

# 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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## Banking Department

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### EMERGENCY RULE MAKING

#### Licensed Check Cashers

**I.D. No.** BNK-39-06-00020-E

**Filing No.** 1096

**Filing date:** Sept. 12, 2006

**Effective date:** Sept. 14, 2006

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

**Action taken:** Amendment of section 400.5(a) of Title 3 NYCRR.

**Statutory authority:** Banking Law, section 371

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

**Specific reasons underlying the finding of necessity:** In order for licensed check cashers to conduct business, it is necessary that such licensees have and maintain a deposit account with a banking institution. Such an account enables licensees to deposit and clear the checks, drafts and money orders that have been cashed for customers, thus recouping for the licensees the funds paid out to customers. Absent this banking relationship, licensed check cashers would not be able to conduct business. Because of recent decisions by various banking institutions located within this State to end their deposit account relationships with licensed check cashers, it is necessary that the pool

of banking institutions that licensees may use for such purposes be expanded.

**Subject:** Permissible banking institutions with which licensed check cashers may maintain deposit accounts.

**Purpose:** To permit licensed check cashers to maintain bank accounts with banking institutions or their branches located inside or outside this State.

**Text of emergency rule:** Section 400.5(a) of the Superintendent's Regulations is hereby amended to read as follows:

§ 400.5 Depositing of checks, etc.

(1) Except as hereinafter stated all checks, drafts and money orders must be deposited in the licensee's bank account in [the banking institution in this State] *a branch or principal office of a bank, savings bank, savings and loan association, trust company, national bank, federal savings bank, or federal savings and loan association or any other duly chartered depository institution that is insured by the Federal Deposit Insurance Corporation, regardless of whether the branch and/or principal office of the foregoing banking institution is located within or without this State (collectively, "banking institution")*, not later than the first business day following the day on which they were cashed. Such items must be deposited during the regular business hours of such [bank] *banking institution* so as to enable it to credit the deposits to the licensee's account on that business day.

(2) *Any account maintained by a licensee for the deposit of checks, drafts or money orders in a banking institution shall be subject to a written account agreement between the licensee and the banking institution that expressly provides for the personal and in rem jurisdiction over the parties and the account, respectively, of state and federal courts located in the State of New York and the agreement shall be governed by the laws of the State of New York, except that this requirement shall not apply (a) with respect to an account maintained in New York or in a State of New York-chartered bank prior to November 1, 2005, unless or until such existing account agreement is amended subsequent to November 1, 2005, or (b) if this requirement is waived in the Superintendent's discretion. Every licensee or applicant for a license shall provide to the Superintendent a copy of any such account agreement within 15 days of establishing any such account or any amendment thereto relating to the items required by this subsection. Every licensee shall maintain a copy of such account agreement as part of its records available for examination by the Superintendent.*

(3) *Prior to depositing any checks, drafts or money orders in an account at a banking institution, the licensee shall cause such banking institution to give the Superintendent written authorization to conduct any such examination of all books, records, documents and materials, including those in electronic form, as they relate to such account and any checks, drafts, or money orders placed on deposit in such account, as the Superintendent in his/her discretion deems necessary, except that this written authorization requirement shall not apply (a) with respect to an account maintained in New York or in a State of New York-chartered bank prior to November 1, 2005, unless or until such*

existing account agreement is amended subsequent to November 1, 2005, or (b) if this requirement is waived in the Superintendent's discretion. The licensee shall pay the cost of any such examination.

(4) [(2)] When the number of payroll checks cashed at a limited station amount to 50 or more, the licensee may present those checks to the drawee bank or the maker of the checks and receive in exchange a single draft, provided full details of the transaction are recorded in a manner satisfactory to the superintendent.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 10, 2006.

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

#### **Regulatory Impact Statement**

1. Statutory Authority. Section 371 of the Banking Law authorizes the Superintendent of Banks to adopt such rules and regulations as are necessary to ensure the proper conduct of the business of check cashing. Pursuant to section 400.5(a) of Title 3 NYCRR, the Superintendent requires licensed check cashers to deposit checks, drafts and money orders (hereafter "instruments") in a banking institution in this state no later than the first business day after the date on which the instruments were cashed for the customers.

2. Legislative Objectives. The Legislature, when enacting and periodically amending Article 9-A of the Banking Law, which requires regulatory supervision of the business of check cashing, has stated as matter of legislative intent that such businesses provide an important and vital service to New York citizens. The regulatory regime applicable to such industry is intended to ensure the consumer confidence in such business is maintained and the public interest is protected. The regulatory requirements addressed in this rule making are necessary to maintain the financial stability of the licensees, thus maintaining the public confidence in their operations.

3. Needs and Benefits. Section 400.5(a) requires that a check casher licensee maintain a deposit account with a banking institution in this State. Licensees are required to deposit any checks, drafts and money orders received into the deposit account within the next business day. The deposit of such instruments in New York facilitates the timely clearing process of such instruments through the banking system. In addition, if a check casher experiences financial or other difficulty and there is a need for the Superintendent to examine or intervene, having the licensee's deposit account at a banking institution in New York State permits the Superintendent to more readily to examine the account and/or obtain control of the licensee's assets through the judicial process, if this proved necessary. However, due to the decision of various in-state banking institutions not to provide further deposit account services to check cashing businesses, it is necessary to expand the pool of potential banking institutions that may be willing to provide such services. Permitting check cashers to open and maintain deposit accounts with banks or branches located out of state should assist in addressing this problem. While doing business with banks or branches located out of state may present certain logistical problems for check cashers in meeting the one-business day deposit requirement, there are mechanisms available within the banking system which should make such arrangements workable.

The ancillary regulatory requirements of the proposed rule in connection with a check casher establishing a deposit account relationship with a bank will ensure the Superintendent's supervisory oversight of and jurisdiction over the casher's banking relationship remains the same, regardless of whether the account is in a banking institution

within or outside of New York and whether the federal or a state government has chartered the institution. Such requirements necessitate that (i) the licensee's account agreement provide for the personal and in rem jurisdiction by federal and state courts located in New York over the parties and the account and that the agreement be governed by the laws of New York State; and (ii) prior to making any deposit in such account, the licensee obtain the written authorization by the bank enabling the Superintendent to examine any records and related documents and materials, in whatever form, pertaining to the deposits and the account. This is a timely revision of the rule, given the current rule was adopted prior to the advent of interstate branch banking and the Comptroller of the Currency's recent preemption ruling prohibiting any state bank regulator from exercising visitation authority over national banks.

4. Costs. The proposed rule imposes no additional costs or regulatory burden upon regulated parties, the Banking Department or other state agencies, or any other unit of government.

5. Local Government Mandates. The proposed rule imposes no mandates or costs upon any type of governmental unit. The regulatory provisions apply only to licensed entities, and such entities are private business enterprises.

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

7. Duplication. None.

8. Alternatives. There are few alternatives to address the present situation other than to increase the pool of potential banks with which licensed check cashers may do business. One alternative is the creation of a bank, either under private or public auspices, that specializes in servicing money services businesses. However, this would be a long-term solution, and not an alternative that may be developed in the short-term given that in-state banks are currently terminating their deposit account relationships with these businesses.

9. Federal Standards. There are no federal standards that apply to the daily operational aspects of the business of check cashing. The federal government does not license check cashers nor directly regulate the primary transaction activity of check cashers. When regulated, states are the sole supervisory regulators of the check cashing industry.

10. Compliance Schedule. The new requirements applicable to any licensee's new deposit account, or modification of an existing account agreement, took effect on November 1, 2005.

#### **Regulatory Flexibility Analysis**

The emergency rule facilitates the conduct of business by and the financial stability of licensed check cashers, which are private businesses. Though the rule requires the licensee to obtain the agreement of the banking institution, when opening an account, to governance of the account relationship under New York law and courts located in New York, as well as to examination of its account-related records by the Superintendent, these are necessary additional conditions in order for the Superintendent to properly supervise licensed check cashers that may choose to open accounts in banking institutions outside New York and also in national banks regardless of where located. The Department has determined that the emergency rule has no impact upon other private businesses, or any unit of local government.

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

The Department has determined the emergency rule has virtually no impact upon private businesses or units of local government situated in rural areas. Licensed check cashers are predominantly located in metropolitan and urban areas of this state. To the extent there are licensed check cashers in any rural locations, the emergency rule will facilitate the conduct of business by and the financial stability of such businesses. The emergency rule will have the same effect upon regulated entities, regardless of where located.

**Job Impact Statement**

The emergency rule is intended to facilitate the conduct of business by and the financial stability of check cashing businesses. Without deposit account relationships with banking institutions, licensed check cashers could not function. Therefore, the Department has determined the emergency rule has no adverse impact upon employment in the check cashing industry.

**NOTICE OF ADOPTION**

**High Cost Home Loans**

**I.D. No.** BNK-25-06-00009-A

**Filing No.** 1095

**Filing date:** Sept. 12, 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 Part 41 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 6-i and 6-l

**Subject:** The making of certain residential mortgage loans, referred to as high cost home loans.

**Purpose:** To conform the provisions of Part 41 of Title 3 NYCRR to various provisions of section 6-l of the Banking Law, and also clarify certain provisions of such section 6-l.

**Text of final rule:** Amendments to General Regulations of the Banking Board Part 41

**RESTRICTIONS AND LIMITATIONS  
ON HIGH COST HOME LOANS**

(Statutory authority: Banking Law §§6-i, 6-l)

§ 41.1 Definitions.

The following definitions shall apply for the purpose of this Part.

(a) "Lender" means [any individual or entity that in any 12-month period originates more than one high cost home loan as defined in this Part] *a mortgage banker licensed pursuant to article 12-D of the Banking Law or an exempt organization as defined in paragraph (e) of subdivision one of section five hundred ninety of such article.* The [individual or entity] *mortgage banker or exempt organization* to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract, shall be deemed to be the lender.

(b) "Affiliate" means any company that controls, is controlled by, or is under the common control of another company. "Control" shall [mean ownership of 10 percent or more of any class of outstanding capital stock of the company or the power to direct or cause the direction of the management and policies of the company] *have the same meaning as control of a bank or any other company is defined pursuant to 12 USC at 1841(a)(2), (3), and (4), as amended from time to time. This publication may be viewed at the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR and the Department of State located at 41 State Street, Albany, NY 12231. The United States Code is published by the Office of the Law Revision Council of the House of Representatives and is for sale by the United States Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-0001.*

(c) "Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the Federal Truth-in-Lending Act (15 U.S.C. section 1601 et seq.), the regulations promulgated thereunder by the Federal Reserve Board, and the official staff commentary thereto. For open-end lines of credit, the "annual percentage rate" is the highest corresponding annual percentage rate required to be disclosed under sections 226.6(a)(2) and 226.14(b) of

title 12 of the Code of Federal Regulations, excluding any annual percentage rate imposed solely in the event of default. These publications may be viewed at [the New York State Banking Department located at Two Rector Street, New York, NY 10006] *the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR* and the Department of State located at 41 State Street, Albany, NY 12231. The United States Code is published by the Office of the Law Revision Council of the House of Representatives. [This publication is] *The Code of Federal Regulations is published by the United States Government Printing Office and both publications are for sale by the United States Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-[9328] 0001.*

(d) "Bona fide loan discount points" means loan discount points *knowingly paid by the borrower and funded through any source* for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the loan, provided the amount of the interest rate reduction purchased by the discount points is reasonably consistent with established industry norms and practices for secondary mortgage market transactions. For purposes of this Part *and section 6-l(1)(c) of the Banking Law*, it shall be presumed that a point is a bona fide loan discount point if it reduces the interest rate by a minimum of [35] 25 basis points or [3/8] 1/4 of a point provided all other terms of the loan remain the same.

(e) "High cost home loan" means a residential mortgage loan, including an open-end line of credit but not including a reverse mortgage transaction, in which:

(1) the principal amount of the loan does not exceed the lesser of:

(i) the conforming loan size limit for a comparable dwelling as established from time to time by the Federal National Mortgage Association; or

(ii) \$300,000;

(2) the borrower is a natural person;

(3) the debt is incurred by the borrower primarily for personal, family or household purposes;

(4) the loan is secured by a mortgage *or deed of trust* on real estate upon which there is located or there is to be located a structure or structures, intended principally for occupancy of from one to four families, which is or will be occupied by the borrower as the borrower's principal dwelling;

(5) the property is located in New York State; and

(6) the terms of the loan exceed one or more of the following thresholds:

(i) the loan is secured by a first mortgage on the borrower's principal dwelling and the annual percentage rate at consummation, [calculated to include any lower introductory rate and] including without limitation any points and/or bona fide discount points, will exceed by more than eight percentage points the yield on United States Treasury securities having comparable periods of maturity to the loan maturity measured as of the 15th day of the month immediately preceding the month in which the application for the residential mortgage loan is received by the [creditor] *lender; provided, however, if the terms of such loan offer any initial or introductory rate, and the annual percentage rate is less than such rate that will apply after the end of the period of such initial or introductory rate, then the annual percentage rate for purposes of determining the application of this threshold to such loan shall be the rate which applies after such initial or introductory period; or*

(ii) the loan is secured by a junior mortgage on the borrower's principal dwelling and the annual percentage rate at consummation, [calculated to include any lower introductory rate and] including without limitation any points and/or bona fide discount points, will

exceed by *nine or more* [than nine] percentage points the yield on United States Treasury securities having comparable periods of maturity to the loan maturity measured as of the 15th day of the month immediately preceding the month in which the application for the residential mortgage loan is received by the [creditor] lender; provided, however, if the terms of such loan offer any initial or introductory rate, and the annual percentage rate is less than such rate that will apply after the end of the period of such initial or introductory rate, then the annual percentage rate for purposes of determining the application of this threshold to such loan shall be the rate which applies after such initial or introductory period; or

(iii) the total points and fees payable [by the borrower at or before loan closing] exceed (1) five percent of the total loan amount; provided, however that bona fide if such amount is \$50,000 or more; or (2) six percent of the total loan amount if such amount is \$50,000 or more and the loan is a purchase money loan guaranteed by the Federal Housing Administration or the U.S. Department of Veterans Administration; or (3) the greater of six percent of the total loan amount or \$1500 if such amount is less than \$50,000. Bona fide loan discount points payable by the borrower in connection with the loan transaction, up to and including two such points, may be excluded from the calculation of the total points and fees payable by the borrower for purposes of this paragraph[;or] but only if the loan's interest rate that is to be discounted is not greater than one percent above the yield on United States Treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month immediately preceding the month in which the application is received; or bona fide discount points may be discounted that are funded directly or indirectly through a grant from a federal, state or local government agency or a not-for-profit organization having a taxable status under section 501(c)(3) of the Internal Revenue Code.

(iv) [in] In determining the applicable yield on United States Treasury securities pursuant to subparagraphs (i) and (ii) of this paragraph, the lender may utilize the yield published by the Banking Department on its website or the yield as determined by reference to section 226.32(a) of Title 12 of the Code of Federal Regulations and the official staff commentary thereto, provided that the lender notes in the loan file which yield is being utilized and uses that yield consistently. This publication may be viewed at the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR and the Department of State located at 41 State Street, Albany, NY 12231.

(f) "[Loan] Total loan amount" [is the same amount as is defined in the official staff commentary to Regulation Z Truth in Lending Section 226.32(a)(1)(i) Comment 1] means the principal of the loan minus those points and fees as defined in paragraph (h) of this section that are included in the principal amount.

(g) "[Obligor] Borrower" refers to [each borrower,] a natural person and shall be deemed to include a co-borrower[,] or co-signer [or guarantor] obligated to repay a high cost home loan.

(h) "Points and fees" means [the points and fees as defined in] (i) all items listed in 15 U.S.C. § 1605(a)(1) through (4), except interest or the time-price differential; (ii) all charges for items listed under section [226.32(b)] 226.4(c)(7) of title 12 of the Code of Federal Regulations,[and the official staff commentary thereto] as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender; and (iii) all compensation paid directly or indirectly to a mortgage broker not otherwise included as points and fees pursuant to clauses (i) and (ii) of this subdivision 41.1(h). These publications may be viewed at the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR and the Department of

State located at 41 State Street, Albany, NY 12231. Any payments to finance premiums for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life or health insurance, or any debt cancellation or suspension agreement or contract, whether or not interest is charged, shall constitute points and fees for purposes of this Part and section 6-1 of the Banking Law. Credit property insurance shall not be deemed to include insurance coverage for fire, miscellaneous property, or water damage, as defined pursuant to section 1113 of the Insurance Law, placed upon such mortgaged property. Payments for title insurance premiums related to such mortgaged property and payments for premiums for insurance required by the lender which guarantees payment of all or part of the outstanding principal loan amount upon the default of the borrower, which shall include but not be limited to private mortgage insurance, the Federal Housing Administration mortgage insurance premium fee, and the U.S. Veterans Administration funding fee, or any fee charged by the Federal National Mortgage Association or the Federal Mortgage Assistance Corporation, which provides for a similar guarantee of such payment, shall not constitute points and fees for purposes of this Part and section 6-1 of the Banking Law. Any payments for a mortgage recording tax shall not constitute points and fees for purposes of this Part and section 6-1 of the Banking Law.

(i) "Scheduled monthly payments" means minimum sums required to be paid with respect to all of the borrower's debts that are reported on a nationally recognized consumer credit bureau report and the monthly mortgage payment due under the high cost home loan (ignoring any reduction arising from a lower introductory rate) plus one twelfth of the annualized cost of real estate tax and insurance premium payments during the immediately preceding 12 months. Scheduled monthly payments shall not include any debts that are consolidated with or paid off by the high cost home loan.

(j) "Unconscionable" means oppressive or unreasonably harsh or unfair, considering all of the circumstances of the loan transaction as such term "unconscionable" is described in the Official Comment and New York Annotations for section 2-302 of the Uniform Commercial Code. This publication may be viewed at the New York State Banking Department located at [the New York State Banking Department located at Two Rector Street, New York, NY 10006] the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR and the Department of State located at 41 State Street, Albany, NY 12231. The Uniform Commercial Code is published by West Publishing Company and is for sale by the West Group, 620 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0779.

For purposes of this Part, the singular shall include the plural.

#### § 41.2 Limitations.

A high cost home loan shall be subject to the following limitations.

(a) No call provision. No high cost home loan may contain a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply when repayment of the loan has been accelerated [by] in good faith, due either to a bona fide default or other failure of the borrower to abide by the material terms of the loan, or pursuant to a due-on-sale provision, or pursuant to some other provision of the loan agreement unrelated to the payment schedule such as bankruptcy or receivership.

(b) No balloon payment. No high cost home loan may contain a scheduled final payment that is more than twice as large as the average of earlier scheduled monthly payments unless such balloon payment becomes due and payable at least [seven] fifteen years after the loan's origination. This prohibition does not apply when the payment schedule is adjusted to account for the seasonal or irregular income of the borrower or if the purpose of the loan is a "bridge" loan connected with the acquisition or construction of a dwelling intended to become the

borrower's principal dwelling. This subdivision shall not apply to open-end high cost home loans.

(c) No negative amortization. Notwithstanding any statute or regulation to the contrary, no high cost home loan may contain a payment schedule with regular periodic payments that cause the principal balance to increase. This shall not prohibit negative amortization as a consequence of a temporary forbearance sought by the borrower. This subdivision shall not apply to open-end high cost home loans.

(d) No increased interest rate. No high cost home loan may contain a provision that increases the interest rate after default. This provision does not apply to periodic interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan agreement, provided the change in the interest rate is not occasioned by the event of default or the acceleration of the indebtedness.

(e) No oppressive mandatory arbitration clause. No high cost home loan may be subject to a mandatory arbitration clause that is oppressive, unfair, unconscionable, or substantially in derogation of the rights of consumers. Arbitration clauses that comply with the standards set forth in the Statement of Principles of the National Consumer Dispute Advisory Committee [[http://www.adr.org/education/education/consumer\\_protocol.html](http://www.adr.org/education/education/consumer_protocol.html)] in effect as of the effective date of this regulation (Oct. 1, 2000)], as such Statement is on file at the New York State Banking Department, shall be presumed not to violate this subdivision. *The Statement of Principles may be viewed at the New York State Department of Banking located at the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR or through internet access at <http://www.banking.state.ny.us/41.htm>.*

(f) No advance payments. No high cost home loan may include terms under which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

(g) No modification or deferral fees. A lender may not charge a borrower any fees to modify, renew, extend, or amend a high cost home loan or defer any payment due under a high cost home loan if, after the modification, renewal, extension or amendment, the loan is still a high cost loan or, if no longer a high cost home loan, the APR has not been decreased by at least two percentage points. For purposes of this subdivision, fees do not include interest that is otherwise payable and consistent with the provisions of the loan documents. This provision shall not prohibit a lender from charging points and fees in connection with any additional proceeds received by the borrower in connection with the modification, renewal, extension or amendment (over and above the current principal balance of the existing high cost home loan) provided that the points and fees charged on the additional sum must reflect the lender's typical point and fee structure for high cost home loans. This provision shall not apply if the existing high cost home loan is in default or is 60 or more days delinquent and the modification, renewal, extension, amendment or deferral is part of a work-out process.]

#### § 41.3 Prohibited acts and practices.

The following acts and practices are prohibited in the making of a high cost home loan.

(a) No lending without counseling disclosure and list of counselors and consumer and home ownership counseling notice.

(1) A lender or mortgage broker must deliver, place in the mail, fax or electronically transmit the following notice in at least 12-point type to the borrower at the time of application: "You should consider financial counseling prior to executing loan documents. The enclosed list of counselors is provided by the New York State Banking Department". In the event that the lender or broker does not know whether the borrower's application is a high cost home loan application, such

disclosure must be made as soon as the lender determines that it is a high cost home loan application[, but in any event, at least three days prior to the closing whether or not funds are disbursed]. In the event of a telephone application, the disclosures must be made immediately after receipt of the application by telephone[, but in any event, at least three days prior to the closing whether or not funds are disbursed]. Such disclosure shall be on a separate form. In order to utilize an electronic transmission, the lender or broker must first obtain either written or electronically transmitted permission from the borrower. A list of approved counselors, available from the New York State Banking Department, shall be provided to the borrower by the lender or the mortgage broker at the time that this disclosure is given. The lender or mortgage broker may provide to the borrower the entire list of counselors or those portions of the list which pertain to both the geographic area in which the borrower resides and any adjacent area or areas.

*(2) Within three days after determining that the loan is a high cost home loan, but no less than ten days before closing, a lender or mortgage broker shall not make or arrange a high cost home loan unless either the lender or the mortgage broker has delivered to the borrower in writing, either placed in the mail, faxed or electronically transmitted, the following notice in at least twelve-point type:*

#### *"CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE*

*If you obtain this loan, which pursuant to New York State Law is a High-Cost Home Loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.*

*You should shop around and compare loan rates and fees. Mortgage loan rates and closing costs and fees vary based on many factors, including your particular credit and financial circumstances, your earnings history, the loan-to-value requested, and the type of property that will secure your loan. The loan rate and fees could vary based on which lender or mortgage broker you select. Higher rates and fees may be related to the individual circumstances of a particular consumer's application.*

*You should consider consulting a qualified independent credit counselor or other experienced financial adviser regarding the rate, fees, and provisions of this mortgage loan before you proceed. The enclosed list of counselors is provided by the New York State Banking Department.*

*You are not required to complete any loan agreement merely because you have received these disclosures or have signed a loan application. If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.*

*Property taxes and homeowner's insurance are your responsibility. Not all lenders provide escrow services for these payments. You should ask your lender about these services.*

*Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors. Accordingly, it is important that you make regular payments to your existing creditors."*

*If the notice required by this paragraph is given to the borrower separately from counseling notice required by paragraph (1) of this subdivision, then the list of counselors so enclosed in the counseling notice disclosure shall be enclosed also with this disclosure notice. Such disclosure*

*shall be on a separate form. In order to utilize an electronic transmission, the lender or broker must first obtain either written or electronically transmitted permission from the borrower.*

(b) No lending without due regard to repayment ability. A lender or mortgage broker may not make or arrange a high cost home loan unless the lender reasonably believes at the time the loan is consummated that the [obligor] borrower or the [obligors] borrowers (when considered collectively in the case of multiple [obligors] borrowers) will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan) as verified by detailed documentation of all sources of income and corroborated by independent verification. [An obligor shall be presumed to be] A lender shall benefit from a rebuttable presumption that an borrower is able to make the scheduled payments to repay the obligation, if, at the time the high cost home loan is consummated, or at the time of the first rate adjustment in the case of a lower introductory interest rate, the [obligor's] borrower's scheduled monthly payments do not exceed 50 percent of the [obligor's] borrower's monthly gross income as verified by the credit application, the [obligor's] borrower's financial statement, a credit report, financial information provided to the lender by or on behalf of the [obligor] borrower, or any other reasonable means, and the lender, in making such high cost home loan, follows the residual income guidelines pursuant to section 36.4337(e) of Title 38 of the Code of Federal Regulations and U.S. Veterans Administration VA Form 26-6393. VA Form 26-6393 may be viewed at the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR or by internet access at <http://www.vba.va.gov/pubs/homeloanforms.htm>. The U.S. Veterans Administration residual incomes for the northeast region may be viewed at the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR or by internet access at <http://www.banking.state.ny.us/41.htm>. A borrower's repayment ability shall be presumed "corroborated by independent verification" for purposes of this Part and section 6-1(2)(k) of the Banking Law if the borrower's income, employment status, obligations, and other financial resources are verified by documents prepared by persons or entities having no direct relationship with the lender or mortgage broker or a relationship with the borrower, other than an employment, debtor-obligor, or fiduciary relationship, or by governmental documents, such as an income tax return. [The requirement of this subdivision shall apply only to obligors whose income, as reported on the loan application which the lender relied upon in making the credit decision, is no greater than 120 percent of the median family income for the metropolitan statistical area (MSA) (as defined by the director of the U.S. Office of Management and Budget), in which the property to be secured is located. For loans secured by properties that are not located within an MSA, the requirement shall apply only to obligors whose incomes do not exceed 120 percent of the non-metropolitan median family income for New York State. For purposes of this section, the median family income shall be derived from the most recent estimates made available by the U.S. Department of Housing and Urban Development, at the time the application is received.] For purposes of determining [whether] monthly income [is less than or greater than 120% of median income e], only the income of the borrower(s) shall be considered. [In addition, in determining repayment ability, lenders should consider indications of residual income such as the guidelines utilized by the Veteran's Administration.]

(c) Financing of points[,] and fees [or charges]. In making a high cost home loan, a lender may not require a borrower to directly or

indirectly finance any portion of the points and/or fees [nor, in any case, directly or indirectly finance points and fees payable to the lender or charges payable to third parties (other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, title report and title insurance charges)], in an amount that exceeds [five] three percent of the principal amount of a closed end high cost home loan, or of the maximum line of credit amount for open end high cost home loans, for loans other than refinancings. For refinancings, a lender may not finance such points[,] or fees [or charges] in an amount that exceeds [five] three percent of the additional proceeds received by the borrower in connection with the refinancing [other than appraisal fees, credit report fees, mortgage recording tax, fire and miscellaneous property insurance, title report and title insurance charges]. In making a high cost home loan, a lender may not finance voluntary credit, disability, unemployment and/or life insurance as part of the principal amount of the loan, whether interest is charged or not. In making a high cost home loan, a lender may not directly or indirectly finance any prepayment fees or penalties payable by the borrower in a refinancing transaction if the lender or an affiliate of the lender is the originator of the loan being refinanced. For purposes of this subsection 41.3(c), "additional proceeds" for a closed end loan is the amount over and above the current principal balance of the existing home loan. For an open end loan, "additional" proceeds is the amount by which the line of credit on the new loan exceeds current principal balance of the existing home loan.

(d) [Frequent refinancing] Refinancing and modification of existing high cost home loan [with new high cost home loan].

(1)(i) A lender shall not charge a borrower points and fees in connection with a high cost home loan if the proceeds of the high cost home loan are used to refinance an existing high cost home loan held by the lender or an affiliate of the lender.

(ii) [A] In all other instances, a lender may not charge a borrower points and fees in connection with a high cost home loan if the proceeds of the high cost home loan are used to refinance an existing high cost home loan and the last financing was within two years of the current refinancing. This provision shall not prohibit a lender from charging points and fees in connection with any additional proceeds received by the borrower in connection with the refinancing, provided that the points and fees charged on the additional sum must reflect the lender's typical point and fee structure for high cost refinance loans. [This subdivision shall apply only in those instances in which the existing high cost home loan was made by the lender or an affiliate of the lender, provided that the new high cost home loan does not involve the use of a mortgage broker, and to all existing high cost home loans in which the new high cost home loan involves the use of a mortgage broker.] For purposes of this subdivision 41.3(d), "additional proceeds" for a closed end loan is the amount over and above the current principal balance of the existing high cost home loan. For an open end loan, "additional proceeds" is the amount by which the line of credit on the new loan exceeds current principal balance of the existing high cost home loan.

(2) A lender may not charge a borrower any fees to modify, renew, extend, or amend a high cost home loan or defer any payment due under a high cost home loan if, after the modification, renewal, extension or amendment, the loan is still a high cost loan or, if no longer a high cost home loan, the annual percentage rate has not been decreased by at least two percentage points. For purposes of this paragraph, fees do not include interest that is otherwise payable and consistent with the provisions of the loan documents. This provision shall not prohibit a lender from charging points and fees in connection with any additional proceeds received by the borrower in connection with the modification, renewal, extension or amendment (over and above the current principal balance of the existing high cost home loan) provided that the points and fees charged on the additional sum

must reflect the lender's typical point and fee structure for high cost home loans. This provision shall not apply if the existing high cost home loan is in default or is sixty (60) or more days delinquent and the modification, renewal, extension, amendment or deferral is part of a work-out process.

(e) Restrictions on home improvement contracts. A lender may not pay a contractor under a home-improvement contract from the proceeds of a high cost home loan other than by an instrument payable to the borrower or jointly to the borrower and the contractor or, at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender, and the contractor prior to the disbursement of funds to the contractor.

(f) *No refinancing of special mortgages. No lender making a high cost home loan may refinance an existing mortgage loan that is a special mortgage originated, subsidized or guaranteed by or through a state, tribal or local government, or nonprofit organization, which either bears a below-market interest rate at the time of origination, or has nonstandard payment terms beneficial to the borrower, such as payments that vary with income, are limited to a percentage of income, or where no payments are required under specified conditions, and where, as a result of the refinancing, the borrower will lose one or more of the benefits of the special mortgage, unless the lender is provided prior to loan closing documentation by a U.S. Department of Housing and Urban Development certified housing counselor or the lender who originally made the special mortgage that a borrower has received home loan counseling in which the advantages and disadvantages of the refinancing has been received.*

[(f)](g) List of counselors [and median family income figure], residual income guidelines and yield on United States Treasury securities. The list of counselors in [subsection 41.3(a)] *subdivision (a) of this section*, [and the median family income figures and] the residual income guidelines [for subsection 41.3(b)] *in subdivision (b) of this section*, and the yield on the United States Treasury securities in [subsection] *section 41.1(e) of this Part* shall be published by the Banking Department on its web site. Lenders may rely upon and use such information until ninety days after the Banking Department publishes new information on its web site.

§ 41.4 Additional requirements.

The following are required in order to make a high cost home loan.

(a) Mortgage brokers and lenders must give the disclosures required pursuant to Part 38 of this Title, as applicable, to the borrower and any other obligor in writing at the time of application which shall be at least [three] *ten* days prior to the closing whether or not funds are then disbursed. In addition, at or prior to taking an application, mortgage brokers and lenders must also deliver, place in the mail, fax or electronically transmit to the borrower a statement in substantially the following form: "Although your aggregate monthly debt payment may decrease, the high cost home loan may increase both (i) your aggregate number of monthly debt payments and (ii) the aggregate amount paid by you over the term of the high cost home loan" if such are likely the case. This disclosure need not be a separate document. A lender may agree with a broker that the broker shall make the disclosures required by this Part and Part 38 of this Title on behalf of the lender. However, it remains the responsibility of the lender to ensure that such disclosures are made. In the event that the lender or broker does not know whether the borrower's application is a high cost home loan application, such disclosure must be made [as soon as] *within three days after* the lender determines that it is a high cost home loan application, but in any event, at least [three] *ten* days prior to the closing. In the event of a telephone application, the disclosure must be made [immediately] *within three days* after receipt of the application by telephone, but in any event, at least [three] *ten* days prior to the closing. In order to

utilize electronic transmission, the lender or broker must first obtain either written or electronically transmitted permission from the borrower.

(b) The lender must report both the favorable and unfavorable payment history of the borrower to a nationally recognized consumer credit bureau at least annually during such period as the lender holds or services the *high cost home* loan.

(c) Mortgage brokers and lenders that broker or make 10 or more high cost home loans per year must report to the Banking Department annually, on or before March 31st in each year, the names and addresses of the three home improvement contractors, the three consultants and the three attorneys who obtain the largest number of payments directly from the proceeds of high cost home loans made or brokered by the lender or mortgage banker. They must also provide the names and addresses of any home improvement company that is an affiliate. This provision shall not apply to attorneys in their capacity as closing attorneys for lenders.

(d) The following statement in a minimum of 12-point type must appear directly above the borrower's signature line on the application: "The loan which may be offered to you is not necessarily the least expensive loan available to you and you are advised to shop around to determine comparative interest rates, points and other fees and charges." In the event of telephone applications, this disclosure shall be made to the borrower *within three days of receipt of an application*, but in any event at least [three] *ten* days prior to the closing whether or not funds are then disbursed. In the event that the lender or broker does not know whether the borrower's application is a high cost home loan application, such disclosure must be made [as soon as] *within three days after* the lender determines that it is a high cost home loan application, but in any event, at least [three] *ten* days prior to closing whether or not funds are then disbursed. *If the mortgage application form is prescribed by a government-sponsored entity, such statement shall be placed on a separate document and attached to the front of the mortgage application.*

§ 41.5 Unfair and deceptive acts or practices.

The following acts shall be prima facie evidence that the lender does not possess the requisite character and fitness required to be licensed or registered by the New York State Banking Department:

(a) the making of high cost home loans that demonstrate a pattern and practice of violating any provision of this Part. The provisions of this section shall apply to any lender that seeks to avoid its application by any device, subterfuge or pretense whatsoever, *which shall include but not be limited to splitting or dividing any loan transaction into separate parts for the purpose of evading the provisions of this Part and section 6-1 of the Banking Law*; [and]

(b) engaging in unfair, deceptive or unconscionable practices in the course of advertising, brokering or making high cost home loans to residents of this State. Such practices include, but are not limited to, the following:

(1) brokering or making a high cost home loan which includes points, fees or other finance charges that, considering the loan transaction as a whole (including the creditworthiness of the borrower, the terms of the loan, the value of the collateral, and the owner's equity in the collateral), so significantly exceed the usual and customary charges incurred by mortgage consumers generally in this State for such points, fees or other finance charges as to be unconscionable;

(2) brokering or making high cost home loans in which the broker or lender charges and retains fees [paid by the borrower] *in any manner or form*:

- (i) for services that are not actually performed;
- (ii) for which the fees bear no reasonable relationship to the value of the services actually performed; or
- (iii) which are otherwise unconscionable; [and]

(3) brokering or making high cost home loans with repayment terms that so exceed the borrower's financial capacity to repay as to be unconscionable. A loan that complies with section 41.3(b) of this Part shall be presumed not to violate this paragraph. Evidence that the repayment terms exceed the borrower's reasonable capacity to repay may be rebutted by:

(i) a showing that the lender reasonably believed at the time the loan was consummated that the borrower and any obligor had the capacity to repay the loan based upon consideration of their current and expected income, current obligations, employment status, and other financial resources, excluding the owner's equity in the dwelling that secures repayment of the loan and including any other collateral securing repayment of the loan; or

(ii) a showing that other compelling circumstances existed that justified the making of the loan notwithstanding the borrower's apparent lack of capacity to repay the loan based upon the factors stated in subparagraph (i) of this paragraph;

(4) [flipping] "flipping" high cost home loans; that is, brokering or making a high cost home loan to a borrower that refinances an existing mortgage loan when, considering all the circumstances of the refinancing, such refinancing [is unconscionable. A loan that complies with section 41.3(d) of this Part shall be presumed not to violate this paragraph] *does not have a tangible net benefit to the borrower. A lender shall be considered by the Superintendent to have provided a tangible net benefit to the borrower if a high cost home loan meets the following criteria: the borrower receives a monetary benefit, such as receipt of additional proceeds, a reduction of the outstanding mortgage debt, a lowering of the annual percentage rate, and/or a lowering of the monthly payments of principal and interest, taking into consideration the totality of the circumstances, including, but not limited to, the amount of the monetary benefit, the loan product and the borrower's repayment ability, current and expected income and current obligations; provided, however, that if the monthly payment of principal and interest and/or the mortgage debt increases, a commensurate monetary benefit shall ensue to the borrower;*

(5) ["Packing"] "packing" high cost home loans; that is, the practice of selling credit life, accident and health, disability, *property*, or unemployment insurance products, *any other life or health insurance product, debt cancellation or suspension agreement products*, or unrelated goods or services in conjunction with a high cost home loan without the informed consent of the borrower under circumstances where:

(i) the broker or lender solicits the sale of such [insurance] *products, goods or services; and*

(ii) the broker or lender receives direct or indirect compensation for the sale of such [insurance] *products, goods or services; [and*

(iii) the charges for such insurance, goods or services are prepaid with the proceeds of the loan and financed, whether interest is charged or not, as part of the principal amount of the loan.]

[Provided] *provided, however, it shall not constitute the practice of "packing" if the broker or lender, at least [three] ten business days before the loan is closed whether or not funds are then disbursed, makes a separate oral and a separate clear and conspicuous written disclosure in at least twelve point type to the borrower containing the following information: (i) the cost of [the credit insurance] such products or other goods and services; (ii) the fact that the [insurance] such products, goods, or services, as offered to the borrower by the broker or lender, will be either prepaid or calculated, earned, and paid on a monthly or other regular, periodic basis [and, if applicable, financed at the interest rate provided for in the loan] ; and (iii) that the purchase of such [insurance] products, goods or services is not required to obtain the mortgage loan; provided further, that insurance premiums shall not be considered financed as part of the loan transaction if*

insurance premiums are calculated, earned and paid on a monthly or other regular, periodic basis]. In addition, the written disclosure shall contain a signed and dated acknowledgment by the [obligor(s)] *borrower(s)* that the oral disclosure was made and a signed and dated acknowledgment by the broker or lender that the oral disclosure was made[.];

(6) recommending or encouraging default or further default by a borrower on an existing loan or other debt, prior to *and in connection with the closing or planned closing* of a high cost home loan that refinances all or any portion of such existing loan or debt; [and] *or*

(7) advertising that refinancing pre-existing debt with a high cost home loan will reduce a borrower's aggregate monthly debt payment without also disclosing, if such are likely the case, that the high cost home loan will increase both:

(i) a borrower's aggregate number of monthly debt payments; and

(ii) the aggregate amount paid by a borrower over the term of the high cost mortgage loan.

#### § 41.6 Multiple borrowers.

Where there is more than one borrower on a high cost home loan, and this Part requires a notice to be given or a signature obtained, such requirement shall be deemed satisfied by the delivery or placing in the mail to, or obtaining the signature of, any borrower who is primarily liable on the high cost home loan.

#### § 41.7 Legend.

High cost home loan mortgages shall include a legend on top of the mortgage in 12-point type stating that the mortgage is a high cost home loan subject to this Part *and section 6-1 of the Banking Law. If the mortgage document form is prescribed by a government-sponsored entity, such legend shall be placed on a separate document and attached to the front of the mortgage document.*

#### § 41.8 Exempt products.

[Any product] *Certain products* offered as a mortgage loan by an instrumentality of the United States or of any state shall be exempt from this Part such as loan products offered by the [VA, FHA or] SONYMA.

#### § 41.9 Correction of errors.

[A lender or assignee has no liability under this Part for any failure to comply with any requirement imposed under this Part, if within 60 days after discovering an error, whether pursuant to a final written examination report, through the lender's or assignee's own procedures, or through a complaint from the obligor, and prior to the institution of an action under this Part, the lender or assignee notifies the individual(s) concerned of the error and makes whatever adjustments are necessary to either correct the error or assure that the person will not be required to pay an amount that will make the loan subject to this Part. Moreover, a lender or assignee has the right to correct errors and may not be held liable for a violation of this Part, only if the lender or assignee shows by a preponderance of evidence that the error was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printer errors, except that an] *A lender of a high cost home loan that, when acting in good faith, fails to comply with the provisions of this section, will not be deemed to have violated this Part and section 6-1 of the Banking Law if the lender establishes that either:*

(a) *Within thirty days of the loan closing and prior to the institution of any action under section 6-1 of the Banking Law, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, (i) make the high cost home loan satisfy the requirements of this Part, or (ii) change the terms of the loan in a*

manner beneficial to the borrower so that the loan is no longer a high cost home loan subject to the provisions of this Part; or

(b) The compliance failure resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors and, within sixty days after the discovery of the compliance failure and prior to the institution of any action under section 6-l of the Banking Law or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, (i) make the high cost home loan satisfy the requirements of this Part, or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan is no longer a high cost home loan subject to the provisions of this Part. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this Part is not a bona fide error.

§ 41.10 Good faith reliance.

A lender or assignee may not be held liable under this Part for any act done or omitted in good faith in conformity with any rule, regulation, release, bulletin, or interpretation thereof by:

(a) the Banking Department; or

(b) with respect to provision of this Part that follow provision of the Federal Truth-in-Lending Act, the Federal Reserve Board or any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the board to issue such interpretations or approvals under such procedures as the board may prescribe therefore, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 41.11 Single premium insurance; debt cancellation and suspension agreement payments.

No lender or Affiliate shall finance single premium credit life, accident, health, disability, or loss of income insurance, or any other life or health insurance premiums, in connection with a high cost home loan subject to this Part, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that such insurance premiums or payments calculated and paid on a monthly basis shall not be considered so financed.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 41.1(b), (c), (e), (h) and (j); 41.2(e); and 41.3(b).

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

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

The non-substantial changes from the amendments to Part 41 as originally proposed involve the updating of references to the Department's address and the elimination of references to mortgage brokers in certain sections dealing with lenders. They do not necessitate changes in the above-referenced statements.

**Assessment of Public Comment**

One comment was received from a staff member of the Banking Department suggesting that Part 41 be further amended so as to cover homes on which the mortgage exceeded \$300,000 which is the current ceiling. The rationale for the comment is the greatly increasing cost of housing in the New York City area is making the regulation irrelevant. While this may be true, the statute sets forth the dollar amounts of the loans to which the statute applies. Accordingly, the implementing regulation can not be amended in a way contrary to the statute.

**NOTICE OF ADOPTION**

**European Union Financial Conglomerates Directive**

I.D. No. BNK-25-06-00010-A

**Filing No.** 1097

**Filing date:** Sept. 12, 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 Part 114 to Title 3 NYCRR.

**Statutory authority:** Banking Law, section 14(1), (k), and art. XII  
**Subject:** Supervision and regulation of art. XII investment company holding companies and their subsidiaries for purposes of the European Union Financial Conglomerates Directive.

**Purpose:** To clarify the superintendent's examination, supervision, regulation and enforcement authority over art. XII investment company parent organizations and their subsidiaries for purpose of providing equivalent supervision as required under the European Union Financial Conglomerates Directive.

**Text or summary was published** in the notice of proposed rule making, I.D. No. BNK-25-06-00010-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:** Sam L. Abram, Secretary to the Banking Board, Banking Department, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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

**Community Reinvestment Act Requirements**

I.D. No. BNK-39-06-00002-P

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

**Proposed action:** Amendment of Part 76 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 10, 14(1) and 28-b(1), (3), (4) and (5)

**Subject:** Compliance with Community Reinvestment Act requirements.

**Purpose:** To remain consistent with the regulations of the Federal bank regulatory agencies under the Community Reinvestment act.

**Substance of proposed rule (Full text is posted at the following State website: www.banking.state.ny.us):** Section 76.2(b) is amended to include references to "metropolitan divisions" in determining an area's median family income.

Section 76.2(f) is amended to revise the definition of "community development" to include activities that revitalize or stabilize disaster areas and distressed or underserved middle-income nonmetropolitan geographies.

Section 76.2(q) is amended to add a definition of "metropolitan division".

Sections 76.2(q) to 76.2(w) are renumbered to account for the added definition in Section 76.2(q), as noted above.

Section 76.2(t) is amended to raise the asset threshold for a "small banking institution" to \$1 billion, to introduce the new concept of an "intermediate small banking institution," and to add provisions for adjusting the asset thresholds for small and intermediate small banking institutions.

Section 76.2(u) is amended to reflect the aforementioned renumbering, and to update references to the Banking Department's address.

Section 76.2(v) is amended to reflect the aforementioned renumbering, to clarify a reference to Federal Reserve Regulation BB and to update references to the Banking Department's address.

Section 76.5(a) is amended to replace the requirement for biennial CRA examinations with more flexible CRA examination scheduling criteria and to clarify the connection between the numerical ratings specified in Part 76 and the words commonly used to describe the rating.

Section 76.5(b) is amended to provide examples of laws, rules and regulations that, when violated, could lead to reduced CRA performance ratings.

Section 76.6(b) is amended to include references to metropolitan divisions.

Section 76.6(c)(1) is amended to include references to metropolitan divisions.

Section 76.8(a)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending as part of the institution's CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.8(b)(2) is amended to eliminate a reference to loan renewals.

Section 76.8(c)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending by an affiliate of the institution as part of the institution's CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.8(d) is amended to clarify that the loans being discussed in the Section are community development loans.

Section 76.8(d)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending by an affiliate of the institution as part of the institution's CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.10(d)(1) is amended to clarify the circumstances under which additional consideration will be given for branches located outside low- or moderate-income areas.

Section 76.10(d)(2) is amended to clarify the criteria for evaluating an institution's record of opening new branches and closing existing branches.

Section 76.10(f) is amended to add a provision specifying that the Banking Department will look favorably upon an institution's efforts to establish a Banking Development District.

Section 76.12(a)(1) is added to identify which performance criteria apply to small banking institutions that are not intermediate small banking institutions.

Section 76.12(a)(2) is added to identify the performance criteria that apply to intermediate small banking institutions.

Section 76.12(b) is added to delineate the Lending Test criteria that apply to all small banking institutions.

Section 76.12(c) is added to identify the Community Development Test performance criteria that apply only to intermediate small banking institutions.

Section 76.13(g)(1) is amended to correct an inaccurate cross-reference.

In addition, various technical amendments have been made to Part 76 to correct punctuation, renumber sub-paragraphs, and make similar minor adjustments.

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

**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:

Banking Law Sections 10, 14(1) and 28-b(1), (3), (4) and (5) authorize the Banking Board to promulgate rules and regulations effectuating the provisions of the Community Reinvestment Act ("CRA").

##### 2. Legislative Objectives:

The purpose of CRA is to encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate income neighborhoods, consistent with safe and sound operations. The proposed amendments to Part 76 make compatible the New York State CRA regulations to the changes made to the federal CRA regulations, recently adopted jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (the "Federal Agencies") that became effective on September 1, 2005. As a result, the proposed amendments will establish a CRA framework paralleling that in the federal CRA regulation, by which the State of New York Banking Department ("Banking Department") can assess a banking institution's record of helping to meet the credit needs of its local community.

##### 3. Needs and Benefits:

Every New York State-chartered bank must comply with both the State and federal CRA laws and regulations. Thus, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. This proposal primarily seeks amendments to Part 76 with respect to certain provisions of the State CRA regulation to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law do not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden.

Specifically, the proposed rule includes amendments that reduce the regulatory burden imposed on banks with an asset size between \$250 million and \$1 billion, now referred to as "intermediate small banking institutions", without regard to holding company affiliation, by exempting them from CRA loan data collection and reporting obligations. There are approximately 25 New York State-chartered banks with assets that place them into the intermediate small banking institution category. The intermediate small banking institutions will not be subject to the lending, investment, and service CRA performance tests. Instead, their CRA performance will be evaluated under the small bank lending test combined with a flexible new community development CRA performance test. This has the effect of reducing regulatory burden on institutions that fall within this category because they are relieved from their obligation to collect and report information about small business, small farm, and community development loans.

As mentioned above, the proposed rule includes the implementation of a community development test for intermediate small banking institutions that will provide a more appropriate framework for assessing community reinvestment performance by these banks. The number and amount of community development loans, the number of qualified investments, and the provision of community development services by an intermediate small banking institution, and the bank's responsiveness through such activities to community development lending, investment, and service needs, is evaluated in the context of the individual bank's capacities, business strategy, the bank's assessment

area(s), and the number and types of opportunities for community development activities.

The proposed rule also revises the definition of "community development" to increase the number and kinds of tracts in which bank activities are eligible for community development consideration. Specifically, the category of community development with respect to activities that "revitalize or stabilize" is revised to provide that activities that revitalize or stabilize areas designated by the federal agencies as "distressed or underserved nonmetropolitan middle-income geographies" will qualify as community development activities. In addition, the proposed rule extends the definition of "community development" to cover efforts made by banks to revitalize or stabilize designated disaster areas.

Further, the proposed rule amends Part 76 to reflect certain technical changes to the regulation implementing the CRA to conform to changes made by the Office of Management and Budget ("OMB") regarding the standards for defining Metropolitan Statistical Areas, and changes related to census tracts adopted by the U.S. Bureau of the Census ("Census"). OMB standards for defining statistical areas provide nationally consistent definitions to use when collecting, tabulating and publishing federal statistics by geographic area. The CRA regulation relies on OMB standards for defining metropolitan areas for purposes of CRA data collection and reporting and for delineating institutions' assessment areas.

The CRA definition of "geography" affects CRA assessment area delineation, data collection and reporting. The CRA regulation defined the term "geography" as a "census tract or a block-numbering area delineated by the United States Bureau of the Census in the most recent decennial census." Beginning with the 2000 Census, the Census only assigns tracts and no longer assigns block-numbering areas. Accordingly, the proposed regulation amends the definition of geography to delete the term "block-numbering area".

Proposed amendments to Part 76 also establish a CRA examination schedule for State chartered banks that will more closely align, to the extent feasible, the State CRA examination schedule with that of the bank's federal regulator, thereby eliminating, when possible, non-concurrent CRA examinations.

In addition, the proposed rule includes certain amendments that will clarify the existing CRA regulations to assist regulated entities whose CRA performance is being assessed. In particular, Part 76 is amended to clarify, by way of examples, actions that evidence discrimination, or evidence credit practices that violate an applicable law, rule, or regulation. Such evidence will adversely affect the evaluation of a bank's CRA performance.

Also included in the proposed rule are clarifying amendments that: (a) describe the level of CRA performance associated with the CRA numerical performance ratings currently referred to throughout the regulation, (b) explain the criteria currently considered for evaluating a bank's CRA performance with respect to branch distribution, (c) specify the data referred to that must be maintained with respect to additional lending activity if banks elect to have additional lending activity considered in assessing their CRA performance, (d) make explicit the Banking Department's already existing practice to consider a bank's efforts to establish a Banking Development District in evaluating the bank's service test CRA performance criteria, and (e) state the Department's existing practice to apply the CRA performance criteria uniformly.

In addition to the foregoing, there are other small amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

#### 4. Costs:

##### Costs to the Regulated Entities

The Banking Department expects that because every New York State-chartered bank must comply with both the State and federal CRA laws and regulations, and the proposed rule primarily seeks amendments to the State's CRA regulation to create compatibility with the federal CRA regulations, there will be no additional costs to the regulated entities due to the proposed amendments to Part 76.

It is expected that the proposed rules, overall, will result in cost-savings to the regulated entities. Specifically, because the amendments to Part 76 primarily create compatibility with the federal CRA regulations, New York State-chartered banks that are subject to both the State and federal CRA laws and regulations will not incur the additional costs that would likely result if the regulated entities were required to satisfy two conflicting sets of CRA regulations. The estimated savings to the regulated entities in this regard can not be quantified by the Banking Department because there are a number of factors affecting a bank's CRA compliance costs, including the institution's asset size, the scope and type of its CRA programs, and the personnel involved in administering the programs and compliance with CRA.

Additionally, because the proposed rule establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator, eliminating the regulatory burden of non-concurrent examinations, when possible, in this area will eliminate additional costs to the regulated entities for CRA examinations. For example, when concurrent CRA examinations occur, it is possible that costs savings may be realized by the regulated entities with respect to the number of personnel hours used by them in order to answer CRA related questions and to provide CRA related materials and information. The Banking Department is unable to estimate the savings to the regulated entities in this respect because the costs to an institution for an on-site CRA examination can vary greatly according to the institution's asset size, the scope and type of its CRA programs, and the number of personnel needed to assist in connection with the examination.

Costs to State Government: None.

It is expected that there will not be an increase in the amount of examiner hours needed to conduct CRA examinations of State-chartered banks by amending the State's CRA regulations to create compatibility with the federal CRA regulations, and establishing a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator.

Costs to Local Government: None.

#### 5. Local Government Mandates:

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

#### 6. Paperwork:

The proposed rule will provide regulatory relief for State-chartered banks with an asset size between \$250 million and \$1 billion (intermediate small banking institutions) because it exempts these banks from CRA loan data collection and reporting obligations. As a result, such intermediate small banking institutions will be relieved of their obligation to collect and report information to the State and federal regulators about small business, small farm, and community development loans.

Additionally, since the proposed rule establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator, a reduction in paperwork will result since

the banks will have to produce the necessary paperwork only once per CRA evaluation period for concurrent examinations.

#### 7. Duplication:

Every New York State-chartered bank must comply with both the State and federal CRA laws and regulations. Consequently, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. The proposed rule seeks amendments to Part 76 of the State CRA regulation to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law do not have to satisfy conflicting sets of CRA regulations.

#### 8. Alternative Approaches:

Proposal – New York State-chartered banks must comply with both the State and federal CRA laws and regulations. Therefore, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. As previously discussed in the Needs and Benefits section contained herein, the rule is necessary as proposed because it primarily amends Part 76 in various ways so that the State CRA regulation is compatible with the federal CRA regulation and establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator.

Due to the fact that State-chartered banks are required to comply with State and federal laws and regulations with respect to CRA, the Banking Department reasoned when Part 76 was first established, and during subsequent amendments thereto, that the State CRA regulation should be compatible with the federal CRA regulation. This approach to CRA has provided the regulated institutions with a consistent set of performance criteria with respect to their CRA activity. Accordingly, the proposed rule seeks amendments to Part 76 that will again provide a consistent approach to CRA compliance for the regulated entities so that they will not have to satisfy conflicting sets of CRA regulations. To the extent possible, it will also enable them to be examined concurrently by the State and federal regulator for CRA purposes, thereby eliminating the regulatory burden of non-concurrent CRA examinations. In the past, preventing regulated institutions from having to satisfy two different sets of CRA regulations has reduced their CRA regulatory burden. For that reason, it is expected that the current proposed rule will have a similar effect.

Do not propose the rule – If this alternative were considered, regulated entities would be faced with CRA compliance requirements under the State and federal regulations that would be substantially different. The regulated entities also would be required to submit to non-concurrent CRA examinations by the State and federal regulators. As explained in the Needs and Benefits section, this approach was not considered because the Banking Department believes that it is unnecessary to increase the regulatory burden placed on State-chartered banks by having them comply with conflicting sets of CRA regulations and subjecting them to non-concurrent CRA examinations.

#### 9. Federal Standards:

Federal CRA regulations recently adopted by the Federal Agencies become effective on September 1, 2005. The proposed rule seeks amendments to the State CRA regulation to make it compatible with the federal CRA regulations.

#### 10. Compliance Schedule:

Compliance with the proposed rule is required upon adoption of the rule. Coming into compliance with the proposed rule is not expected to present issues for the regulated entities since, in practice, the regulated entities are already subject to, and required to be in compliance with, the federal CRA counterparts of the proposed rule.

#### **Regulatory Flexibility Analysis**

The proposed rule makes amendments to Part 76, the State's CRA regulation, primarily to make it compatible with the recently amended

federal CRA regulations, which became effective September 1, 2005. All New York State-chartered banks must comply with both the State and federal CRA laws and regulations.

#### Effect of the rule:

With respect to asset size of the State-chartered banks, the proposed rule specifically includes amendments to Part 76 similar to the changes recently adopted in the federal CRA regulations, that reduce the regulatory burden imposed on banks with an asset size between \$ 250 million and \$ 1 billion (referred to as "intermediate small banking institutions"), without regard to holding company affiliation. These amendments will exempt intermediate small banking institutions from CRA loan data collection and reporting requirements. Also, the intermediate small banking institutions will not be subject to the lending, investment, and service CRA performance tests. Instead, their CRA performance will be evaluated under the small bank lending test combined with a flexible new community development CRA performance test. This has the effect of reducing regulatory and cost burdens on institutions that fall within this category because they are relieved from their obligation to collect and report information about small business, small farm, and community development loans.

The implementation of a new community development test for the intermediate small banking institutions will provide a more appropriate framework for assessing community reinvestment performance by these banks. The number and amount of community development loans, the number of qualified investments, and the provision of community development services by an intermediate small bank, and the bank's responsiveness through such activities to community development lending, investment, and service needs is evaluated in the context of the individual bank's capacities, business strategy, the bank's assessment area(s), and the number and types of opportunities for community development activities. Accordingly, because the performance standards for the intermediate small banking institutions will have the effect of reducing regulatory burden on these institutions, it is apparent that the amendments will not impose any appreciable or substantial adverse impact on State-chartered banks licensed under New York Law. While the Banking Department does not systematically collect data on staffing levels of the regulated entities that are designated under the rule as "intermediate small banking institutions", it is possible that some of those regulated entities may have less than 100 employees and otherwise qualify as "small businesses" under the State Administrative Procedures Act.

The proposed rule affects State-chartered banks. As was previously stated, the proposed rule makes amendments to the State's CRA regulation, primarily to make it compatible with the recently amended federal CRA regulations. Prior to the adoption of the amendments to the federal CRA regulations, extensive outreach was conducted by the federal regulators with the banking industry and community groups. The proposed rule will have no effect on local governments because there are no local governments that are State-chartered banks.

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

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. As is more fully described in the Regulatory Impact Statement, the rule contains amendments to Part 76 to make various changes with respect to the ways in which the CRA performance is assessed for banks with a certain asset size to make the State CRA rules compatible with the recently adopted amendments to the federal CRA regulation. The amendments to Part 76 also establish a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator. Additionally, amendments to Part 76 seek to clarify certain provisions of the existing State CRA regulation to assist the regulated entities whose CRA performance is being assessed. Finally, there are

certain amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

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

#### **Job Impact Statement**

The purpose of CRA is to encourage banking institutions to help meet the credit needs of their local communities, including low and moderate income neighborhoods, consistent with safe and sound operations. Every New York-State chartered bank must comply with both the State and federal CRA laws and regulations and is examined by State and federal regulators with respect to CRA. Recent amendments to the federal CRA regulation that apply to federal as well as State-chartered banks were adopted and will become effective September 1, 2005. Accordingly, the amendments to Part 76, the State's CRA regulations, are intended primarily to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law will not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden.

As is more fully described in the Regulatory Impact Statement, the rule contains amendments to Part 76 to make various changes with respect to the ways in which certain bank's CRA performance is assessed to make the State CRA rules compatible with the recently adopted amendments to the federal CRA regulation. Furthermore, amendments to Part 76 establish a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator. Additionally, amendments to Part 76 seek to clarify certain provisions of the existing State CRA regulation to assist the regulated entities whose CRA performance is being assessed. Finally, there are certain amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

Accordingly, based on the nature and purpose of the rule, it will have no impact on jobs in New York State.

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

#### **Overdraft Protection Fee Disclosure**

**I.D. No.** BNK-39-06-00003-P

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

**Proposed action:** Amendment of section 6.8 of Title 3 NYCRR.

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

**Subject:** Overdraft protection fee disclosure.

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

**Text of proposed rule:** Section 6.8 of Part 6 of 3 NYCRR is amended to read as follows:

§ 6.8 Overdraft Protection Charges.

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

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

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

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

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

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

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

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

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

#### **Regulatory Impact Statement**

1. Statutory Authority. Sections 14-g and 14-h of the Banking Law authorize the Banking Board to adopt a rule or regulation permitting,

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

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

3. Needs and Benefits. The Banking Board recently adopted amendments to Part 32 and a new Section 6.8 of its General Regulations to permit State-chartered banks, trust companies, savings banks and savings and loan associations to charge fees to the same extent as national banks for accepting or honoring checks which overdraw accounts; to clarify that charges may be imposed with respect to electronic as well as check transactions; and to establish that such institutions may establish different charges for consumer accounts and other types of accounts, such as commercial accounts, that they may offer (collectively, the "Overdraft Protection Amendments").

In the course of considering the Overdraft Protection Amendments, the Department received many comments from members of the public, and held public hearings. This proposed rule addresses concerns about clarity and prominence of overdraft protection fee disclosure.

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

4. Costs. There will be additional cost imposed on banking institutions by the giving of the separate notice, but the industry has indicated

to the Department it does not object to the requirement. Overdraft protection programs can be expected to generate additional fee income for financial institutions.

5. Local Government Mandates. None.

6. Paperwork. This requirement will increase paperwork for banking institutions but this cannot be avoided as it is the objective of the rule making. The required separate disclosure will help alert consumers to the potential fees associated with an overdraft protection program.

7. Duplication. In addition to the separate disclosure as required by this proposal, a banking institution may choose also to include the overdraft protection fee information in the account agreement's terms and conditions, or in a periodic account statement if the bounce protection program is applied to the account after it is opened.

8. Alternatives. The Department could have chosen not to require that overdraft protection program fees be disclosed separately. However, doing so would have permitted banking institutions simply to notify customers of such fees in the account agreement or a monthly statement. The Department concluded that such disclosure would not provide sufficient notice to the consumer.

9. Federal standards. The content of the disclosures and the requirements of when such disclosures must be given are specified in the federal Guidances and Regulation DD, as cited above, and apply to all insured accounts. While the requirement that these disclosures be given separately exceeds federal standards, the Department concluded that separate clear and conspicuous disclosure of overdraft protection program fees is necessary for consumer protection.

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

#### **Regulatory Flexibility Analysis**

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

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

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

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

can be expected to generate additional fee income for financial institutions.

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

6. Minimizing adverse economic impact: This proposed rule is the sole provision of the Department's regulations that goes beyond the federal regulatory requirements and standards that otherwise pertain to the overdraft protection programs banking institutions provide to account holders. In developing its regulatory framework for such programs, the Department considered the inclusion of additional requirements. However, after weighing the benefits and costs to consumers and regulated parties, the Department chose to conform to the standards specified in the federal guidances on overdraft protection programs and in the federal Truth in Savings Act regulations. This proposed rule addresses concerns about the clarity and prominence of overdraft protection fee disclosure for consumers which were expressed during the process of developing the Department's overdraft protection fee regulations.

7. Small business participation and local government participation: No local government participation was necessary as the rule has no effect upon local governments. As regards its effects on banking institutions which are small businesses, the Department advised the banking industry trade associations of the proposed requirement prior to its adoption as an emergency rule and they advised that it was acceptable. During the Banking Board's discussion prior to adopting the emergency rule, a member of the Board, who is a CEO of a small banking institution, advised that it would not pose compliance problems for banking institutions.

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

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## Education Department

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

**Proprietary College Degree-Conferring Authority**

**I.D. No.** EDU-39-06-00026-P

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

**Proposed action:** Amendment of section 3.46 and addition of section 3.58 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 210 (not subdivided); 215 (not subdivided); 216 (not subdivided); 218(1) and (2); and 224(1)(a) and (b); and L. 1995, ch. 82, section 137  
**Subject:** Proprietary college degree-conferring authority.

**Purpose:** To set forth requirements that a for-profit institution must meet for Regents authorization to confer degrees and that a prospective owner of a proprietary college must meet to obtain Regents consent to the transfer of the degree-conferring authority of the institution, and to establish requirements for the revocation and surrender of degree-conferring authority at proprietary colleges.

**Substance of proposed rule (Full text is posted at the following State website: [www.highered.nysed.gov](http://www.highered.nysed.gov)):** The Board of Regents proposes to amend section 3.46 of the Rules of the Board of Regents and add a new section 3.58, relating to proprietary college degree-conferring authority.

Section 3.46 of the Rules of the Board of Regents is amended to delete the current provision concerning the transfer of degree-conferring authority at a for-profit proprietary college upon the change of ownership or control of the institution.

Section 3.58 of the Rules of the Board of Regents, entitled "Proprietary college degree-conferring authority," is added. Subdivision (a) of section 3.58 prescribes definitions for the following terms used in this section: change of ownership or control, Deputy Commissioner, proprietary college, and prospective owner.

Subdivision (b) of section 3.58 establishes general requirements:

(1) A for-profit institution may be granted degree-conferring authority by the Board of Regents in accordance with the procedures of this section. Such an institution that has no degree-conferring authority must first obtain provisional authority to confer degrees for a period of up to five years, in accordance with the requirements of subdivision (c) of this section. At least 12 months prior to the end of the provisional authority period, such institution must apply to the department for permanent authority to confer degrees, in accordance with the requirements of subdivision (d) of this section. The Board of Regents shall determine whether to grant such permanent authority, or extend the provisional authority to confer degrees for an additional period of up to five years, or deny continuing degree-conferring authority past the term of the previously granted provisional authority.

(2) During the period of provisional authority, the institution shall take steps to meet the requirements for permanent authority to confer degrees, as prescribed in subdivision (d) of this section. At the department's request, the institution shall provide the department with information and reports concerning its progress in meeting the requirements for permanent authority to confer degrees.

Subdivision (c) establishes requirements for granting a for-profit institution provisional authority to confer degrees. It requires the institution to submit to the department the following documentation which substantiates the institution's capacity to operate as a degree-granting institution:

(a) evidence confirming the owner's capacity to operate the institution in compliance with the Education Law, program registration standards set forth in Part 52 of this Title, other Rules of the Board of Regents and Regulations of the Commissioner of Education, other State statutes and regulations, and Federal statutes and regulations, relevant to the operation of degree-granting institutions;

(b) evidence confirming that the institution has sufficient financial resources to ensure satisfactory conduct of its degree programs and achievement of its stated educational goals;

(c) evidence that the individuals having ownership or control of the institution have experience operating an educational institution or other business or enterprise in an effective manner which demonstrates their capacity to operate a degree-granting institution; and

(d) evidence that the individuals having ownership or control of the institution have not engaged in fraudulent or deceptive practices.

This paragraph requires the institution to submit to the department documentation which substantiates the need for the degree programs it plans to offer based upon demand by students and/or employers and/or need of society for such programs. It prescribes the process used by the State Education Department and the Regents for determining whether the for-profit institution shall be granted provisional authority to confer degrees.

Subdivision (d) of section 3.58 establishes requirements for granting a proprietary college having provisional authority to confer degrees with permanent authority. Paragraph (1) of subdivision (d) provides that the Board of Regents may grant a proprietary college having provisional authority to confer degrees permanent authority, or extend the provisional authority to confer degrees for an additional period of up to five years, or deny continuing degree-conferring authority past the term of the previously granted provisional authority. Paragraph (2) of subdivision (d) requires the proprietary college to submit to the department the following documentation which substantiates the institution's on-going capacity to operate as a degree-granting institution:

(a) evidence confirming that the institution is in compliance with the Education Law, program registration standards set forth in Part 52 of this Title, other Rules of the Board of Regents and Regulations of the Commissioner of Education, other State statutes and regulations, and Federal statutes and regulations, relevant to the operation of degree-granting institutions;

(b) evidence confirming that the institution has sufficient financial resources to ensure satisfactory conduct of its degree programs and achievement of its stated educational goals;

(c) evidence that the individuals having ownership or control of the institution are operating the proprietary college in an effective manner and that the degree programs meet their educational objectives;

(d) evidence that the individuals having ownership or control of the institution have not engaged in fraudulent or deceptive practices; and

(e) evidence that substantiates the institution's beneficial contributions to the community or communities it serves.

This paragraph prescribes the process used by the State Education Department and the Regents for determining whether the proprietary college with provisional authority to confer degrees shall be granted permanent authority.

Subdivision (e) of section 3.58 establishes requirements for the transfer of degree authority of a proprietary college upon the change of ownership or control of the institution. Paragraph (1) of subdivision (e) provides that no proprietary college holding degree-conferring authority granted by the Board of Regents shall convey, assign or transfer such degree-conferring authority through a change of ownership or control of the institution, without the consent of the Board of Regents to transfer such degree-conferring authority prior to the change of ownership or control of the institution, except that consent to a temporary transfer of degree-conferring authority may be obtained after a change of ownership or control of the institution already has been made where the Board of Regents determine there is an adequate showing of good cause as prescribed in paragraph (7) of this subdivision. Paragraph (2) provides that the department shall determine if a proposed transaction is a change of ownership or control of a proprietary college. Paragraph (3) provides that the department may expedite in terms of time the department's review for the transfer of degree-conferring authority where the change of ownership or control is between family members, upon an adequate showing of good cause. Paragraph (4) provides that the Regents may limit or condition the degree-conferring authority of the proprietary college under the prospective owner based upon a review of the prospective owner's capacity to meet the standards prescribed in paragraph (6) of this subdivision. Paragraph (5) prescribes requirements and responsibilities

applicable to a proprietary college when the Regents did not consent to the transfer of degree-conferring authority prior to the change of ownership or control of the institution.

Paragraph (6) of subdivision (e) establishes the procedures for a prospective owner to apply for a transfer of degree-conferring authority upon the change of ownership or control of the institution. It requires the proprietary college to make prescribed notifications to the State Education Department and the prospective owner at least 180 days prior to the date of the change of ownership or control of the institution. At least 150 days prior to the proposed date for the change of ownership or control, the prospective owner shall apply to the department for the transfer of degree-conferring authority. The prospective owner shall submit to the department the following documentation which substantiates the prospective owner's capacity to operate the college:

(a) evidence confirming the prospective owner's capacity to operate the institution in compliance with the Education Law, program registration standards set forth in Part 52 of this Title, other Rules of the Board of Regents and Regulations of the Commissioner of Education, other State statutes and regulations, and Federal statutes and regulations, relevant to the operation of degree-granting institutions;

(b) evidence confirming that the prospective owner has sufficient financial resources to ensure satisfactory conduct of degree programs and achievement of the institution's stated educational goals;

(c) evidence of the prospective owner's experience operating an educational institution or other business or enterprise in an effective manner which demonstrates the prospective owner's capacity to operate a degree-granting institution;

(d) evidence that postsecondary education institutions that the prospective owner operates in New York State or elsewhere, if any, are in compliance with Federal and state statutes and regulations and accreditation requirements relevant to the operation of such institutions; and

(e) evidence that the prospective owner has not engaged in fraudulent or deceptive practices.

This paragraph prescribes the procedures used by the State Education Department and the Regents for determining whether the Regents shall consent to the transfer of degree-conferring authority of a proprietary college upon the change of ownership or control of the institution.

Paragraph (7) of subdivision (e) establishes requirements for the temporary transfer of degree-conferring authority of a proprietary college. Subparagraph (i) of paragraph (7) provides that the Board of Regents may consent to a temporary transfer of degree-conferring authority after the change of ownership or control of the institution has been made, upon a showing of good cause. Subparagraph (ii) provides that the department shall review the institution's application and make a recommendation to the Regents concerning whether to grant consent to the temporary transfer of degree-conferring authority. Subparagraph (iii) provides that when the department determines that it is in the best interests of students at the institution, the department may require the institution to have a teach-out agreement with other institution(s) that is acceptable to the department before making a positive recommendation to the Regents and prescribes requirements for the agreement. Subparagraph (iv) provides that the Regents consent to such temporary transfer may limit or condition the degree-conferring authority of the institution and shall be for an initial period not to exceed 180 days, but may be extended for such additional periods as determined by the Regents. Subparagraph (v) provides that the new owner must also apply under the regular procedures of paragraph (6) of this subdivision for the review required for the transfer of degree-conferring authority.

Subdivision (f) of section 3.58 provides procedures and requirements for revoking or limiting the degree-conferring authority of a

proprietary college. Paragraph (1) of subdivision (f) provides that the Board of Regents may revoke in whole or part or limit the degree-conferring authority of a proprietary college for sufficient cause. As a prerequisite for the revocation in whole or part of degree-conferring authority in accordance with the requirements of this subdivision, all registered programs at the institution leading to the degree(s) covered by the revocation must first be denied re-registration by the department pursuant to the requirements and procedures prescribed in Part 52 of this Title.

Subparagraph (i) of paragraph (2) of subdivision (f) establishes requirements for the department's review of the capacity of the proprietary college to continue to have degree-conferring authority. Subparagraph (ii) prescribes the Deputy Commissioner's review of the record. Based upon such review, the Deputy Commissioner may recommend that the Regents revoke in whole or in part or otherwise limit the authority of a proprietary college to confer degrees upon sufficient cause, meaning the institution violated substantive requirements of Part 52 of this Title that demonstrate that the institution does not have the ability to offer quality programs leading to the degree(s) covered by the revocation or that demonstrate that the institution must have limitations on degree-conferring authority to ensure the quality of the degree programs.

This paragraph prescribes the subsequent process used by the State Education Department and the Regents for determining whether to revoke or limit the degree-conferring authority of the proprietary college.

Subdivision (g) of section 3.58 establishes requirements for the surrender of degree-conferring authority by a proprietary college, and subdivision (h) establishes a proprietary college's responsibilities upon cessation of degree-conferring authority.

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

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Deputy Commissioner, Education Department, Office of Higher Education, 2M West Wing Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: hedepcom@mail.nysed.gov

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

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

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

Section 210 of the Education Law grants to the Board of Regents authority to register domestic and foreign institutions in terms of New York standards.

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the education supervision of the State and require reports from such schools.

Section 216 of the Education Law provides that no institution which might be incorporated under the Education Law may be incorporated under any other general law without the consent of the Board of Regents and that the Commissioner of Education may consent to the incorporation of such an institution under the Business Corporation Law.

Subdivision (1) of section 218 of the Education Law provides that no institution shall have the power to confer baccalaureate or higher degrees in New York State unless the Board of Regents determines that the institution has financial resources which are adequate to ensure

satisfactory conduct of its degree programs and achievement of its stated educational goals.

Subdivision (2) of section 218 of the Education Law provides that no institution shall have the power to confer associate degrees in New York State unless the Board of Regents determines that the institution has financial resources which are adequate to ensure satisfactory conduct of its degree programs and achievement of its stated educational goals.

Paragraph (a) of subdivision (1) of section 224 of the Education Law prohibits an individual, association, partnership, or corporation not holding degree-conferring powers by special charter from the Legislature or from the Regents from conferring any degree, unless the right to do so has been granted by the Regents in writing under their seal.

Paragraph (b) of subdivision (1) of section 224 of the Education Law prohibits an individual, association, partnership or corporation operating an institution on a for-profit basis and holding degree-conferring powers granted by the Board of Regents from transferring such degree-conferring power through a change of ownership or control, without the consent of the Regents.

Section 137 of Chapter 82 of the Laws of 1995 establishes requirements for the master plan amendment process used when New York's public, independent, and proprietary colleges seek Regents authorization for major changes in institutional mission.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment carries out the legislative objectives of the above-referenced statutes by setting forth requirements which must be met by for-profit institutions to obtain Regents authorization to confer degrees and the consent of the Regents to transfer degree-conferring authority upon the change of ownership or control of the institution.

##### **3. NEEDS AND BENEFITS:**

The purpose of the proposed amendment is to set forth requirements that a for-profit institution must meet for Regents authorization to confer degrees and that a prospective owner of a proprietary college must meet to obtain Regents consent to the transfer of the degree-conferring authority of the institution, and to establish requirements for the revocation and surrender of degree-conferring authority at proprietary colleges. The intent is to strengthen the Regents and State Education Department's oversight of proprietary colleges, thereby helping to ensure high standards of academic quality at these institutions.

The for-profit sector of higher education has grown significantly in recent years. Enrollments in proprietary colleges in New York State have tripled over the last 30 years. An increasing number of students are looking at proprietary colleges as potential providers of programs and degree options that offer flexibility, applied education, and the knowledge and skills they need to be successful in the workforce. However, while the majority of proprietary colleges provide quality education to students, instances of poor academic practices have recently been identified and in other cases fraud has been uncovered in a number of institutions in New York and other states. In these cases, some students have left college with considerable debt, no degree, and little hope of being successful in the job market.

In response to these incidents, the Regents requested a report on the process by which proprietary colleges are approved and regulated in New York State. The report, entitled *Proprietary Colleges in New York State* (New York State Education Department, Office of Higher Education, 2M West Wing, State Education Building, 89 Washington Avenue, Albany, NY 12234), was presented to the Board of Regents at its May 2006 meeting. This report describes the for-profit sector of higher education in New York State, including enrollment and growth patterns, the current process for regulating such institutions, and

regulatory practices of other states identified through a survey of the membership of the State Higher Education Executive Officers Association (SHEEO), and offers five recommendations to improve the oversight of these institutions. The proposed amendment implements two recommendations set forth in the report.

At present, a grant by the Board of Regents of authority to confer degrees to a for-profit institution is without term. This is in contrast with requirements applicable to not-for-profit independent colleges. Education Law section 217 authorizes the Regents to grant a provisional charter to a new independent college. While under the provisional charter, the independent college would meet the conditions for an absolute charter, and during this period the Regents would confer the degrees to students at the institution. Upon granting the absolute charter, the Regents would authorize the independent college to confer degrees.

The proposed amendment would establish a similar procedure for for-profit institutions seeking degree-conferring authority for the first time. Initially, the institution would apply for provisional authority to confer degrees for a period of up to five years. During the period of provisional authority, the institution would be authorized to confer degrees, and the institution must take steps to meet prescribed standards for permanent authority to confer degrees. Within 12 months of the expiration of the term of provisional authority, the institution must apply for permanent authority to confer degrees.

This change is needed in order to establish a procedure by which the State Education Department and the Regents will monitor and assess the on-going capacity of the new degree-granting proprietary college, before it is granted permanent authority to confer degrees. These institutions may have to make significant changes in governance, personnel, and curricula in order to meet requirements for degree programs prescribed in the Commissioner's regulations and Regents Rules.

Education Law section 224(1)(b) prohibits a proprietary college from transferring degree-conferring authority through a change of ownership or control without the consent of the Regents. Current Regents Rules provide for a State Education Department and Regents review of the new owner's capacity to operate a degree-granting institution during a transition period after the change of ownership or control has taken place.

The proposed amendment would improve this process by requiring the prospective owner of a proprietary college to be reviewed by the Department and Regents prior to the change ownership or control of the institution. The review would determine whether the prospective owner meets prescribed standards for Regents consent to the transfer of degree-conferring authority. The amendment provides expedited time frames for this review. In addition, the amendment provides for Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has taken place in limited cases, upon a showing of good cause.

The proposed amendment is also needed to establish circumstances and procedures under which the Board of Regents may revoke or limit the degree-conferring authority of a proprietary college and procedures for the surrender of such degree-conferring authority. Finally, it is needed to establish institutional responsibilities upon the cessation of degree-granting authority.

#### 4. COSTS:

(a) Costs to State government: The amendment will not impose additional costs on the State Education Department or any other State agency. The State Education Department will use existing personnel and resources to review applications by for-profit institutions for authority to confer degrees and the applications of prospective owners of proprietary colleges for the transfer of degree authority upon the change of ownership and control of the institution.

(b) Costs to local government: None.

(c) Costs to regulated parties: Under current procedures, for-profit institutions must apply to the State Education Department for degree-conferring authority. The proposed amendment will increase costs by requiring for-profit institutions to apply initially for provisional degree-conferring authority and subsequently for permanent degree-conferring authority. The additional cost is for the second application for permanent authority. Proprietary colleges operating under a provisional grant of authority to confer degrees will incur costs to provide documentation and other evidence substantiating its on-going capacity to operate as a degree-granting institution. The Department believes that these additional costs will be between \$8,800 and \$10,600 (two professionals employed for 40 hours at a cost of between \$100 and \$120 per hour and one clerical staff member employed for 40 hours at a cost of between \$20 and \$25 per hour).

In most cases, the proposed amendment will not impose additional costs on prospective owners of proprietary colleges seeking the Regents consent to a transfer of degree-conferring authority. They merely will be required to provide documentation substantiating their capacity to operate a degree-granting institution prior to the change in ownership or control of the institution rather than after the change.

However, in cases where the new owner of a proprietary college is requesting Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has been made, the amendment will require the new owner to make an additional written application for the temporary transfer. The Department believes that the additional costs for completing the application will be between \$8,800 and \$10,600 (two professionals employed for 40 hours at a cost of between \$100 and \$120 per hour and one clerical staff member employed for 40 hours at a cost of between \$20 and \$25 per hour).

(d) Costs to the regulatory agency: As stated above in "Costs to State government," the proposed amendment will not impose additional costs on the State Education Department because existing staff and resources will be used to conduct reviews of for-profit institutions seeking degree-conferring authority and prospective owners seeking consent of the Regents to a transfer of degree authority upon the change of ownership and control of the institution.

#### 5. LOCAL GOVERNMENT MANDATES:

The amendment concerns the authority of for-profit institutions to confer college degrees. It does not impose any program, service, duty, or responsibility on local governments.

#### 6. PAPERWORK:

The proposed amendment will impose an additional paperwork requirement on for-profit institutions seeking authority to confer degrees. Under current procedures, for-profit institutions must make written application and provide documentation to the State Education Department once, substantiating that they meet standards for degree-conferring authority. The proposed amendment will require these institutions to make written application and provide documentation twice, initially for provisional degree-conferring authority and subsequently for permanent degree-conferring authority.

In most cases, the amendment will not increase paperwork requirements for prospective owners of proprietary colleges seeking a transfer of degree-conferring authority upon the change of ownership or control of the institution. They will continue to have to make written application to the Department documenting their capacity to operate the college, but the amendment will require this application prior to the change of ownership or control of the institution rather than after the change.

In cases where the new owner of a proprietary college is requesting Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has been made, the

amendment will require the new owner to make an additional application for the temporary transfer. When the State Education Department determines that it is in the best interests of students at the institution, the Department may require such an institution to have an acceptable teach-out agreement with one or more institutions.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

The proposed amendment implements recommendations of a State Education Department policy paper. There were no viable alternatives to the amendment.

#### 9. FEDERAL STANDARDS:

There are no relevant Federal standards governing the authorization of for-profit institutions to confer degrees.

#### 10. COMPLIANCE SCHEDULE:

The amendment would be effective on its stated effective date. No additional period of time is needed to ensure that regulated parties meet its requirements.

### **Regulatory Flexibility Analysis**

#### (a) Small Businesses:

##### 1. EFFECT OF RULE:

The proposed amendment sets forth requirements for for-profit proprietary institutions to obtain Regents authority to confer degrees and for the transfer of such authority on the change of ownership or control of such an institution. State Education Department data indicate that 21 of the 42 degree-granting proprietary institutions in the State (50 percent) are small businesses with 100 or fewer employees. The Department estimates that each year one or two for-profit proprietary institutions will request authority to confer degrees, and about two proprietary colleges will request a transfer of degree authority upon the change of ownership or control. The Department estimates that about one-half of these institutions will be small businesses.

##### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment sets forth requirements that a for-profit institution must meet for Regents authorization to confer degrees and that a prospective owner of a proprietary college must meet to obtain Regents consent to the transfer of the degree-conferring authority of the institution, and establishes requirements for the revocation and surrender of degree-conferring authority at proprietary colleges.

The proposed amendment would establish a procedure for for-profit institutions, including those classified as small businesses, to be granted by the Board of Regents degree-conferring authority for the first time. Initially, the institution would apply for provisional authority to confer degrees for a period of up to five years. During the period of provisional authority, the institution would be authorized to confer degrees, and the institution must take steps to meet prescribed standards for permanent authority to confer degrees. Within 12 months of the expiration of the term of provisional authority, the institution must apply for permanent authority to confer degrees.

Education Law section 224(1)(b) prohibits a for-profit institution from transferring degree-conferring authority through a change of ownership or control without the consent of the Regents. The proposed amendment would require the prospective owner of such an institution to be reviewed by the Department and Regents prior to the change of ownership or control of the institution. The review would determine whether the prospective owner meets prescribed standards for Regents consent to the transfer of degree-conferring authority. The amendment provides expedited time frames for this review. In addition, the amendment provides for Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has taken place in limited cases, upon a showing of good cause.

The proposed amendment also establishes circumstances and procedures under which the Board of Regents may revoke or limit the degree-conferring authority of a proprietary college, procedures for the surrender of such degree-conferring authority, and institutional responsibilities upon the cessation of degree-granting authority.

The proposed amendment will impose an additional paperwork requirement on for-profit institutions seeking authority to confer degrees. Under current procedures, for-profit institutions must make written application and provide documentation to the State Education Department once substantiating that they meet standards for degree-conferring authority. The proposed amendment will require these institutions to make written application and provide documentation twice, initially for provisional degree-conferring authority and subsequently for permanent degree-conferring authority.

In most cases, the amendment will not increase paperwork requirements for prospective owners of proprietary colleges seeking a transfer of degree-conferring authority upon the change of ownership or control of the institution. They will continue to have to make written application to the Department documenting their capacity to operate the college, but the amendment will require this application prior to the change of ownership or control of the institution rather than after the change.

In cases where the new owner of a proprietary college is requesting Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has been made, the amendment will require the new owner to make an additional application for the temporary transfer. When the State Education Department determines that it is in the best interests of students at the institution, the Department may require such an institution to have an acceptable teach-out agreement with one or more institutions.

##### 3. PROFESSIONAL SERVICES:

The proposed amendment will not require proprietary colleges that are classified as small businesses to hire professional services to comply.

##### 4. COMPLIANCE COSTS:

Under current procedures, for-profit institutions, including those classified as small businesses, must apply to the State Education Department for degree-conferring authority. The proposed amendment will increase costs by requiring for-profit institutions to apply initially for provisional degree-conferring authority and subsequently for permanent degree-conferring authority. The additional cost is for the second application for permanent authority. Proprietary colleges operating under a provisional grant of authority to confer degrees will incur costs to provide documentation and other evidence substantiating its on-going capacity to operate as a degree-granting institution. The Department believes that these additional costs will be between \$8,800 and \$10,600 (two professionals employed for 40 hours at a cost of between \$100 and \$120 per hour and one clerical staff member employed for 40 hours at a cost of between \$20 and \$25 per hour).

In most cases, the proposed amendment will not impose additional costs on prospective owners of proprietary colleges seeking the Regents consent to a transfer of degree-conferring authority, including those classified as small businesses. They merely will be required to provide documentation substantiating their capacity to operate a degree-granting institution prior to the change in ownership or control of the institution rather than after the change.

However, in cases where the new owner of a proprietary college is requesting Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has been made, the amendment will require the new owner to make an additional written application for the temporary transfer. The Department believes that the additional costs for completing the application will be between \$8,800 and \$10,600 (two professionals

employed for 40 hours at a cost of between \$100 and \$120 per hour and one clerical staff member employed for 40 hours at a cost of between \$20 and \$25 per hour).

The proposed amendment will not impose any capital costs on regulated parties that are small businesses.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and is economically feasible. See above "Compliance Costs" for the economic impact of the amendment.

#### 6. MINIMIZING ADVERSE IMPACT:

The Department believes that the requirements of the proposed amendment should apply to all proprietary colleges, including those classified as small businesses, in order to help to ensure that the educational programs and services they provide to students are of high academic quality. The Department believes that the proposed amendment will have no adverse impact on for-profit institutions seeking to apply for initial grants of authority to confer degrees. The proposed amendment will clarify for such schools the expectations of the Board of Regents for institutions of higher education. The Department also believes that the proposed amendment will have no adverse impact on proprietary colleges that are undergoing a change of ownership or control. The amendment clarifies the requirements that prospective owners of proprietary colleges must meet to obtain Regents consent to the transfer of degree-conferring authority.

#### 7. SMALL BUSINESS PARTICIPATION:

Before drafting the proposed amendment, the State Education Department solicited comments on the proposed changes from all colleges and universities in the State, including proprietary colleges. The Department received comments and recommendations from proprietary colleges, including one classified as a small business. In addition, an association of proprietary colleges provided comments on behalf of its members, many of which are classified as small businesses. These comments were considered during the development of the proposed amendment.

##### (b) Local Governments:

The amendment establishes requirements for for-profit institutions relating to their degree-conferring authority. It will not impose an adverse economic impact or reporting, recordkeeping, or other compliance requirements on local governments. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

#### *Rural Area Flexibility Analysis*

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

The proposed amendment sets forth requirements for for-profit institutions to obtain Regents authorization to confer degrees and for the transfer of degree-conferring authority upon the change of ownership or control of proprietary colleges, including such institutions located in the State's 44 rural counties and 71 towns in urban counties with a population density of 150 per square mile or less.

State Education Department data indicate that four of the 42 degree-granting proprietary colleges in New York State are located in rural areas of New York State (9.5 percent of the institutions). The Department estimates that each year one or two for-profit institutions will request authority to confer degrees, and about two proprietary colleges will request a transfer of degree-conferring authority upon the change of ownership or control of the institution. Based upon the percentage of proprietary colleges located in rural areas of the State (9.5 percent), the Department estimates that over the next ten years, about one or two of the for-profit institutions requesting authority to

confer degrees will be located in a rural area of New York State, and about two proprietary colleges requesting consent to the transfer of degree-conferring authority will be located in a rural area of the State.

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

The proposed amendment sets forth requirements that a for-profit institution must meet for Regents authorization to confer degrees and that a prospective owner of a proprietary college must meet to obtain Regents consent to the transfer of the degree-conferring authority of the institution, and establishes requirements for the revocation and surrender of degree-conferring authority at proprietary colleges.

The proposed amendment would establish a procedure for for-profit institutions to be granted by the Board of Regents degree-conferring authority for the first time, including those institutions located in rural areas of the State. Initially, the institution would apply for provisional authority to confer degrees for a period of up to five years. During the period of provisional authority, the institution would be authorized to confer degrees, and the institution must take steps to meet prescribed standards for permanent authority to confer degrees. Within 12 months of the expiration of the term of provisional authority, the institution must apply for permanent authority to confer degrees.

Education Law section 224(1)(b) prohibits a for-profit institution from transferring degree-conferring authority through a change of ownership or control of the institution without the consent of the Regents. The proposed amendment would require the prospective owner of such an institution to be reviewed by the Department and Regents prior to the change of ownership or control of the institution. The review would determine whether the prospective owner meets prescribed standards for Regents consent to the transfer of degree-conferring authority. The amendment provides expedited time frames for this review. In addition, the regulation provides for Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has taken place in limited cases, upon a showing of good cause.

The proposed amendment also establishes circumstances and procedures under which the Board of Regents may revoke or limit the degree-conferring authority of a proprietary college, procedures for the surrender of such degree-conferring authority, and institutional responsibilities upon the cessation of degree-granting authority.

The proposed amendment will impose an additional paperwork requirement on for-profit institutions seeking authority to confer degrees, including those located in rural areas of New York State. Under current procedures, for-profit institutions must make written application and provide documentation to the State Education Department once substantiating that they meet standards for degree-conferring authority. The proposed amendment will require these institutions to make written application and provide documentation twice, initially for provisional degree-conferring authority and subsequently for permanent degree-conferring authority.

In most cases, the amendment will not increase paperwork requirements for prospective owners of proprietary colleges seeking a transfer of degree-conferring authority upon the change of ownership or control of the institution. They will continue to have to make written application to the Department documenting their capacity to operate the college, but the amendment will require this application prior to the change of ownership or control of the institution rather than after the change.

In cases where the new owner of a proprietary college is requesting Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has been made, the amendment will require the new owner to make an additional application for the temporary transfer. When the State Education Department determines that it is in the best interests of students at the institution,

the Department may require such an institution to have an acceptable teach-out agreement with one or more institutions.

3. COSTS:

Under current procedures, for-profit institutions, including those located in rural areas of New York State, must apply to the State Education Department for degree-conferring authority. The proposed amendment will increase costs by requiring for-profit institutions to apply initially for provisional degree-conferring authority and subsequently for permanent degree-conferring authority. The additional cost is for the second application for permanent authority. Proprietary colleges operating under a provisional grant of authority to confer degrees will incur costs to provide documentation and other evidence substantiating their on-going capacity to operate as a degree-granting institution. The Department believes that these additional costs will be between \$8,800 and \$10,600 (two professionals employed for 40 hours at a cost of between \$100 and \$120 per hour and one clerical staff member employed for 40 hours at a cost of between \$20 and \$25 per hour).

In most cases, the proposed amendment will not impose additional costs on prospective owners of proprietary colleges seeking the Regents consent to a transfer of degree-conferring authority, including those located in rural areas of the State. They merely will be required to provide documentation substantiating their capacity to operate a degree-granting institution prior to the change in ownership or control of the institution rather than after the change.

However, in cases where the new owner of a proprietary college is requesting Regents consent to a temporary transfer of degree-conferring authority after the change of ownership or control already has been made, the amendment will require the new owner to make an additional written application for the temporary transfer. The Department believes that the additional costs for completing the application will be between \$8,800 and \$10,600 (two professionals employed for 40 hours at a cost of between \$100 and \$120 per hour and one clerical staff member employed for 40 hours at a cost of between \$20 and \$25 per hour).

4. MINIMIZING ADVERSE IMPACT:

The Department believes that the requirements of the proposed amendment should apply to all proprietary colleges, including those located in rural areas of New York State, in order to ensure that the educational programs and services they provide to students are of high academic quality. The Department believes that the proposed amendment will have no adverse impact on for-profit institutions seeking to apply for initial grants of authority to confer degrees or prospective owners of proprietary colleges seeking Regents consent for the transfer of degree-conferring authority upon the change in ownership or control of the institution.

5. RURAL AREA PARTICIPATION:

Before drafting the proposed amendment, the State Education Department solicited comments on the proposed changes from all colleges and universities in the State, including proprietary colleges located in rural areas of New York State. In addition, the Association of Proprietary Colleges also provided comments on behalf of its membership, which includes degree-granting proprietary colleges located in rural areas of the State. These comments were considered during the development of the proposed amendment.

**Job Impact Statement**

The proposed amendment sets forth requirements that a for-profit institution must meet for Regents authorization to confer degrees and that a prospective owner of a proprietary college must meet to obtain Regents consent to the transfer of the degree-conferring authority of the institution, and establishes requirements for the revocation and surrender of degree-conferring authority at proprietary colleges.

The amendment concerns degree-conferring authority at proprietary colleges. It will not affect jobs or employment opportunities at these

institutions, and will not affect jobs or employment opportunities in any other field. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Department of Environmental Conservation

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

**Migratory Game Bird Regulations for the 2006-2007 Season**

**I.D. No.** ENV-39-06-00009-EP

**Filing No.** 1091

**Filing date:** Sept. 8, 2006

**Effective date:** Sept. 8, 2006

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

**Action taken:** Amendment of section 2.30 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

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

**Specific reasons underlying the finding of necessity:** The Department of Environmental Conservation (Department) is adopting this rule by emergency rule making in order to conform state migratory game bird hunting regulations with the federal regulations for the 2006-2007 season and flyway guidelines for resource conservation. Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. Environmental Conservation Law Section 11-0307 requires that the Department adjust state migratory game bird regulations to maintain consistency with federal regulations. The final federal regulations are adopted in late summer, thereby necessitating emergency adoption of state regulations in order to have them in place for the migratory game bird seasons that begin in September.

Immediate adoption of this rule is necessary to preserve the general welfare by implementing New York State's 2006-2007 waterfowl hunting regulations. Law enforcement problems, public dissatisfaction, and adverse economic impacts would ensue if migratory game bird hunting regulations were not adjusted annually to conform with federal regulations and hunter preferences.

**Subject:** Migratory game bird hunting regulations for the 2006-2007 season.

**Purpose:** To adjust migratory bird hunting regulations to conform with Federal regulations.

**Text of emergency/proposed rule:** Title 6 of NYCRR, Section 2.30, entitled "Migratory game birds," is amended as follows:

Subparagraph 2.30(d)(6)(iii) is repealed and subparagraphs (iv) through (ix) are renumbered subparagraphs (v) through (x).

New subparagraphs 2.30(d)(6)(iii) and (iv) are adopted to read as follows:

(iii) The Northeast Goose Hunting Area is the same as the Northeastern Zone, as defined in paragraph 2.30(d)(3).

(iv) The East Central Goose Hunting Area consists of the following WMUs: 4A, 4F, 4N, 6P, 6R, 6S, and 7M. The East Central Goose Hunting Area also includes those parts of WMUs 7F and 7J lying south of Route 31 and east of Interstate Route 81.

Subparagraphs 2.30(e)(1)(i) through (iv) are repealed and new subparagraphs (i) through (iv) are adopted to read as follows:

- (i) ducks, coot and mergansers
  - (a) Western Zone Open for 47 consecutive days beginning on the third Saturday in October, and for 13 consecutive days beginning on December 26.
  - (b) Northeastern Zone Open for 9 consecutive days beginning on the first Saturday in October, and for 51 consecutive days beginning on the Wednesday following the third Saturday in October.
  - (c) Lake Champlain Zone Open for 9 consecutive days beginning on the first Saturday in October, and for 51 consecutive days beginning on the Wednesday following the third Saturday in October.
  - (d) Southeastern Zone Open for 9 consecutive days beginning on the second Saturday in October, and for 51 consecutive days beginning on the second Saturday in November.
  - (e) Long Island Zone Open for 5 consecutive days beginning on the Wednesday just prior to Thanksgiving Day, and for 55 consecutive days ending on the last Sunday in January.
- (ii) Canada geese, cackling geese, and white-fronted geese
  - (a) Lake Champlain Goose Hunting Area Open for 45 consecutive days beginning on the first Saturday after October 19.
  - (b) Northeast Goose Hunting Area Open for 45 consecutive days beginning on the fourth Saturday in October.
  - (c) West Central Goose Hunting Area Open for 30 consecutive days beginning on the first Saturday in November, and for 15 consecutive days beginning on December 26.
  - (d) East Central Goose Hunting Area Open for 21 consecutive days beginning on the fourth Saturday in October, and for 24 consecutive days beginning on the fourth Saturday in November.
  - (e) Hudson Valley Goose Hunting Area Open for 21 consecutive days beginning on the fourth Saturday in October, and for 24 consecutive days beginning on the first Saturday in December.
  - (f) South Goose Hunting Area Open for 50 consecutive days beginning on the fourth Saturday in October, and for 20 consecutive days beginning on December 26.
  - (g) Western Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone, and for 10 consecutive

days immediately following the regular duck season.

- (h) Eastern Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone.
- (iii) snow geese and Ross' geese
  - (a) Western Zone Open for 85 consecutive days beginning on the fourth Saturday in October, and for 22 days ending on March 10.
  - (b) Northeastern Zone Open for 85 consecutive days beginning on the first Saturday in October, and for 22 days ending on March 10.
  - (c) Lake Champlain Zone Open for 84 consecutive days beginning on the first Saturday in October.
  - (d) Southeastern Zone Open for 85 consecutive days beginning on the fourth Saturday in October, and for 22 days ending on March 10.
  - (e) Long Island Zone Open for 107 consecutive days beginning on the first day of the regular duck season in the Long Island Zone.
- (iv) brant
  - (a) Western Zone Open for the first 30 days of the regular duck season in the Western Zone.
  - (b) Northeastern Zone Open for the first 30 days of the regular duck season in the Northeastern Zone.
  - (c) Lake Champlain Zone Open for 30 consecutive days beginning on the first day of the regular duck season in the Lake Champlain Zone.
  - (d) Southeastern Zone Open for the first 30 days of the regular duck season in the Southeastern Zone.
  - (e) Long Island Zone Open for the first 5 days, and the last 25 days of the regular duck season in the Long Island Zone.

Subparagraph 2.30(e)(2)(iii) is amended to read as follows:

(iii) Hunters may take Canada geese in the Special Late Canada Goose Hunting Area from February [3rd] 8th through February [12th] 15th.

Subparagraph 2.30(e)(2)(iv) is repealed and new subparagraphs 2.30(e)(2)(iv) and (v) are adopted to read as follows:

(iv) *Youth Waterfowl Hunt Days defined. In addition to regular seasons specified above, licensed junior hunters (12-15 years of age), accompanied as provided by subdivision 1 of Section 11-0929 of the Environmental Conservation Law, may take ducks, coot, Canada geese, brant and mergansers on special Youth Waterfowl Hunt Days in each hunting zone, as specified below. The adult companion shall not shoot ducks, coot, Canada geese, brant, mergansers, or any other migratory game birds, on those special days, unless the respective seasons are open. Also, the adult companion shall possess a valid Federal migratory bird hunting and conservation stamp, and have a current Harvest Information Program (HIP) confirmation number on those special days.*

(v) *Youth Waterfowl Hunt Days are as follows:*

- (a) Western Zone Sunday and Monday of the Columbus Day weekend in October.

- (b) *Northeastern Zone* Saturday and Sunday of the last full weekend in September.
- (c) *Lake Champlain Zone* Saturday and Sunday of the last full weekend in September.
- (d) *Southeastern Zone* Saturday and Sunday of the last full weekend in September.
- (e) *Long Island Zone* Saturday and Sunday of the second full weekend in November.

Amend existing paragraph 2.30(f)(1) to read as follows:

(1) woodcock *and crows* may be taken from sunrise to sunset only[.].

Paragraphs 2.30(f)(2) and (3) are repealed.

Subparagraph 2.30(g)(3)(i) is amended to read as follows:

Species	Times and/or places within seasons	Daily bag limit	Possession limit
(i) ducks	All times and places	6*	12

\* The daily bag limit for ducks includes mergansers, and may include no harlequin ducks and no more than 4 mallards (no more than 2 hens), 1 black duck, 2 wood ducks, 1 pintail, 1 canvasback [(except during closed periods specified in subparagraph 2.30(e)(1)(i) of this Part)], 2 redheads, 2 scaup, 4 scoters or [1] 2 hooded mergansers. Possession limits for all duck species are twice the daily limit.

Subparagraph 2.30(g)(3)(iii) is amended to read as follows:

Species	Times and/or places within seasons	Daily bag limit	Possession limit
(iii) Canada geese**	During September in the Lake Champlain Goose Hunting Area	5	10
	During September in all other areas	8	16
	During Youth Waterfowl Hunt Days <i>in all areas</i> and during the regular goose hunting season in the Eastern Long Island Goose Hunting Area	2	4
	During the regular goose hunting season in the Lake Champlain, [North Central] <i>Northeast, West Central, East Central, Hudson Valley, and Western Long Island Goose Hunting Areas</i>	3	6
	During the regular goose hunting season in the South Goose Hunting Area and during the Special Late Canada Goose Season	5	10

\*\* Daily bag and possession limits for Canada geese are aggregate daily bag and possession limits for Canada geese, cackling geese, and greater and lesser white-fronted geese in all areas.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 6, 2006.

**Text of rule and any required statements and analyses may be obtained from:** Bryan L. Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8919, e-mail: blswift@gw.dec.state.ny.us

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

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

**Additional matter required by statute:** A programmatic environmental impact statement has been prepared and is on file with the Department of Environmental Conservation.

**Regulatory Impact Statement**

1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL) authorizes the Department of Environmental Conservation (DEC) to provide for the recreational harvest of wildlife giving due consideration to ecological factors, the natural maintenance of wildlife, public safety, and the protection of private property. ECL Sections 11-0307, 11-0903, 11-0905 and 11-0909 and 11-0917 authorize DEC to regulate the taking, possession, transportation and disposition of migratory game birds.

2. Legislative Objectives

The legislative objective of the above-cited laws is to ensure adoption of state migratory game bird hunting regulations that conform with federal regulations made under authority of the Migratory Bird Treaty Act (16 U.S.C. §§703-711). Season dates and bag limits are used to achieve harvest objectives and equitably distribute hunting opportunity among as many hunters as possible. Regulations governing the manner of taking upgrade the quality of recreational activity, provide for a variety of harvest techniques, afford migratory game bird populations with additional protection, provide for public safety and protect private property.

3. Needs and Benefits

The primary purpose of this rule making is to adjust annual migratory game bird hunting regulations to conform with federal regulations for the 2006-2007 season and flyway guidelines for resource conservation. This rule making also reflects preferences of migratory game bird hunters in New York.

Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. The Department annually reviews and promulgates state regulations in order to maintain conformance with federal regulations, as required by Environmental Conservation Law Section 11-0307, and to address ecological considerations and user desires.

The Department is proposing the following regulatory changes: changes to the delineation of goose hunting area boundaries for Canada geese during regular goose seasons in some areas; season date adjustments for ducks, geese, brant and Youth Waterfowl Hunt Days in all areas; an increase in the daily bag and possession limits for hooded mergansers; and elimination of a special shooting hours restriction for goose hunting in the Lake Champlain Zone.

Changes to Canada goose hunting areas will provide for more effective management of resident (local-nesting) and migrant populations that occur in New York.

Season date adjustments contained in this rule making are intended to maximize hunting opportunities when they are most desired (for example, maximizing the number of weekend days open to hunting), within constraints established by the U.S. Fish and Wildlife Service (USFWS).

An increase in the bag limits for hooded mergansers was made in response to growing populations of this species in New York and throughout the Atlantic Flyway.

Season dates, bag limits and shooting hours for the Lake Champlain Zone are consistent with regulations established in adjoining areas of Vermont, in accordance with federal regulations and a long standing interstate agreement.

4. Costs

These revisions to 6 NYCRR 2.30 will not result in any increased expenditures by state or local governments or the general public. Costs

to DEC for implementing and administering this rule are continuing and annual in nature. These involve preparation and distribution of annual regulations brochures and news releases to inform the public of migratory game bird hunting regulations for the coming season.

#### 5. Paperwork

The proposed revisions to 6 NYCRR 2.30 do not require any new or additional paperwork from any regulated party.

#### 6. Local Government Mandates

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

#### 7. Duplication

Each year, the USFWS establishes "framework" regulations which specify allowable season lengths, dates, bag limits and shooting hours for various migratory game bird species based on their current population status. Within constraints of the federal framework, New York selects specific hunting season dates and bag limits for various migratory game birds, based primarily on hunter preferences. These selections are subsequently included in a final federal rule making (50 CFR Part 20 Section 105), which appears annually in the Federal Register in September. However, Section 11-0307 of the ECL specifies that the Department's migratory game bird hunting seasons and bag limits conform with the federal regulations. This requires that Section 2.30 be amended annually.

#### 8. Alternatives

The principal alternative, which is no action, would result in state waterfowl hunting regulations that do not conform with federal guidelines. Leaving season dates and bag limits unchanged would also result in a significant loss of hunting opportunity, public dissatisfaction, and adverse economic impacts because they would not reflect hunter preferences or alleviate goose damage through sport harvest to the extent possible.

#### 9. Federal Standards

There are no federal environmental standards or criteria relevant to the subject matter of this rule making. However, there are federal regulations for migratory game birds. This rule making will conform state regulations to federal regulations, but will not establish any environmental standards or criteria.

#### 10. Compliance Schedule

All waterfowl hunters must comply with this rule making during the 2006-2007 and subsequent hunting seasons.

#### *Regulatory Flexibility Analysis*

The purpose of this rule making is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local government. Therefore, a Regulatory Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with migratory bird hunting are administered by the New York State Department of Environmental Conservation (Department) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, sell hunting licenses, but this rule does not affect that activity. Thus, there will be no effect on reporting or recordkeeping requirements imposed on those entities.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rule making may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. Some small businesses currently benefit from migratory bird hunting because migratory bird hunters spend money on goods and services, and thus an increase in hunter participation should lead to positive economic impacts on such businesses. Additional goose

hunting activity will not require any new or additional reporting or recordkeeping by any small businesses or local governments. For these reasons, the Department has concluded that this rule making does not require a Regulatory Flexibility Analysis.

#### *Rural Area Flexibility Analysis*

The purpose of this rule making is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas, other than individual hunters. Therefore, a Rural Area Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with hunting are administered by the New York State Department of Environmental Conservation (Department) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, issue hunting licenses, but this rule making does not affect that activity.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rule making may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. Rural areas benefit when migratory bird hunters spend money on goods and services.

Additional hunting activity will not require any new or additional reporting or recordkeeping by entities in rural areas, and no professional services will be needed for people living in rural areas to comply with the proposed rule. Furthermore, this rule making is not expected to have any adverse impacts on any public or private interests in rural areas of New York State. For these reasons, the Department has concluded that this rule making does not require a Rural Area Flexibility Analysis.

#### *Job Impact Statement*

The purpose of this rule making is to amend migratory game bird hunting regulations. The Department of Environmental Conservation (Department) has historically made regular revisions to its migratory game bird hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the state impacted by this proposed rule making, the Department has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually hunt migratory game birds as a means of employment. Moreover, this rule making is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. In fact, this rule making may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. For these reasons, the Department anticipates that this rule making will have no impact on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

## AMENDED NOTICE OF ADOPTION

#### **Sportfishing Regulations**

**I.D. No.** ENV-52-05-00027-AA

**Filing No.** 1093

**Filing date:** Sept. 7, 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 Parts 10, 35, and 36 of Title 6 NYCRR.

**Amended action:** This action amends the rule that was filed with the Secretary of State on April 14, 2006, to be effective October 1, 2006, File No. 465. The notice of adoption, I.D. No. ENV-52-05-00027-A, was published in the May 3, 2006 issue of the *State Register*.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0305, 11-0317, 11-0319, 11-1301, 11-1303, and 11-0316

**Subject:** Sportfishing regulations.

**Purpose:** To revise regulations governing sportfishing and associated activities.

**Substance of amended rule:** The purpose of this rulemaking is to amend the Department of Environmental Conservation's (Department) general regulations governing sportfishing (6 NYCRR Part 10), licenses (6 NYCRR Part 35) and gear and operation of gear (6 NYCRR Part 36). Following biennial review of the Department's fishing regulations, Department staff have determined that the proposed amendments are necessary to maintain or improve the quality of the State's fisheries resources. Changes to sportfishing regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The following is a summary of the amendments that the Department is proposing:

Statewide sportfishing regulations:

1. Create a statewide year round season for black bass by adding a catch and release only, artificial lures only, season from December 1 through the Friday preceding the third Saturday in June (hereinafter referred to as "catch and release only season"), except for waters governed by special regulations. This season would be in addition to the current open season for black bass which runs from the third Saturday in June through November 30 (hereinafter referred to as "current open season").

Special sportfishing regulations:

2. Add the catch and release only season referred to in item 1 above, while retaining the existing 10" minimum size limit during the current open season (third Saturday in June through November 30) on rivers and streams in the following counties: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester and on the following stream segments:

(a) Normans Kill from mouth to Watervliet Reservoir (Albany County);

(b) Schoharie Creek from Route 20 bridge downstream (Montgomery, Schoenectady and Schoharie Counties);

(c) Black River, Deer River, West Branch Deer River and Beaver River in Lewis County;

(d) Black River, Oneida County;

(e) Chemung River and tributaries upstream of Rt. 17 west of Corning.

3. Add the catch and release only season referred to in item 1 above, while retaining the existing minimum size limit during the current open season on Schoharie Creek from Schoharie Reservoir downstream to Rt. 20 bridge.

4. Add the catch and release only season referred to in item 1 above on the Otselic River, Tioughnioga River and the East and West Branches of the Tioughnioga River, Cortland County.

5. Add the catch and release only season referred to in item 1 above to the existing slot limit on Cassadaga Lakes, Chautauqua County.

6. Add the catch and release only season referred to in item 1 above to the existing 15" bass limit on Allen Lake, Allegany County.

7. Amend Lake Champlain black bass regulations to add a catch and release only, artificial lures only, season from December 1 through the Friday preceding the second Saturday in June.

8. Add a catch and release black bass season from December 1 through March 31 in Fall Creek above Ithaca Falls, Tompkins County.

9. Create a catch and release black bass season on border water sections of the Delaware River and West Branch Delaware River from the first Saturday after June 11 through the first Saturday preceding the first Saturday in May.

10. Add a catch and release black bass season from the first Saturday in May through the Friday preceding the third Saturday in June to the traditional black bass season to Oneida Lake.

11. Add 12" minimum 5 black bass limit to the special regulations in Hamilton, Franklin, Jefferson and St. Lawrence Counties.

12. Increase the black bass minimum size limit from 15" to 20" during the first Saturday in May through the Friday preceding the third Saturday in June for Lake Erie.

13. Increase the size limit from 12" to 15" on black bass in the Hudson River from the Troy Dam downstream and all tributaries in this section upstream to the first barrier impassible by fish.

14. Extend the existing black bass regulation on Catatunk and Cayuga Creeks to all year, Tioga County.

15. Extend the trout season from September 30 to October 15 on the following stream segments:

(a) Border water sections of the Delaware River and the West Branch Delaware River;

(b) East Branch Delaware River tributaries between the villages of East Branch and Hancock;

(c) West Branch Delaware River from Cannonsville Dam downstream to the Rt. 17 overpass at Deposit;

(d) West Branch Delaware River from the lower limits of the catch and release only segment downstream to the NY/PA border;

(e) East Branch Delaware River from Pepacton Dam downstream to the Shinhopple bridge;

16. Extend the no-kill trout season from September 30 to October 15 on the catch and release only section of the West Branch Delaware River.

17. Allow a catch and release, artificial lures only season from October 16 through March 31 to the existing 5/2 trout regulation in the following stream segments:

(a) Cattaraugus Creek upstream of Springville Dam (Cattaraugus, Erie and Wyoming Counties);

(b) Elm Creek, Elton Creek, and Mansfield Creek, Cattaraugus County;

(c) East Koy Creek, Allegany and Wyoming Counties.

18. Allow a catch and release, artificial lures only trout season from October 16 through March 31 in the following stream segments:

(a) Salmon Creek upstream of Ludlowville Falls, Cayuga and Tompkins Counties;

(b) East Branch Owego Creek, West and East Branch Tioughnioga River, and the Otselic River, Cortland, Madison, and Otselic Counties;

(c) Owego Creek and the East and West Branches of Owego Creek, Tioga and Tompkins Counties.

19. Create a catch and release, artificial lures only season for trout and salmon in Fall Creek, Cayuga Lake tributary, from the downstream edge of the railroad bridge below Rt. 13 from January 1 through March 15.

20. Allow a year round trout season and ice fishing is permissible on Blue Lake, Orange County, and Loch Sheldrake, Sullivan County.

21. Allow ice fishing for lake trout and landlocked salmon in Sixberry Lake and Lake-of-the-Woods, Jefferson County.

22. Allow ice fishing for landlocked salmon in Lake Pleasant and Sacandaga Lake, Hamilton County.

23. Create a catch and release artificial lures only section of stream for all trout and salmon on 1.3 miles of Chautauqua Creek and 1.67 miles of the main branch of Eighteen Mile Creek (Erie County).

24. Increase the minimum length for all salmonids from 9" to 12"

on Lake Erie and its tributaries and Upper Niagara River and its tributaries.

25. Amend Lake Ontario, St. Lawrence River and Lower Niagara River Trout and Salmon regulations to establish a 21" minimum size regulation for rainbow trout and establish a 2 fish daily lake trout limit with only 1 that may be between 25" and 30".

26. Reduce the lake trout daily possession limit to 1 fish for Sterling Lake, Orange County.

27. Reduce the size limit on lake trout from 21" to 18" on Kensico Reservoir, Westchester County.

28. Increase the size limit on Lake Trout in Otsego Lake, Otsego County, from 21" to 23" and change the 2 fish creel limit in combination for brown trout, lake trout and landlocked salmon to 1 fish each.

29. Create a 10" minimum and 3 trout limit on Holding Pond, Schoharie County.

30. Add a 10" minimum 3 trout limit from April 1 through October 15 and a catch and release only season from October 16 through March 31 on Wiscoy Creek, Allegany County.

31. Create an all year 12" minimum 3 trout limit ice fishing permitted special regulation on Colgate Lake, Greene County.

32. Amend Lake Ozonia trout to a 12" minimum 3 fish limit, St. Lawrence County.

33. Change the daily limit on trout to 5 with no more than 2 longer than 12" on the following waters:

(a) Moose River, Middle and South Branch of Moose River Downstream of Moose River Plains Recreation Area, and West Canada Creek from mouth upstream to Cincinnati Creek in Herkimer County;

(b) Black River, East Branch Fish Creek from Rome Reservoir Dam Downstream and Moose River in Lewis County;

(c) Mohawk River from Barge Canal Upstream to Delta Dam, Mohawk River from Bridge in Westernville Upstream to Lansing Kill, Moose River, Nine Mile Creek, Oneida Creek, Sauquoit Creek from Pinnacle Road in Sauquoit Downstream, and Black River in Oneida County;

(d) St. Regis River from Ft. Jackson to Franklin County line;

(e) Spafford Brook, Cortland County.

34. Amend walleye special fishing regulation on the Lower Niagara River to include a one fish 18" minimum length creel limit from January 1 through March 15.

35. Enact 18 inch minimum 3 fish limit for walleye on Redfield Reservoir, Oswego County.

36. Add Franklin Falls Flow to existing walleye special regulation in Essex County.

37. Eliminate special regulations and revert to statewide regulations for:

(a) Walleye in Lake Erie; Upper Niagara River; Dyken Pond, Rensselaer County; and Moon Lake, Jefferson County;

(b) Lake trout on Paradox Lake;

(c) Lake trout and landlocked salmon for the Indian River in Essex and Hamilton Counties;

(d) Landlocked salmon on Tupper Lake, St. Lawrence County; Abanakee Lake, Hamilton County; and Talyor Pond, Clinton County;

(e) Trout and kokanee on Polliwog Pond, Franklin County;

(f) Trout and lake trout on Grampus lake, Hamilton County;

(g) Black bass in Lower and Upper Niagara Rivers and tributaries; Schroon River, Warren County; Sacandaga River, Saratoga County; Chenango River, Madison County; Unadilla River, Otsego, Madison and Chenango Counties; and the Hudson River from Glens Falls Bridge upstream, Essex, Saratoga, Warren, and Hamilton Counties;

(h) Lake trout in West Pine Pond, Ledge Pond, and Deer Pond, Franklin County;

(i) Special regulations on Floodwood Pond and Lower Chateaugay Lake, Franklin County;

(j) Special regulations for Long Lake and West Canada Lake, Hamilton County;

(k) Black bass on Nicks Lake, Herkimer County;

(l) Black bass in the Finger Lakes.

38. Manage the Buffalo River and its tributaries as a portion of the Lake Erie tributary streams special fishing regulations.

39. Open Fall Creek in Ithaca to fishing for non-trout and salmon during the current closed season (January 1-March 31).

40. Eliminate the Great Lakes waters and tributaries restriction that prohibits use of "other than a conventional rod, reel and line."

41. Eliminate the addition of weight to the leader in the Salmon River special fly fishing area from May 1 through August 15.

42. General clarifications:

(a) Clarify dividing line of the bass regulations for Lake Ontario and the St. Lawrence River;

(b) Clarify where the special regulation for Saratoga Lake panfish applies;

(c) Clarify section of the Black River where special regulations for black bass and statewide regulations for walleye apply;

(d) Clarify geographical divide between where Great Lakes regulations and inland regulations begin for Cattaraugus Creek, Erie County;

(e) Clarify Finger Lake tributary regulations by substituting a table for existing text;

(f) Correct discrepancies between Part 10 and the Fishing Regulations Guide for Willowemoc Creek, South Branch Grass River, Middle and South Branch Moose River, and Mohawk River stream segments.

43. Remove prohibition that restricts dipnetting smelt in Tupper Lake to only the waters of the lake proper.

44. Close Blue Mountain Lake, Hamilton County, to dipnetting for smelt.

45. Regarding privately owned waters:

(a) Amend existing regulation to allow an all year ice fishing permitted season on salmonids in Brandreth Park, Hamilton County;

(b) Extend the lake trout season on Chatiemac Lake, Warren County, until November 30;

(c) Allow an all year any size 5 fish limit on trout on three trout ponds on the North Woods Club.

46. Remove baitfish prohibition on Basswood Pond, Otsego County.

47. Prohibit use of baitfish on:

(a) Alewife on Canadarago Lake (Otsego County);

(b) Upper Preston Pond, Town of North Elba;

(c) South Creek Lake, Towns of Diana and Fine.

48. Change name of a town from Altamont to Tupper Lake.

Commercial fishing regulations

49. Provisions for set lines and electrofishing gear are removed from Part 35 and Part 36.

**Amended rule as compared with adopted rule:** Nonsubstantive revisions were made in section 10.3(b)(39).

**Text of amended rule and any required statements and analyses may be obtained from:** Shaun Keeler, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8920, e-mail: sxkeeler@gw.dec.state.ny.us

**Additional matter required by statute:** State Environmental Quality Review Act — A programmatic impact statement is on file with the Department of Environmental Conservation.

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

A non-substantive revision was added to the text of the final rule as adopted. This change to the last published text of the rule does not necessitate revision of the previously published Regulatory Impact Statement (RIS), Regulatory Flexibility Analysis (RFA), Rural Area Flexibility Analysis (RAFA), Job Impact Statement (JIS).

**Department of Health**

**EMERGENCY RULE MAKING**

**Nursing Home Pharmacy Regulations**

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

**Filing No.** 1088

**Filing date:** Sept. 8, 2006

**Effective date:** Sept. 8, 2006

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

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

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

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

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

**Subject:** Nursing home pharmacy regulations.

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

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

Section 415.18 Pharmacy Services.

\* \* \*

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

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

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

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

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

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

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

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

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

\* \* \*

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-50-05-00004-P, Issue of December 14, 2005. The emergency rule will expire November 6, 2006.

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

**Regulatory Impact Statement**

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

The State's nursing homes provide a variety of clinical services which were not anticipated when the current pharmacy services

regulations were promulgated. The Rug-II case mix reimbursement methodology which began in 1986, has allowed nursing homes to open their doors to residents who require resources which were previously unavailable. Currently, nursing homes accept residents whose clinical needs at one time were met in a hospital. In addition, some nursing homes have units that address the unique needs of special populations such as HIV, traumatic brain injury (TBI), or ventilator residents.

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

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

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

Costs:

Costs to Regulated Parties:

There will be no additional costs to regulated parties.

Costs to State and Local Government:

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

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

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

Duplication:

The regulation does not duplicate any federal or state regulation.

Alternative Approaches:

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

Federal Standards:

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

Compliance Schedule:

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

**Regulatory Flexibility Analysis**

Effect on Small Business and Local Government:

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

Compliance Requirements:

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

Professional Services:

The regulation would impose no additional professional services.

Compliance Costs:

The regulation would impose no additional costs.

Economic and Technological Feasibility Assessment:

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

Minimizing Adverse Impact:

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

Small Business and Local Government Input:

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

**Rural Area Flexibility Analysis**

Effect on Rural Areas:

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

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne

Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

The regulation would impose no additional reporting, record-keeping or other affirmative acts.

**Professional Services:**

The regulation would not require additional professional services.

**Compliance Costs:**

The regulation would not impose additional costs.

**Minimizing Adverse Impact:**

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

**Opportunity for Rural Area Participation:**

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

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

The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made up of representatives of groups that have as their members representatives of rural areas.

**Job Impact Statement**

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

**Assessment of Public Comment**

The agency received no public comment.

**EMERGENCY  
RULE MAKING**

**Controlled Substances in Emergency Kits**

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

**Filing No.** 1087

**Filing date:** Sept. 8, 2006

**Effective date:** Sept. 8, 2006

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

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

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

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

**Specific reasons underlying the finding of necessity:** We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety. Having consulted closely with administrators, nursing personnel and

consultant pharmacists of Class 3a health care facilities (nursing homes, and other long-term facilities), the Department has determined that the current Part 80 and Part 400 regulations do not ensure timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. However, for purposes of this emergency justification, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490. The proposed regulations exempt such adult care facilities from its provisions.

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

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

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

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

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

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

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

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

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

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

(1) *Except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, a pharmacy may distribute a controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits. Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the type and quantity of the drug distributed, and the signature of the pharmacist.*

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

Section 80.47 Institutional dispenser, limited. (a) Nursing homes, convalescent homes, health-related facilities, *adult care facilities*

subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490 [homes for the aged], dispensaries or clinics not qualifying as institutional dispensers in license class 3 shall apply for an institutional dispenser, limited license. Such institutional dispensers qualifying for controlled substances privileges shall obtain a class 3a license from the department.

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

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

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. HLT-50-05-00005-E, Issue of December 14, 2005. The emergency rule will expire November 6, 2006.

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

#### **Regulatory Impact Statement**

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

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

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

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

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

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

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

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

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

situations can, and do, result in needed medications not being administered in a timely fashion to relieve a patient's severe symptoms or suffering.

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

The amendment to Section 80.11(f) authorizes a licensed pharmacy to supply controlled substances to a practitioner in a Class 3a facility for stocking in emergency medication kits. The amendments to Section 80.50(e) authorize a Class 3a healthcare facility to possess a limited supply of controlled substances in an emergency medication kit and specify limitations on the quantities of such substances and requirements for their safeguarding. The amendment to Section 80.49 specifies record-keeping requirements for controlled substances administered from emergency kits. When instituted together, these amendments will provide for timely access to controlled substances by practitioners and patients in the long-term care facility environment while simultaneously requiring adequate measures to ensure the security of such substances.

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

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

#### Costs:

##### Costs to Regulated Parties

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

##### Costs to State and Local Government

There will be no costs to state or local government.

##### Costs to the Department of Health

There will be no additional costs to the Department.

##### Local Government Mandates:

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

##### Paperwork:

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

Practitioners authorized to prescribe controlled substances are required by regulations to make a notation in a patient record of all

controlled substances prescribed for that patient. The amendment to Section 80.47 requires that the administration of a controlled substance to a patient from an emergency kit in a Class 3a facility be pursuant to the written or oral medical order of a practitioner.

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

#### Duplication:

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

#### Alternatives:

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

#### Federal Standards:

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

#### Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State. At that time, in order that the public health derive maximum benefit from this regulatory amendment, all Class 3a license holders will be authorized to possess and administer controlled substances in an emergency medication kit to meet the immediate, legitimate need of a patient.

#### **Regulatory Flexibility Analysis**

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

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

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

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

Of the 1,282 healthcare facilities licensed by the department as Class 3a institutional dispensers limited, the rule will affect only those

facilities that choose to maintain controlled substances in emergency medication kits. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

**Compliance Requirements:**

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

**Professional Services:**

No additional professional services are necessary.

**Compliance Costs:**

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

**Economic and Technological Feasibility:**

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

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

**Minimize Adverse Impact:**

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

**Small Business and Local Government Participation:**

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

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

**Rural Area Flexibility Analysis**

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

The proposed rule will apply to participating pharmacies and Class 3a healthcare facilities located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain widespread rural areas. These can range in extent from small towns and villages, and their surrounding areas, to locations that are very sparsely populated.

**Compliance Requirements:**

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

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration

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

**Professional Services:**

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

**Compliance Costs:**

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

**Economic and Technological Feasibility:**

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

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

**Minimizing Adverse Impact:**

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

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

**Rural Area Participation:**

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

**Job Impact Statement**

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

**Assessment of Public Comment**

The agency received no public comment.

**EMERGENCY  
RULE MAKING**

**Opioid Overdose Prevention Programs**

**I.D. No.** HLT-39-06-00007-E

**Filing No.** 1089

**Filing date:** Sept. 8, 2006

**Effective date:** Sept. 8, 2006

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

**Action taken:** Amendment of section 80.138 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3309(1)

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

**Specific reasons underlying the finding of necessity:** The immediate adoption of this regulation is necessary for the preservation of the public health, safety and general welfare because any delay with the implementation of opioid overdose prevention programs could result in additional deaths that could have been prevented through proper training to be offered through these programs. The legislation recognized the immediacy of the need for opioid overdose prevention programs by making the effective date April 1, 2006. Since compliance with standard rule making procedures would make implementation by the effective date of this law impossible, compliance with those requirements is contrary to the public interest.

**Subject:** Opioid overdose prevention programs.

**Purpose:** To implement L. 2005, ch. 413 which calls for the establishment of standards for opioid overdose prevention programs to prevent fatalities due to overdose.

**Text of emergency rule:** The Table of Contents for Part 80 of Title 10 NYCRR is amended to read as follows:

PART 80

RULES AND REGULATIONS ON  
CONTROLLED SUBSTANCES

(Statutory authority: Public Health Law, Sections 338, 3300, 3305, 3307, 3308, 3309, 3381, 3701(1), (6), art. 33)

Sec.

GENERAL PROVISIONS

\* \* \*

80.138. Opioid Overdose Prevention Programs

A new Section 80.138 is added as follows:

Section 80.138. Opioid Overdose Prevention Programs.

(a) Definitions.

(1) "Clinical Director" means a physician, physician assistant or nurse practitioner who provides oversight of the clinical aspects of the Opioid Overdose Prevention Program. This oversight includes serving as a clinical advisor and liaison concerning medical issues related to the Opioid Overdose Prevention Program, providing consultation on training and reviewing reports of all administrations of an opioid antagonist.

(2) "Opioid" means an opiate as defined in section 3302 of the public health law.

(3) "Opioid antagonist" means an FDA-approved drug that, when administered, negates or neutralizes in whole or in part the pharmacological effects of an opioid in the body. The opioid antagonist is limited to naloxone or other medications approved by the Department for this purpose.

(4) "Opioid Overdose Prevention Program" means a program the purpose of which is to train individuals to prevent a fatal opioid overdose in accordance with these regulations.

(5) "Opioid Overdose Prevention Training Program" means a training program offered by an authorized Opioid Overdose Prevention Program which instructs a person to prevent opioid overdoses, including by providing resuscitation, contacting emergency medical services and administering an opioid antagonist.

(6) "Person" means an individual other than a licensed health care professional, law enforcement personnel, and first responders otherwise permitted by law to administer an opioid antagonist.

(7) "Program Director" means an individual who is identified to manage and have overall responsibility for the Opioid Overdose Prevention Program.

(8) "Registered provider" for the purposes of this section shall mean any of the following that have registered with the Department pursuant to subsection (b):

(i) a health care facility licensed under the public health law;

(ii) a physician, physician assistant, or nurse practitioner who is authorized to prescribe the use of an opioid antagonist;

(iii) a drug treatment program licensed under the mental hygiene law;

(iv) a not-for-profit community-based organization incorporated under the not-for-profit corporation law and having the services of a Clinical Director;

(v) a local health department.

(9) "Trained Overdose Responder" means a person who has successfully completed an authorized Opioid Overdose Prevention Training Program offered by an authorized Opioid Overdose Prevention Program within the past two years and has been authorized by a Registered Provider to possess the opioid antagonist.

(b) Registration.

(1) Registered providers may operate an Opioid Overdose Prevention Program if they obtain a certificate of approval from the Department authorizing them to operate an Opioid Overdose Prevention Program and otherwise comply with the provisions of this section.

(2) Providers eligible to register to operate an Opioid Overdose Prevention Program that are in good standing may apply to the Department to operate an Opioid Overdose Prevention Program on forms prescribed by the Department which must include, at a minimum, the following information:

(i) the provider name, address, operating certificate or license number where appropriate, telephone number, fax number, e-mail address, Program Director and Clinical Director;

(ii) the name, license type and license number of the affiliated prescriber(s);

(iii) the name and location of the site(s) at which the Opioid Overdose Prevention Program will be conducted;

(iv) a description of the targeted population to be served and recruitment strategies to be employed by the Opioid Overdose Prevention Program; and

(v) the addresses, telephone numbers, fax numbers, e-mail addresses and signatures of the Program Director and Clinical Director.

(c) Program Operation.

(1) Each Opioid Overdose Prevention Program shall have a Program Director who is responsible for managing the Opioid Overdose Prevention Program and shall, at a minimum:

(i) identify a Clinical Director to oversee the clinical aspects of the Opioid Overdose Prevention Program;

(ii) establish the content of the training program, which meets the approval of the Department;

(iii) identify and train other program staff;

(iv) select and identify persons as Trained Overdose Responders;

(v) issue certificates of completion to Trained Overdose Responders who have completed the prescribed program;

(vi) maintain Opioid Overdose Prevention Program records including Trained Overdose Responder training records, Opioid Overdose Prevention Program usage records and inventories of Opioid Overdose Prevention Program supplies and materials;

(vii) ensure that all Trained Overdose Responders successfully complete all components of Opioid Overdose Prevention Training Program;

(viii) provide liaison with local emergency medical services and emergency dispatch agencies, where appropriate;

(ix) assist the Clinical Director with review of reports of all overdose responses, particularly those including opioid antagonist administration; and

(x) report all administrations of an opioid antagonist on forms prescribed by the Department.

(2) Each Opioid Overdose Prevention Program shall have a Clinical Director who is responsible for clinical oversight and liaison concerning medical issues related to the Opioid Overdose Prevention Program and, at a minimum, shall:

(i) provide clinical consultation, expertise, and oversight;

(ii) serve as a clinical advisor and liaison concerning medical issues related to the Opioid Overdose Prevention Program;

(iii) provide consultation to ensure that all Trained Overdose Responders are properly trained;

(iv) adapt and approve training program content and protocols; and

(v) review reports of all administrations of an opioid antagonist.

(3) The Trained Overdose Responders shall:

(i) complete an initial Opioid Overdose Prevention Training Program;

(ii) complete a refresher Opioid Overdose Prevention Training program at least every two (2) years;

(iii) contact the emergency medical system during any response to a victim of suspected drug overdose and advise if an opioid antagonist is being used;

(iv) comply with protocols for response to victims of suspected drug overdose; and

(v) report all responses to victims of suspected drug overdose to the Opioid Overdose Prevention Program Director.

(4) The opioid antagonist shall be dispensed to the Trained Overdose Responder in accordance with all applicable laws, rules and regulations.

(5) The Opioid Overdose Prevention Program will maintain and provide response supplies including: latex gloves, mask or other barrier for use during rescue breathing, and agent to prepare skin before injection.

(6) The Opioid Overdose Prevention Program will establish and maintain a record keeping system that will include, at a minimum, the following information:

(i) list of Trained Overdose Responders, including dates of completion of training;

(ii) a log of Opioid Overdose Prevention Trainings which have been conducted;

(iii) copies of program policies and procedures;

(iv) copy of the contract/agreement with the Clinical Director, if appropriate;

(v) opioid antagonist administration usage reports and forms; and

(vi) documentation of review of administration of an opioid antagonist.

(7) The Opioid Overdose Prevention Program will establish a procedure by which any administration of Opioid Antagonist to another individual by a Trained Overdose Responder affiliated with an Opioid Overdose Prevention Program, shall be reported on forms prescribed by the Department.

(8) Approval obtained pursuant to this section shall consist of a certificate of approval provided by the Department that shall remain in effect for two years or until receipt by the authorized provider of a written notice of termination of the program from the Department, whichever shall first occur. The Department may renew a certificate of approval for a subsequent two-year period if the registered provider is in good standing with all applicable state and federal licensing agencies and such provider is found to have complied with the requirements of this section and has submitted a request for renewal.

(9) Pursuant to Public Health Law Section 3309(2) the purchase, acquisition, possession or use of an opioid antagonist by an Opioid Overdose Prevention Program or a Trained Overdose Responder in accordance with this section and the training provided by an authorized Opioid Overdose Prevention Program shall not constitute the unlawful practice of a professional or other violation under title eight of the education law or article 33 of the public health 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 6, 2006.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

Chapter 413 of the Laws of 2005 amended the Public Health Law to add a new Section 3309 to provide for opioid overdose prevention programs in New York State. Section 3309(1) authorizes the Commissioner of Health to establish standards for approval of opioid overdose prevention programs, including, but not limited to, standards for program directors, clinical oversight, training, recordkeeping and reporting. The effective date of Chapter 413 of the Laws of 2005 is April 1, 2006.

##### Legislative Objectives:

This legislation was enacted to reduce the incidence of fatal opioid overdoses by providing training to individuals to increase the likelihood that timely administration of life-saving medication will be provided on an emergency basis to individuals who experience accidental opioid drug overdoses.

##### Needs and Benefits:

Approximately half of all injection drug users (IDUs) experience at least one nonfatal overdose during their lifetime. According to the New York State (NYS) Office of Alcoholism and Substance Abuse Services (OASAS) estimates, there are approximately 171,500 IDUs in NYS. Overdose is a preventable cause of death in the majority of cases involving opioids. Opioids include heroin, morphine, codeine, methadone, oxycodone (Oxycontin, Percodan, Percocet), hydrocodone (Vicodin), fentanyl (Duragesic) and hydromorphone (Dilaudid). In an opioid overdose, the user becomes sedated and gradually loses the urge to breathe, leading to death from respiratory depression. Naloxone is an opioid receptor antagonist that can be used to reverse an opioid overdose within 1-2 minutes of administration. An untreated heroin overdose will result in death in 1-3 hours.

Although a comprehensive picture of the extent of opioid overdose in NYS does not yet exist, drug overdose is known to be a major cause

of death among heroin users (Garfield and Drucker, 2001). Accidental fatal drug overdose continues to be a substantial cause of death. It has been one of the top ten causes of death in New York City (NYC) from 1993 to present (NYC Department of Health and Mental Hygiene, 2003). According to a study conducted by the New York Academy of Medicine, between 1990 and 1998 there were 5,506 accidental fatal overdoses in NYC involving opiates (Galea et al., 2003). These reflected 74 percent of all accidental overdose deaths (7,451) in NYC during that period.

NYS Department of Health (NYSDOH) hospital data show that, during 1998-2004, there were 3,408 hospital discharges reflecting admissions for which heroin-overdose was a factor. Of these, 2,183 (64 percent) were in NYC. Another 25 percent were in the Syracuse, Rochester, Buffalo, Albany and Nassau-Suffolk regions.

The federal Substance Abuse and Mental Health Services Administration (SAMHSA) determined that the case rate for emergency department heroin admissions in NYC in 2002 was reported to be 123 per 100,000 population, which was more than three times the national rate of 36 per 100,000 (SAMHSA, March 2004). Between 1995 and 2002, heroin-related emergency department visits in Buffalo increased 125 percent (from 41 to 93) visits per 100,000 population with a 29 percent increase from 2001 to 2002 (from 72 visits) (SAMHSA, April 2004).

Most overdoses are not instantaneous and the majority of them are witnessed by others. Therefore, many overdose fatalities are preventable, especially if witnesses have had appropriate training and are prepared to respond in a safe and effective manner. Prevention measures include education on risk factors (such as polydrug use and recent abstinence), recognition of the overdose and an appropriate response. Response includes contacting emergency medical services (EMS) and providing resuscitation while awaiting the arrival of EMS. Resuscitation consists of rescue breathing, or if available, injectable naloxone which immediately reverses the effects of heroin overdose. Naloxone is an opioid antagonist with no abuse potential and no effect on a recipient who has not taken opioids. Provision of naloxone has been suggested for many years and is being offered in a variety of settings in jurisdictions outside of NYS. Complications of naloxone in the medical setting are rare. Naloxone is inexpensive (\$1.00-\$1.50) and there have been no cases in which it has developed a street value.

Opioid overdose prevention programs have proven effective in preventing unnecessary deaths abroad and elsewhere in the United States (US). In the US, opioid overdose prevention programs exist in New Mexico; Chicago, Illinois; Baltimore, Maryland; and San Francisco, California, for example, and programs are being planned elsewhere. A recently published evaluation of an opioid overdose prevention program in San Francisco showed that of the 20 heroin overdoses witnessed by trained program participants there were no deaths. (Seal *et al.*, 2005). As of August 2005, the New Mexico Department of Health had trained and provided naloxone to a total of 1,168 individuals. There were over 191 reports of lives saved, of which 185 involved administration of naloxone. Almost all administrations of naloxone were accompanied by rescue breathing and 5 lives were saved with rescue breathing alone. (Fiuty, P., personal communication, November 3, 2005). The Chicago Recovery Alliance has reported training over 4,500 individuals, with 374 reported reversals using naloxone, as of November 3, 2005. There has been a 30 percent overall decline in overdose related deaths reported in Cook County, Illinois (Carlberg, S. Personal communication, November 3, 2005). The Baltimore City Health Department has reported 888 persons trained, 101 reported reversals and over 20 persons placed into drug treatment. A 17 percent decrease in overdose deaths was observed from 2001 to 2002 (Rucker, M., personal communication, November 3, 2005).

The potential exists to achieve similar outcomes in NYS through the establishment of opioid overdose prevention programs. Potential providers that may register voluntarily with NYSDOH to offer such programs include health and human service providers serving IDUs (such as NYSDOH-approved syringe exchange programs and other community-based organizations, health care practitioners (specifically physicians, physician assistants and nurse practitioners), local health departments, health care facilities licensed by NYSDOH under Article 28 of the NYS Public Health Law and drug treatment programs licensed by the NYS Office of Alcoholism and Substance Abuse Services (OASAS) pursuant to the NYS Mental Hygiene Law).

The proposed rule, which is entirely within the legislative mandate of Section 3309 of the Public Health Law, is consistent with established models for opioid overdose prevention programs elsewhere. Common features of opioid overdose prevention programs operating elsewhere that have been incorporated into the proposed rule include: a Program Director who is responsible for managing the program and assuring that program participants receive adequate training; a Clinical Director who oversees clinical aspects; use of a curriculum that provides program participants with the necessary knowledge, skills and abilities to prevent fatal overdoses through administration of naloxone, use of rescue breathing and contacting emergency medical services; maintaining program records, such as those surrounding trainings offered, including issuance of certificates of completion to those who successfully complete the training; and collection of basic information about impact of the program in terms of incidents and lives saved.

The anticipated benefits under the proposed rule are: reduced incidence of fatal opioid overdoses, increased contact of IDUs with medical personnel, greater awareness of risk factors for overdose, increased knowledge of safer injection practices and an increased number of persons trained in rescue breathing. The creation of opioid overdose prevention programs will not lead to increased drug use. Naloxone is not addictive and does not cause a "high." It has no potential for abuse or street value.

#### Costs:

Since this regulation allows providers to establish opioid overdose prevention programs, but does not require a provider to establish such a program, no provider will be required to incur costs as a result of the adoption of this regulation. Existing staff can serve as the Program Director and provide clinical oversight. No registration fee will be collected and the reporting requirements will be minimal. A one-time, registration process to receive a certificate of approval is required with review and renewal every two years. An internal operational policy and procedure and training of staff regarding program implementation will be required. Since it is expected that registration, record keeping and the development of policies, procedures and training materials will be done by existing staff, the costs of complying with this regulation will be minimal. Costs to the Department of Health are also expected to be minimal since the production and review of all documents will be done by existing staff.

#### Local Government Mandates:

This regulation does not impose any program, service, duty, or other responsibility on any county, city, town, village, school, fire district, or other special district except to the extent that such entities choose to provide opioid overdose prevention programs and, consequently, would be subject to the same requirements as all other providers.

#### Paperwork:

The NYSDOH anticipates a simple and streamlined registration process for seeking a certificate of approval to establish an opioid overdose prevention program. Additional record keeping requirements and reporting requirements will be minimal. Paperwork will include documentation of staff training, program policies and procedures, logs

of training sessions offered and certificates of completion provided, inventories of program supplies and materials, reports of overdoses to which trained program participants have responded and reports to the Department. Only those providers voluntarily participating will be required to provide information to the Department.

**Duplication:**

The proposed regulation does not duplicate any existing state or federal law or regulation regarding opioid overdose prevention.

**Alternatives:**

The proposed regulation does not exceed the specific requirements of the legislation. Because offering an opioid overdose prevention program is voluntary, the regulation was designed to encourage eligible individuals and organizations to provide opioid overdose prevention services allowed under law and regulation. The registration process will be simple and the reporting and financial impact of establishing a voluntary opioid overdose prevention program will be minimal. Any other alternatives would require a more complex and more costly approach for both the NYSDOH and volunteer operators of opioid overdose prevention programs.

**Federal Standards:**

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

**Compliance Schedule:**

Each individual or organization that chooses to establish an opioid overdose prevention program must submit a registration form to the Department. Information will be distributed to eligible parties to allow implementation on April 1, 2006. Registration information will be used to develop a listing of opioid overdose prevention programs holding certificates of approval issued by the Department. Registration forms from those seeking to establish opioid overdose prevention programs will be accepted on a continuous basis, with review and renewal of certificates of approval taking place at two-year intervals.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

The proposed rule will have no impact on small businesses unless such businesses voluntarily decide to operate an Opioid Overdose Prevention Program. The types of businesses that could be affected include hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local governments (health departments). In New York State there are 7 hospitals, 245 clinics, 1,164 drug treatment programs, an unknown number of community-based organizations and 36 county health departments that are considered small businesses.

**Compliance Requirements:**

Under the proposed rule, hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments that elect to establish opioid overdose prevention programs will report aggregate data on forms prescribed by the NYSDOH. Providers must have a Program Director who is responsible for managing the program and assuring that program participants receive adequate training; a Clinical Director who oversees clinical aspects; use of a curriculum that provides program participants with the necessary knowledge, skills and abilities to prevent fatal overdoses through administration of naloxone, use of rescue breathing and contacting emergency medical services; maintaining program records, such as those surrounding trainings offered, including issuance of certificates of completion to those who successfully complete the training; and collection of basic information about impact of the program in terms of incidents and lives saved.

Programs must also keep records including but not limited to documentation of staff training, program policies and procedures, logs of training sessions offered and certificates of completion provided, inventories of program supplies and materials, reports of overdoses to

which trained program participants have responded and reports to the Department. Aside from simple reporting of certain easy-to-collect data, no new requirements are mandated.

**Professional Services:**

No additional professional services will be required since providers and others will be able to utilize existing staff.

**Compliance Costs:**

Since this regulation allows providers to establish opioid overdose prevention programs, but does not require a provider to establish such a program, no provider will be required to incur costs as a result of the adoption of this regulation. Existing staff can serve as the Program Director and provide clinical oversight. No registration fee will be collected and the reporting requirements will be minimal. A one-time, registration process to receive a certificate of approval is required with review and renewal every two years. An internal operational policy and procedure and training of staff regarding program implementation will be required. Since it is expected that registration, recordkeeping and the development of policies, procedures and training materials will be done by existing staff, the costs of complying with this regulation will be minimal. Costs to the Department of Health are also expected to be minimal since the production and review of all documents will be done by existing staff.

**Economic and Technological Feasibility:**

Most health care facilities, health care practitioners, drug treatment programs, community-based organizations and local health departments that are eligible to offer opioid overdose prevention programs have the capacity and expertise to carry out the necessary activities. Small businesses that opt to voluntarily offer opioid overdose prevention programs will be provided with necessary forms and instructions to register and comply with reporting requirements. In large part, these forms and instructions are being/will be developed with specific input from regulated parties and NYSDOH staff are being made available to provide instructions and technical assistance.

**Minimizing Adverse Impact:**

There are no alternatives to the proposed recordkeeping and reporting requirements due to the need for the NYSDOH to assure that registered providers holding certificates of approval to operate opioid overdose prevention programs conduct activities in a safe and effective manner. Reporting requirements are those minimally necessary for the Department to coordinate oversight and provide information to the Governor and the Legislature as required by Section 3309(4) of the Public Health Law.

**Small Business and Local Government Participation:**

The regulations are minimal and consultation on program implementation will take place prior to the April 1, 2006 effective date of the law, and beyond. Small businesses (hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments) will have opportunities to review and comment on the proposed regulations. The NYSDOH has already begun to have conversations with providers interested in offering this service that are small businesses and local health departments and has consulted with representatives of opioid overdose prevention programs already operating in other states that are offered by small businesses and local health departments.

NYSDOH staff will consult with statewide organizations representing hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments. Examples include the Hospital Association of NYS, Greater New York Hospital Association, Community Health Center Association of NYS (CHCANYS), Medical Society of the State of New York, New York Academy of Medicine, Harm Reduction Coalition, NYSDOH-approved syringe exchange programs, New York AIDS Coalition, and the NYS Association of County Health Officials

(NYSACHO). The proposed regulation will be discussed at meetings of the NYS AIDS Advisory Council and the NYS HIV Prevention Planning Group (PPG), both of which include representatives from a variety of types of organizations.

The NYSDOH has considered all comments received in this process in development of the proposed rule. Additional comments are being sought and will be considered.

**Rural Area Flexibility Analysis**

Types and Estimated Number of Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. There are 44 counties in NYS with a population less than 200,000. Nine counties have certain townships with population densities of 150 persons or less per square mile. The proposed rule will have no impact on hospitals, clinics, health care practitioners, drug treatment programs and local governments in these rural areas, unless such providers voluntarily decide to operate opioid overdose prevention programs.

Hospital, clinic, health care practitioner, drug treatment program, community-based organization and local health department participation in making opioid overdose prevention programs available will be on a voluntary basis and potential providers will make individual decisions regarding participation. Potential providers are most likely to be located in urban or suburban, not rural, areas. For example, NYSDOH SPARCS data show 3,408 hospital discharges for admissions related to opioid overdose during 1998-2002. Of these, 2,183 (64 percent) were in NYC. Another 25 percent were in the Syracuse, Rochester, Buffalo, Albany and Nassau-Suffolk regions. Similarly, OASAS county-level estimates of treatment need show that the greatest need for opioid overdose prevention programs is in urban or suburban areas (OASAS, 2004 County Resource Book, Volume 1. Service Need and Utilization Data, Table 2).

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

The NYSDOH anticipates a simple and streamlined registration process for seeking a certificate of approval to establish an opioid overdose prevention program. Additional recordkeeping requirements and reporting requirements will be minimal. Paperwork will include documentation of staff training, program policies and procedures, logs of training sessions offered and certificates of completion provided, inventories of program supplies and materials, reports of overdoses to which trained program participants have responded and reports to the Department. Only those providers voluntarily participating will be required to provide information to the Department.

Costs:

Since this regulation allows providers to establish opioid overdose prevention programs, but does not require a provider to establish such a program, no provider will be required to incur costs as a result of the adoption of this regulation. Existing staff can serve as the Program Director and provide clinical oversight. No registration fee will be collected and the reporting requirements will be minimal. A one-time, registration process to receive a certificate of approval is required with review and renewal every two years. An internal operational policy and procedure and training of staff regarding program implementation will be required. Since it is expected that registration, record keeping and the development of policies, procedures and training materials will be done by existing staff, the costs of complying with this regulation will be minimal. Costs to the Department of Health are also expected to be minimal since the production and review of all documents will be done by existing staff.

Minimizing Adverse Impact:

The program is designed to minimize impact on those who will participate: participation is voluntary, the registration process will be simple, no fee will be charged, and recordkeeping requirements will be minimal.

The new opioid overdose prevention programs will build upon already-existing programs and services for IDUs - - through hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments. The NYSDOH will maintain and make available a list of registered programs holding certificates of approval.

Rural Area Participation:

The regulations are minimal and consultation on program implementation will take place prior to the April 1, 2006 effective date of the law, and beyond. Hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments in rural areas will have opportunities to review and comment on the proposed regulations. The NYSDOH has already consulted with representatives of opioid overdose prevention programs already operating in rural areas of other states.

NYSDOH staff will consult with statewide organizations representing hospitals, clinics, health care practitioners, drug treatment programs, community-based organizations and local health departments. Examples include the Hospital Association of NYS, Greater New York Hospital Association, Community Health Center Association of NYS (CHCANYS), Medical Society of the State of New York, New York Academy of Medicine, Harm Reduction Coalition, NYSDOH-approved syringe exchange programs, New York AIDS Coalition, and the NYS Association of County Health Officials (NYSACHO). The proposed regulation will be discussed at meetings of the NYS AIDS Advisory Council and the NYS HIV Prevention Planning Group (PPG), both of which include representatives from a variety of types of organizations.

The NYSDOH has considered all comments received in this process in development of the proposed rule. Additional comments are being sought and will be considered.

**Job Impact Statement**

A Job Impact Statement is not required. The proposed rule will not have a substantial adverse impact on jobs and employment opportunities based upon its nature and purpose.

**EMERGENCY  
RULE MAKING**

**Provision of Information by the EPIC Program**

**I.D. No.** HLT-39-06-00008-E

**Filing No.** 1090

**Filing date:** Sept. 8, 2006

**Effective date:** Sept. 8, 2006

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

**Action taken:** Amendment of section 9600.4(c) of Title 9 NYCRR.

**Statutory authority:** Elder Law, sections 244, 245 and 246

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

**Specific reasons underlying the finding of necessity:** The specific reason underlying the finding of necessity to adopt as an emergency rule: The proposed regulation will require EPIC to share data with OTDA so that OTDA can match the data against its files of individuals who are in receipt of Food Stamp benefits. The match will enable an automated increase in Food Stamp benefits for those EPIC participants enrolled in the Medicare prescription drug discount program who are also Food Stamp beneficiaries. In order to obtain a deduction for

medical expenses that will result in this increased benefit for calendar year 2004, the exchange of data must take place before the end of the calendar year. There is not enough time to canvas all EPIC participants for their consent to release of data. An emergency regulation mandating the sharing of data is the only way to ensure that those EPIC participants enrolled in the Medicare prescription drug program who are Food Stamp eligible will have the opportunity to get their medical deduction before the end of this calendar year and that the sharing of the data does not violate the confidentiality requirements of HIPAA. For these reasons, the Department finds that the immediate adoption of the regulation is necessary for the preservation of the public health, safety and general welfare and that compliance with the procedural requirements of the State Administrative Procedure Act (SAPA) 202(1) would be contrary to the public interest.

**Subject:** Provision of information by the EPIC Program.

**Purpose:** To enable the provision of information to OTDA by EPIC regarding participants who are enrolled in the Medicare Prescription Drug Card Program, thereby assisting these participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits.

**Text of emergency rule:** A new subdivision (c) is added to Section 9600.4 of Title 9 NYCRR to read as follows:

*(c) For the purpose of assisting participants to receive an appropriate amount of federal Food Stamp benefits, the Program for Elderly Pharmaceutical Insurance Coverage (EPIC) shall provide to the Office of Temporary and Disability Assistance (OTDA) information identifying EPIC participants who are also enrolled in the Medicare prescription drug discount card program authorized by Title XVIII of the Social Security Act. Information provided shall be limited to eligibility and enrollment data available to EPIC and sufficient to enable OTDA to identify those participants who are also Food Stamp recipients. OTDA's use of this information shall be limited to the purpose of identifying EPIC participants who are also Food Stamp recipients and are eligible for additional Food Stamp benefits by virtue of their enrollment in the Medicare prescription drug discount card program.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 6, 2006.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

The authority for the amendment of this regulation is contained sections 244(5)(a), 245(2) and 246(4) of the Elder Law.

##### Legislative Objectives:

Section 244(5)(a) of the Elder Law requires the Elderly Pharmaceutical Insurance Coverage (EPIC) panel, consisting of the Commissioners of the Departments of Education and Health, the Superintendent of Insurance, and the Directors of the State Office for the Aging and the Division of the Budget to promulgate regulations pursuant to Section 246(4) of the Elder Law, subject to the approval of the Director of the Budget. The Director of the Budget approved the promulgation of these regulations. Section 245(2) of the Elder Law requires the Executive Director of EPIC to appoint staff and request the assistance of any department or other agency of the State in performing such functions as may be necessary to carry out the provisions of the EPIC law and to perform such other functions as may be specifically required by the law, assigned by the EPIC panel, or necessary to ensure the efficient operation of the program. Section 246(4) of the Elder Law defines the

scope of EPIC regulations as including procedures to ensure that all information obtained on persons applying for EPIC benefits remains confidential and is not disclosed to persons or agencies other than those entitled to such information because such disclosure is necessary for the proper administration of the EPIC program.

##### Needs and Benefits:

The EPIC program provides coverage of certain drugs for residents of the State of New York who are at least 65 years of age, who have incomes within the limitations prescribed by law, who are not in receipt of Medical Assistance and who do not have equivalent or better drug coverage from any other public or private third party payment source or insurance plan. The program provides an essential benefit for elderly New York residents who need financial assistance in order to obtain medications but who do not have other insurance benefits and are not in receipt of Medical Assistance coverage of their drug expenses. Chapter 49 of the Laws of 2004 authorizes the EPIC program to apply for transitional assistance under the Medicare prescription drug discount card program with a specific drug discount card under Title XVIII of the federal Social Security Act. EPIC automatically enrolled eligible participants in the Medicare prescription drug discount card program.

Section 1860D-31(g)(6) of the Social Security Act, as amended by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), 42 USC 1395w-141(g)(6), states that the availability of negotiated prices or transitional assistance received through the Medicare prescription drug card "shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or the amount of benefits under, any other Federal program." The Secretary of the United States Department of Agriculture, through its Northeast Regional office, has interpreted this statute as requiring that the discounts and subsidy a household receives through the Medicare prescription drug discount card be treated as standard medical expenses to be used in determining the household's medical expenses deduction for Food Stamp eligibility purposes.

EPIC seeks to assist its participants who are enrolled in the Medicare prescription drug discount program who are applying for or in receipt of Food Stamp benefits to receive the appropriate amount of Food Stamp benefits. Providing information to the Office of Temporary and Disability Assistance (OTDA) about its participants who are also enrolled in the Medicare Prescription Drug card program will assist these participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits. Improved health outcomes for these participants as a result of increased Food Stamp benefits and the resultant potential for decreased prescription drug needs for these participants has a direct impact on the EPIC program and justifies the sharing of this information with OTDA.

##### Costs:

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

There are no costs to regulated entities as a result of this proposed regulation which requires EPIC to share data with OTDA.

##### Costs to State and Local Governments:

There are no costs to State and local governments as a result of this proposed regulation.

##### Costs to the Department of Health:

The Department of Health will incur minimal costs in producing and transmitting the data required by this proposed regulation.

##### Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates on local governments.

##### Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment.

**Duplication:**

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

**Alternatives:**

The alternative considered to the proposed regulatory amendment was to obtain individual consents for release of information from all EPIC participants who were enrolled in the Medicare prescription drug card program. The length of time required to obtain this consent would have meant that many elderly participants would lose the medical deduction to which they are entitled for the current year. Release of the information pursuant to regulation is a permissible release of protected health information under regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) pursuant to 45 CFR 164.512(k)(6)(i).

**Federal Standards:**

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

**Compliance Schedule:**

The EPIC program will transfer data as required by this regulation as of the effective date of the regulation's filing.

**Regulatory Flexibility Analysis**

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

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would require the EPIC program to share data concerning EPIC participants enrolled in the Medicare prescription drug program with OTDA in order for those participants to receive appropriate Food Stamp benefits. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

**Job Impact Statement**

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to assist EPIC participants enrolled in the Medicare prescription drug program to receive in a timely manner medical deductions, to which they are entitled, for Food Stamp eligibility purposes.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Licensure and Practice of Nursing Home Administration**

**I.D. No.** HLT-39-06-00004-P

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

**Proposed action:** Amendment of Part 96 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, art. 28-D, section 2896(b)(1)

**Subject:** Licensure and practice of nursing home administration.

**Purpose:** To refine and streamline the existing regulations and ensure their consistency with the policies and directives of the Board of Examiners of Nursing Home Administrators.

**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 96 of Title 10 NYCRR regulates the practice of nursing home administration in New York State, including the procedures for licensing new nursing home administra-

tors, registration procedures for existing administrators, and the conduct of administrators in discharging their professional obligations.

These regulations are based on the statutory authority found in PHL 2896. The law established the Board of Examiners of Nursing Home Administrators (the Board), to regulate nursing home administrators in New York State, and set standards of licensure and practice.

Part 96 has not been modified in nine years, with most sections remaining unchanged since 1970. Many of these regulations can be clarified, particularly those governing the application and registration processes. The promulgation of clarified regulations will better provide potential applicants for licensure with the specific requirements and qualifications necessary, and provide more flexibility in meeting the standards established by the Board. The regulations also require updating, with many of the sections outmoded, to reflect the changes that have occurred in the past decade in long term care and the needs of nursing home residents.

Many of the revisions are concerned with the substitution of more precise and gender neutral language into the existing regulation. More extensive revision has been undertaken to those sections that are inconsistent with current Board policies and directives and the contemporary practice of nursing home administration.

Section 96.1(f) will be amended to simplify the definition of a nursing home administrator to mean an individual fulfilling the requirements of and licensed by the Board. Section 96.1(I) will be amended to make the definition of a temporary license coincide with the definition of acting administrator delineated in Part 415. The implementation of the applicant scheduled computer-based administered examination, by the national nursing home administrator licensure examination contractor has eliminated the semi-annual offerings of the licensure examination. The individual now schedules his or her own licensure examination upon eligibility determination and notification by Board staff. The examination is available on demand at multiple locations across the state and nation. Under Part 415, a nursing home may, upon approval by the Department, appoint an unlicensed individual to serve as acting administrator of a nursing home under the supervision of a licensed and currently registered New York State administrator for a period of not more than six months. Prior to the change in the administration of the licensure examination, an eligible applicant for licensure could wait more than six months for the administration of the examination. Section 96.1(l) will be replaced by the definition of registration. New Section 96.1(n) adds the definition of Administrator of Record. New Section 96.1(o) adds the definition of qualifying field experience and new Section 96.1(p) further defines the term active participation which is central to the definition of qualifying field experience. New Section 96.1(q) adds the definition of Code of Ethics, which stipulates that all nursing home administrators must adhere to the body of rules promulgated by the Board to govern the profession of nursing home administration.

Section 96.3 will be revised to update original regulatory language from 1970 governing the composition of the Board.

Section 96.5 will be amended to clarify the procedure for qualifying to take the nursing home administrator examination.

Section 96.8 will be wholly replaced by a new section on the educational and specialized training requirements an applicant must undertake to be granted a nursing home administrator license. The revised regulation will put into regulation the policy and procedures established by the Board over the past 20 years. The revisions will eliminate the antiquated educational requirements that specified applicants complete a 100-hour Board approved licensure course. Since the early 1970's the Board has required applicants for licensure to have a bachelors degree from an accredited college or university that was specific to health care administration or supplemented by five college courses in areas of study relevant to health care administration

in addition to the 100-hour course in nursing home administration. Within the past 15 years, college and university courses in nursing home administration have become readily available at various schools in New York State and across the country. These courses are provided in both traditional and on-line settings. Changes in the complexity of today's nursing homes require that the administrators enter the profession with a thorough and well rounded college accredited course work in the five domains of nursing home administration practice that are nationally and professionally recognized. The revised regulation merges the educational and nursing home course of study requirements into a single requirement that calls for a five course requirement in the mandated areas of finance, legal issues, gerontology, personnel management and nursing home administration, to be supplemented by a 12 month internship at a nursing home or commensurate qualifying field experience undertaken at a nursing home.

Section 96.9 will be wholly replaced by a new section concerning the content of any course to meet the mandated course areas specified in 96.8.

Section 96.10 will be amended to eliminate obsolete language on training agencies.

Section 96.11 will be amended to eliminate obsolete language on continuing education requirements for nursing home administrator registration, and add provisions that specify the manner in which an administrator accounts for continuing education credits.

The existing Section 96.12 will be renumbered Section 96.13. A new Section 96.12 will be added to specify the procedure for a licensed out-of-state nursing home administrator to follow to obtain a license in New York State. The revision will not provide for reciprocity, but will provide alternatives for meeting course of study requirements, and provide for the recognition of previous successful performance on the national nursing home administrator examination for New York State licensure requirements. These proposed revisions would be consistent with the policy advocated by the National Association of Boards of Examiners of Long Term Care Administrators (NAB) that state boards adopt a standardized process for licensing administrators previously licensed in other states.

**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: regsqa@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:

These proposed regulations are promulgated under the authority of Sections 2896-b (1) of the Public Health Law (PHL) which authorizes the Board of Examiners of Nursing Home Administrators (Board or BENHA) to adopt and amend rules and regulations relating to the practice of nursing home administration. This section of law requires that the Board issue regulations governing the standards for courses of study and training for nursing home administrators and the standards and procedures for the issuance, revocation and suspension of licenses and registrations of nursing home administrators.

PHL Section 2896-a establishes the make-up and the composition of the Board. Under PHL Section 2896-b the Board is authorized to set standards for courses of study, and standards and procedures of examination and the issuance, revocation and suspension of licenses and registrations of nursing home administrators. PHL Section 2896-d sets the rules for the examination of candidates for licensure as nursing home administrators. PHL Section 2896-g provides the basis of the registration process for nursing home administrators. PHL Section

2897 states the grounds for the suspension and revocation of a nursing home administrator's license and the procedure for instituting a disciplinary action against a nursing home administrator's license.

##### Legislative Objectives:

Section 2896 of the Public Health Law governs the practice of nursing home administration in New York State. Section 2896-a meets the objective of establishing the framework of the Board. Section 2896-b gives the Board the ability to formulate standards for a course of study for nursing home administrators including instruction, training and experience for licensure, as well as the procedures for registration of nursing home administrators and the suspension and revocation of nursing home administrator licenses. Board oversight of the nursing home administrator licensure examination, and the registration process for existing nursing home administrators is extended through Section 2896-d and Section 2896-g respectively. Section 2897 delineates the actions or conduct of a nursing home administrator that constitute the grounds for the Board to suspend or revoke an administrator's license or registration.

##### Needs and Benefits:

The proposed regulations will refine and streamline existing regulations to eliminate outmoded nursing home administrator licensure requirements, and clarify existing registration procedures. The current regulations have not undergone revision in nine years, with some sections unchanged since 1970. Some sections of the regulations require updating to reflect the current standards for licensure and practice established by the Board. The promulgation of clarified regulations can better provide potential applicants for licensure with the specific requirements and qualifications necessary for licensure. It will also reduce the confusion that has occurred as the Board has exercised its authority to improve the nursing home administrator profession consistent with the changes over the past decade in long term care and nursing home resident's needs.

The revision of the regulations relating to the courses of study for nursing home administrator applicants can be expected to improve the skill level of newly licensed individuals, which may result in a corresponding improvement in quality for nursing home administration. The regulations eliminate the 100-hour course which is mandated by current regulations but which is no longer readily available as needed across the state. Changes in the method and frequency of the administration of the national nursing home administrator examination allows for testing upon demand. This has resulted in the need for the establishment of educational requirements that would provide applicants with a thorough and well rounded program of college accredited course work in the five domains of nursing home administrator practice that are nationally and professionally recognized. The revised regulations replace the non-accredited 100-clock hour course with a more flexible educational requirement consisting of fifteen semester credit hours in five course areas, including nursing home administration, that embody the contemporary practice of nursing home administration. The college accredited course work is more accessible to those applicants whose baccalaureate degree is not in the field of health care administration deemed necessary for today's nursing home administrators by the Board. Over the past 10 – 15 years, the availability of these courses has increased dramatically. Accredited colleges and universities now offer degree programs in the field of nursing home administration. The proposed educational requirement offers the additional benefit of conveying the ability to complete the necessary coursework at a variety of colleges and universities across the nation. Courses are offered by accredited colleges and universities in both traditional classroom settings and on-line across the country.

##### Costs:

Costs to Regulated Parties:

There are no new costs resulting from the promulgation of the regulatory amendments. These courses have been required through Board established licensure guidelines. Fees associated with licensure and registration are established in statute and are not affected by these regulations. Applicants for nursing home administrator licensure are required to pay a \$40 processing fee. Nursing home administrators pay a fee of \$40 for their biannual registration. Fees associated with the national examination for nursing home administrator licensure are set by the National Association of State Boards of Examiners of Long Term Care Administrators (NAB) and are applied to all test takers, regardless of state. Currently applicants are required to pay the \$270 test fee for testing directly to the NAB. The NAB conducts testing independently from the Department of Health but has a contract that permits the BENHA to utilize this national examination for New York licensure candidates.

**Costs to State and Local Government:**

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

**Costs to the Department of Health:**

The Department will not incur any additional costs from the regulatory revisions. Existing staffing to the Board is adequate to implement the regulations.

**Local Government Mandates:**

The regulatory amendments will not impose any new programs, services, duties or responsibilities upon any county, city town, village, school district, fire district or other special district.

**Paperwork:**

The revisions to the regulations would not impose any additional paperwork requirements.

**Duplication:**

There is no duplication of federal or State requirements.

**Alternative Approaches:**

Since the regulatory amendments are of a clarifying and updating nature, the only alternative would be to maintain the regulation in its current form. This approach would lead to the continued use of obsolete and inadequate regulations for nursing home administrators.

**Federal Standards:**

The proposed regulations do not exceed any minimal standards of the federal government for the same or similar subject areas. The federal government has not released minimal standards for the licensure of nursing home administrators. Federal law and regulation require the states to establish such standards in those states that license nursing home administrators.

**Compliance Schedule:**

The proposed regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

**Regulatory Flexibility Analysis**

Pursuant to Section 202-bb of the State Administrative Procedure Act, a regulatory flexibility analysis is not required. The regulations only clarify and update the language of the existing regulations governing nursing home administrators. There will be no impact on small businesses or local government in New York State, and no additional recordkeeping, reporting or compliance requirements will be imposed.

**Rural Area Flexibility Analysis**

Pursuant to Section 202-bb of the State Administrative Procedure Act, a regulatory flexibility analysis is not required. The regulations only clarify and update the language of the existing regulations governing nursing home administrators. There will be no impact on small businesses or local government in New York State, and no additional recordkeeping, reporting or compliance requirements will be imposed.

**Job Impact Statement**

A Job Impact Statement is not included because it is apparent from the nature and purpose of these amendments that they will not have a substantial adverse impact on jobs and employment activities.

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

**Continuing Day Treatment (CDT) Utilization Threshold Program**

**I.D. No. HLT-39-06-00005-P**

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

**Proposed action:** Amendment of sections 511.1 and 511.15 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 206; Social Services Law, section 365-g

**Subject:** Continuing Day Treatment (CDT) Utilization Threshold Program.

**Purpose:** To subject Medicaid recipients to service limits for certain types of Medicaid reimbursed categories of service and treatment during their recipient benefit year. These services formerly did not include limits for continuing day treatment. Article 7 Budget Bill of 2005 requires that the exclusion of CDT from Utilization Thresholds requirements be changes.

**Text of proposed rule:** The table of contents for Part 511 is amended to read as follows:

PART 511

MEDICAL CARE - UTILIZATION THRESHOLDS

(Statutory Authority: Social Services Law, Sections 20(3)(d), 34(3)(f), 363-a(2), 365-g)

Sec.

511.1 Utilization thresholds

\* \* \*

*511.15 Continuing day treatment programs - utilization threshold*  
Subparagraph (i) of Section 511.10(b)(2) is amended to read as follows:

(i) mental health continuing treatment [and continuing day treatment], day treatment, partial hospital, and intensive psychiatric rehabilitative treatment services, alcoholism treatment services, substance abuse services and mental retardation and developmental disability treatment services provided in clinics certified under article 28 of the Public Health Law, or article 23 or article 31 of the Mental Hygiene Law; and

A new Section 511.15 is added to read as follows:

*Section 511.15 Continuing day treatment programs - utilization threshold.*

*This section describes the utilization threshold that has been established for continuing day treatment programs. The department will pay for up to the number of continuing day treatment program visits per benefit year as set forth in 14 NYCRR 588.7(e).*

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

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

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

**Regulatory Impact Statement**

Statutory Authority:

Section 365-g of the Social Services Law (SSL). Section 365-g of the SSL protects the Medicaid program from abusive behavior by providers or recipients through the unnecessary utilization of medical care and services. This section authorizes the Department "to implement a system for utilization controls." At the same time, the rights of recipients in obtaining necessary care were required to be protected

through the use of notices and hearing rights for those recipients affected by the utilization controls.

**Legislative Objective:**

This regulation change modifies the Department's system of utilization controls. Required as part of the Budget Bill (Section 44, Part C of Chapter 58 of the Laws of 2005) for the state fiscal year 2005-2006, this proposal ends the exemption from utilization controls for Continuing Day Treatment services. The end of this exemption will allow the Office of Mental Health to impose new limits in this category of service for Medicaid recipients, which will help ensure that only appropriate levels of care are permitted. These new limits are proposed as an amendment to 14 NYCRR 588.7(e).

The Office of Mental Health in concert with the Department of Health will use these changes to monitor and control the over-utilization of continuing day treatment services. This is especially important in cases where recipients are incapable of understanding the appropriate levels of care which they should receive. Recipients approaching the chosen level or otherwise potentially adversely affected are entitled to notice and the right to a hearing. Recipients approaching these levels can also continue to request that their physician submit "threshold override applications" (TOAs) to increase their maximum level of medically necessary continuing day treatment services.

**Needs and Benefits:**

This proposed rule is a SFY 2005-2006 Budget initiative (Section 44, Part C of Chapter 58 of the Laws of 2005) which removed the exemption of Continuing Day Treatment from Utilization Thresholds. A proposed amendment to OMH regulations establishes a threshold level for Continuing Day Treatment services (14 NYCRR 588.7(e)).

Since its inception in 1990, Utilization Thresholds have resulted in cost savings to the Medicaid program by ensuring that certain medical services were not abused. The utilization limits were first instituted to address those at the 95th percentile of service use, which allowed the vast majority of recipients to obtain care within guidelines, yet required that statistically high service using outlier recipients obtain Threshold Override Applications (TOAs) from certain of their providers (for physician/clinic, drug, mental health clinic, services and laboratory tests). It has been demonstrated that the oversight provided by the medical professionals who submit the TOAs results in greater awareness of the service utilization habits of their recipients which might, if unmonitored, result in health and safety issues for recipients and in fiscal harm to the Medicaid program from paying for potentially excessive services. The TOA process still permits medically necessary services to be available to recipients based on their unique needs and through mandatory participation by the treating providers access to services is managed in a more appropriate manner. For example, physicians are required to submit TOAs for patients who exceed their maximum number, ten (10), of physician/clinic visits in a benefit year. However, these TOAs may be for the number of service encounters that the physician deems medically appropriate for that particular recipient. The imposition of a new level for continuing day treatment services will require treating providers to be cognizant of the services utilized by their recipients. Analyses completed by the Office of Mental Health demonstrated the needed refinement of the original 1990 limits.

**Costs:**

Anticipated costs in the first full year of implementation are \$103,000 gross. This annually recurring cost results from increased administrative oversight required by the new utilization levels. This cost will be paid by the Medicaid program with traditional allocation between the federal and state governments. It will be shared as follows: \$51,500 Federal share, and \$51,500 State share. There will be no local share for these administrative costs.

Anticipated savings in the first full year of implementation and annually thereafter is \$3,120,000 due to further reduction of medically unnecessary care and services. It is anticipated that the breakdown will be as follows: \$1,560,000 Federal share, \$780,000 State share and \$780,000 Local share. Savings estimates are based on statistical modeling using frequency distributions by service type. Medicaid eligibility data from eMedNY and frequency distributions of claims and expenditure data from the eMedNY Adjudicated Claims File were used. Costs to regulated parties are minimal to nonexistent. The rule may cause the newly imposed service limits for recipients to be reached for continuing day treatment in their benefit year, but providers have the authority to submit TOAs for a medically necessary amount at that point in time. Given the ease of requesting TOAs, resulting savings from new limits on Continuing Day Treatment are expected through a decline in medically unnecessary services without associated elevated costs. Recipients incur no costs due to this new rule.

**Local Government Mandates:**

No new mandates to local governments in the administration of the Medicaid program. This program is administered by the State Department of Health.

**Paperwork:**

The State will be responsible for notification to providers and recipients of the changes in utilization levels.

**Duplication:**

The regulations do not duplicate, overlap or conflict with any other state or federal law or regulation.

**Alternatives:**

If this rule is not proposed the Department will be out of compliance with the 2005-2006 enacted State Budget (Section 44, Part C of Chapter 58 of the Laws of 2005). Additionally, it is fiscally imprudent for the Medicaid program to provide unnecessary medical services. This proposed change coincides with changes being proposed in the Office of Mental Health regulations and is consistent with similar such programs.

**Federal Standards:**

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

**Compliance Schedule:**

The proposed amendments will become effective on the first day of the month following publication of a Notice of Adoption in the *State Register*.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

This regulatory proposal removes the exclusion of Continuing Day Treatment Services from the Utilization Threshold Program. This program is administered by the New York State Health Department as part of its responsibility in supervising the Medicaid program. There are, therefore, no new requirements imposed on small businesses or state and local government.

**Compliance Requirements:**

This proposal does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments except that providers of Continuing Day Treatment Services must adhere to Utilization Program requirements and monitor their Medicaid recipients who receive these services. These providers must submit Threshold Override Applications (TOAs) for their recipients if the recipients are in need of more services than what is permitted under the Utilization Threshold program as stated in 14 NYCRR 588.7(e).

**Professional Services:**

No new professional services are required as a result of this proposal.

**Compliance Costs:**

In the first full year of implementation, state costs charged to the Medicaid program are estimated at \$103,000 gross. Savings to the Medicaid program are estimated at \$3,120,000.

**Economic and Technological Feasibility:**

The proposal does not change the way Medicaid providers bill for Medicaid services or the rate of reimbursement for such services. Therefore, there is no economic or technological impact.

**Minimizing Adverse Impact:**

This proposed rule has no adverse economic impact on small businesses or local governments. It is a modification to the existing program's service limits. There is no direct local government involvement in the current administration of this program or in its proposed rule.

**Small Business and Local Government Participation:**

Inasmuch as this proposal has no impact on small business or local governments, no discussions were conducted.

**Rural Area Flexibility Analysis**

No Rural Area Flexibility Analysis is required because the proposed rule, which merely revises utilization levels of a certain service in the Medicaid program, does not have an adverse impact on rural areas and will not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

The Department has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities. This rule adds to the utilization levels for certain services in the Medicaid program.

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

**Neonatal Herpes Reporting and Laboratory Specimen Submission**

**I.D. No.** HLT-39-06-00006-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 2.1 and 2.5 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 225(4), (5)(a), (g), (h) and (i), 206(1)(d) and (e)

**Subject:** Neonatal herpes infection reporting and laboratory specimen submission.

**Purpose:** To properly identify and treat infected mothers and detect early cases of neonatal herpes. Making neonatal herpes a reportable disease will assist in the diagnosis, prevention and effective management and call public attention to this disease.

**Text of proposed rule:** Subdivision (a) of Section 2.1 is amended to read as follows:

Section 2.1. Communicable diseases designated: cases, suspected cases and certain carriers to be reported to the State Department of Health.

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioner's authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

- Amebiasis
- Anthrax

- Arboviral infection
- Babesiosis
- Botulism
- Brucellosis
- Campylobacteriosis
- Chancroid
- Chlamydia trachomatis infection
- Cholera
- Cryptosporidiosis
- Cyclosporiasis
- Diphtheria
- E. coli O157:H7 infections
- Ehrlichiosis
- Encephalitis
- Giardiasis
- Glanders
- Gonococcal infection
- Group A Streptococcal invasive disease
- Group B Streptococcal invasive disease
- Hantavirus disease
- Hemolytic uremic syndrome
- Hemophilus influenzae (invasive disease)
- Hepatitis (A; B; C)
- Herpes infection in infants aged 60 days or younger (neonatal)
- Hospital-associated infections (as defined in section 2.2 of this Part)
- Influenza (laboratory-confirmed)
- Legionellosis
- Listeriosis
- Lyme disease
- Lymphogranuloma venereum
- Malaria
- Measles
- Melioidosis
- Meningitis
  - Aseptic
  - Hemophilus
  - Meningococcal
  - Other (specify type)
- Meningococcemia
- Monkeypox
- Mumps
- Pertussis (whooping cough)
- Plague
- Poliomyelitis
- Psittacosis
- Q Fever
- Rabies
- Rocky Mountain spotted fever
- Rubella
- Congenital rubella syndrome
- Salmonellosis
- Severe Acute Respiratory Syndrome (SARS)
- Shigellosis
- Smallpox
- Staphylococcal enterotoxin B poisoning
- Streptococcus pneumoniae invasive disease
- Syphilis, specify stage
- Tetanus
- Toxic Shock Syndrome
- Trichinosis
- Tuberculosis, current disease (specify site)
- Tularemia
- Typhoid

Vaccinia disease: (as defined in Section 2.2 of this Part)  
 Viral hemorrhagic fever  
 Yersiniosis

\* \* \*

Section 2.5 is amended to read as follows:

2.5 Physician to submit specimens for laboratory examination in cases or suspected cases of certain communicable diseases. A physician in attendance on a person affected with or suspected of being affected with any of the diseases mentioned in this section shall submit to an approved laboratory, or to the laboratory of the State Department of Health, for examination of such specimens as may be designated by the State Commissioner of Health, together with data concerning the history and clinical manifestations pertinent to the examination:

Anthrax  
 Babesiosis  
 Botulism  
 Brucellosis  
 Campylobacteriosis  
 Chlamydia trachomatis infection  
 Cholera  
 Congenital rubella syndrome  
 Conjunctivitis, purulent, of the newborn (28 days of age or less)  
 Cryptosporidiosis  
 Cyclosporiasis  
 Diphtheria  
 E. coli 0157:H7 infections  
 Ehrlichiosis  
 Giardiasis  
 Glanders  
 Gonococcal infection  
 Group A Streptococcal invasive disease  
 Group B Streptococcal invasive disease  
 Hantavirus disease  
 Hemophilus influenzae (invasive disease)  
 Hemolytic uremic syndrome  
*Herpes infection in infants aged 60 days or younger (neonatal)*  
 Legionellosis  
 Listeriosis  
 Malaria  
 Melioidosis  
 Meningitis  
     Hemophilus  
     Meningococcal  
 Meningococemia  
 Monkeypox  
 Plague  
 Poliomyelitis  
 Q Fever  
 Rabies  
 Rocky Mountain spotted fever  
 Salmonellosis  
 Severe Acute Respiratory Syndrome (SARS)  
 Shigellosis  
 Smallpox  
 Staphylococcal enterotoxin B poisoning  
 Streptococcus pneumoniae invasive  
 Syphilis  
 Tuberculosis  
 Tularemia  
 Typhoid  
 Viral hemorrhagic fever  
 Yellow Fever  
 Yersiniosis

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

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

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

#### **Regulatory Impact Statement**

Statutory Authority:

Sections 225(4) and 225(5)(a), (g), (h), and (i) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health, designation of diseases for which specimens shall be submitted for laboratory examination, and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section 206(1)(d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1)(e) permits the commissioner to "obtain, collect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state." PHL Article 21 requires local boards of health and health officers to guard against the introduction of such communicable diseases as are designated in the sanitary code by the exercise of proper and vigilant medical inspection.

Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding neonatal herpes to reportable disease requirements, thereby permitting enhanced monitoring of disease, prompt identification of cases and unusual or dramatic increases in disease reporting that might indicate an outbreak, and the ability to implement measures, if necessary, to prevent further transmission.

Needs and Benefits:

Neonatal herpes, defined as herpes infection in infants aged 60 days or less, is a serious disease associated with neurological devastation of the infant and neonatal death. Neonatal herpes can result from infection with either herpes simplex virus (HSV) type 1 (HSV-1) or HSV type 2 (HSV-2). The disease can be localized to skin, eye and mouth (SEM disease), involve the central nervous system (CNS), or manifest as disseminated infection involving multiple organs. Most infants with CNS or disseminated disease have neurological sequelae, and the mortality rate in the absence of therapy is very high (80 percent) for these babies.

There are three ways that neonatal herpes infection can occur: (1) congenital (in utero) from an infected mother to the fetus; (2) perinatal from an infected mother to the neonate at delivery; or (3) following delivery (postnatal acquisition).

Congenital infection:

Intrauterine infection represents approximately 5 percent of cases of neonatal herpes infection. It can result from an ascending infection from the cervix or vulva or as a consequence of transplacental transmission. The risk of herpes transmission to the neonate is greatest, approximately 50 percent, if the pregnant woman develops a primary infection in the third trimester.

Perinatal infection:

Neonatal infection with HSV most often occurs during delivery. In 85 percent of cases, HSV infection is transmitted to the neonate during labor when the baby comes into direct contact with infected maternal secretions in the birth canal. The risk of neonatal herpes is increased if the woman has obvious lesions at delivery. Delivery by Caesarean

section appears to decrease the risk of HSV transmission in the presence of an active lesion.

**Post-partum infection:**

Postnatal acquisition of HSV accounts for approximately 10 percent of all cases of neonatal herpes and occurs as a consequence of the baby coming into contact with an environmental source of herpes, such as a family member or caregiver with orolabial herpes or lesions at other sites (e.g. breast, herpetic whitlow).

Based on national estimates, neonatal herpes is one of the most common of all congenital and perinatal infections in the United States, infecting approximately 1/1,500 to 1/3,200 live births each year. Based on these estimates, it can be estimated that of the 133,532 births in New York State in 2003, exclusive of New York City, there could have been approximately 40 neonatal herpes cases. Another 40 cases could be estimated to have occurred among the 119,469 births in New York City.

Diagnostic tests and therapies exist to properly identify and treat infected mothers and detect early cases of neonatal herpes. Type-specific serologic tests for herpes are commercially available and amplification tests such as polymerase chain reaction (PCR) have increased the sensitivity of diagnostic testing. Antiviral therapy can be used to reduce viral shedding of an infected pregnant woman and to treat an infected neonate. Cesarean delivery of infants born to mothers presenting with genital lesions can also reduce the likelihood of perinatal transmission.

Making neonatal herpes a reportable disease will assist in the diagnosis, prevention and effective management of neonatal herpes and call public attention to this disease. Multi-center studies of neonatal herpes show that delays in instituting appropriate therapies persist. Clinicians need to be educated to include neonatal herpes in the differential diagnosis for a febrile neonate, and recognize clinical signs. Educating expecting parents with known genital herpes about risks to the newborn can also promote early intervention. New York State reporting of neonatal herpes is needed to:

- Accurately measure the incidence of this disease by transmission category;
- Increase awareness of the disease by providers and the public;
- Investigate cases of neonatal herpes to systematically assess and address gaps in provider knowledge of prevention and treatment strategies;
- Identify outbreaks of postnatally-acquired neonatal herpes in a timely fashion, identify the source, and intervene to prevent subsequent infection.

Neonatal herpes is currently a reportable condition in seven states (Connecticut, Florida, Louisiana, Massachusetts, Nebraska, South Dakota and Washington). The New York City Department of Health and Mental Hygiene recently amended the New York City Health Code to require reporting of neonatal herpes.

**Costs:**

**Costs to Regulated Parties:**

The costs associated with implementing the reporting of this disease are minimal as reporting processes and forms already exist. Hospitals, practitioners and clinical laboratories are accustomed to reporting communicable disease to public health authorities.

In the event of post-partum cases of neonatal herpes, it is imperative to the public health that suspect cases be reported immediately and investigated thoroughly to curtail additional exposure and potential morbidity and mortality.

**Costs to Local and State Governments:**

The staff who will be involved in reporting and tracking neonatal herpes at the State and local health departments are the same as those currently involved with other communicable diseases listed in 10 NYCRR Section 2.1 and existing disease reporting processes will be

used. Therefore, minimal incremental cost is expected. The time expended by a local health department to report a neonatal herpes case is estimated to be low to receive the report, obtain any missing information, and enter the report into the surveillance data system.

The additional cost to local or state governments associated with investigating and implementing control strategies to curtail the spread of neonatal herpes, particularly post-partum cases of neonatal herpes, could become significant depending upon the extent of any outbreak. Suspect cases are to be reported to the local health department, who should immediately notify the Regional Epidemiologist or the New York State Department of Health (NYSDOH) after-hours duty officer.

By monitoring and preventing the spread of neonatal herpes, savings may include reducing costs associated with public health control activities, morbidity, treatment and premature death.

**Costs to the Department of Health:**

The NYSDOH already collects communicable disease reports from local health departments, checks the reports for accuracy and transmits them to the federal Centers for Disease Control and Prevention. The addition of neonatal herpes to the list of communicable diseases should lead to slight to moderate additional costs, mostly related to investigating cases. Existing staff should be able to handle the incremental increase in workload.

**Paperwork:**

The existing general communicable disease reporting form (DOH-389) will be revised. This form is familiar to and is already used by regulated parties.

**Local Government Mandates:**

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports of neonatal herpes will be required to immediately forward such reports to the State Health Commissioner.

**Duplication:**

There is no duplication of this initiative in existing State or federal law.

**Alternatives:**

No other alternatives are available. Reporting of cases of neonatal herpes is of critical importance to public health. There is an urgent need to conduct surveillance, identify cases in a timely manner, and reduce the potential for further exposure to contacts.

**Federal Standards:**

Currently there are no federal standards requiring the reporting of neonatal herpes.

**Compliance Schedule:**

Reporting of neonatal herpes is currently mandated pursuant to emergency adoption of this regulation by the Public Health Council, and filing of a Notice of Emergency Adoption of this regulation with the Secretary of State. The regulation will be made permanent upon publication of a Notice of Adoption of this regulation in the *New York State Register*.

**Regulatory Flexibility Analysis**

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

This proposed rule will apply to physicians, hospitals, nursing homes, diagnostic and treatment centers and clinical laboratories. There are approximately 65,000 licensed and registered physicians in New York State; it is not known how many of them practice in small businesses. Three hospitals, 100 nursing homes, 237 diagnostic and treatment centers, and 1,000 clinical laboratories employ less than 100 persons and qualify as small businesses.

Implementation will require reporting of neonatal herpes in all 57 counties of the State outside of New York City. New York City has already passed regulations making neonatal herpes a reportable disease.

**Compliance Requirements:**

Existing reporting forms will be revised. Clinical laboratories that are small businesses will utilize the revised NYSDOH electronic reporting format.

**Professional Services:**

No additional professional staff will be needed to complete the required forms manually and mail to the county health department.

**Compliance Costs:**

No initial capital costs of compliance are anticipated. The reporting of neonatal herpes should have a negligible to modest effect on the estimated cost of disease reporting. The cost of complying with required reporting includes staff time to complete the necessary forms and mail to the respective local health department. The cost of reporting neonatal herpes by laboratories should be modest given the estimated small number of cases.

**Minimizing Adverse Impact:**

There are no alternatives to the reporting or laboratory testing requirements. Adverse impacts have been minimized since revised forms and reporting staff will be utilized by regulated parties. Electronic reporting will save time and expense. The approaches suggested in the State Administrative Procedure Act Section 202-b(1) were rejected as inconsistent with the purpose of the regulation.

**Feasibility Assessment:**

The NYSDOH estimates minimal increases in workload and costs associated with the requirement to report neonatal herpes.

**Small Business and Local Government Participation:**

Local governments have been consulted in the process through ongoing communication on this issue with local health departments and the New York State Association of County Health Officers (NYSACHO).

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

The proposed rule will apply statewide. It is assumed that the distribution of neonatal herpes will be less in rural counties than in more urban or metropolitan areas similar to the population distribution.

**Compliance Requirements:**

Compliance requirements are the same in rural areas as those in all other areas of the state. Existing reporting forms will be revised. Clinical laboratories will use the revised NYSDOH electronic reporting format.

**Professional Services:**

No additional professional staff should need to be hired to complete the required forms and mail to the county health department. Rural providers are expected to use existing staff to comply with the requirements of this regulation.

**Compliance Costs:**

No initial capital costs of compliance are anticipated. See cost statement in Regulatory Impact Statement for additional information.

**Minimizing Adverse Impact:**

There are no alternatives to the reporting requirements. Adverse impacts have been minimized since familiar forms and existing staff will be utilized by regulated parties. The approaches suggested in State Administrative Procedure Act Section 202-b (2) were rejected as inconsistent with the purpose of the regulation.

**Rural Area Input:**

The New York State Association of County Health Officers (NYSACHO), including representatives of rural counties, has been informed about this change and has voiced no objections.

**Job Impact Statement**

This regulation adds neonatal herpes to the list of diseases that clinical laboratories, clinicians, and hospitals must report to public health authorities and for which clinicians must submit laboratory specimens. The staff who are involved in reporting neonatal herpes at the local and State health departments are the same as those currently involved with

reporting, monitoring and investigating other communicable diseases. Implementation should not significantly increase the demands on existing staff nor increase the need to hire additional staff for laboratories, hospitals, and providers. The NYSDOH has determined that this regulatory change will not have a substantial adverse impact on jobs and employment.

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

**Nursing Home Pharmacy Regulations**

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

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following revised rule: **Revised action:** Amendment of section 415.18(g) and (i) of Title 10 NYCRR.

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

**Subject:** Pharmacy services in nursing homes.

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

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

Section 415.18 Pharmacy Services.

\* \* \*

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

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

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

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

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

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

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

(i) sublingual nitroglycerine; and

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

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

\* \* \*

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order

shall be given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a *legally* designated alternate [physician] *practitioner* within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 415.18(g)(3)(ii).

**Text of revised 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:** 30 days after publication of this notice.

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

##### Statutory Authority:

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

##### Legislative Objectives:

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

##### Needs and Benefits:

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

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

The present regulation, section 415.18(g), provides for emergency medication kits but limits the contents to injectables. It also provides for the kit to contain sublingual nitroglycerine and up to five noninjectable prepackaged medications. At the time this regulation was

promulgated, the extensive array of oral medications currently available did not exist and emergency medications were primarily viewed in terms of injectable medications. With the greater complexity of clinical conditions often seen in today's nursing home, resident issues of pain management have taken on greater significance. The availability of oral medications for pain and the wide range of antibiotics that did not exist at the time the regulations were written would significantly affect how nursing homes could respond to an emergency need of a resident.

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

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

##### Costs:

##### Costs to Regulated Parties:

There will be no additional costs to regulated parties.

##### Costs to State and Local Government:

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

##### Costs to the Department of Health:

There will be no additional costs to the Department.

##### Local Government Mandates:

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

##### Paperwork:

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

##### Duplication:

The regulation does not duplicate any federal or state regulation.

##### Alternative Approaches:

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

##### Federal Standards:

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

**Compliance Schedule:**

The proposed regulation will be effective upon publication of a Notice of Adoption in the New York *State Register*.

**Revised Regulatory Flexibility Analysis**

The proposed rule revision does not require any changes to the Regulatory Flexibility Analysis.

**Revised Rural Area Flexibility Analysis**

The proposed rule revision does not require any changes to the Rural Area Flexibility Analysis.

**Revised Job Impact Statement**

The proposed rule revision does not require any changes to the Job Impact Statement.

**Assessment of Public Comment**

A Notice of proposed amendment of section 415.18 of Title 10 NYCRR Subdivisions (g) and (i) titled "Pharmacy Services" was published in the December 14, 2005 issue of the *State Register*. In response to this publication, the NYSDOH received written comments from the NYS Chapter of the American Society of Consultant Pharmacists and from the NYS Council of Health-system Pharmacists.

The following is a summary of the public comments:

**Comment:**

Both comments recommended that the wording "up to five noninjectable" in subdivision (g)(3)(ii) be removed or changed to reflect the original intent.

**Response:**

The limit of up to five noninjectables per kit is being removed. This change will further support the original intent of the revised regulation.

At this time, Healthy New York participants seeking comprehensive health insurance coverage cannot access high deductible health plans and establish health savings accounts in accordance with the federal standards. These employers and individuals are not currently eligible for the tax deductions they would otherwise enjoy for funds deposited into health savings accounts and used for qualified medical expenses. The funds deposited into the health savings accounts may accrue tax-deferred until the account owner seeks reimbursement for medical expenses or reaches Medicare eligibility.

Health insurance costs have escalated dramatically in recent years, with some health plans implementing increases in the range of 25-30 percent. The increased cost of insurance has, in turn, contributed to a decline in the number of employers who offer insurance to their employees. Recent data indicates that approximately 15 percent of New York's population is uninsured. A large portion of New York State's uninsured population are individuals who are self-employed or who work for small employers.

This amendment to Part 362 of 11 NYCRR will require health maintenance organizations and insurers to offer high deductible health plans, as defined by the federal Medicare legislation, using the Healthy New York program for qualifying small employers and individuals. The high deductible health plans will have lower premiums than the current Healthy New York benefit package. The reduction in cost should encourage more small businesses and individuals to purchase comprehensive health insurance coverage and should therefore result in a decrease in the number of uninsured. In addition, the high deductible health plans purchased with the health savings accounts will give New Yorkers access to another health insurance alternative that complies with federal standards. The new option will also provide New Yorkers with access to a tax-advantaged method of purchasing health insurance that is currently not available.

Employers generally renew existing insurance arrangements or enroll in new insurance policies during the fall. These new policies become effective in January of the following year. In order for these high deductible health plans to be sold with a January 1, 2007 effective date, the health plans must be able to market them to employers along with other new product offerings in the fall. Therefore, this regulation must be adopted as an emergency to allow the Insurance Department to review and approve health insurance policies for sale and marketing during the fall.

This amendment also adds the following new benefits to the Healthy New York program: diagnostic screening for prostate cancer, and a limited number of post-hospital or post-surgical home health care of physical therapy services. The addition of the prostate cancer screening benefit will facilitate prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. Currently, the Healthy New York program covers surgery and hospitalizations but does not cover home health care and physical therapy care. Consequently, Healthy New York beneficiaries may extend hospitalizations to receive therapy. The addition of post-hospitalization and post surgical home health and physical therapy services should result in lower hospital costs, which should in turn reduce costs to the state.

The Department has received extensive comments and suggestions from the health insurance industry in preparing these regulations. The Department has met several times with representatives from groups that represent the health maintenance organization and not-for-profit health insurance industry and has held numerous phone conferences. Some of these conversations have been with experts in high deductible health plans and HSAs. These industry representatives have provided the Department with comments and suggestions on how the drafting of this regulation.

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## Insurance Department

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### EMERGENCY RULE MAKING

**Healthy New York Program**

**I.D. No.** INS-39-06-00010-E

**Filing No.** 1092

**Filing date:** Sept. 11, 2006

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

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

**Action taken:** Addition of sections 362-2.7(d), (e) and (f) and 362-2.8 to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3201, 3217, 3221, 4235, 4303, 4304, 4305 and 4326

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

**Specific reasons underlying the finding of necessity:** The Federal Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, added a new Section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. In his 2006 State of the Union Address, President Bush emphasized the importance of high deductible health plans and HSAs in expanding health care options and reducing the number of the uninsured. Chapter 1 of the Laws of 1999 enacted the Healthy New York Program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage uninsured individual proprietors and working uninsured individuals to purchase insurance coverage.

Consequently, it is critical that this regulation be adopted as promptly as possible. For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

**Subject:** Minimum standards for the form and content of policies and contracts subject to the provisions of section 4326 of the Insurance Law.

**Purpose:** To create additional health insurance options for qualifying small employers and individuals by requiring health maintenance organizations and participating insurers to offer high deductible health plans in conjunction with the Healthy New York Program.

**Text of emergency rule:** New subdivisions (d), (e), and (f) are added to section 362-2.7 to read as follows:

§ 362-2.7 *Healthy New York benefit adjustments.*

(d) *Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to forty post-hospital or post-surgical home health care visits per calendar year.*

(e) *Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for up to thirty post-hospital or post-surgical physical therapy visits.*

(f) *Beginning January 1, 2007, qualifying health insurance contracts shall include a benefit for diagnostic screening for prostatic cancer consistent with the benefit set forth in section 4303(z-1) of the Insurance Law.*

A new section 362-2.8 is added to read as follows:

§ 362-2.8 *High Deductible Health Plan Under the Healthy New York Program.*

(a) *For purposes of this section:*

(1) *"High deductible health plan" shall mean a qualifying health insurance contract with a plan year deductible of at least \$1,150 for individual coverage and \$2,300 for family coverage. Out-of-pocket expenses, including the deductible and copayments, shall be capped at \$5,250 for individual coverage and \$10,500 for family coverage for the plan year.*

(2) *"Family coverage" means any coverage that is not self-only.*

(b) *Effective January 1, 2007, every health maintenance organization and insurer participating in the Healthy New York program shall offer a high deductible health plan with a plan year deductible of \$1,150 for individual coverage and \$2,300 for family coverage to qualifying small employers and qualifying individuals under the Healthy New York program in connection with a Health Savings Account (hereinafter "HSA") authorized by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Pub. L. No. 108-173). The high deductible health plan shall be offered in addition to existing qualifying health insurance contracts. The health maintenance organization or participating insurer must provide qualifying small employers and qualifying individuals that select a high deductible health plan with a disclosure statement which prominently discloses the existence of the deductible.*

(c) *Health maintenance organizations and participating insurers may also offer additional high deductible health plans with deductibles exceeding the minimum amounts set forth in subdivision (a) of this section in connection with qualifying health insurance contracts. Any such additional options must contain the cap on out-of-pocket expenses set forth in subdivision (a) of this section.*

(d) *When necessary to meet the federal minimums for a high deductible health plan, each of the dollar amounts referred to in subdivision (a) of this section shall be adjusted by an amount which is consistent with the automatic cost-of-living adjustment as set forth in section 223(g) of the Internal Revenue Code, 26 USC section 223.*

(e) *The plan year deductible shall not apply to those services described in sections 4326(d)(7) and (8) of the Insurance Law, pros-*

*tatic cancer screenings or routine prenatal care. Health maintenance organizations and participating insurers may also exempt from the deductible such other preventive services which would not jeopardize the eligibility of the high deductible health plan to be used in conjunction with an HSA.*

(f) *The calendar year prescription drug deductible set forth in section 4326(e)(5) of the Insurance Law shall not be applied in addition to the overall plan year deductible for the high deductible health plan.*

(g) *At the time of application, the health maintenance organization or insurer shall obtain a certification that the applicant intends to establish an HSA, or if applicable, HSAs. At the time of annual recertification, the qualifying small employer or individual shall submit a recertification confirming the status of the HSA or HSAs.*

(h) *A small employer or individual may choose between a high deductible health plan or a qualifying health insurance contract at the time of enrollment. Once enrolled, any change from one type of plan to another may occur only at the time of the annual recertification.*

**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 9, 2006.

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

#### **Regulatory Impact Statement**

1. Statutory authority: The superintendent's authority for the adoption of the third amendment to 11 NYCRR 362 is derived from sections 201, 301, 1109, 3201, 3217, 3221, 4235, 4303, 4304, 4305 and 4326 of the Insurance Law. Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization (HMO) and its subscribers. Section 3201 authorizes the superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state. Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies. Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers. Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued. Section 4303 governs the accident and health insurance contracts written by non-for-profit corporations and sets forth the benefits that must be covered under such contracts. Section 4304 includes requirements for individual health insurance contracts written by not-for-profit corporations. Section 4305 includes requirements for group health insurance contracts written by not-for-profit corporations. Section 4326 authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the superintendent to modify the copayment and deductible amounts for qualifying health insurance contracts. Section 4326(g) authorizes the superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002.

2. Legislative objectives: The Federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish a tax-deductible health savings account to pay for certain medical expenses. Chapter 1 of the Laws of 1999 enacted the Healthy New York Program, an initiative designed to encourage small employers to offer health insurance to their employees and to encourage individual proprietors and working uninsured individuals to purchase insurance coverage.

3. Needs and benefits: Currently, small employer and individual participants in the Healthy New York program seeking comprehensive health insurance coverage cannot purchase high deductible health plans and establish health savings accounts in accordance with federal standards. These participants in the Healthy New York Program are not currently eligible for the tax deductions for funds deposited into health savings accounts and used for qualified medical expenses.

Due in part to the rising cost of health insurance coverage, many small employers are currently unable to provide health insurance coverage to their employees. The high cost of insurance prevents many individual proprietors and working individuals from purchasing their own coverage.

These amendments to Part 362 of 11 NYCRR will require HMOs and participating insurers to offer high deductible health plans using the Healthy New York small employer and individual programs. The high deductible health plans will have lower premiums than current Healthy New York benefit packages. The reduction in premium should encourage more small businesses and individuals to purchase comprehensive health insurance coverage. In addition, the high deductible health plans purchased for use with the health savings accounts will give New Yorkers access to another health insurance alternative that complies with recently-enacted federal standards. This new option will also provide New Yorkers with access to a tax-advantaged method of purchasing health insurance.

The amendment will also provide for prostatic cancer screening and a limited home health care and physical therapy benefit. The addition of the prostate cancer screening benefit will facilitate prompt and early detection of prostate cancer, which in turn should decrease mortality and reduce treatment costs. The addition of post-hospitalization and post-surgical home health and physical therapy services should result in lower hospital costs, which should in turn reduce costs to the state.

4. Costs: This amendment imposes no compliance costs upon state or local governments. HMOs and participating insurers may incur some modest costs in drafting the contract riders that will create the high deductible health plans and add the new benefits. The Health Care Reform Act allocated a fixed amount to the Healthy New York Program to encourage uninsured businesses and individuals to purchase health insurance. This amendment will not alter the amounts dedicated to the program. However, this amendment may decrease the per head cost to the State to be distributed from the overall allocation for the program for workers enrolled in Healthy New York because the addition of the home health care and therapy benefits will reduce hospitalization costs by allowing insureds to receive services in less costly settings. In addition, the prostatic screening benefit may reduce costs to the state by resulting in some instances of cancer being detected earlier, with fewer medical costs. Because the amendment enhances access to Healthy New York, we would also expect that the amendment will cause the program to operate at enrollment levels which are consistent with the program's full funding capacity.

5. Local government mandates: This amendment imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also

requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department. This amendment will not impose any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option.

7. Duplication: There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. Alternatives: There is no alternative to the adoption of this amendment. The adoption of this amendment will require high deductible health plans to be issued under the Healthy New York Program for qualifying individuals and small employers. The amendment will also add prostatic cancer screening and a limited post-hospital and post-surgical physical therapy and home health care benefit to the Healthy New York program. Currently, the program does not cover these benefits. The Department has received extensive comments and suggestions from the health insurance industry in preparing these regulations. The Department has met several times with representatives from groups that represent the health maintenance organization and not-for-profit health insurance industry and has held numerous phone conferences. Some of these conversations have been with experts in high deductible health plans and HSAs. These industry representatives have provided the Department with comments and suggestions on the drafting of this regulation, including technical advice and cost analysis of the deductibles and benefits.

9. Federal standards: The Federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added a new section 223 to the Internal Revenue Code. The new section authorizes those insured by a high deductible health plan, as defined in the federal legislation, to establish tax-deductible health savings accounts to pay for certain medical expenses.

10. Compliance schedule: HMOs and participating insurers will be required to comply by January 1, 2007.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses since the provisions of this Part apply only to health maintenance organizations (HMOs) and participating insurers. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of HMOs and participating insurers and none of them comes within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there is none which is both independently owned and has fewer than 100 employees.

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

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

1. Types and estimated numbers of rural areas: Health maintenance organizations (HMOs) and participating insurers to which this regulation is applicable do business in every county of the state, including rural areas as defined under section 102(13) of the State Administrative Procedure Act. Small employers and individuals in need of health insurance coverage are located in every county of the state including rural areas as defined under section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a

county by county basis are submitted to the Insurance Department. This revision will not add any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option. Nothing in this revision distinguishes between rural and non rural areas. No special type of professional services will be needed in a rural area to comply with this requirement.

3. Costs: HMOs and participating insurers may incur some modest costs in drafting the contract riders that will create the high deductible plans and include the additional benefits. There are no costs to local governments. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will have the same impact on all affected entities.

5. Rural area participation: None.

**Job Impact Statement**

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to comprehensive health insurance for small employers and working individuals. This amendment provides qualifying small employers and individuals with the ability to obtain a federal tax deduction through the purchase of a high deductible health plan. It also reduces the cost of Healthy New York health insurance by adding a deductible and benefits that will reduce costs to the program, which will in turn improve access to health insurance by lowering health insurance premiums.

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## Division of the Lottery

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### EMERGENCY RULE MAKING

**Video Lottery Gaming**

**I.D. No.** LTR-39-06-00012-E

**Filing No.** 1094

**Filing date:** Sept. 12, 2006

**Effective date:** Sept. 12, 2006

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

**Action taken:** Addition of Part 2836 to Title 21 NYCRR.

**Statutory authority:** Tax Law, section 1617-a

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

**Specific reasons underlying the finding of necessity:** (1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. It is projected that the operation of video lottery gaming in New York State may generate over \$1 billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately \$1 to \$4 million weekly in aid to education that are needed to offset anticipated shortfalls.

Since passage of the legislation in October 2001 which authorized the Division to license the operation of video lottery gaming at racetracks in New York State, the Division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. Five facilities are now in operation. The Legislature enacted changes to the legislation in April 2005. In enacting Chapter 61 of the

Laws of 2005, the Legislature found that the revenue generated from video lottery gaming to that date had not met predictions. Overall, the Legislature found that lottery revenue would be maximized by making available to the video lottery gaming facilities an increased vendor's fee and a vendor's marketing allowance. The legislation was designed to provide the necessary resources and incentives to the video lottery gaming facilities to undertake the capital, marketing and other expenditures necessary to create and sustain video lottery gaming and maximize lottery revenue to support education. These regulations are a result of that legislation and were initially issued in September 2005, almost six (6) months after passage of Chapter 61. These Emergency Regulations permit the vendor's to receive the benefits of the increased vendors fee and the vendor's marketing allowance, pending formal adoption of these regulations by the Division. The Division met with each of the current and pending vendors and operators of the video gaming facilities during the months of October and November, 2005 to solicit comments on the Emergency Regulations. While the facilities agreed to submit written comments, the regulations expired requiring a new emergency filing on December 20, 2005. The video lottery gaming facilities submitted comments in late December, 2005. Since that date, the Division has been meeting with the facility owners and operators and determining the best approach on implementing proposed and acceptable changes. Accordingly, although timing requires issuance of these Emergency Regulations for a third time, it is expected that final regulations will be published for public comment within sixty (60) days.

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rulemaking is that the stated Legislative goal of Chapter 61 of the Laws of 2005 will be implemented and lottery revenue to support education will be maximized. The Division intends to file shortly a Notice of Proposed Rulemaking pursuant the State Administrative Procedure Act Section 202(4-a) to continue the normal rulemaking procedures relative to these regulations within sixty (60) days.

(3) Compliance with the requirements of §202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation and deprive the state of needed revenue to education.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment at this time since there is insufficient time to commence a formal rulemaking process and permit such public comment period. The Division expects to commence the formal rulemaking process within sixty (60) days. Such delay would thereby result in a loss of needed aid to education. This is the earliest the regulations could have been finalized in light of the new legislation, leaving inadequate time to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1). Delaying the implementation of the increased vendor's fee and the providing of the marketing allowance would mean a loss in lottery revenue to aid education and frustrate the legislative intent of Chapter 61 of the Laws of 2005.

**Subject:** Video lottery gaming.

**Purpose:** To allow for the licensed operation of video lottery gaming.  
**Substance of emergency rule:** Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the Laws of 2002, as amended further by Chapters 62 and 63 of the Laws of 2003, and as amended further by Chapter 61 of the Laws of 2005, codified as §§1612 and 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks in New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

In April, 2005, Chapter 61 of the Laws of 2005 amended §1612 of the Tax Law to provide an increase to the vendor fee to be paid to each video lottery terminal operator and also permits a marketing allowance for each such facility. These changes have necessitated a revision to the Emergency Regulations. Regulations were initially adopted on an Emergency basis in 2003. Since that date, the regulations have been renewed every 90 days. The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principals and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. Annually, the agents will be required to submit a marketing plan for approval by the Division. The marketing plan will identify those marketing or promotion costs which may be reimbursed from the marketing allowance permitted by §1612 of the Tax Law. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations. Since issuing the Emergency Regulations in September, 2005, the Division has met and discussed the marketing procedures with each of the existing and pending vendors and operators. Formal comments have been submitted by those facilities. The Division is in the process of responding to these comments and expects to commence the formal rulemaking within sixty (60) days.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility. **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 10, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert J. McLaughlin, Deputy Director and General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: [rmclaughlin@lottery.state.ny.us](mailto:rmclaughlin@lottery.state.ny.us)

#### **Regulatory Impact Statement**

1. Statutory Authority: On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, codified as §§1612 and 1617-a of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of video lottery gaming at racetrack locations around the state. Chapter 383 of the Laws of 2001 has been amended by Chapter 85 of the laws of 2002, as amended further by Chapters 62 and 63 of the Laws of 2003, and amended further by Chapter 61 of the Laws of 2005. The legislation directs the Division to promulgate regulations

allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. Legislative Objectives: These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming and, as required by Chapter 61 of the Laws of 2005, permitted vendors to receive an increased vendor fee and a vendor marketing allowance.

3. Needs and Benefits: The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, certain requirements for the physical layout of the gaming facilities, and how the marketing allowance will be disbursed. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While video lottery gaming has been held to be similar to other lottery games that the Division has successfully conducted for over thirty years, some components set it apart from those more traditional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming requires the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key and other employees.

A Notice of Proposed Rule Making was first published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Based on comments received during the public comment period, it was necessary to revise the proposed regulations. Emergency regulations have been promulgated since early 2004. Subsequently, the Legislature made certain additional changes to the statute authorizing video lottery gaming. By way of example, Chapter 61 of the Laws of 2005 increases the vendors fee originally promulgated and adds a new marketing allowance subject to the supervision of the Lottery.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York. Since issuing the Emergency Regulations in September, 2005, the Division has met and discussed the marketing procedures with each of the existing and pending vendors and operators. Formal comments have been submitted by those facilities. The Division is in the process of responding to these comments and expects to commence the formal rule making within sixty (60) days.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$550 million if all eligible venues participate. Each racetrack's proposed

project differs. The cost for each facility ranges from \$4 million to \$250 million. The regulations require video lottery gaming agents to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. Such gaming facilities throughout the state are expected to employ more than 4,000 people. Individual video lottery gaming agents will be employing approximately 110 to 1,200 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries ranging from \$22,000 to \$250,000. Total annual payroll for each racetrack could range from \$1.8 million to over \$10.8 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately \$100,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

Portions of these rules and regulations identify the guidelines and requirements in relation to marketing expenses and the utilization of the legislatively provided funds. It is anticipated that the licensed video gaming facilities will take full advantage of the allowable uses of the funds which when fully implemented will create over \$70 million annually in available resources for increasing the amount of aid to education from the video gaming program. The use of the marketing allowance funds is voluntary for video gaming facilities as is participation in the video gaming program in general.

The Lottery expects to annually expend over \$110 million in gaming vendor fees in generating over \$800 million in aid to education annually from the video gaming program when fully implemented. Video gaming facilities which are not yet open, but have construction intentions, will likely expend approximately \$300 million in renovations and new construction for video gaming.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted

under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. Any registered vendor may be required to be licensed as determined by the Division and if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

(a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds \$150,000.00 in any twelve (12) month period;

(b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed \$500,000.00 in any twelve (12) month period;

Video lottery gaming agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures, marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

Finally, video lottery gaming agents are required to submit an annual marketing plan to the Division which describes the proposed use of the marketing allowance permitted by Chapter 61 of the Laws of 2005.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the New York State Racing and Wagering Board must license the operation of pari-mutuel wagering at the racetracks as well as licensing racetrack employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Division may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Division and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: The Division has conducted outreach sessions with each of the operating video lottery gaming facilities and believes that these regulations fulfill its statutory mandate while addressing those comments. While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. All comments received are available for public review by contacting Robert J. McLaughlin, Esq., General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to [rmclaughlin@lottery.state.ny.us](mailto:rmclaughlin@lottery.state.ny.us).

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license

applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-going throughout the operation of the games.

#### **Regulatory Flexibility Analysis**

1. Effect of Rule: The Division of the Lottery finds that the rule will not adversely affect local government. The rule will impact a number of different types of businesses:

(a) Licensed racetracks: It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses" as that term is defined in New York State Administrative Procedure Act §102;

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central computer system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain lenders. It is anticipated that, these companies will recoup any costs associated with licensing and start-up from operations;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process only. However, if their contract exceeds a certain value, or if the Division otherwise determines, such vendors will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, should not exceed \$100 per application for the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. Certain small vendors may not even be required to register.

3. Professional Services: It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming operation. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$550 million if all eligible remaining venues participate. Each facility's proposed project differs. The cost for each facility ranges is from \$4 million to over \$250 million dollars. The regulations require video lottery gaming agents equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional \$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each racetrack's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ more than 4,000 people. Individual gaming agents will be employing between approximately 110 to 1,200 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual hourly salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racetrack facilities. The majority of these controls are put in place through adequate experienced personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately \$100,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. These emergency regulations include revisions made to the regulations as a result of such comments.

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

Many of the racetracks eligible for video lottery gaming licenses are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Division believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

#### **Job Impact Statement**

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ more than 4,000 people. Individual gaming agents will be employing between approximately 110 to 1,200 people. The average number of employees at each gaming facility (incremental over current

operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs. It is expected that, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### Criminal History Record Review

**I.D. No.** OMH-39-06-00001-E

**Filing No.** 1086

**Filing date:** Sept. 6, 2006

**Effective date:** Sept. 6, 2006

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

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

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

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

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

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

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

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

The legislation requires the Office of Mental Health to promulgate regulations that establish standards and procedures for the criminal

history record checks contemplated in the statute. Accordingly, these regulations would establish provisions governing the procedures by which fingerprints will be obtained, and outlining the requirements and responsibilities on both the part of the Office and providers of services with regard to this process.

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire December 4, 2006.

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

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

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

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

##### 2. Legislative Objectives:

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

##### 3. Needs and Benefits:

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

Each provider subject to these requirements must designate one or more "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective employee or volunteer who will have regular, unsupervised client contact can be perma-

nently hired or retained, he or she must consent to having his/her fingerprints taken and a criminal history check performed. The fingerprints will be taken by an Office of Mental Health-designated fingerprinting entity and sent to the Office, who will then submit them to the Division of Criminal Justice Services. The Division will provide criminal history information for each person back to the Office. Prospective licensed operators of mental health services must follow the same process.

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

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

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

#### 4. Costs:

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

Estimated start-up costs to the Office of Mental Health, which include the purchase of LiveScan technology and supporting equip-

ment, activities, and systems, and staffing costs, are approximately \$900,000.

#### 5. Local Government Mandates:

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

#### 6. Paperwork:

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

#### 7. Duplication:

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

#### 8. Alternatives:

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

#### 9. Federal Standards:

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

#### 10. Compliance Schedule:

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

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

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

## 2. Compliance Requirements:

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

## 3. Professional Services:

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

## 4. Compliance Costs:

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

## 5. Economic and Technological Feasibility:

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

## 6. Minimizing Adverse Impact:

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

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

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

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

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

## 7. Small Business and Local Government Participation:

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

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

#### 1. Effect of Rule:

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

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

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

#### 3. Costs:

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

#### 4. Minimizing Adverse Impact:

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

Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process.

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

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

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

#### 5. Rural Area Participation:

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

#### Job Impact Statement

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

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## Office of Mental Retardation and Developmental Disabilities

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### NOTICE OF ADOPTION

#### Fee Settings

**I.D. No.** MRD-28-06-00019-A

**Filing No.** 1098

**Filing date:** Sept. 12, 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 671.7, 679.6 and 690.7 of Title 14 NYCRR.

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

**Subject:** Fee setting in home and community-based (HCBS) waiver community residential habilitation services, clinic treatment facilities, and day treatment facilities for persons with developmental disabilities.

**Purpose:** The amendment establish cost of living (COLA) adjustments and trend factors applicable to these facilities and services, effective Oct. 1, 2006.

**Text or summary was published** in the notice of proposed rule making, I.D. No. MRD-28-06-00019-P, Issue of July 12, 2006.

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

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

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

#### Assessment of Public Comment

The agency received no public comment.

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

#### Personal Allowance

**I.D. No.** MRD-39-06-00025-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 633.15 of Title 14 NYCRR.

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

**Subject:** Personal allowance.

**Purpose:** To increase the amount of cash allowed to be maintained per person at his/her place of residence. The current cash cap was set in 1988 and is no longer adequate to meet the needs of all persons served.

**Text of proposed rule:** Paragraph 633.15(a)(12) is amended as follows:

(12) When an agency or sponsoring agency manages personal allowance pursuant to paragraph (9) or (10) of this subdivision, some cash, not to exceed [\$150] *the monthly personal allowance amount established in Section 131-o of the Social Services Law for individuals receiving enhanced residential care (Congregate Care Level III), plus \$20, per person, may be maintained at the place of residence in accordance with agency/facility or sponsoring agency policies/procedures. The purpose is to enable a person to participate in day-to-day activities and to meet incidental needs. Policies/procedures shall address, at a minimum: security; accountability of staff, volunteers or family care providers; recordkeeping; usage; and monitoring of the personal allowance maintained at the residence.*

Subparagraph 633.15(b)(3)(i) is amended as follows:

(i) the amount does not exceed [\$150] *the monthly personal allowance amount established in Section 131-o of the Social Services Law for individuals receiving enhanced residential care (Congregate Care Level III), plus \$20, per person;*

Subparagraph 633.15(a)(11)(v) is amended as follows:

(v) *Once credited to the personal allowance account, there is no requirement the funds be sent to, or maintained in, the residence cash account except upon request of the person or appropriate agency staff.*

Note: Rest of section is renumbered accordingly

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

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

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

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

**Consensus Rule Making Determination**

The primary purpose of the amendment is to increase the amount of personal allowance cash allowed to be maintained per person at their place of residence. The amount in the existing regulation was last set in 1988 and is no longer adequate to meet the needs of all persons served.

Since 1988, the maximum amount of cash allowed to be maintained in a residence has been \$150 per person. This cash limit will soon be below the monthly personal allowance amount set by law for some residents due to the annual adjustments which increase the personal allowance each year. Because of the current limit, some provider agencies have experienced difficulties in making necessary cash readily available to persons who are entitled to it. Leaving the existing limit in place causes hardship to persons whose monies may not be readily available due to the limit. In addition, it causes hardship and additional paperwork for provider agencies attempting to serve consumers yet comply with the regulation and law. OMRDD, therefore, proposes to change the regulation and tie the cash limit to the monthly amount of personal allowance established by law.

In this manner, the cash cap will increase automatically in the future in conjunction with increases established by the legislature for the statutory personal allowance amount.

**Job Impact Statement**

A Job Impact Statement for these amendments was not submitted because it is apparent from the nature and purpose of the amendments that they will not have an impact on jobs and/or employment opportunities. The finding is based on the fact that the proposed rule making only revises regulations to increase the cash cap allowed to be maintained at the person's residence.

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**Nassau County  
Bridge Authority**

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

**Toll Rates for Single Trips; Reduced Rate Cards and Commutation**

**I.D. No.** NBA-39-06-00027-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 301.1 and 301.2 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 654(13)

**Subject:** Toll rates for single trips; reduced rate cards and commutation.

**Purpose:** To amend the existing toll schedule for the Atlantic Beach Bridge.

**Public hearing(s) will be held at:** 10:00 a.m., November 14, 2006 at Village of Atlantic Beach, Village Hall, 65 The Plaza, Atlantic Beach, 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:** Section 301.1 Toll Rates for single trip.

Toll rates established December 13, 1996, effective [January 1, 1997] *January 1, 2007* are as follows:

Classification	One-way rate
1. Vehicles under five tons registered weight, including passenger cars, commercial vehicles, taxicabs, motorcycles (with or without sidecars), trailers and motorized bicycles . . . . .	[\$1.25] \$2.00
2. Vehicles, five tons or over registered weight, including auto trailers . . . . .	[\$1.25] \$2.00 per axle
3. Buses, operating under franchise . . . . .	[\$.25] \$0.50
Section 301.2 Reduced Rate [Books] <i>Pass Cards</i> and <i>Commutations</i>	
(a) [40 Trip Book] <i>Nassau County Bridge Authority 20 trip pass card</i> , for use only by passenger vehicles or motorcycles under five tons registered weight, operated for non-commercial use and by taxicabs (extra [ticket] <i>pass card trip</i> valid for auto trailer attached) [Book of 40 single trip tickets] <i>20 trip pass card</i> valid for use only during the calendar year for which issued . . . . .	\$15.00
(b) <i>Vehicles registered to an address within the confines of Nassau County</i>	
Annual commutation decal (sticker) for use only by private passenger vehicle under five tons registered weight, operated for non-commercial use, <i>and registered to an address within in the confines of Nassau County</i> valid during the calendar of issue by the specific car for which issued and to which affixed, and only for passage through toll lanes designated for commutation decal (sticker) passage . . . . .	[\$ 75.00] \$150.00
(c) <i>Vehicles Registered in all other Areas Outside Confines of Nassau County.</i>	
Annual Commutation Decal (sticker) for use by only Private Passenger Vehicle under five tons registered weight, operated for Non-commercial use and registered to an address in all other	

*areas outside the confines of Nassau County, valid during calendar year of issue by the specific car for which issued and to which affixed and only for passage through toll lanes designated for commutation decal (stick passage) . . . . . \$225.00*

[c](d) Conditions. [Tickets are valid only when attached in the book in which they are issued.] There will be no refund or credit in the event or loss of theft of [ticket book or] annual commutation decal (sticker) or 20 trip pass card or for unused [or detached tickets] 20 trip pass card or discontinued use of the annual commutation decal (sticker).

[d] (e) The authority may permit toll-free passages for any persons or vehicles required to cross the bridge on official business as it shall determine proper in its discretion.

**Text of proposed rule and any required statements and analyses may be obtained from:** Morrey Vine, Nassau County Bridge Authority, P.O. Box 341, Lawrence, NY 11559, (516) 239-6900, e-mail: mvncba@optonline.net

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

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

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## Public Service Commission

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### 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-26-05-00008-X	June 29, 2005
PSC-36-05-00015-X	September 7, 2005

### NOTICE OF ADOPTION

**Transfer of Ownership Interests by Central Hudson Gas and Electric Corporation**

**I.D. No.** PSC-19-06-00010-A

**Filing date:** Sept. 6, 2006

**Effective date:** Sept. 6, 2006

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

**Action taken:** The commission, on Aug. 23, 2006, adopted an order approving Central Hudson Gas and Electric Corporation's request to transfer its ownership interest in the Neversink Hydroelectric Generating Facility and related assets to the City of New York.

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

**Subject:** Transfer of the Neversink Hydroelectric Generating Facility and related assets.

**Purpose:** To transfer Neversink Hydroelectric Generating Station and related assets to the City of New York.

**Substance of final rule:** The Commission adopted an order approving Central Hudson Gas and Electric Corporation's request to transfer the Neversink Hydroelectric Generating Station and related assets to the City of New York, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14<sup>th</sup> 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-0452SA1)

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

**Demand Side Management Program by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-39-06-00011-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 a request by Consolidated Edison Company of New York, Inc. for rehearing or clarification of a July 24, 2006 order concerning lost revenue recovery for the company's Demand Side Management Program. The commission may approve, reject, or modify, in whole or in part, Con Edison's requests for changes to procedure adopted in that order for verifying the load reductions achieved and calculating the associated lost revenues, and it may consider other, related issues.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** Procedure for verifying load reductions from a Demand Side Management Program and calculating associated lost revenues and related issues.

**Purpose:** To consider whether to modify the procedure by which Con Edison must verify load reductions achieved and calculate lost revenues, and related issues.

**Substance of proposed rule:** Consolidated Edison Company of New York, Inc. (Con Edison) filed a request for rehearing or clarification of the Public Service Commission's Order, issued July 24, 2006, which set the procedure Con Edison must use to verify the load reductions achieved by it and the New York State Energy Research and Development Authority (NYSERDA) associated with the company's demand side management program and to calculate the lost revenues arising from the program. Specifically, Con Edison seeks to have the Commission require NYSERDA to perform the verifications for its programs or authorize Con Edison to recover the costs of such verification from its customers, eliminate the requirement to determine free-ridership in the program, and authorize the company to recover interest on the lost revenues if either or both of the first two requests are denied.

The Commission may approve, reject, or modify, in whole or in part, Con Edison's request, and it may also consider other, related matters.

**Text of proposed and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our**

website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500.

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

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

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

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

(04-E-0572SA10)

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

**Enhanced Powerful Opportunities Program by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-39-06-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, reject or modify a proposal of Central Hudson Gas & Electric Corporation to design and implement a new low-income program, the Enhanced Powerful Opportunities Program (EPOP), in accordance with the rate plan order issued Case 05-E-0934 on July 24, 2006.

**Statutory authority:** Public Service Law, sections 5(1)(b); 65(1); 66(1), (3), (5) and (12)

**Subject:** Enhanced Powerful Opportunities Program.

**Purpose:** To approve Central Hudson Gas & Electric's proposal to implement a new low-income program.

**Substance of proposed rule:** To Public Service Commission is considering whether to approve, reject or modify a proposal of Central Hudson Gas & Electric Corporation to design and implement a new low-income program, the Enhanced Powerful Opportunities Program (EPOP), in accordance with the Rate Plan Order issued in Case 05-E-0934 on July 24, 2006.

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

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

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

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

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

(05-E-0934SA2)

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

**Order Establishing Rate Plan by Central Hudson Gas & Electric Corporation and the Consumer Protection Board**

**I.D. No.** PSC-39-06-00014-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, petitions for rehearing of its order establishing rate plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935. Petitions were filed by Central Hudson Gas & Electric Corporation and the New York State Consumer Protection Board.

**Statutory authority:** Public Service Law, sections 4, 22, 65 and 66

**Subject:** Petitions for rehearing of an order establishing rate plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935.

**Purpose:** To consider the petitions for rehearing of an order establishing rate plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935.

**Substance of proposed rule:** Central Hudson Gas & Electric Corporation and the New York State Consumer Protection Board have each filed a petition for rehearing of the Commission's Order Establishing Rate Plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935. Central Hudson Gas & Electric Corporation asks that the Commission revise its allowed return on equity to 9.9%. The New York State Consumer Protection Board asks that the Commission order the utility to (1) use funds held in the electric depreciation reserve account to moderate electric rate increases and (2) provide electricity and gas at a fixed price to residential customers.

The Commission may approve or reject the petitions, in whole or in part.

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

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

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

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

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

(05-E-0934SA3)

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

**Rates Set for New York State Electric & Gas Corporation**

**I.D. No.** PSC-39-06-00015-P

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

**Proposed action:** The commission will reconsider various actions it took in Case 05-E-1222 involving the rates set for New York State Electric & Gas Corporation (NYSEG), on Aug. 23, 2006.

**Statutory authority:** Public Service Law, section 22

**Subject:** In Case 05-E-1222, the commission examined NYSEG's revenues and costs, and determined that rates should be reduced by \$36.2 million. The commission also established the commodity options, rate design changes, and retail access program for 2007.

**Purpose:** To consider all the petitions for rehearing filed in Case 05-E-1222 pursuant to Public Service Law, section 22. Such petitions have been filed by NYSEG and multiple intervenors. Other such petitions

may also be filed by other parties within 30 days and by Sept. 22, 2006.

**Substance of proposed rule:** On August 23, 2006, the Public Service Commission issued its decision in Case 05-E-1222 and determined that New York State Electric & Gas (NYSEG) should reduce its delivery rates by \$36.2 million starting in 2007. The Commission also established the commodity options and retail access programs that NYSEG would support in 2007 to foster competitive opportunities in its service area. Pursuant to Public Service Law §22, the parties to Case 05-E-1222 have thirty (30) days to petition the Commission to rehear and change its actions. Petitions for rehearing have been filed by NYSEG and Multiple Intervenors. Other parties may also file rehearing petitions by September 22, 2006. The Commission will reconsider the issues raised by these petitions and determine whether there are any errors of law or fact, or any new circumstances to warrant a different determination. Among the matters the Commission will consider are the following: capital structure; return on equity; hydroelectric expenses; productivity; integrated back office and work management system costs; health care costs; and, pension and benefit costs. The Commission will also consider retail access credits, merchant function changes and delivery rate impacts. The Commission may also consider other items raised in any other petitions filed by September 22, 2006.

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

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

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

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

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

(05-E-1222SA3)

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

**Transfer of Property by Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-39-06-00016-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. requesting authorization for the transfer of ownership of certain utility property and for related relief.

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

**Subject:** Transfer of property.

**Purpose:** To allow Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. to transfer ownership of certain utility transformers.

**Substance of proposed rule:** The Commission is considering a request by Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. for authority under section 70 of the Public Service Law to transfer the ownership of certain transformers. The

transformers would be transferred pursuant to the terms of the Spare Transformer Sharing Agreement that Con Edison entered into as part of its participation in the Edison Electric Institute Spare Transformer Equipment Program. In addition, Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. requested Commission approval of a Transformer Sharing Agreement between the two companies and authorization to make transfers pursuant to that agreement in the event that the Edison Electric Institute Spare Transformer Equipment Program is triggered. The Commission any approve, reject or modify, in whole or in part, the parties' request.

**Text of proposed 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-1047SA1)

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

**Enhanced Powerful Opportunities Program by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-39-06-00017-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, reject or modify a proposal of Central Hudson Gas & Electric Corporation to design and implement a new low-income program, the Enhanced Powerful Opportunities Program (EPOP), in accordance with the rate plan order issued in Case 05-G-0935 on July 24, 2006.

**Statutory authority:** Public Service Law, sections 5(1)(b); 65(1); 66(1), (3), (5) and (12)

**Subject:** Enhanced Powerful Opportunities Program.

**Purpose:** To approve Central Hudson Gas & Electric's proposal to implement a new low-income program.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, reject or modify a proposal of Central Hudson Gas & Electric Corporation to design and implement a new low-income program, the Enhanced Powerful Opportunities Program (EPOP), in accordance with the Rate Plan Order issued in Case 05-G-0935 on July 24, 2006.

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

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

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

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

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

(05-G-0935SA2)

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

**Order Establishing Rate Plan by Central Hudson Gas & Electric Corporation and the Consumer Protection Board**

**I.D. No.** PSC-39-06-00018-P

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

**Proposed action:** The commission is considering whether to approve, modify or reject, in whole or in part, petitions for rehearing of its order establishing rate plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935. Petitions were filed by Central Hudson Gas & Electric Corporation and the New York State Consumer Protection Board.

**Statutory authority:** Public Service Law, sections 4, 22, 65, and 66

**Subject:** Petitions for rehearing of an order establishing rate plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G0935.

**Purpose:** To consider the petitions for rehearing of an order establishing rate plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935.

**Substance of proposed rule:** Central Hudson Gas & Electric Corporation and the New York State Consumer Protection Board have each filed a petition for rehearing of the Commission's Order Establishing Rate Plan, issued July 24, 2006, in Cases 05-E-0934 and 05-G-0935. Central Hudson Gas & Electric Corporation asks that the Commission revise its allowed return on equity to 9.9%. The New York State Consumer Protection Board asks that the Commission order the utility to (1) use funds held in the electric depreciation reserve account to moderate electric rate increases and (2) provide electricity and gas at a fixed price to residential customers.

The Commission may approve or reject the petitions, in whole or in part.

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

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

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

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

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

(05-G-0935SA3)

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

**Investigation of Richard M. Osborne by Corning Natural Gas Corporation**

**I.D. No.** PSC-39-06-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a request filed by Corning Natural Gas Corporation (Corning Gas) for the commission to investigate Richard M. Osborne and his trust. In addition, Corning Gas requests that the commission require entities affiliated with or cooperating with Richard M. Osborne and his trust, to provide a plan that will assure financial integrity, and that will provide safe and reliable service.

**Statutory authority:** Public Service Law, sections 110 and 111

**Subject:** Investigation of Richard M. Osborne and his trust.

**Purpose:** To examine Richard M. Osborne and his trust, and determine the interests, plans and commitments that will be in place if he is successful in blocking the merger of Corning Gas and C&T Enterprises.

**Substance of proposed rule:** Corning Natural Gas Corporation requests that the Commission commence an examination of Richard M. Osborne and his Trust, as well as others who may be working with Richard M. Osborne, to disclose and determine their respective interests. Corning Natural Gas Corporation also asks that the Commission require Richard M. Osborne, his Trust, and any other person or entities who may be working with Richard M. Osborne, to demonstrate that if they are successful at blocking the merger of Corning Natural Gas Corporation and C&T Enterprises, Inc. as previously approved by the Commission, that they have plans and will make necessary financial commitments to assure an adequate level of financial integrity, and safe and reliable service for the customers of Corning Natural Gas Corporation, at least to the level that C&T Enterprises, Inc. had committed to provide. The Commission may grant or reject, in whole or in part, the company's request, or may modify such proposal or take such different action as may be warranted.

**Text of proposed 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-0569SA3)

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

**Electronic Data Interchange (EDI) Standards by U.S. Energy Savings Corporation**

**I.D. No.** PSC-39-06-00021-P

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

**Proposed action:** The Public Service Commission is considering a petition filed by U.S. Energy Savings Corporation requesting modifica-

tions to the Electronic Data Interchange (EDI) standards in connection with its request for amendments to the uniform business practices to require utilities, upon receipt of an enrollment request, to notify the pending ESCO whether the customer is already being served by an energy services company, and establish a "contest period" during which an incumbent energy services company could cancel a pending enrollment request, if the customer has authorized the incumbent ESCO to do so.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 65 and 66  
**Subject:** Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

**Purpose:** To revise the TS814 enrollment request and response standard and any other standard as necessary to support implementation of a contest period.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, a petition filed by U.S. Energy Savings Corporation (USES) for changes to the Electronic Data Interchange Standards as necessary to accommodate and implement requested changes to the Uniform Business Practices (UBP).

USES requests that paragraph D.4 of Section 5 of the UBP be revised to require utilities, upon receipt of an enrollment request, to notify the pending energy services company (ESCO) as to whether the customer is already receiving service from another ESCO. The petition requests that paragraph E.1 of Section 5 of the UBP be revised so that, when a customer receives a verification letter from the utility notifying the customer of the utility's acceptance of an enrollment request, if the customer decides to cancel the enrollment, the customer must immediately notify the utility, the incumbent ESCO or the pending ESCO. The petition requests that paragraph E.1 of the UBP be amended to allow the incumbent ESCO, if it has obtained the customer's prior authorization, to cancel a pending enrollment request by notifying the utility. The petition also requests that the Commission take any other action, including other changes to the UBP and the EDI standards, as it deems necessary to accommodate the relief sought in the petition.

At a minimum, the TS814 Enrollment Request and Response Standard would require a change to provide for an indicator in Enrollment Accept Response transactions that the customer is currently served by another ESCO, and may require modifications in the use of TS814 Drop and Reinstatement transactions as described in the Business Process documents associated with those standards. Commenting parties should address which, if any, EDI standards must or should be modified to support implementation of USES's proposal, and describe in detail such modifications.

The Commission is also considering making such other and related findings and authorizations as it deems appropriate in connection with its review of USES's petition.

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

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

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

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

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

(98-M-0667SA57)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Uniform Business Practices and Related Matters by U.S. Energy Savings Corporation

**I.D. No.** PSC-39-06-00022-P

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

**Proposed action:** The Public Service Commission is considering a petition filed by U.S. Energy Savings Corporation requesting modifications to the uniform business practices to require utilities, upon receipt of an enrollment request, to notify the pending ESCO whether the customer is already being served by an energy services company, and establish a "contest period" during which an incumbent energy services company could cancel a pending enrollment request, if the customer has authorized the incumbent ESCO to do so.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 65 and 66  
**Subject:** Revisions to uniform business practices and related matters.

**Purpose:** To revise section 5 (changes in service providers) of the uniform business practices, and any other section that may be necessary, in order to establish a content period.

**Substance of proposed rule:** The Uniform Business Practices (UBP) govern the interrelationships between utilities, Energy Services Companies (ESCOs) and customers participating in retail access programs in New York State. The UBP, initially published on January 22, 1999, were designed to foster competition in the provision of energy commodity in New York State by establishing certain statewide procedures to, among other things, minimize barriers to entry and reduce operating costs for ESCOs or Direct Customers that participate in retail access programs in multiple utility service territories.

The Commission is considering whether to approve or reject, in whole or in part, a petition filed by U.S. Energy Savings Corporation (USES) for changes to the Uniform Business Practices, as described below. USES requests that paragraph D.4 of Section 5 of the UBP (Changes in Service Providers) be revised to require utilities, upon receipt of an enrollment request, to notify the pending ESCO as to whether the customer is already receiving service from another energy services company. The petition requests that paragraph E.1 of Section 5 of the UBP be revised so that, when a customer receives a verification letter from the utility notifying the customer of the utility's acceptance of an enrollment request, if the customer decides to cancel the enrollment, the customer must immediately notify the utility, the incumbent ESCO or the pending ESCO. The petition requests that paragraph E.1 of the UBP be amended to allow the incumbent ESCO, if it has obtained the customer's prior authorization, to cancel a pending enrollment request by notifying the utility. The petition also requests that the Commission take any other action, including other changes to the UBP and the EDI standards, as it deems necessary to accommodate the relief sought in the petition.

The Commission is also considering making such other and related findings and authorizations as it deems appropriate.

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

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

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

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

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

(98-M-1343SA14)

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

**Energy Service Company Referral Program by Rochester Gas and Electric Company**

**I.D. No.** PSC-39-06-00023-P

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

**Proposed action:** The Public Service Commission is considering whether to adopt, modify or reject, in whole or in part, a proposal by Rochester Gas and Electric Company to establish an Energy Service Company (ESCO) Referral Program based upon the general guidelines set forth in the order adopting ESCO Referral Program guidelines and approving an ESCO Referral Program subject to modifications (issued Dec. 22, 2005) in Case 05-M-0858. The program sets forth specific components, including among other things, an introductory discount period for customers choosing to obtain supply from an ESCO, the method for enrolling the customer, the various rights and obligations of the company, participating ESCOs and the customers. Rochester Gas and Electric Company has included incremental, ongoing and start-up cost estimates and requested waivers of certain provisions of the uniform business practices (UBPs) with its filing.

**Statutory authority:** Public Service Law, sections 5 and 66

**Subject:** Consideration of the establishment of RG&E's ESCO Referral Program.

**Purpose:** To approve the program and associated cost estimates.

**Substance of proposed rule:** The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, a proposal by Rochester Gas and Electric Company to establish an Energy Service Company (ESCO) Referral Program based upon the general guidelines set forth in the Order Adopting ESCO Referral Program Guidelines and Approving and ESCO Referral Program Subject to Modifications (issued December 22, 2005) in Case 05-M-0858. The Program sets forth specific components, including among other things, an introductory discount period for customers choosing to obtain supply from an ESCO, the method for enrolling the customer, the various rights and obligations of the Company, participating ESCOs and the customers. Rochester Gas and Electric Company has included incremental, ongoing and start-up cost estimates and requested waivers of certain provisions of the Uniform Business Practices (UBPs) with its filing.

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

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

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

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

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

(05-M-0858SA3)

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

**Waiver of Certain Application Filing Requirements by National Grid**

**I.D. No.** PSC-39-06-00024-P

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

**Proposed action:** The Public Service Commission's consideration of National Grid's request for waivers of 16 NYCRR sections 86.3(a)(1)(i), (iii), (a)(2), (b)(2), and 88.4(a)(4).

**Statutory authority:** Public Service Law, sections 4(1) and 122(1)

**Subject:** The request by National Grid for waiver of certain application filing requirements.

**Purpose:** To consider National Grid's request for waivers of 16 NYCRR sections 86.3(a)(1)(i), (iii), (a)(2), (b)(2), 88.4(a)(4) in connection with its application to rebuild approximately 21 miles of a 115kV transmission facility located in Erie County.

**Substance of proposed rule:** The Public Service Commission is considering a motion by National Grid for waivers of certain filing requirements. The waiver motion was included in National Grid's application for a Certificate of Environmental Compatibility and Public Need to rebuild approximately 21 miles of a 115kV transmission facility located in Erie County, New York. National Grid specifically requests waivers of 16 NYCRR §§ 86.3(a)(1)(i), (iii), (a)(2), (b)(2), and 88.4(a)(4), which require, in relevant part, submission of detailed maps, drawings and explanations showing the right-of-way for each proposed facility, covering an area of at least five miles on either side of the proposed facility location; any known archaeological, geologic, historical or scenic area, park or untouched wilderness on or within three miles of the right-of-way; the relationship of the proposed facility to the applicant's overall system; aerial photographs (indicating by whom and on what date the photographs were taken) reflecting the current situation; engineering justification for the proposed transmission line, showing its relation to the applicant's existing facilities and the interconnected network; specific benefits with respect to reliability and economy; the proposed line's completion date and the impact of failing to meet such completion date; and appropriate system studies, showing expected flows on the line under normal, peak and emergency conditions, including effects on stability of the interconnected system.

**Text of proposed 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-T-1040SA1)