW**

##### **Section 1**

Section 2108.13 of this Part is amended to read as follows:

The filing and determination of a PAR is a prerequisite to obtaining judicial review of any provision of this Subchapter or any order issued thereunder, except as provided by section 8 of the Act. A proceeding for review may be instituted under article 78 of the Civil Practice Law and Rules provided the petition is filed within 60 days after the [final determination] issuance of the PAR. *Issuance date is defined as the date of mailing of the order; no additional time is allowed by virtue of mailing.* Service of the petition upon the Division of Housing and Community Renewal shall be made by either:

(a) personal delivery of the notice of petition and petition to counsel's office at the division's office, 25 Beaver Street, New York, New York 10004, or such other address as may be designated by the administrator, and delivering a copy thereof to an Assistant Attorney General at an office of the New York State Attorney General within the state; or

(b) by such other method as is authorized by the Civil Practice Law and Rules.

#### **PART 2109 MISCELLANEOUS PROCEDURAL MATTERS**

##### **Section 1**

Section 2109.1 of this Part is amended by adopting new subdivisions (d) and (e) to read as follows:

(d) *Unless otherwise expressly provided in these regulations, no additional time is required or allowed for service by mail of any notice, order, answer, lease offer or other papers, beyond the time period set forth in these regulations and such time period provided is inclusive of the time for mailing.*

(e) *Unless otherwise expressly provided in these regulations, no additional time is required or allowed to respond or to take any action when served by mail with any notice, order, answer, lease offer, or other papers, beyond the time period set forth in these regulations and the time to respond is commenced upon mailing of said notice, order, answer, lease offer, or other paper.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Maurice Jamison, Special Assistant to the Deputy Commissioner, Department of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4816

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

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

### Regulatory Impact Statement

#### 1. STATUTORY AUTHORITY

The Emergency Housing Rent Control Law, Laws of 1946, Chap. 274, subdivision 4(a), as amended by the Laws of 1950, Chap. 250, as amended, as transferred to the Division of Housing and Community Renewal (DHCR) by the Laws of 1964, Chap. 244, provides authority to the DHCR to amend the State Rent and Eviction Regulations (SRER).

#### 2. LEGISLATIVE OBJECTIVES

The proposed rule making is necessary to implement Chapter 188 of the Laws of 2005 (New York State) adopting the Disability Rent Increase Exemption (DRIE).

#### 3. NEEDS AND BENEFITS

In addition to the Legislative Objectives detailed in item 2 above, the subject amendments are also necessary to implement the New York State Court of Appeals' holding in *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004), wherein the Court held that a landlord's written notice of default to a rent stabilized tenant, if served by mail, must add five days to the cure period.

Affected tenants benefit from the proposed DRIE revisions because they qualify for exemption from future Maximum Base Rent increases, fuel cost adjustments, and increases based on the owner's economic hardship or major capital improvements (MCI's). Affected owners may offset any loss in rental income resulting from DRIE, through a dollar-for-dollar reduction in real estate taxes. Thus owners are not penalized in order for the exemption to be realized.

The proposed regulations provide additional protection to occupants of housing accommodations against "rent-gouging" by tenants. In addition to occupants addressing such actions in a court of competent jurisdiction, the proposed amendments would also provide owners an avenue of recourse against such activities.

#### 4. COSTS

a. The regulated parties are residential tenants and the owners of the rent controlled buildings in which such tenants reside.

Neither tenants nor owners are expected to experience any increase in costs associated with implementing DRIE regulations. In fact, affected tenants will experience a "rent freeze," as they would be exempt from certain rent increases. Nor are tenants or owners expected to experience any increase in costs associated with implementing regulations adding five days to certain notices sent by mail, excluding certain other notices from any additional time if mailed, or terminating the necessity of filing a copy of an agency Order with a Petition for Administrative Review.

b. DHCR costs are expected to be negligible. Otherwise, no additional costs are expected to be incurred by state or local governments as a result of adopting the proposed amendments.

c. Existing laws, regulations, agency policies and procedures form the basis upon which the above analysis is based.

#### 5. LOCAL GOVERNMENT MANDATE

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

#### 6. PAPERWORK

It is anticipated that the proposed amendments will result in paperwork associated with the submission of DRIE applications to DHCR from tenants in those localities which adopt DRIE.

#### 7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

#### 8. ALTERNATIVES

The proposed amendments implement statutory provisions and court decisions not yet reflected in the regulations. As indicated and discussed in the "NEEDS AND BENEFITS" and "COSTS" sections, absent these proposed modifications, there are no other significant viable alternatives.

#### 9. FEDERAL STANDARDS

The proposed amendments do not exceed any known minimum federal standards.

#### 10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules.

### Regulatory Flexibility Analysis

#### 1. EFFECT OF RULE

The State Rent and Eviction Regulations (SRER) apply only to housing units located in those communities outside New York City that are subject to the Emergency Housing Rent Control Law. The small businesses that

would be affected by these proposed amendments are the owners of small numbers of regulated housing units, at least one of which is rent controlled.

The amended regulations are expected to have no burdensome impact on small businesses.

These amendments to the SRER, which apply exclusively in the aforementioned communities, are expected to have no impact on the local governments thereof.

#### 2. COMPLIANCE REQUIREMENTS

The Division of Housing and Community Renewal will design and process Disability Rent Increase Exemption (DRIE) applications for those localities outside New York City which adopt DRIE.

The proposed amendments do not otherwise require regulated parties to perform any additional recordkeeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

#### 3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services.

#### 4. COMPLIANCE COSTS

There is no indication that this action will impose any significant costs upon small businesses or upon local governments.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

#### 6. MINIMIZING ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or the local government. Consequently, it was not necessary to consider the approaches suggested in SAPA section 202-b(1).

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

To assure that regulated and other interested parties were given an opportunity to participate in the rule making process, the DHCR provided several parties and organizations with a demonstrated interest in rent regulation with the opportunity to make regulatory amendment suggestions. The DHCR provided opportunity for comment to such organizations as the London Terrace Tenants Association, Community Housing Improvement Program, Inc., and the Council of New York Cooperatives.

In addition, a Regulatory Agenda was both published in the State Register on June 29, 2005, and placed on DHCR's website, indicating that the agency was considering this proposed rule making, and all interested parties were given an opportunity to comment. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the State Register, at which all interested parties will have an opportunity to comment, and all such comments will be reviewed.

#### Rural Area Flexibility Analysis

The proposed rules are not anticipated to impose any new adverse reporting, recordkeeping or other compliance requirements on public or private entities in any rural area that is subject to these regulations.

#### Job Impact Statement

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Rent Stabilization Code

**I.D. No.** HCR-42-06-00021-P

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

**Proposed action:** Amendment of Parts 2520, 2522, 2524, 2525, 2527, 2529 and 2530 of Title 9 NYCRR.

**Statutory authority:** Administrative Code of the City of New York, section 26-511(b)

**Subject:** Rent Stabilization Code (RSC).

**Purpose:** To conform RSC to Yr.-2005 amendments to the RPTL and the NYC Admin. Code adopting DRIE, and to the Court of Appeals' holding in *ATM v. Landaverde*, 779 NYS2d 808 (2004).

**Public hearing(s) will be held at:** 9 a.m. to 5 p.m., December 4, 2006 at FIT, C Bldg., 27th St., between 7th and 8th Ave., New York, NY 10001-5992.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.dhcr.state.ny.us](http://www.dhcr.state.ny.us)):** Substance of Proposed Rules: Substantive amendments and new provisions covered by the proposed rule are as follows:

#### PART 2520 SCOPE

Housing accommodations in receipt of tax benefits pursuant to Real Property Tax Law section 421-a would be eligible for High-Income Rent Decontrol pursuant to Part 2531 of this Title, if they would have otherwise qualified.

#### PART 2522 RENT ADJUSTMENTS

Owners would be eligible for an individual apartment improvement rent increase where lead paint is removed from a vacant apartment, and a major capital improvement rent increase where lead paint is removed from common areas and occupied apartments.

DRIE recipients would be treated as SCRIE recipients with regard to including the cost of electricity in their respective rents upon conversion to electrical exclusion. Therefore, such tenants would not be responsible for individual electrical bills.

#### PART 2524 EVICTIONS

Per the Court of Appeals ruling in *ATM V. LANDAVERDE*, 779 NYS2d 808 (2004), the period to cure would be extended five (5) days if an owner elects to serve a tenant by mail with a notice to cease violations, notice of inspection, or notice to move within a hotel.

An owner would be able to either commence a proceeding to recover possession of a housing accommodation based upon non-primary residence, without the prior approval of DHCR if notice is provided per the requirements of section 2524.2 or, in the same situation, refuse to renew the subject tenant's lease.

#### PART 2525 PROHIBITIONS

Owners would be able to collect up to a two-month security deposit for tenancies commenced after October 1, 2006, except where tenants are 65 or older, or where the subject rent is paid in part, or in full, by a governmental entity. Under such exceptions, the security deposit shall not exceed the rent for one month, for so long as the subject exceptions exist.

#### PART 2527 PROCEEDINGS BEFORE THE DHCR

No additional time is required for service by mail beyond the time period set forth in this code. Nor is any additional time required to respond or to take any action when served by mail beyond the time period set forth in this code.

#### PART 2529 ADMINISTRATIVE REVIEW

The issuance date of an order would be defined as the date of mailing, and a PAR served by mail must be postmarked not more than 35 days after issuance of such order to be deemed timely filed.

#### PART 2530 JUDICIAL REVIEW

The issuance date of an order against which an Article 78 is filed is defined as the date of mailing of the order; no additional time is allowed by virtue of mailing.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maurice Jamison, Special Assistant to the Deputy Commissioner, Department of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4816

**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 26-511(b) of the Administrative Code of the City of New York, as recodified by the Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.0[b]), as amended by Laws of 1985, Chap. 888, section 2) and section 26-518(a) of such Code, as recodified by the Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.1[a] as added by the laws of 1985, Chap. 888, section 8) provides authority to the Division of Housing and Community Renewal (DHCR) to amend the Rent Stabilization Code (RSC).

#### 2. LEGISLATIVE OBJECTIVES

The proposed rule making is necessary to implement Chapter 188 of the Laws of 2005 (New York State) and Local Law 76 of 2005 (New York City), adopting the Disability Rent Increase Exemption (DRIE).

### 3. NEEDS AND BENEFITS

In addition to the Legislative Objectives detailed in item 2 above, the subject amendments are also necessary to implement the New York State Court of Appeals' holding in *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004), wherein the Court held that a landlord's written notice of default to a rent stabilized tenant, if served by mail, must add five days to the cure period.

Affected tenants benefit from the proposed DRIE revisions because they qualify for exemption from future guidelines increases and increases based on the owner's economic hardship or major capital improvements (MCI's). Affected owners may offset any loss in rental income resulting from DRIE, through a dollar-for-dollar reduction in real estate taxes. Thus owners are not penalized in order for the exemption to be realized.

Allowing owners the option of collecting a two-month security deposit for new tenancies provides for the continued viability of the housing stock for future tenancies. However, an owner would not be required to demand security deposits of up to two months and could not charge it for existing tenancies.

These amendments would also serve to ensure that the luxury decontrol provisions of the Rent Stabilization Law and RSC are equally applicable to apartments which would otherwise qualify for luxury decontrol, but for no other reason than the receipt of tax benefits pursuant to section 421-a of the Real Property Tax Law (RPTL), they do not qualify. Where an owner is in receipt of a section 421-a tax exemption, and an apartment is deregulated as a result of luxury decontrol, said tax exemption would be reduced to reflect the subject apartment's deregulation.

Where owners are required to remove hazardous lead paint by law, it would be equitable that the regulations be clarified to assure such projects qualify for rent increases as improvements mandated by law or individual apartment improvements. Tenants benefit because a known health hazard is eliminated and the owner benefits because such projects are accorded appropriate treatment under the Code.

Where an owner seeks to recover possession of an apartment not occupied by the tenant as his or her primary residence more than 150 days prior to the expiration of the subject lease term, a notice of termination should not be required because it is outside the window in which a tenant would be entitled to a notice of lease renewal. It is only within such a window (not more than 150 days and not less than 90 days prior to the end of a lease term) that an owner should definitively state their intention to terminate a tenancy, as the subject tenant would otherwise be lawfully entitled to a notice of renewal. Such an amendment would not violate the due process rights of tenants.

### 4. COSTS

a. The regulated parties are residential tenants and the owners of the rent stabilized buildings in which such tenants reside.

Neither tenants nor owners are expected to experience any increase in costs associated with implementing DRIE regulations. In fact, affected tenants will experience a "rent freeze," as they would be exempt from certain rent increases. Nor are tenants or owners expected to experience any increase in costs associated with implementing regulations adding five days to certain notices sent by mail, excluding certain other notices from any additional time if mailed, or terminating the necessity of filing a copy of an agency Order with a Petition for Administrative Review.

A two-month security deposit for new tenancies does not affect current tenancies and therefore, is not an increase in costs for owners or tenants. Such deposits remain subject to, and refundable per, article 7 of the General Obligations Law and the subject lease agreements. The regulations reflect exceptions to two-month security deposits created by the State Legislature as well as for other tenants who need governmental assistance in order to meet their rent obligations.

Allowing owners the option of recovering possession of an apartment not occupied by the tenant as his or her primary residence more than 150 days prior to the expiration of a lease term, merely creates additional flexibility in the limited instances where an owner does pursue such recourse, and imposes no additional costs on owners or tenants. While theoretically an owner could bring more than one non-primary residence proceeding during a lease term, realistically, such occasions would be limited given the length of time necessary to pursue a non-primary residence proceeding to conclusion and the Res Judicata effect given such determination if a new proceeding is commenced in close time proximity without a change in circumstances. Rent Control has long allowed for such proceedings without a window period and any owner abuse may result in court or DHCR sanctions. The present circumstances which may allow a two-year grace period for behavior violative of the rent laws (or more if the proceeding is dismissed on a technical non-meritorious ground) does not

serve the purposes which the non-primary residence provisions are designed to address.

Amending the regulations to allow owners to apply or obtain an appropriate rent increase for the removal of lead paint using either the Major Capital Improvement or Individual Apartment Improvement formula will raise rent. It is impossible to compute the actual cost to a tenant as such cost would be based upon the actual substantiated cost incurred by the subject owner. Each formula has ameliorative provisions to mitigate the immediate rent burden on tenants. The splitting of the rent increases between building-wide and individual apartment improvements is designed to target the increases through the property benefiting from the abatement while shielding those most vulnerable, in-place families in need of abatement services from the bulk of the costs. As with other DHCR rent increases in the MCI area, these increases will also be reduced by tax benefits afforded the owner by the City of New York.

It is anticipated that no costs will be incurred by tenants or owners if the regulations are amended to apply luxury decontrol provisions equally to apartments which would otherwise qualify for decontrol but for the receipt of tax benefits pursuant to section 421-a of the RPTL. This regulatory change reflects extant DHCR policies.

b. DHCR costs are expected to be negligible. Otherwise, no additional costs are expected to be incurred by state or local governments as a result of adopting the proposed amendments.

c. Existing laws, regulations, agency policies and procedures form the basis upon which the above analysis is based.

**5. LOCAL GOVERNMENT MANDATES**

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

**6. PAPERWORK**

It is anticipated that the proposed amendments will result in some increase in paperwork with regard to the submission of DRIE applications (the New York City Department of Finance will process DRIE applications from tenants residing within the New York City area), Luxury Decontrol applications and forms, and MCI applications.

**7. DUPLICATION**

The proposed amendments do not duplicate any known State or federal requirements.

**8. ALTERNATIVES**

The proposed amendments implement statutory provisions and court decisions not yet reflected in the regulations. Additionally, the proposed amendments preserve the housing stock, serve the interests of equal treatment, equity, and do not violate due process rights. As indicated and discussed in the "NEEDS AND BENEFITS" and "COSTS" sections, absent these proposed modifications, there are no other significant viable alternatives.

**9. FEDERAL STANDARDS**

The proposed amendments do not exceed any known minimum federal standards.

**10. COMPLIANCE SCHEDULE**

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules. Should the DHCR determine that delayed implementation is appropriate, section 2527.11 of the RSC authorizes the agency to take such action.

**Regulatory Flexibility Analysis**

**1. EFFECT OF RULE**

The Rent Stabilization Code (RSC) applies only to rent stabilized housing units in New York City. The class of small businesses affected by these proposed amendments would be limited to small building owners, those who own limited numbers of rent stabilized units. The amended regulations are expected to have no burdensome impact on such small businesses.

These amendments to the RSC, which applies exclusively in New York City, are expected to have no impact on the local government thereof.

**2. COMPLIANCE REQUIREMENTS**

Tenants located in New York City must submit their respective Disability Rent Increase Exemption applications to the New York City Department of Finance. With regard to major capital improvement rent increases based upon the removal of lead paint, it is expected that existing forms will be satisfactory. Similarly, it is expected that the existing forms for the processing of Luxury Decontrol applications will also be satisfactory. However, in any event, existing forms can be updated and amended where necessary.

The proposed amendments do not otherwise require regulated parties to perform any additional recordkeeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

**3. PROFESSIONAL SERVICES**

The proposed amendments do not require small businesses to obtain any new or additional professional services.

**4. COMPLIANCE COSTS**

There is no indication that this action will impose any significant costs upon small businesses or upon local governments.

**5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY**

Compliance is not anticipated to require any unusual new or burdensome technological applications.

**6. MINIMIZING ADVERSE IMPACT**

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or the local government. Consequently, it was not necessary to consider the approaches suggested in SAPA section 202-b(1).

**7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION**

To assure that regulated and other interested parties were given an opportunity to participate in the rule making process, the DHCR provided several parties and organizations with a demonstrated interest in rent regulation with the opportunity to make code amendment suggestions. The DHCR provided opportunity for comment to such organizations as the London Terrace Tenants Association, Community Housing Improvement Program, Inc., Legal Services of New York City, New York City Commission on Human Rights, City-Wide Tenants Coalition, and the Council of New York Cooperatives.

In addition, a Regulatory Agenda was both published in the State Register on June 29, 2005, and placed on DHCR's website, indicating that the agency was considering this proposed rule making, and all interested parties were given an opportunity to comment. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the State Register, at which all interested parties will have an opportunity to comment, and all such comments will be reviewed.

**Rural Area Flexibility Analysis**

The Rent Stabilization Code applies exclusively to New York City, and therefore, the proposed rules will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities located in any rural area pursuant to Subdivision 10 of SAPA Section 102.

**Job Impact Statement**

It is apparent from the text of the rule that there will be no adverse impacts on jobs and employment opportunities.

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## Insurance Department

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

**Unemployment Lapse Protection Benefit for Life Insurance**

**I.D. No.** INS-42-06-00003-P

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

**Proposed action:** Addition of Part 46 (Regulation No. 174) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1113, 3201 and 4525

**Subject:** Unemployment lapse protection benefit for life insurance.

**Purpose:** To establish the minimum standards for benefit levels, benefits eligibility and exclusions. Establishing premium levels that meet the statutory requirement that the premium charged shall be reasonable in relation to the benefit provided.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.ins.state.ny.us>):** The previous Part 46 was repealed. The Part 46 proposed is all new material.

Section 46.1 provides that the purpose of Part 46 is to establish minimum standards for benefit levels, eligibility, exclusions and premium rates for unemployment lapse protection benefits for life insurance.

Section 46.2 is the applicability section for Part 46. This Part applies to all individual and group life policy forms delivered or deemed to be delivered in New York State as well as any life insurance advertisement intended for presentation, distribution or dissemination in this State.

Section 46.3 sets forth the definitions of unemployment, identifiable charge, policy and unemployment as used in Part 46.

Section 46.4 states the filing and approval requirement for forms used to provide life insurance unemployment lapse protection benefits under policies delivered or issued for delivery in New York State.

Section 46.5 sets forth the specific statements required in advertising materials for unemployment lapse protection benefits. The statements pertain to benefit eligibility, taxation, waiting period, if any, and premium/charge payment obligations of the parties.

Section 46.6 requires that the unemployment lapse protection benefit be optional except for noncontributory programs, and that the charge for the benefit be specifically identified.

Section 46.7 sets forth the standard provisions required for unemployment lapse protection benefits, including covered types of unemployment, conditions for coverage eligibility, conditions precedent to claim payment, description of benefit, permitted exclusions/bases for claim denial, disclosure provisions, re-eligibility conditions, benefit termination, policy/benefit renewal, coordination of benefits, and coverage of other policies.

Section 46.8 sets forth the acceptable premium rates for the unemployment lapse protection benefits. An insurer may elect to develop its own rates. When an insurer develops its own rates, this section requires a 60% annual loss ratio requirement.

Section 46.9 has special rules for policies and certificates that credit additional amounts. This section limits the amount of the benefit to the amount necessary to keep the insurance from lapsing. An exception to this is made for products that include a no-lapse guarantee. The exception allows the payment of the amount of premium needed to satisfy the no-lapse guarantee.

Section 46.10 has special rules for group policies and certificates. Special rules are needed in the group setting because in the group setting unlike individual products unemployment may effect the insureds eligibility for the group insurance and the insured has a statutory right to a conversion policy if the group life insurance ends.

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

**Data, views or arguments may be submitted to:** Thomas K. Hartman, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 486-2126, e-mail: thartman@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 promulgation of Regulation No. 174 (11 NYCRR 46) is derived from sections 201, 301, 1113, 3201 and 4525 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 1113 of the Insurance Law defines types of insurance that may be authorized in New York State. In particular, section 1113(a)(1) defines "life insurance" to include additional benefits to safeguard the contract against lapse in the event of unemployment of the insured.

Section 3201(c)(12) of the Insurance Law directs the superintendent to promulgate a regulation relating to waiver of premium for unemployment, which establishes minimum standards for benefit levels and benefit eligibility and exclusions. This section also requires that the premium charged be reasonable in relation to the benefit provided.

Section 4525 of the Insurance Law provides direction on the applicability of other sections of the Insurance Law to Fraternal Benefit Societies.

#### 2. Legislative objectives:

Section 1113(a)(1) defines "life insurance" to include additional benefits to safeguard the contract against lapse in the event of unemployment of the insured as a kind of insurance authorized in New York.

In 1993, the Legislature added new paragraph 13 (renumbered as paragraph 12 in 2001) of subsection (c) to section 3201 of the Insurance Law (L. 1993 c. 507) to specifically direct the superintendent to promulgate a regulation relating to waiver of premium for unemployment, which would establish minimum standards for benefit levels and benefit eligibil-

ity and exclusions. This section also requires that the premium charged be reasonable in relation to the benefit provided.

The legislature recognized that the loss of income due to unemployment can have serious consequences to the affected party. This benefit when included with life insurance would at least eliminate one concern for the unemployed by preserving important insurance protection during a time of economic hardship and stress. Balanced against this is the recognition that the presence of the benefit may result in some individuals remaining unemployed longer than they otherwise would be. This has both the negative aspect of increasing state unemployment claims and the positive aspect of allowing the unemployed to find employment truly appropriate for them instead of taking the first possible job.

#### 3. Needs and benefits:

The Legislature intended to have an unemployment waiver of premium/lapse protection benefit available as an option for consumers in life insurance policies, within the parameters of regulatory standards. The legislation reflected a perceived need to assist consumers who especially in difficult economic times may find themselves without gainful employment. In the unfortunate event of unemployment consumers are faced with difficult financial decisions. The loss of life insurance coverage, which may have been purchased to provide financial protection to dependents, could be devastating to many consumers. The option to purchase this benefit will afford the consumer the ability to protect against the possibility that future unemployment may negatively impact their lives and economic resources by causing them to forfeit their life insurance coverage. Policyholders and certificateholders who lapse their life insurance coverage due to a lack of sufficient financial resources to pay the premium, may not be in a position to purchase new coverage at a later date due to such factors as adverse health conditions or increased cost due to age. The proposed regulation would permit insurers to proceed with policy form filings so that this optional benefit can now be made available to life insurance policyholders and certificate holders in New York and provide such holders with the opportunity to continue their life insurance coverage in the event of unemployment.

The standards set forth in the proposed regulation provide guidance to be considered in product design, which will benefit insurers and consumers by setting clear and accurate expectations regarding the nature of the benefit available under the policy. The proposed regulation also includes a table of premium rates that are considered to meet the statutory requirement of Section 3201(c)(12) of the New York Insurance Law that the premium charged be reasonable in relation to the benefit provided. Instead of using the premium rates set forth in the proposed regulation, an insurer may elect to develop its own rates. When an insurer develops its own rates, the proposed regulation requires a 60% annual loss ratio requirement. The 60 percent loss ratio requirement is recommended by the National Association of Insurance Commissioners in its Consumer Credit Insurance Model Regulation for Credit Unemployment Insurance.

#### 4. Costs:

There should be minimal or no cost to life insurers. Some companies may make policy form submissions to take advantage of the changes and offer the benefit in New York. Insurers that do not participate in providing the benefit 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:

As part of the drafting process the Department obtained policy forms used in other states to provide an unemployment lapse protection benefit for life insurance. These designs were considered in developing this regulation. In particular, one design would only provide benefits in the event of unemployment due to a strike. In the absence or reviewing products being used in other states we would not have thought that a company would want to write such a benefit and might have inadvertently prohibited it.

A draft version of this regulation was provided to the Life Insurance Council of New York (LICONY). LICONY is a trade group representing a

significant number of life insurance companies licensed in New York. LICONY provided no comments on this regulation.

One Company noted a few areas of concern with some of the earlier versions of the regulation. A number of the concerns were addressed by explaining what our intent was and other areas of concerns were satisfied by expanding the regulation to more fully set forth our intent. An area of significant change has been the inclusion of a lapse protection benefit on coverage provided under other policies in order to allow for protection on the life insurance of dependents. If the insured becomes unemployed, then under the terms of the insured's policy the life insurance on the insured's dependents provided under other policies is also protected against lapse. We viewed this as being similar to the payor benefits that have long existed on life insurance policies on dependents. Two existing versions of payor benefits are a payor death benefit and a payor disability benefit. The payor death benefit results in the life insurance on the dependent becoming paid up on the death of the policyowner. The payor disability benefit waives the premium on the dependent coverage in the event of the disablement of the owner. Both common versions of payor benefit and the new lapse protection benefit for unemployment recognize that in the case of life insurance on dependents the person responsible for the premium payment often is not the insured.

9. Federal standards:

There is no federal standard for waiver of premium/lapse protection for unemployment benefits provided under life insurance policies.

10. Compliance schedule:

The regulation will be effective upon adoption. Insurers who elect to offer this product will be required to file the appropriate policy and certificate forms for prior approval by the New York State Insurance Department. Insurers will be able to market the unemployment lapse protection benefit for life insurance after the regulation is adopted and policy forms are approved.

**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 insurers authorized 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 establishes benefit, eligibility and premium rate standards for the unemployment lapse protection benefit for life insurance. The benefit is not required for individual or group life insurance products. The regulation does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

3. Costs:

There should be minimal or no cost to life insurers licensed to do business in New York State. Insurers who elect to offer this product will be required to file the appropriate policy and certificate forms for prior approval by the New York State Insurance Department. Insurers will be able to market the unemployment lapse protection benefit for life insurance after the regulation is adopted and policy forms are approved. Insurers that do not participate in providing the benefit 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.

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 and other interested insurers.

**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 and requirements for insurers designing waiver of premium/lapse protection benefits for unemployment to be offered for life insurance.

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 authorized 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. This benefit would eliminate unemployed individuals' concern of preserving important life insurance protection thereby increasing the likelihood of the unemployed accepting truly appropriate employment instead of taking the first possible job.

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

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## Office of Mental Health

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### NOTICE OF ADOPTION

**Operation of Community Residences**

**I.D. No.** OMH-25-06-00013-A

**Filing No.** 1164

**Filing date:** Oct. 3, 2006

**Effective date:** Oct. 18, 2006

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

**Action taken:** Repeal of Part 586 of Title 14 NYCRR.

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

**Subject:** Operation of community residences.

**Purpose:** To repeal an obsolete rule.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-25-06-00013-P, Issue of June 21, 2006.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Office of Mental Retardation and Developmental Disabilities

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Reimbursement Methodologies for Health Care Enhancement Funding Initiative**

**I.D. No.** MRD-42-06-00008-P

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

**Proposed action:** Amendment of sections 635-10.5, 671.7, 679.6, 680.12, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 43.02

**Subject:** Revision of the reimbursement methodologies for various facilities and services provided under the auspices of OMRDD to include a health care enhancement (HCE II) funding initiative.

**Purpose:** To implement the second phase of a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees.

**Public hearing(s) will be held at:** 10:30 a.m., Dec. 4, 2006 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Conference Rm. B, 4th Fl., Albany, NY; and 10:30 a.m., Dec. 5, 2006 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Counsel's Office, Conference Rm., 3rd Fl., Albany, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.omr.state.ny.us](http://www.omr.state.ny.us)):** OMRDD has been working for several years to improve recruitment and retention of direct care staff. The proposed regulations implement the second phase of an employee health care enhancement initiative (HCE II) to support and sustain provider agencies and their staff, including direct care staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain direct care staff.

HCE II makes additional funding available to providers of the referenced OMRDD authorized or funded developmental disabilities facilities or services effective January 1, 2007. All providers must apply for funding for HCE II which is available at either an annual allocation of \$2500 per employee or \$425 per employee, as follows:

The annual allocation at the \$2500 level is determined by OMRDD based on the total number of employees included in the provider's approved HCE II application multiplied by \$2500. Funding at the \$2500 level is available to providers which (a) submitted an application for HCE II funding at the \$2500 level; and (b) do not offer health care benefits; and (c) were insufficiently funded for health care, as determined by OMRDD. Affected providers were notified by OMRDD of this determination.

The annual allocation at the \$425 level is determined by OMRDD based on the total number of employees included in the provider's approved HCE II application multiplied by \$425. Funding at the \$425 level is available to providers which: (a) offer health care benefits to some or all employees and submitted an application for HCE II funding at the \$425 level; or (b) applied for HCE II funding at the \$2500 level but already received funding at the \$2500 per employee level pursuant the previous employee health care enhancement (HCE); or (c) submitted an application at the \$2500 level but have sufficient funding for health care, as determined by OMRDD. Affected providers were notified by OMRDD of this determination.

Unlike the initial phase of the Health Care Enhancement (HCE) which became effective January 1, 2006, HCE II does not include the option for a percentage increase to operating costs. All providers of services must apply, and have their application approved by OMRDD, for HCE II funding at one of the funding levels outlined above.

Day Treatment facilities will receive HCE II funds in the form of variable trend factor increases established according to the above criteria.

To ensure that funds granted to providers are expended for their intended purpose, the regulations require that agencies whose funding applications are approved by OMRDD submit a resolution from the agency governing body (Board of Directors) before any HCE II funds are disbursed to the agency.

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

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

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

**Additional matter required by statute:** 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**

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 the New York State Mental Hygiene Law Section 13.07.

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

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law by making necessary revisions to the reimbursement methodologies for Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. The proposed amendments will enhance reimbursement of providers of the referenced programs and services so as to enhance employee health care benefits or to help their employees defray the ever increasing costs of health care.

3. Needs and benefits: Direct care staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands-on, person-to-person needs of each individual requiring care. The direct care staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct care staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

OMRDD has been working for several years to improve recruitment and retention of direct care staff. Among other efforts, OMRDD has implemented annual trend factor rate enhancements for most programs, which have enabled voluntary provider agencies to give salary increases to direct care staff. However, the rising costs of health care have disproportionately impacted workers like direct care staff with more modest salaries. For some workers, the increase in out-of-pocket health care costs may have actually exceeded recent salary increases.

The proposed regulations implement the second phase of an employee health care enhancement initiative (HCE II) to support and sustain provider agencies and their staff, including direct care staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain direct care staff.

HCE II makes additional funding available to providers of the referenced OMRDD authorized or funded developmental disabilities facilities or services effective January 1, 2007. All providers must apply for funding for HCE II which is available at either an annual allocation of \$2500 per employee or \$425 per employee, as follows:

The annual allocation at the \$2500 level is determined by OMRDD based on the total number of employees included in the provider's approved HCE II application multiplied by \$2500. Funding at the \$2500 level is available to providers which (a) submitted an application for HCE II funding at the \$2500 level; and (b) do not offer health care benefits; and (c) were insufficiently funded for health care, as determined by OMRDD. Affected providers were notified by OMRDD of this determination.

The annual allocation at the \$425 level is determined by OMRDD based on the total number of employees included in the provider's approved HCE II application multiplied by \$425. Funding at the \$425 level is available to providers which: (a) offer health care benefits to some or all employees and submitted an application for HCE II funding at the \$425 level; or (b) applied for HCE II funding at the \$2500 level but already received funding at the \$2500 per employee level pursuant the previous employee health care enhancement (HCE); or (c) submitted an application at the \$2500 level but have sufficient funding for health care, as deter-

mined by OMRDD. Affected providers were notified by OMRDD of this determination.

Day Treatment facilities will receive HCE II funds in the form of variable trend factor increases established according to the above criteria.

To ensure that funds granted to providers are expended for their intended purpose, the regulations require that agencies whose funding applications are approved by OMRDD submit a resolution from the agency governing body (Board of Directors) before any HCE II funds are disbursed to the agency.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: The amendments will result in an annual aggregate increase of approximately \$26.2 million in reimbursements to affected providers of developmental disabilities services. This \$26.2 million cost in Medicaid will be evenly shared by the State and the federal governments. For affected HCBS waiver services the estimated cost will be approximately \$17.6 million; for specialty hospitals, approximately \$10,000; for community residence facilities, approximately \$490,000; for clinic treatment facilities, approximately \$300,000; for intermediate care facilities, approximately \$6.3 million; and for day treatment facilities, approximately \$1.5 million.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There may be some administrative costs associated with implementation and continued compliance with the amendments. However, overall, the change will have a positive fiscal impact on providers of services because the revisions are designed to provide them with additional funds to be utilized to enhance the health care benefits or reduce the health care expenditures of their employees.

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: There will be some paperwork associated with the preparation and forwarding of applications and governing body or board resolutions.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

8. Alternatives: The proposed rule making represents what OMRDD believes to be the most effective way to provide funding increases designed to address health care costs. The proposed amendments have been developed with the participation and input of the service provider community to facilitate application of the funding where it is most needed by each individual agency. The alternative would be to revise the current reimbursement methodologies with a general increase in funding which does not specifically require that the monies must be used to reduce employee health care expenditures. However, without the agency applications and associated governing body resolutions there would be no guarantee that the added funds would be applied to the intended purpose.

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

10. Compliance schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act so as to enable an effective date of January 1, 2007. As with similar targeted funding initiatives previously adopted by OMRDD, this agency will provide information and assistance in completing the application and board resolutions required by the regulations.

#### **Regulatory Flexibility Analysis**

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies that are providers of Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. The OMRDD has determined, through a review of providers' certified cost reports, that the organizations which operate such facilities or provide such services employ fewer than 100 employees at the discrete certified or authorized sites and would therefore be classified as small businesses. OMRDD estimates that approximately 500 provider agencies would be affected by the proposed amendments.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not have any negative effects

on these small business service providers. In fact, the proposed amendments to the various reimbursement methodologies have been developed to increase funding provided to these small business service providers in order to enhance their capacity to provide adequate health care benefits for their employees.

Direct care staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands-on, person-to-person needs of each individual requiring care. The direct care staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct care staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

OMRDD has been working for several years to improve recruitment and retention of direct care staff. Among other efforts, OMRDD has implemented annual trend factor rate enhancements for most programs, which have enabled voluntary provider agencies to give salary increases to direct care staff. However, the rising costs of health care have disproportionately impacted workers like direct care staff with more modest salaries. For some workers, the increase in out-of-pocket health care costs may have actually exceeded recent salary increases.

The proposed regulations implement the second phase of an employee health care enhancement (HCE II) initiative to support and sustain provider agencies and their staff, including direct care staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain indispensable direct care staff.

HCE II makes additional funding available to providers of the referenced OMRDD authorized or funded developmental disabilities facilities or services effective January 1, 2007. Funding for HCE II is available at either an annual allocation of \$2500 per employee or \$425 per employee, as follows:

The annual allocation at the \$2500 level is determined by OMRDD based on the total number of employees included in the provider's approved HCE II application multiplied by \$2500. Funding at the \$2500 level is available to providers which (a) submitted an application for HCE II funding at the \$2500 level; and (b) do not offer health care benefits; and (c) were insufficiently funded for health care, as determined by OMRDD. Affected providers were notified by OMRDD of this determination.

The annual allocation at the \$425 level is determined by OMRDD based on the total number of employees included in the provider's approved HCE II application multiplied by \$425. Funding at the \$425 level is available to providers which: (a) offer health care benefits to some or all employees and submitted an application for HCE II funding at the \$425 level; or (b) applied for HCE II funding at the \$2500 level but already received funding at the \$2500 per employee level pursuant to the previous employee health care enhancement (HCE I); or (c) submitted an application at the \$2500 level but have sufficient funding for health care, as determined by OMRDD. Affected providers were notified by OMRDD of this determination.

Day Treatment facilities will receive HCE II funds in the form of variable trend factor increases established according to the above criteria.

To ensure that funds granted to providers are expended for their intended purpose, the regulations require that agencies whose funding applications are approved by OMRDD submit a resolution from the agency governing body (Board of Directors) before any HCE II funds are disbursed to the agency.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

2. Compliance requirements: For providers, there will be some compliance activities associated with the submission of applications for the additional funds and the required governing body or board resolution that will ensure their appropriate expenditure. OMRDD will provide the necessary guidance and assist providers in completion of the required documents to minimize the necessary workload.

3. Professional services: Depending on the labor situation of the individual provider, there may be some need for the advice of a labor relations professional to implement the benefit. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these proposed amendments.

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and administrative issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: As discussed in the Regulatory Impact Statement, the amendments will have only positive economic impacts.

7. Small Business and local government participation: The proposed amendments continue to address an area of concern for both the providers and OMRDD. During the initial phase of this funding initiative, OMRDD surveyed all voluntary provider agencies regarding their various health insurance benefit plans and worked closely with the provider community in the development of the regulations. The funding initiative and the regulatory structure surrounding its implementation were discussed with provider representatives on OMRDD's Provider Council composed of over 40 providers and representatives of provider associations. Membership on the Provider Council is diverse and representative of agencies both large and small from various geographic locations throughout New York State. The particulars were also discussed with the Health Insurance Committee of the Provider Council including representatives of provider associations such as the NYS Association of Community and Residential Agencies, the NYS ARC, and the Cerebral Palsy Association of NYS.

The initial phase of the funding initiative which became effective January 1, 2006 was well received by the provider community. HCE II, as implemented by the proposed amendments, merely builds upon the original health care enhancement initiative so that providers will be familiar with the basic concepts and requirements contained in these proposed regulations.

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

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement a funding initiative (HCE II) that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees. The amendments provide additional funding and will only have positive fiscal impacts for providers.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

As discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments, there will be some compliance activities associated with submission of applications for the additional funds and the required governing body or board resolution that will ensure their appropriate expenditure. OMRDD will provide the necessary guidance and assist providers in completion of the required documents to minimize the necessary workload.

Finally, the amendments will have no adverse impact on providers as a result of the location of their operations (rural/urban) because OMRDD's reimbursement methodologies are primarily based upon costs or budgeted costs of services. Thus, OMRDD's reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees and enhance their ability to hire and retain indispensable direct care staff. While the amendments do provide additional funding for the stated purposes, they will not result in any changes to current staffing levels of the affected facilities and services. There will therefore be no effect on the numbers of jobs and employment opportunities in New York State.

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

#### **Reimbursement Methodologies in Individualized Residential Alternative Facilities**

**I.D. No.** MRD-42-06-00009-P

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

**Proposed action:** Amendment of section 635-10.5(b) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 43.02

**Subject:** Revision of the reimbursement methodologies for residential habilitation services provided under the auspices of OMRDD in supervised and supportive Individualized Residential Alternative (IRA) facilities.

**Purpose:** To simplify price setting and billing procedures for IRAs.

**Public hearing(s) will be held at:** 10:30 a.m., Dec. 4, 2006 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Conference Rm. B, 4th Fl., Albany, NY; and 10:30 a.m., Dec. 5, 2006 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Counsel's Office, Conference Rm., 3rd Fl., 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.

**Text of proposed rule:** • Current paragraphs 635-10.5(b)(7)-(9) are amended as follows:

(7) Except for [IRAs identified in subparagraph (10)(i) of this subdivision and] residential habilitation services provided in the consumer's home or a certified family care home, a monthly price, based upon annual total reimbursable residential habilitation costs, will be established for the 12 months in an annual price period. One monthly supervised IRA price for each annual price period will be established for a provider's supervised IRAs, and one monthly supportive IRA price for each annual price period will be established for a provider's supportive IRAs.

(8) Monthly supervised IRA price.

(i) A monthly supervised IRA price will be effective [at the beginning of an annual price period] for residential habilitation services delivered in a provider's supervised IRAs that have:

(a) a valid operating certificate; and

(b) a site-specific price approved by the director of the Division of the Budget.

(ii) The monthly supervised IRA price shall be determined by taking into account the annual total reimbursable residential habilitation services costs of all supervised IRAs operated by the provider that meet the requirements of clauses (i)(a) and (b) of this paragraph and dividing by 12, and then dividing by the total certified capacities of these sites, less any certified temporary use bed(s).

(a) The full month supervised IRA residential habilitation price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) in accordance with the consumer's Individualized Service Plan (ISP) and residential habilitation plan on each of the 22 days of the enrollment requirement. These are known as countable service days.

(b) One-half of the full month supervised IRA residential habilitation price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services in accordance with the consumer's ISP and residential habilitation plan on each of the 11 days of the enrollment requirement. These are known as countable service days.

(iii) *Newly certified sites.* A newly certified site is an IRA whose reimbursable costs are not already included in the monthly price and at which a provider is initially approved to deliver services pursuant to an operating certificate issued by OMRDD. A newly certified site's annual total reimbursable residential habilitation costs and certified capacity shall be included in the monthly price as calculated in subparagraph (ii) of this paragraph. If 11 countable service days are possible in the month of certification, the new site shall be included in the monthly price in the month of certification. If 11 countable service days are not possible in the month of certification, the new site shall be included in the monthly price effective the month after the month of certification.

(9) Monthly supportive IRA price.

(i) A monthly supportive IRA price will be effective [at the beginning of an annual price period] for residential habilitation services delivered in a provider's supportive IRAs that have:

(a) a valid operating certificate; and

(b) a site-specific price approved by the director of the Division of the Budget.

(ii) The monthly supportive IRA price shall be determined by taking into account the annual total reimbursable residential habilitation services costs of all supportive IRAs operated by the provider that meet the requirements of clauses (i)(a) and (b) of this paragraph and dividing by 12, and then dividing by the total certified capacities of these sites, less any certified temporary use bed(s).

(a) The full month supportive IRA residential habilitation services price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) in accordance with the consumer's ISP and residential habilitation plan on 4 of the 22 days of the enrollment requirement. Services provided on these 4 days must be delivered, initiated or concluded at the site. No more than 2 days of service within a week may be counted toward the 4 day requirement. These 4 days are countable service days.

(b) One-half of the full month supportive IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services in accordance with the consumer's ISP and residential habilitation plan on 2 of the 11 days of the enrollment requirement. Services provided on these 2 days must be delivered, initiated or concluded at the site. No more than 1 day of service within a week may be counted toward the 2 day requirement. These 2 days are countable service days.

(iii) *Newly certified sites. A newly certified site is an IRA whose reimbursable costs are not already included in the monthly price and at which a provider is initially approved to deliver services pursuant to an operating certificate issued by OMRDD. A newly certified site's annual total reimbursable residential habilitation costs and certified capacity shall be included in the monthly price as calculated in subparagraph (ii) of this paragraph. If 2 countable service days are possible in the month of certification, the new site shall be included in the monthly price in the month of certification. If 2 countable service days are not possible in the month of certification, the new site shall be included in the monthly price effective the month after the month of certification.*

• The text of current paragraph 635-10.5(b)(10) is deleted in its entirety and the number reserved.

(10) [Site-specific monthly IRA price] *Reserved.*

(i) Residential habilitation services provided at a supervised or supportive IRA that is initially certified after the beginning of an annual price period, or that is certified before the beginning of an annual price period but for which a site-specific price has not been approved by the director of the Division of the Budget, and which cannot be in the monthly IRA price, shall be reimbursed by a site-specific monthly supervised or supportive IRA price.

(ii) The site-specific monthly IRA price shall be determined by taking into account the site's annual total reimbursable residential habilitation services costs and dividing by 12, and then dividing by the total certified capacity of the site, less any certified temporary use bed(s).

(a) The full month site-specific supervised IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) in accordance with the consumer's ISP and residential habilitation plan on each of the 22 days of the enrollment requirement. These 22 days are countable service days.

(b) One-half of the full month site-specific supervised IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services in accordance with the consumer's ISP and residential habilitation plan on each of the 11 days of the enrollment requirement. These 11 days are countable service days.

(c) The full month site-specific supportive IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) in accordance with the consumer's ISP and residential habilitation plan on 4 of the 22 days of the enrollment requirement. The services provided on these 4 days must be delivered, initiated or concluded at the site. No more than 2 days of service within a week may be counted toward the 4 day requirement. These 4 days are countable service days.

(d) One-half of the full month site-specific supportive IRA price shall be paid for services provided to a consumer who meets the

enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services in accordance with the consumer's ISP and residential habilitation plan on 2 of the 11 days of the enrollment requirement. The services provided on these 2 days must be delivered, initiated or concluded at the site. No more than 1 day of service within a week may be counted toward the 2 day requirement. These 2 days are countable service days.]

Note: Rest of subdivision 635-10.5(b) remains unchanged.

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

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

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

**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 the New York State Mental Hygiene Law Section 13.07.

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

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law by making necessary revisions to the reimbursement methodologies for Home and Community-based (HCBS) Waiver Residential Habilitation Services provided in Individualized Residential Alternative (IRA) facilities. The proposed amendments will simplify price setting and billing procedures for HCBS waiver residential habilitation services provided under the auspices of OMRDD in supervised and supportive IRA facilities.

3. Needs and benefits: From the time of their inception and implementation in New York State, OMRDD has provided funding for the above referenced facilities and services. Such funding is necessary to assure the continued delivery of services to persons with developmental disabilities. The proposed amendments are concerned with revising the reimbursement methodologies applicable to HCBS waiver residential habilitation services provided in IRAs, effective January 1, 2007. As of September 2006 there were approximately 244 providers authorized by New York State to operate IRAs in approximately 3,741 certified sites.

Recently, OMRDD has been working to streamline the price setting and reimbursement methodologies for such services by establishing a single monthly price for all of a given provider's existing sites. This single aggregate monthly price is established at the beginning of a provider's 12 month price period and is assigned a provider identification number for billing purposes. However, under current regulations, OMRDD also establishes an additional site-specific price for each of a provider's newly certified site(s) that begin operation between the beginning of the provider's annual price period and the beginning of the subsequent price period. Each of these newly certified sites (and there may be several for a given provider and price period) must still be assigned its own I.D. number for billing purposes. Thus, under the current system, multiple provider I.D.s necessitate the maintenance of multiple billing accounts which are in effect for only 12 months or less.

The proposed revisions to the current regulations will result in incorporating newly certified sites into the aggregate single monthly agency price upon their certification. This will significantly simplify price setting and billing procedures for these facilities and services by eliminating the need for temporary provider I.D.s and billing accounts for newly certified sites.

4. Costs:

a. Costs to the Agency and to the State and its local governments: The amendments merely simplify price setting and billing procedures. They will not result in any costs, either to the State or to its local governments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. The proposed revisions will not affect the total annual reimbursement for providers of IRA and HCBS waiver residential habilitation services. Therefore, the proposed amendments will not have any fiscal impacts.

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: The proposed amendments will simplify price setting and billing procedures. Since the proposed amendments eliminate the need for multiple temporary provider I.D.s and billing accounts, it can be expected that they will result in some reduction in paperwork and administrative effort, both for OMRDD and its authorized providers of services.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

8. Alternatives: The proposed rule making is necessary to revise existing regulations in order to enable this simplification of price setting and billing procedures. OMRDD did not consider other ways to simplify price setting and billing for IRAs because the simplification reflected in the proposed amendments is the most obvious and simple way to reform the system.

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

10. Compliance schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act so as to enable an effective date of January 1, 2007. Except for billing changes associated with the simplification of the process, there will be no new required compliance activities or requirements as a result of the proposed amendments.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: These proposed regulatory amendments will apply to voluntary not-for-profit corporations that provide Home and Community-based (HCBS) Waiver services in Individualized Residential Alternative (IRA) facilities. As of September 2006 there were approximately 244 providers authorized by New York State to operate IRAs in approximately 3,741 certified sites. The OMRDD has determined, through a review of the certified cost reports, that the organizations which operate the above referenced 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 proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will continue to provide appropriate funding for small business providers of developmental disabilities services. Recently, OMRDD has been working to streamline the price setting and reimbursement methodologies for such services by establishing a single monthly price for all of a given provider's existing sites. This single aggregate monthly price is established at the beginning of a provider's 12 month price period and is assigned a provider identification number for billing purposes. However, under current regulations, OMRDD also establishes an additional site-specific price for each of a provider's newly certified site(s) that begin operation between the beginning of the provider's annual price period and the beginning of the subsequent price period. Each of these newly certified sites (and there may be several for a given provider and price period) must still be assigned its own I.D. number for billing purposes. Thus, under the current system, multiple provider I.D.s necessitate the maintenance of multiple billing accounts which are in effect for only 12 months or less.

The proposed revisions to the current regulations will result in incorporating newly certified sites into the aggregate single monthly agency price upon their certification. This will significantly simplify price setting and billing procedures for these facilities and services by eliminating the need for temporary provider I.D.s and billing accounts for newly certified sites. Since the proposed revisions will not affect the total annual reimbursement for providers of IRA and HCBS waiver residential habilitation services, the amendments will not have any fiscal impacts, either for small business providers of services or for local governments.

2. Compliance requirements: There are no additional compliance requirements for small businesses or local governments resulting from the

implementation of most of these proposed amendments. The proposed amendments will simplify price setting and billing procedures. Since the proposed amendments eliminate the need for multiple temporary provider I.D.s and billing accounts, it can be expected that they will result in some reduction in paperwork and administrative effort, both for OMRDD and its authorized providers of services. Except for billing changes associated with the simplification of the process, there will be no new required compliance activities or requirements as a result of the proposed amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The proposed amendments do not alter this requirement. Therefore, no additional professional services are required as a result of most of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: There will be no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these proposed amendments.

5. Economic and technological feasibility: The proposed amendments are concerned with price setting in the affected facilities or services, and only revise the reimbursement methodologies which describe the ways in which OMRDD calculates the appropriate reimbursement of such facilities and services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: The proposed amendments will not have any adverse economic impact on regulated parties or local governments. Therefore, regulatory approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small Business and local government participation: The proposed revisions have been discussed with provider representatives on OMRDD's Provider Council composed of over 40 providers and representatives of provider associations. Membership on the Provider Council is diverse and representative of agencies both large and small from various geographic locations throughout New York State. The proposed revisions were an agenda item in the Provider Council meeting of September 28, 2006.

In addition, OMRDD is required to hold public hearings only on those amendments to section 635-10.5 as they may affect reimbursement of the room and board components of the community residence fees. These hearings are scheduled to be held on December 4, 2006 and on December 5, 2006 as set forth in the Notice of Proposed Rule Making.

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

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. The amendments will have no adverse impact on providers as a result of the location of their operations (rural/urban) because OMRDD's reimbursement methodologies are primarily based upon costs or budgeted costs of services. Thus, OMRDD's reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

The proposed amendments will revise the reimbursement methodologies for Home and Community-based (HCBS) Waiver Residential Habilitation Services provided in Individualized Residential Alternative (IRA) facilities. The proposed amendments merely simplify price setting and billing procedures for HCBS waiver residential habilitation services provided under the auspices of OMRDD in supervised and supportive IRA facilities.

The proposed amendments will not have any effect on local governments.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. The proposed amendments will revise the reimbursement methodologies for Home and Community-based (HCBS) Waiver Residential Habilitation Services provided in Individualized Residential Alternative (IRA) facilities. The proposed amendments merely simplify price setting and billing procedures for HCBS waiver residential habilitation services provided under the auspices of OMRDD in supervised and supportive IRA facilities. There will therefore be no effect on the numbers of jobs and employment opportunities in New York State.

## Department of Motor Vehicles

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

#### Sullivan County Motor Vehicle Use Tax

I.D. No. MTV-42-06-00016-P

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

**Proposed action:** This is a consensus rule making to amend section 29 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** Sullivan County motor vehicle use tax.

**Purpose:** To impose a Sullivan County motor vehicle use tax.

**Text of proposed rule:** Section 29.12 is amended by adding a new subdivision (cc) to read as follows:

(cc) Sullivan County. The Sullivan County Legislature adopted a resolution on September 21, 2006, to establish a Sullivan County Motor Vehicle Use Tax. The County Manager of Sullivan County entered into an agreement with the Commissioner of Motor Vehicles for the collection of the tax in accordance with the provisions of this Part, for the collection of such tax on original registrations made on and after January 1, 2007 and upon the renewal of registrations expiring on and after March 1, 2007. The County Treasurer is the appropriate fiscal officer, except that the County Attorney is the appropriate legal officer of Sullivan County referred to in this Part. The tax due on passenger motor vehicles for which the registration fee is established in paragraph (a) of subdivision (6) of Section 401 of the Vehicle and Traffic Law shall be \$5.00 per annum on such motor vehicles weighing 3500 lbs. or less and \$10.00 per annum for such motor vehicles weighing in excess of 3500 lbs. The tax due on trucks, buses and other commercial motor vehicles for which the registration fee is established in subdivision (7) of Section 401 of the Vehicle and Traffic Law used principally in connection with a business carried on within Sullivan County, except for vehicles used in connection with the operation of a farm by the owner or tenant thereof shall be \$10.00 per annum.

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

**Data, views or arguments may be submitted to:** Ida L. Traschen, Supervising Attorney, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

#### Consensus Rule Making Determination

This proposed regulation would create a new 15 NYCRR Part 29.12(cc) to provide for the collection of an Sullivan County motor vehicle use tax by the Department of Motor Vehicles. Pursuant to the authority contained in Tax Law section 1202(c) and Vehicle and Traffic Law section 401(6)(d)(ii), the Commissioner must collect a motor vehicle use tax if a county has enacted a local law requiring the collection of such tax.

On September 21, 2006, the Sullivan County Legislature enacted a resolution requiring that a motor vehicle use tax be imposed on passenger and commercial vehicles. Pursuant to this resolution, the Commissioner is required to collect the tax on behalf of the county and transmit the revenue to the County, minus the administrative costs required to process the tax. The tax is five dollars per annum on a passenger vehicle weighing 3,500 pounds or less, ten dollars per annum on a passenger vehicle weighing more than 3,500 pounds, and ten dollars per annum on all commercial vehicles. There are certain exempt vehicles, such as vehicles used by non-profit religious, charitable, or educational organizations, and vehicles used only in connection with the operation of a farm by the owner or tenant of the farm.

This is a consensus rule because the Commissioner has no discretion about whether to collect the tax, i.e., it must be collected per the mandate of the Sullivan County resolution. The merits of the tax may have been debated before the Sullivan County Legislature, but are no longer the

subject of debate—it is now the law. DMV is merely carrying out the will expressed by the County Legislature.

#### Job Impact Statement

A Job Impact Statement is not submitted with this rule making, because it will not have any impact on job creation or development in New York State.

## Public Service Commission

### NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-23-05-00014-P	June 8, 2005
PSC-04-06-00019-P	January 25, 2006
PSC-10-06-00015-P	March 8, 2006
PSC-28-06-00012-P	July 12, 2006

### NOTICE OF ADOPTION

#### Disposition of Property Tax Refunds by Aquarion Water Company of Sea Cliff

I.D. No. PSC-11-06-00015-A

Filing date: Sept. 27, 2006

Effective date: Sept. 27, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order approving the terms of a joint proposal that allocates benefits received in a property tax settlement between Aquarion Water Company of Sea Cliff and the County of Nassau in which Aquarion is directed to provide refunds to its customers.

**Statutory authority:** Public Service Law, section 113-2

**Subject:** Disposition of property tax refunds received by utilities.

**Purpose:** To determine the disposition of property tax refunds.

**Substance of final rule:** The Commission adopting the terms of a Joint Proposal that allocates benefits received in a property tax settlement between Aquarion Water Company of Sea Cliff (Aquarion) and the County of Nassau, and directed Aquarion to issue refunds to its customers, 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-W-0161SA1)

### NOTICE OF ADOPTION

#### Issuance of Debt by Southside Water Inc.

I.D. No. PSC-18-06-00011-A

Filing date: Sept. 29, 2006

Effective date: Sept. 29, 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 Southside Water Inc.'s request to finance a meter replacement project with a surcharge to repay the loan, and an escrow account to monitor the surcharge funds.

**Statutory authority:** Public Service Law, sections 89-c(10) and 89-f

**Subject:** Issuance of debt and water rates and charges.

**Purpose:** To approve the issuance of debt in order to purchase and install water meters and related software and to recover the associated costs from customers.

**Substance of final rule:** The Commission adopted an order approving Southside Water Inc.'s request to finance a meter replacement project with a surcharge to repay the loan, and an escrow account to monitor the surcharge funds, 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-W-0429SA1)

### NOTICE OF ADOPTION

#### Transfer of Property by Consolidated Edison Company of New York, Inc. and 405 West 53rd Development Group, LLC

**I.D. No.** PSC-19-06-00012-A

**Filing date:** Sept. 28, 2006

**Effective date:** Sept. 28, 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. and 405 West 53rd Development Group, LLC's request for the transfer of certain real property located at 405-427 W. 53rd St., New York, NY and for related relief.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of property.

**Purpose:** To approve Consolidated Edison Company of New York, Inc.'s request to transfer its property located at 405-427 W. 53rd St., New York, NY to 405 West 53rd Development Group, LLC.

**Substance of final rule:** The Commission adopted an order approving the joint petition by Consolidated Edison Company of New York, Inc. and 405 West 53rd Development Groups, LLC to transfer certain real property located at 405-427 West 53rd Street, New York, New York, 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-M-0407SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Battery Place Green, LLC

**I.D. No.** PSC-22-06-00018-A

**Filing date:** Sept. 28, 2006

**Effective date:** Sept. 28, 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 Battery Place Green, LLC's request to submeter electricity at Site 3, Battery Park City, New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Purpose:** To approve Battery Place Green, LLC's request to submeter electricity at Site 3, Battery Park City, New York, NY located in the territory of Consolidated Edison Company of New York, Inc.

**Substance of final rule:** The Public Service Commission adopted an order approving Battery Place Green, LLC's request to submeter electricity at Site 3, Battery Park City, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0519SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Central Towers Preservation, LP

**I.D. No.** PSC-22-06-00025-A

**Filing date:** Sept. 27, 2006

**Effective date:** Sept. 27, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order approving Central Towers Preservation, LP's request to submeter electricity at 400 Central Ave., Albany, NY, located in the territory of National Grid.

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

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

**Purpose:** To approve Central Towers Preservation, LP's request to submeter electricity at 400 Central Ave., Albany, NY, located in the territory of National Grid.

**Substance of final rule:** The Commission adopted an order approving Central Towers Preservation, LP's request to submeter electricity at 400 Central Avenue, Albany, New York, located in the territory of National Grid.

**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-0520SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Herbert E. Hirschfeld, P.E.

**I.D. No.** PSC-22-06-00027-A

**Filing date:** Sept. 27, 2006

**Effective date:** Sept. 27, 2006

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

**Action taken:** The commission, on Sept. 20, 2006, adopted an order approving Mr. Herbert E. Hirschfeld, P.E.'s petition on behalf of DVL Inc. to submeter electricity at Claremont Gardens at Van Cortlandt Ave. and Rte. 9, Ossining, NY, located in the territory of consolidated Edison Company of New York, Inc., filed in Case 26998.

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

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

**Purpose:** To approve a request to submeter electricity at Claremont Gardens at Van Cortlandt Ave. and Rte. 9, Ossining, NY.

**Substance of final rule:** The Commission adopted an order approving Mr. Herbert E. Hirschfeld, P.E.'s petition on behalf of DVL Inc. to submeter electricity at Claremont Gardens at Van Cortlandt Avenue and Route 9, Ossining, New York.

**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-0564SA1)

## NOTICE OF ADOPTION

### Submetering of Electricity by Community Development Association, LLC

**I.D. No.** PSC-25-06-00015-A

**Filing date:** Sept. 28, 2006

**Effective date:** Sept. 28, 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 Community Development Association, LLC's request to submeter electricity at 31 Water St., Jamestown, NY, located in the territory of the Jamestown Board of Public Utilities.

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

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

**Purpose:** To approve Community Development Association, LLC's request to submeter electricity at 31 Water St., Jamestown, NY.

**Substance of final rule:** The Public Service Commission adopted an order approving Community Development Association, LLC's request to submeter electricity at 31 Water Street, Jamestown, New York, located in the territory of the Jamestown Board of Public Utilities.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0576SA1)

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Water Rates and Charges by United Water New York Incorporated

**I.D. No.** PSC-42-06-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to adopt, adopt with changes, or reject the terms of the joint proposal executed by the parties recommending approval of various changes in the rates, charges, rules and regulations contained in United Water New York Incorporated's tariff schedule, P.S.C. No. 1—Water.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** To consider the joint proposal executed by the parties on Sept. 29, 2006, to increase United Water New York Incorporated's annual revenues by about \$9.8 million of 23.0 percent for the first year of a multi-year rate plan, and additional increases of \$1.1 million or 2.1 percent and \$1.0 million or 1.8 percent for the second and third years, along with proposed separate surcharges for the company's Long Term Main Renewal Program, and a future major water supply project and a revenue adjustment clause.

**Public hearing(s) will be held at:** 10:00 a.m., Oct. 30, 2006 (Evidentiary Hearing) at Ramapo Town Hall, 237 Rte. 59, Suffern NY; and 3:00 p.m. and 7:30 p.m., Oct. 30, 2006 (Public Statement Hearings) at Ramapo Town Hall, 237 Rte. 59, Suffern, NY. There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Web Site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case No. 06-W-0131.

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

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

**Substance of proposed rule:** On January 30, 2006, United Water New York Incorporated (UWNY or the Company) filed a proposed three year rate plan requesting additional annual revenues of \$15.1 million or 33.8% for the year ending December 31, 2007, \$4.6 million or 7.7% for the second year and \$3.3 million or 5.1% for the third year. The company also proposed separate surcharges to recover costs for a future major water supply project and for a Long Term Main Renewal Program (LTMRP). The proposed LTMRP surcharge would produce approximately \$500,000 in additional revenue. On February 8, 2006, the Commission initially suspended the effective date of the filing through June 28, 2006; and, on June 20, 2006, the filing was further suspended through December 28, 2006. In a separate proceeding, Case 06-W-0244, the company is seeking approval to merge with United Water South County Water Inc. (UWSCW) and, upon approval of the merger, it is proposed that UWSCW's customers be billed at UWNY's proposed rates. Negotiation among the parties in this rate proceeding led to a Joint Proposal that was executed on September 29, 2006. The specific terms of the Joint Proposal include the following:

1. Base rates would be increased to generate additional annual revenue of approximately \$9.8 million (23.0%) during 2007, \$1.1 million (2.1%) during 2008, and \$1.0 million (1.8%) during 2009.

2. The new revenue levels in all three years would be based in part on a cost of common equity of 9.6%. As an incentive for the Company to operate efficiently, it would be able to retain 100% of average actual equity earnings of up to 10.75% over three years, 50% of average equity earnings above 10.75% but less than or equal to 11.25% over three years, and 25% of average equity earnings in excess of 11.25% over three years. The remaining share of earnings above 10.75% would be deferred for the benefit of ratepayers.

3. Customers would be subject to a surcharge, intended to generate additional annual revenues of approximately \$.6 million, \$1.2 million, and \$1.9 million in the years 2007 through 2009, to allow the Company to begin to recover promptly a return on and depreciation expense associated with actual incremental infrastructure capital investment beyond that reflected in the previously summarized base rate revenue increases, including new capital invested to replace fire hydrants. Examples of projects that would be covered by this surcharge include a new pump station at the Spring Valley reservoir, and main replacements in Haverstraw, Orangetown, Sloatsburg, Ramapo, and Clarkstown.

4. Customers would also be subject to a second surcharge, expected to generate additional annual revenues of approximately \$.17 million, \$.94 million, and \$1.1 million in the years 2007 through 2009, to allow the Company to begin to recover promptly a return on and depreciation and deferred federal income tax expenses associated with short- and medium-term projects to augment the Company's water supply. These projects are needed, among other reasons, to help increase the Company's peak day water supply from 45.5 million gallons currently to 52.6 million gallons by 2015 and to help increase the Company's average day water supply from 33.0 million gallons currently to 34.5 million gallons by 2015. Examples of specific projects that might be covered by this surcharge in the short- and medium-term are listed in Exhibit 8 of the Joint Proposal. There would be another Commission proceeding to consider the Company's long-term water supply plans before any related costs could be recovered.

5. The Company would undertake an enhanced fire hydrant maintenance program.

6. Three performance milestones would be established, for peak day water supply, average day water supply, and other construction commitments, respectively, and the Company would be liable to credit customers up to a maximum of \$750,000 per year for failure to meet all three milestones except where its failure to do so is a result of reasons beyond its control.

7. An adjustment clause would also be adopted so that the Company could flow back to or recover from customers all differences between forecast and actual (1) metered revenues and (2) water production costs (including electricity, purchased water, and chemicals) and, in the right circumstances, 85% of the differences between forecast and actual property tax expenses. Any property tax refunds received during the rate plan would be deferred with interest for future disposition in a manner to be determined later.

8. Exhibit 1 of the Joint Proposal includes an overall projection of bill impacts, compounded over three years, including the effects of the base rate and surcharge increases. Overall bill increases are projected as follows:

Customer Type	Compounded Bill Increase Over Three years
Average Residential Single Family	26.4%
Average Residential Multi-Family	42.9%
Average Non-Residential	36.8%
Medium Large Non-Residential	52.9%
Large Non-Residential	63.1%

There would be considerable variation around these forecasts, depending on individual customer usage.

UWNY serves approximately 70,240 residential, commercial and fire protection customers throughout Rockland County. UWSCW serves approximately 485 residential, commercial and fire protection customers located within portions of the Towns of Tuxedo, Warwick and Monroe in Orange County. The Commission may adopt the terms of the Joint Proposal related to the multi-year rate plan, adopt the terms with changes, or reject the terms and adopt others.

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0131SA1)

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

**Merger of United Water New York Incorporated and United Water South County Water Inc.**

**I.D. No.** PSC-42-06-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to adopt, adopt with changes, or reject the terms of the joint proposal executed by the parties recommending unconditional approval of a petition to merge United Water New York Incorporated and United Water South County Water Inc., with United Water New York Incorporated as the surviving corporation.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c and h and 108

**Subject:** Merger of United Water New York Incorporated and United Water South County Water Inc.

**Purpose:** To approve the merger of United Water New York Incorporated and United Water South County Water Inc. with United Water New York Incorporated as the surviving corporation.

**Public hearing(s) will be held at:** 10:00 a.m., Oct. 30, 2006 (Evidentiary Hearing) at Ramapo Town Hall, 237 Rte. 59, Suffern, NY; and 3:00 p.m. and 7:30 p.m., Oct. 30, 2006 (Public Statement Hearings) at Ramapo Town Hall, 237 Rte. 59, Suffern, NY. There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Web Site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case No. 06-W-0244.

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

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

**Substance of proposed rule:** On February 28, 2006, United Water New York Incorporated (UWNY) and United Water South County Water Inc. (UWSCW) filed a joint petition requesting Public Service Commission approval to merge UWNY with UWSCW and to dissolve UWSCW upon receiving Commission approval. United Waterworks Inc. (parent company of UWNY) received approval to acquire UWSCW's stock in May of 2004. Negotiation among the parties in this merger proceeding led to a Joint Proposal that was executed on September 29, 2006. The parties are recommending unconditional approval of the merger with UWNY as the surviving corporation. UWNY serves approximately 70,240 residential, commercial and fire protection customers throughout Rockland County. UWSCW serves approximately 485 residential, commercial and fire protection customers located within portions of the Towns of Tuxedo, Warwick and Monroe in Orange County. The Commission may adopt the terms of the Joint Proposal related to the merger, adopt the terms with changes, or reject the terms and adopt others.

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0244SA1)

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

**Benchmark Rate Cap for Telephone Business Services**

**I.D. No.** PSC-42-06-00010-P

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

**Proposed action:** The Commission is considering establishing a benchmark rate cap for telephone business services in order to determine eligibility for the Transition Fund.

**Statutory authority:** Public Service Law, sections 94(2) and 97

**Subject:** Benchmark rate cap for telephone business services.

**Purpose:** To consider setting a benchmark rate cap for telephone business services in order to determine eligibility for the Transition Fund.

**Substance of proposed rule:** The Commission is considering establishing a benchmark rate cap for telephone business services in order to determine eligibility for the Transition Fund as set out in the Notice Soliciting Comments issued on September 29, 2006 in Case 02-C-0595.

**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.  
(02-C-0595SA1)

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

**Submetering of Electricity by 225 5th LLC**

**I.D. No.** PSC-42-06-00011-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by 225 5th LLC to submeter electricity at 225 Fifth Ave., New York, NY.

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

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

**Purpose:** To consider the request of 225 5th LLC to submeter electricity at 225 Fifth Ave., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by 225 5th LLC to submeter electricity at 225 Fifth Avenue, New York, New York.

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

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

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

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

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

(06-E-1144SA1)

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

**Annual Reconciliation of Gas Expenses and Gas Cost Recoveries by Various Local Gas Distribution Companies and Municipalities**

**I.D. No.** PSC-42-06-00012-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the filings made by various local gas distribution companies (LDC) and municipalities regarding their annual reconciliation of gas expenses and gas cost recoveries.

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

**Subject:** Annual reconciliation of gas expenses and gas cost recoveries.

**Purpose:** To consider the filings of various LDCs and municipalities regarding their annual reconciliation of gas expenses and gas cost recoveries.

**Substance of proposed rule:** The Commission is considering whether to approve, reject, or modify the filings by sixteen local distribution companies and two municipalities reconciling purchased gas costs and gas cost adjustment recoveries for the twelve months ended August 31, 2006.

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

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

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

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

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

(06-G-1168SA1)

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## Department of State

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**EMERGENCY  
RULE MAKING**

**Appliance and Equipment Energy Efficiency Standards**

**I.D. No.** DOS-42-06-00002-E

**Filing No.** 1154

**Filing date:** Sept. 27, 2006

**Effective date:** Sept. 27, 2006

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

**Action taken:** Addition of Chapter XIX, Parts 910 and 911 to Title 19 NYCRR.

**Statutory authority:** Energy Law, section 16-106

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

**Specific reasons underlying the finding of necessity:** Energy Law, section 16-106(2) requires that matters which are necessary to insure the proper implementation and enforcement of the provisions of Article 16 of the Energy Law dealing with Appliance and Equipment Energy Efficiency Standards be adopted on and after June 30, 2006.

**Subject:** Appliance and equipment energy efficiency standards.

**Purpose:** To adopt provisions dealing with implementation and enforcement of art. 16 of the Energy Law.

**Text of emergency rule:** Chapter XIX Appliance and Equipment Energy Efficiency Standards

*Part 910 General Requirements.*

*Section 910.1. Purpose and applicability.*

*(a) Article 16 of the Energy Law provides for the testing, certification, and enforcement of efficiency standards for certain products identified in subdivision (b) of this section, and the administration of such standards by the Secretary of State.*

*(b) The provisions of this Part shall be applicable to the following new products which are sold, offered for sale or installed in New York State:*

- (1) automatic commercial ice cube machines;*
- (2) ceiling fan light kits;*
- (3) commercial pre-rinse spray valves;*
- (4) commercial refrigerators, freezers and refrigerator-freezers;*
- (5) consumer audio and video products;*
- (6) illuminated exit signs;*
- (7) incandescent reflector lamps;*
- (8) very large commercial packaged air-conditioning and heating equipment;*
- (9) metal halide lamp fixtures;*
- (10) pedestrian traffic signal modules;*
- (11) power supplies;*
- (12) torchiere lighting fixtures;*
- (13) unit heaters; and*
- (14) vehicular traffic signal modules.*

*Section 910.2 Definitions. For the purposes of this part, the following terms shall have the meanings ascribed herein.*

*(a) "Active mode" means the condition in which the input of a power supply or consumer audio and video equipment is connected to the line voltage AC and the output is connected to a DC or an AC load, fulfilling one or more of its main functions and drawing a fraction of the power supply's nameplate power output greater than zero.*

*(b) "Automatic commercial ice-cube maker" means a factory-made assembly, not necessarily shipped in one package, consisting of a con-*

densing unit and ice-making section operating as an integrated unit, with means for making and harvesting cube-type ice. It may also include means for storing or dispensing cube-type ice, or both.

(c) "Ballast" means a device used with an electric discharge lamp to obtain necessary circuit conditions (voltage, current, and waveform) for starting and operating the lamp.

(d) "Ceiling fan light kit" means the equipment used to provide light from a ceiling fan. This equipment may be part of the unit such that the ceiling fan light kit is hardwired to the ceiling fan, or attachable such that the ceiling fan light kit is not, at the time of sale, physically attached to the fan. Attachable ceiling fan light kits may be included inside the ceiling fan package at the time of sale, or sold separately for subsequent attachment to the fan.

(e) "Very large commercial package air conditioning and heating equipment" means air-cooled, water-cooled, evaporatively-cooled, or water source (not including ground water source) electrically operated, unitary central air conditioners and central air conditioning heat pumps for commercial application rated at or above two hundred forty thousand BTU per hour and below seven hundred sixty thousand BTU per hour (cooling capacity).

(f) "Commercial pre-rinse spray valve" means a hand-held device designed to spray water on dishes, flatware and other food service items for the purpose of removing food residue prior to the placement of such items in a commercial automatic dishwasher.

(g) "Commercial refrigerator, freezer, and refrigerator-freezer" means refrigeration equipment that:

(1) is not a consumer product as defined by 42 USC 6291;

(2) is not designed and marketed exclusively for medical, scientific, or research purposes;

(3) operates at a chilled, frozen, combination chilled/frozen, or variable temperature;

(4) displays or stores merchandise and other perishable materials either horizontally, semi-vertically, or vertically;

(5) has transparent or solid doors, sliding or hinged doors, a combination of hinged, sliding, transparent or solid doors;

(6) is designed for pull-down temperature applications or holding temperature applications; and

(7) is connected to a self-contained condensing unit.

(h) "Compact audio product," also known as a mini, mid, micro, or shelf audio system, means an integrated audio system encased in a single housing that includes an amplifier and radio tuner, attached or separable speakers, and can reproduce audio from one or more of the following media: magnetic tape, CD, DVD, or flash memory. "Compact audio product" does not include products that can be independently powered by internal batteries or that have a powered external satellite antenna, or that can provide a video output signal.

(i) "Consumer audio and video product" means televisions, compact audio products, digital versatile disc players, digital versatile disc recorders, and digital television adapters.

(j) "Digital television adapter" means a commercially available electronic product for which the sole purpose is the conversion of digital video terrestrial broadcast signals to analog NTSC video signals for use by a TV or VCR.

(k) "Digital versatile disk" (DVD) means a laser-encoded plastic medium capable of storing a large amount of digital audio, video and computer data.

(l) "DVD player" means a commercially available electronic product encased in a single housing that includes an integral power supply and for which the sole purpose is the decoding of digitized video signals on a DVD.

(m) "DVD recorder" means a commercially available electronic product encased in a single housing that includes an integral power supply and for which the sole purpose is the production or recording of digitized audio and video signals on a DVD. "DVD recorder" does not include models that have an EPG function.

(n) "Digital video recorder (DVR)" means a device which can record video signals onto a hard disk drive or other device that can store the images digitally. "DVR" does not include models that have an EPG function.

(o) "Electronic programming guide (EPG)" means an application that provides an interactive, onscreen menu of TV listings, and that downloads program information from the vertical blanking interval of a regular TV signal.

(p) "Illuminated exit sign" means an internally-illuminated sign that is designed to be permanently fixed in place and used to identify an exit; a

light source illuminates the sign or letters from within, and the background of the exit sign is not transparent.

(q) "Incandescent reflector lamp" means a lamp which is not colored or designed for rough or vibration service applications, that has an inner reflective coating on the outer bulb to direct the light, an E26 medium screw base, and a rated voltage or voltage range that lies at least partially within one hundred fifteen to one hundred thirty volts, and that falls into one of the following categories:

(1) a bulged reflector or elliptical reflector bulb shape and which has a diameter which equals or exceeds 2.25 inches; or

(2) a reflector, parabolic aluminized reflector, or similar bulb shape and which has a diameter of 2.25 to 2.75 inches.

(r) "Metal halide lamp" means a high intensity discharge lamp in which the major portion of the light is produced by radiation of metal halides and their products of dissociation, possibly in combination with metallic vapors.

(s) "Metal halide lamp fixture" means a light fixture designed to be operated with a metal halide lamp and a ballast for a metal halide lamp.

(t) "No load mode" means the condition in which the input of a power supply is connected to an AC source consistent with the power supply's nameplate AC voltage, and the output is not connected to a product or any other load.

(u) "Pedestrian traffic signal module" means an electrically operated traffic control device composed of one or more indications which is erected for the exclusive purpose of directing pedestrian traffic at signalized locations. It consists of a light source, lens, and all parts necessary for operation.

(v) "Power supply" means a single voltage external AC to DC or AC to AC power supply included with other retail products and single voltage external AC to DC or AC to AC power supply sold separately.

(w) "Single-voltage external AC to DC or AC to AC power supply" means a device that:

(1) is designed to convert line voltage AC input into lower voltage DC or AC output;

(2) is able to convert to only one DC or AC output voltage at a time;

(3) is sold with, or intended to be used with, a separate end-use product that constitutes the primary load;

(4) is contained within a separate physical enclosure from the end-use product;

(5) is connected to the end-use product via a removable or hard-wired male/female electrical connection, cable, cord, or other wiring;

(6) does not have batteries or battery packs that physically attach directly (including those that are removable) to the power supply unit;

(7) does not have a battery chemistry or type selector switch and an indicator light; or does not have a battery chemistry or type selector switch and a state of charge meter; and

(8) has a nameplate output power less than or equal to two hundred fifty watts.

(x) "Standby-passive mode" means the condition in which a power supply or consumer audio and video product is connected to a power source, and does not fulfill its main function, and can be switched to active mode with the remote control unit or an internal signal.

(y) "Television" (TV) means a commercially available electronic product consisting of a tuner/receiver and a monitor encased in a single housing, which is designed to receive and display an analog or digital video television signal broadcast by an antenna, satellite, cable, or broadband source. "Television" does not include multifunction TVs which have VCR, DVD, DVR, or EPG functions.

(z) "Torchiere lighting fixture" means a portable electric lighting fixture with a reflective bowl that is designed to direct light upward onto a ceiling so as to produce indirect illumination on the surfaces below.

(aa) "Unit heater" means a self-contained, vented fan-type commercial space heater that uses natural gas or propane, and that is designed to be installed without ducts within a heated space, except that such term does not include any products covered by federal standards established pursuant to 42 U.S. Code section 6291 and subsequent sections or any product that is a direct vent, forced flue heater with a sealed combustion burner.

(bb) "Vehicular traffic signal module" means an electrically operated standard 8-inch (200mm) or 12-inch (300mm) round traffic control device composed of one or more indications which is erected for the exclusive purpose of directing vehicular traffic at signalized locations. It consists of a light source, lens, and all parts necessary for operation. It communicates traffic control messages through red, amber and green colors.

(cc) "Video cassette recorder" (VCR) means a commercially available analog recording device that includes an integral power supply and which records television signals onto a tape medium for subsequent viewing.

Part 911 Preempted standards.

Section 911.1

(a) Section 16-106(1)(b) of Article 16 of the Energy Law provides that no standard adopted pursuant to Article 16 shall go into effect if federal government energy efficiency performance standards regarding such products preempt state standards unless preemption has been waived pursuant to federal law. Sections 135 and 136 of the federal Energy Policy Act of 2005 provides for energy conservation standards for certain consumer products and commercial equipment to be promulgated by the United States Department of Energy, which standards preempt state regulation except as provided for in 42 United States Code, Section 6297.

(b) Sections 135 and 136 of the Energy Policy Act of 2005 provide that the Department of Energy shall promulgate regulations for energy conservation standards for the following products:

- (1) automatic commercial ice cube machines;
- (2) ceiling fan light kits;
- (3) commercial pre-rinse spray valves;
- (4) commercial refrigerators, freezers and refrigerator-freezers;
- (5) illuminated exit signs;
- (6) very large commercial packaged air-conditioning and heating equipment;
- (7) pedestrian traffic signal modules;
- (8) torchiere lighting fixtures;
- (9) unit heaters; and
- (10) vehicular traffic signal modules.

(c) The Secretary of State, in consultation with the President of the New York State Energy Research and Development Authority, has determined that it is not in the interests of New York State to petition the Secretary of Energy for a waiver of products enumerated in subdivision (b) at this time. The Secretary reserves the right to petition for such waiver if it is determined to be in the interests of New York State.

**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 25, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Steven Rocklin, Department of State, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: srocklin@dos.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory Authority

Paragraph b, subdivision 1 of Energy Law section 16-106 authorizes the Secretary of State, in consultation with the President of the New York State Energy Research and Development Authority ("NYSERDA"), to promulgate regulations establishing energy efficiency performance standards for products listed in subdivision 1 of section 16-104. It further provides that no standard shall go in to effect if federal government energy efficiency performance standards regarding such product preempt state standards unless preemption has been waived pursuant to federal law.

##### 2. Legislative Objectives

Article 16 of the Energy Law, entitled Appliance and Equipment Energy Efficiency Standards, was enacted into law as Chapter 431 of the Laws of 2005. It sets forth provisions for the testing, certification, and enforcement of efficiency standards for certain new products which are sold, offered for sale, or installed in New York State. Although no purpose is explicitly set forth in the statute, its implicit purpose is clearly to reduce or restrain growth in the use of energy by mandating that specified appliances use electrical energy and water in a more efficient manner. The Legislature listed fourteen specific categories of appliances in Article 16 for which efficiency standards are required to be adopted. When Article 16 was enacted, the Legislature considered the possibility that the Federal government might adopt standards for such appliances at some future date, and provided that any standards which might be adopted by New York State would not remain effective if preempted by federal standards.

Subsequent to the enactment of Article 16, the United States Congress enacted the Energy Policy and Conservation Act (EPCA) of 2005 (42 U.S.C. 6291 et seq.). Sections 135 and 136 of the Act direct the Department of Energy to establish energy efficiency standards for certain categories of appliances. There are ten categories of appliances regulated pursuant to EPCA that are also specified in Article 16. These categories are:

- automatic commercial ice cube machines;
- ceiling fan light kits;
- commercial pre-rinse spray valves;

- commercial refrigerators, freezers and refrigerator-freezers;
- illuminated exit signs;
- very large commercial packaged air-conditioning and heating equipment;
- pedestrian traffic signal modules;
- torchiere lighting fixtures;
- unit heaters; and
- vehicular traffic signal modules.

Section 6297 of the Energy Policy and Conservation Act provides that energy conservation standards promulgated by the Department of Energy supersede any state regulation with regard to testing and labeling requirements [42 U.S.C. 6297(a)(1)(A)]; however, there are provisions in EPCA which permit States to petition the Department of Energy for a waiver of Federal preemption [42 U.S.C. 6297(d)]. Since Federal standards have been set prior to June 30, 2006, the purposes of Article 16 would not be advanced by promulgating standards for products for which no waiver of Federal preemption has been sought.

##### 3. Needs and Benefits

The proposed rule would serve to notify regulated parties and other affected entities and persons that the Secretary of State, in consultation with the President of NYSERDA, has determined that it is not in the interests of the State of New York at this time to petition the Secretary of Energy for a waiver for products subject to efficiency standards pursuant to EPCA. Any waiver received would require that these products comply with separate New York State standards. However, the rule provides that the Secretary of State reserves the right to petition for a waiver at such time as it is determined to be in the interests of New York State.

This rule is needed so that regulated parties and other affected entities or persons will have a clear understanding that New York State does not intend at this time to seek a waiver from the Secretary of Energy to permit the implementation of State efficiency standards. Thus, regulated parties will not need to expend efforts to bring covered products into compliance with New York State specific standards in addition to Federal standards.

The proposed rule will benefit regulated parties by reducing costs for testing and for certification to State standards. The proposed rule would also remove uncertainty with regard to whether a petition to the Secretary of Energy would be successful, in whole or part, and thereby force regulated parties to comply with separate New York State standards. The rule will also reduce potential costs related to tracking and segregating products to be sold within New York State from products intended to be sold in other states.

The proposed rule will also benefit certain affected parties by allowing for a timely implementation of Federal appliance efficiency standards.

##### 4. Costs

a. Costs to Regulated Parties for Implementation of and Compliance with the Rule:

The proposed rule will not increase costs for regulated parties, in that it requires no action on the part of such parties.

b. Costs to the Agency, the State, and Local Governments for the Implementation and Continuation of the Rule:

The proposed rule will reduce costs to the Department of State by relieving it of the need to develop efficiency standards, test procedures, and a certification system for those products which have been pre-empted by EPCA. The proposed rule will not affect other agencies of State and local governments, in that it will not require any action on their part to implement the rule.

##### 5. Local Government Mandates

Adoption of the proposed rule would not impose any mandates on local governments.

##### 6. Paperwork

This rule will not impose any reporting or recordkeeping requirements.

##### 7. Duplication

The proposal does not duplicate, nor is it inconsistent with any existing Federal or State law.

##### 8. Alternatives

As an alternative to accepting Federal energy efficiency standards, the Department could have developed New York State standards for products covered by these Federal standards, set forth procedures for the testing of these products, developed a certification system to assure that products offered for sale in New York State meet these standards and testing procedures, and developed enforcement procedures. After taking these steps, the Department would have been required to petition the Secretary of Energy for a waiver to implement the New York State specific program.

The Secretary of State, in consultation with the President of NYSERDA, determined that this alternative should not be pursued at this

time. The reason that this determination was reached was that there is a substantial likelihood that pursuing this alternative would not meet the test required by 42 U.S.C. 6297(d)(1)(B). This section provides that in considering petitions, the Secretary of Energy must make a finding that a state regulation “. . . has established by a preponderance of evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests.” “Unusual and compelling State or local energy or water interests” is defined as meaning those which are substantially different than those prevailing in the United States generally, and are such that differences in cost, benefits, burdens and reliability of savings resulting from State regulation make it preferable or necessary.

#### 9. Federal Standards

Federal standards concerning regulated products have been promulgated in 10 CFR 430 and 431, pursuant to EPCA.

#### 10. Compliance Schedule

Regulated parties will be able to comply immediately with the proposed rule.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

This rule making will serve to notify regulated parties and other affected entities and persons that New York State does not intend to seek a waiver from the Secretary of Energy to regulate the energy efficiency of products specified in Article 16 of the Energy Law that are also regulated pursuant to federal law. The Energy Policy Act [42 U.S.C. 6297] provides that energy conservation standards promulgated by the Department of Energy supersede any state regulation with regard to testing and labeling requirements of regulated products. All portions of New York State will be affected by this proposed rule. There will be no differential impact on small businesses and local governments as a result of this proposed rule. The rule will have the same impact on small businesses and local governments as it has on the other New York State entities.

#### 2. Compliance Requirements:

This proposed rule making will impose no compliance requirements on small businesses and local governments.

#### 3. Professional Services:

No professional services will be required to comply with the proposed rule.

#### 4. Compliance Costs:

This proposed rule making will not impose any additional compliance costs on small businesses and local governments.

#### 5. Economic and Technological Feasibility:

Since the proposed rule making sets no compliance requirements, the rule does not raise any issues related to economic or technological feasibility.

#### 6. Minimizing Adverse Impact:

This proposed rule will have no adverse impact on small businesses and local governments. Regulated parties will not need to expend efforts to bring covered products into compliance with State standards in addition to Federal standards, and the rule will remove uncertainty with regard to whether a petition to the Secretary of Energy would be successful, in whole or part. It will also reduce potential costs related to tracking and segregating products to be sold within New York State from products intended to be sold in other states.

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

To assist the Department of State and NYSEERDA in the development of this proposed rule, an appliance efficiency advisory committee was appointed by NYSEERDA. Members of the advisory committee have presented the interests of small businesses and local governments. The advisory committee consists of representatives of energy efficiency and consumer advocacy groups, manufacturers, retailers, state agencies and federal agencies. The advisory committee has met three times. DOS and NYSEERDA presented to the advisory committee their intention not to seek a waiver from federal standards for the ten classes of products for which the federal Department of Energy is promulgating standards, but to retain the authority to seek such waiver if it is determined at some later date to be in the interests of the State. Energy efficiency and consumer advocates have stated that this retention of authority is important, and representatives of manufacturers and business did not object to this proposal.

### **Rural Area Flexibility Analysis**

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

This rule will be applicable in all areas of the New York State. Therefore, all rural areas of State will be affected by this rule.

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

This proposed rule making acknowledges the preemption of State energy efficiency performance standards by Federal standards for certain classes of appliances. Therefore, it will not impose any reporting, record-keeping or other compliance requirements on any parties within the State. No professional services will be required in order to comply with this rule.

#### 3. Costs:

This rule making will not impose any additional costs on regulated parties.

#### 4. Minimizing Adverse Impact:

This proposed rule will have no adverse impacts on regulated parties. Regulated parties will not need to expend efforts to bring covered products into compliance with State standards in addition to Federal standards, because this rule states that New York State will not petition the Secretary of Energy for an exemption from federal standards at this time. The rule will also reduce potential costs for regulated parties related to tracking and segregating products to be sold within New York State from products intended to be sold in other states.

#### 5. Rural Area Participation:

To assist the Department of State and NYSEERDA in the development of this proposed rule, an appliance efficiency advisory committee was appointed by NYSEERDA. While no member of the committee was appointed for the specific purpose of representing interests of rural areas, this rule will have statewide application and will not have a differential effect on rural areas of the State. Individuals representing consumer interests, including interests of consumers living in rural areas, are members of the advisory committee. Also, members of the committee representing business interests represent the interests of all businesses in the state, including businesses in rural areas.

### **Job Impact Statement**

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs and employment opportunities. This rule will serve to notify regulated parties and other affected entities and persons that New York State does not intend to seek a waiver from the Secretary of Energy to regulate the energy efficiency of products specified in Article 16 of the New York State Energy Law that are also regulated pursuant to federal law. The Energy Policy Act [42 U.S.C. 6297] provides that energy conservation standards promulgated by the Department of Energy supersede any state regulation which deals with testing and labeling requirements of regulated products. As a result of this rule, regulated parties will not need to expend efforts to bring covered products into compliance with State standards in addition to Federal standards. The rule will remove uncertainty with regard to whether a petition to the Secretary of Energy requesting a waiver would be successful, in whole or part, and reduce potential costs related to tracking and segregating products to be sold within New York State from products intended to be sold in other states. Therefore, this rule making will not have a substantial adverse impact on jobs and employment opportunities within New York.

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## Office of Temporary and Disability Assistance

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

#### **Home Energy Assistance Program**

**I.D. No.** TDA-42-06-00015-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 358-2.2(a)(14) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 97 and 131(1)

**Subject:** Adequate notice requirements for Home Energy Assistance Program (HEAP) determinations.

**Purpose:** To amend adequate notice requirements to reflect the current policy and practice of providing budget information in HEAP notices that are based upon budget computations.

**Text of proposed rule:** Paragraph (14) of subdivision (a) of section 358-2.2 is amended to read as follows:

Section 358-2.2 Adequate notice.

(a) Except as provided in subdivision (b) of this section, an adequate notice means a notice of action[,], or an adverse action notice or an action taken notice which sets forth all of the following:

(14) a copy of the budget or the basis for the computation, in instances where the social services agency's determination is based upon a budget computation[. This subdivision does not apply to actions taken involving HEAP benefits]; and

**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 an amendment to 18 NYCRR 358-2.2(a)(14) to amend adequate notice requirements to require budgetary information in Home Energy Assistance Program (HEAP) notices that are based upon budget computations. OTDA has determined that no person is likely to object to the adoption of the proposed rule as written.

The proposed amendment to 18 NYCRR 358-2.2(a)(14) is necessary to conform the regulation to current policy and practice. The policy of OTDA is to require that all adequate notices, including HEAP notices, set forth a copy of the budget or the basis for the computation in instances where a social services district's determination is based upon a budget computation. In accordance with OTDA's policy and as a result of litigation, the Human Resources Administration (HRA) has changed its HEAP notices for the 2006-2007 HEAP season to provide budgetary information in instances where its HEAP determinations are based upon budget computations. In the rest of the State, the social services districts already provide budgetary information when their HEAP notices are based upon budget computations. Thus all the social services districts are in compliance with the proposed rule.

The proposed amendment will result in applicants for and recipients of HEAP being better informed of the grounds for the social services districts' actions and thus better able to assess the merits of those determinations. Also, as a result of litigation (*Kapps v. Wing*, 404 F.3d 105 (2nd Cir. 2005) (class action lawsuit relating to New York City HEAP applicants), it is appropriate to pursue this amendment.

It is expected that no person will object to the proposed amendment contained in this consensus rule since the amendment is consistent with OTDA policy, better reflects current practices in the social services districts, and protects the interests of applicants and recipients.

#### **Job Impact Statement**

A job impact statement has not been prepared for the proposed regulatory amendment. It is evident from the subject matter of the amendment that the job of the worker making the decisions required by the proposed amendment will not be affected in any real way. Thus the change will not have any impact on jobs and employment opportunities in the State.

## Workers' Compensation Board

### EMERGENCY RULE MAKING

#### **Independent Medical Examinations (IMEs)**

**I.D. No.** WCB-42-06-00001-E

**Filing No.** 1153

**Filing date:** Sept. 27, 2006

**Effective date:** Sept. 27, 2006

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

**Action taken:** Amendment of section 300.2(d)(11) of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 137

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

**Specific reasons underlying the finding of necessity:** Recent decisions issued by Board Panels have interpreted the current regulation as requiring reports of independent medical examinations (IMEs) be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays, and that U.S. Post Offices are not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is precluded and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, workers' compensation insurance carrier/self-insured employer, claimant's treating provider and representative, and the claimant it is not possible to send the report by facsimile or electronic means. The recent Decisions have greatly, negatively impact the professionals who conduct IMEs, the IME entities, insurance carriers and self-insured employers. When untimely reports are precluded, the insurance carriers and self-insured employers are prevented from adequately defending their position. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Filing written reports of Independent Medical Examinations (IMEs).

**Purpose:** To amend the time for filing written reports of IMEs with the board and furnished to all others.

**Text of emergency rule:** Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

**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 25, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Esq., Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 486-9564, e-mail: OfficeofGeneralCounsel@wcb.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations.

Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

#### 2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

#### 3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

#### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

#### 6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

#### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the

exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Job Impact Statement**

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.