

# 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; or EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

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## Department of Civil Service

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### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00002-A  
**Filing No.** 772  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-51-06-00002-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00003-A  
**Filing No.** 777  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Public Service.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-51-06-00003-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00004-A  
**Filing No.** 778  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the New York State Thruway Authority.

**Text of final rule:** RESOLVED, That subject to the approval of the Governor, Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the New York State Thruway Authority, be and hereby is amended by increasing the number of positions of Assistant Counsel from 1 to 2 it having been determined that competitive examination is not practicable for filing this position.

**Final rule as compared with last published rule:** Nonsubstantive changes were made as follows: paragraph should read: number of positions of Assistant Counsel from 1 to 2.

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 10, 2007 under the notice of proposed rule making, I.D. No. CVS-02-07-00003-P.

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00006-A  
**Filing No.** 779  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making, I.D. No.** CVS-51-06-00006-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00007-A  
**Filing No.** 771  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making, I.D. No.** CVS-51-06-00007-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00008-A  
**Filing No.** 773  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making, I.D. No.** CVS-51-06-00008-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00009-A  
**Filing No.** 776  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making, I.D. No.** CVS-51-06-00009-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00010-A  
**Filing No.** 774  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making, I.D. No.** CVS-51-06-00010-P, Issue of December 20, 2006.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-51-06-00011-A  
**Filing No.** 775  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the exempt and non-competitive classes in the Office of the Lieutenant Governor and Office of General Services.

**Text was published in the notice of proposed rule making, I.D. No.** CVS-51-06-00011-P, Issue of December 20, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-02-07-00003-A  
**Filing No.** 784  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-02-07-00003-P, Issue of January 10, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-02-07-00004-A  
**Filing No.** 785  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-02-07-00004-P, Issue of January 10, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-06-07-00002-A  
**Filing No.** 786  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Agriculture and Markets.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-06-07-00002-P, Issue of February 7, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-06-07-00003-A  
**Filing No.** 787  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from the non-competitive class in the Department of Labor.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-06-07-00003-P, Issue of February 7, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-06-07-00004-A  
**Filing No.** 788  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Taxation and Finance.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-06-07-00004-P, Issue of February 7, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Supplemental Military Leave Benefits**

**I.D. No.** CVS-09-07-00002-A  
**Filing No.** 789  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of sections 21.15 and 28-1.17 of Title 4 NYCRR.

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

**Subject:** To amended the attendance rules for employees in New York State Department and Institutions to extend the availability of a single grant supplemental military leave with pay, military leave at reduced pay, and a grant of training leave at reduced pay, through Dec. 31, 2007.

**Purpose:** Supplemental military leave benefits.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CVS-09-07-00002-P, Issue of February 28, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-16-07-00004-A  
**Filing No.** 790  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from the exempt class in the Department of Agriculture and Markets.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-16-07-00004-P, Issue of April 18, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-16-07-00005-A  
**Filing No.** 791  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-16-07-00005-P, Issue of April 18, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-16-07-00006-A  
**Filing No.** 792  
**Filing date:** July 30, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from the exempt class in the Department of State.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-16-07-00006-P, Issue of April 18, 2007.

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

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

## Department of Correctional Services

### NOTICE OF ADOPTION

#### Lakeview Correctional Facility

**I.D. No.** COR-23-07-00002-A  
**Filing No.** 782  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Repeal of section 100.73 and amendment of section 100.89 of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 70 and 73

**Subject:** Lakeview Correctional Facility.

**Purpose:** To consolidate two sections referring to Lakeview Correctional Facility to one section.

**Text or summary was published** in the notice of proposed rule making, I.D. No. COR-23-07-00002-P, Issue of June 6, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

## Crime Victims Board

### NOTICE OF ADOPTION

#### Definition of Medical Services or Medical Expenses

**I.D. No.** CVB-22-07-00003-A  
**Filing No.** 781  
**Filing date:** July 26, 2007  
**Effective date:** Aug. 15, 2007

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

**Action taken:** Addition of section 525.1(m) to Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 626 and 631

**Subject:** Definition of medical services or medical expenses.

**Purpose:** To specifically define medical services and medical expenses and enumerate under which circumstances the board would consider homecare of a minor by a family member to be reimbursable and calculate the amount of reimbursement, in order for claimants or potential claimants to be aware of what services the board would consider reimbursable.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CVB-22-07-00003-P, Issue of May 30, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, Crime Victims Board, One Columbia Circle, Suite 200, Albany, NY 12203, (518) 457-8066, e-mail: johnwatson@cvb.state.ny.us

#### Assessment of Public Comment

The New York State Crime Victims Board (the Board) received comment on this proposed amendment from RoAnn Destito, Chair of the Assembly Standing Committee on Governmental Operations and Michael Gianaris, Assembly Chair of the Administrative Regulations Review Commission. While the Assembly-members are supportive of the purpose of the proposed amendment, as it relates to the reimbursement of non-licensed caregivers who are family members of a crime victim, they have

recommended that the Board reconsider the age based limit (*i.e.*, victims under 18 years of age) and allow reimbursement of either additional categories of crime victims (*e.g.*, elderly, disabled or sexual assault victims) or all victims of crime who would benefit from such care.

In section three of the Regulatory Impact Statement filed with this proposed amendment, it was stated that the Board recognizes that home care provided to minor victims by a family member should be considered for reimbursement as a medical expense under certain circumstances. It was also stated that from recent history to date, making such reimbursements has been the practice of the Board. This proposed amendment simply codifies this practice and enumerates the circumstances under which the Board will consider such home care to be reimbursable and how to calculate the amount of reimbursement. In section four of the Regulatory Impact Statement filed with this proposed amendment, it was stated that this codification of the Board's current practice would not impose any additional costs to the agency or State.

The changes to this proposed amendment suggested by Assemblymembers Destito and Gianaris in their comment are beyond the scope of the Board's current practice and would impose significant, additional costs to the agency and the State which were not anticipated by the Board when it originally proposed this amendment and would be prohibitive.

The adoption of this proposed amendment does not preclude the possible expansion of this practice by the Board, but at this time the Board is not prepared to make the changes proposed by Assemblymembers Destito and Gianaris.

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

#### Presumption of Physical Injury When Determining the Eligibility of Victims of Human Trafficking

**I.D. No.** CVB-33-07-00002-P

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

**Proposed action:** Addition of section 525.32 to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 621(5)

**Subject:** Presumption of physical injury when determining the eligibility of victims of human trafficking.

**Purpose:** To create the rebuttable presumption that victims of human trafficking crimes, as defined in sections 135.35 and 230.24 of the Penal Law, have suffered a physical injury for the purposes of eligibility under article 22 of the Executive Law.

**Text of proposed rule:** 525.32 *Victims of human trafficking, presumption of physical injury. When a claimant applies as a victim of labor trafficking as defined in section 135.35 of the penal law, or sex trafficking as defined in section 230.34 of the penal law, there shall be a rebuttable presumption that such victim has suffered a physical injury for the purposes of eligibility under article 22 of the executive law.*

**Text of proposed rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, Crime Victims Board, One Columbia Circle, Suite 200, Albany, NY 12203, (518) 457-8066, e-mail: johnwatson@cvb.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: The New York State Executive Law, section 623 creates the Crime Victims Board (the Board) and grants the Board the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. Pursuant to Chapter 74 of the Laws of 2007 and effective November 1, 2007, New York State Executive Law, section 621(5) includes in the definition of "victim" a person who is the victim labor trafficking as defined in section 135.35 or sex trafficking as defined in section 230.34 of the Penal Law.

2. Legislative objectives: By adding labor trafficking as defined in section 135.35 and sex trafficking as defined in section 230.34 of the Penal Law to the Executive Law's definition of "victim" in section 621(5), the Legislature sought to ensure that victims of these crimes would be eligible for Crime Victims Board awards pursuant to Article 22 of the Executive Law.

3. Needs and benefits: Chapter 74 of the Laws of 2007, effective November 1, 2007, creates the new crimes of labor trafficking (section

135.35) and sex trafficking (section 230.34) to the Penal Law, and adds such victims to the New York State Crime Victims Board's definition of "victim" in section 621(5) of the Executive Law. For a claimant to be eligible for the most comprehensive array of Crime Victims Board awards pursuant to Article 22 of the Executive Law, a physical injury as a direct result of a crime is required in most cases. In anticipation of the effective date of this new law, and because the Board wants to ensure the victims of these newly created crimes are consistently determined by its individual Board Members to be eligible for the most comprehensive array of Crime Victims Board awards, this proposed regulation creates the rebuttable presumption that victims of human trafficking crimes have suffered a physical injury for purposes of eligibility under Article 22 of the Executive Law.

The Board however, recognizes that it should retain some ability to deny claims based on eligibility in such instances where it suspects fraud or abuse, or when the claimants themselves admit to suffering no physical injury. The rebuttable presumption contained in this proposed regulation reserves the Board's right to deny claims based on eligibility in such instances.

4. Costs: a. Costs to regulated parties. It is expected that this regulation along with Chapter 74 of the Laws of 2007 will increase the number of claimants eligible for Crime Victims Board reimbursement, thus increasing the Board's overall compensation expenditures.

b. Costs to local governments. The proposed regulation does not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulation does not apply to private regulated parties and would not impose any additional costs on private regulated parties.

5. Local government mandates: The proposed regulation does not impose any program, service duty or responsibility upon any local government.

6. Paperwork: The proposed regulation does not require any additional paperwork requirements.

7. Duplication: The proposed regulation does not duplicate any other existing state or federal requirements.

8. Alternatives: Not implementing this proposed regulatory change could result in inconsistent claimant award decisions in the future. Another alternative would be an outright presumption, but the Board recognizes that it should retain some ability to deny claims based on eligibility in such instances where it suspects fraud or abuse, or when the claimants themselves admit to suffering no physical injury. The rebuttable presumption contained in this proposed regulation reserves the Board's right to deny claims based on eligibility in such instances.

9. Federal standards: Permissible under 42 USC 10602.

10. Compliance schedule: This regulation will be effective on November 1, 2007.

#### Regulatory Flexibility Analysis

The New York State Crime Victims Board (the Board) projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change simply creates the rebuttable presumption that victims of human trafficking crimes have suffered a physical injury for purposes of eligibility under Article 22 of the Executive Law. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and one were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

#### Rural Area Flexibility Analysis

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of this proposed rule change. This proposed rule change simply creates the rebuttable presumption that victims of human trafficking crimes have suffered a physical injury for purposes of eligibility under Article 22 of the Executive Law. Since nothing in this proposed rule change will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

#### Job Impact Statement

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply creates the rebuttable presumption that victims of human trafficking crimes have suffered a physical injury for purposes of eligibility under Article 22 of the Executive Law. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

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## Department of Economic Development

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### EMERGENCY RULE MAKING

#### Empire State Commercial Production Tax Credit Program

**I.D. No.** EDV-33-07-00001-E

**Filing No.** 780

**Filing date:** July 26, 2007

**Effective date:** July 26, 2007

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

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

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

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

**Specific reasons underlying the finding of necessity:** As a matter of public policy, the Legislature determined that a tax credit to eligible qualified commercial production companies would provide incentive for commercials to be made in New York.

**Subject:** Empire State Commercial Production Tax Credit Program.

**Purpose:** To promulgate regulations for the program to establish procedures for the allocation of commercial tax credits.

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

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

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

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

First, the rule makes clear that the Governor's Office for Motion Picture and Television development shall administer the Empire State

commercial production tax credit program. This proposed rule does not govern the New York City commercial production tax credit program – eligibility in either the state or city program does not guarantee eligibility or receipt of a credit in the other.

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire October 23, 2007.

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

#### Regulatory Impact Statement

##### STATUTORY AUTHORITY:

Section (8)(e) of Part V of Chapter 62 of the laws of 2006 which creates a new section 28 of the tax law as well as amends sections 210, 606, and 1310 thereof as well as Chapter 440 of the laws of 2006 which amends sections 28, 1201-a and 1310 require the Commissioner of Economic Development to promulgate rules and regulations by October 31, 2006 to establish procedures for the allocation of the Empire State commercial production tax credit, including provisions describing the application process, the due dates for such applications, the standards used to evaluate the applications, and the documentation provided to taxpayers to substantiate to the State Department of Taxation and Finance the amount of the tax credit for the program itself.

##### LEGISLATIVE OBJECTIVES:

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

##### NEEDS AND BENEFITS:

The proposed rule is required to be promulgated by October 31, 2006 (see section 8(e) of Part V of Chapter 62 of the laws of 2006). It is necessary to administer properly the tax credit program. The statute itself does not set out the specifics of the program; rather, it deals primarily with its creation and calculation of the actual tax credit. There are several administrative benefits that would be derived from this proposed rulemaking. First, the proposed rule establishes a clear and precise application process, complete with due process as there is an opportunity for applicants to appeal from denials of applications or a disagreement regarding the actual amount of the tax credit. Second, the proposed rule describes in detail the standards to be used to evaluate applications created under this program. Third, it describes the documentation that will be provided to

taxpayers to substantiate to the State Tax and Finance Department the amount of the tax credits allocation. Finally, it clarifies some existing definitions and creates several new definitions in order to help facilitate an efficient and efficient administration of the program.

#### COSTS:

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

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

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

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

#### LOCAL GOVERNMENT MANDATES:

None.

#### PAPERWORK:

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

#### DUPLICATION:

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

#### ALTERNATIVES:

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

#### FEDERAL STANDARDS:

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

#### COMPLIANCE SCHEDULE:

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

#### Regulatory Flexibility Analysis

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

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

#### Rural Area Flexibility Analysis

This program is open to participation from all qualified commercial production companies, defined by statute to include a corporation, partnership or sole proprietorship making and controlling a qualified commercial in

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

#### Job Impact Statement

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

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## Education Department

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### EMERGENCY RULE MAKING

#### Delegation of Authority Concerning Charter Schools

**I.D. No.** EDU-32-07-00007-E

**Filing No.** 795

**Filing date:** July 31, 2007

**Effective date:** July 31, 2007

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

**Action taken:** Amendment of section 3.16 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 206 (not subdivided), 207 (not subdivided), 305(1), (2) and (20) and 2857(1) and (1-a); and L. 2007, ch. 57, part D-2, section 7

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

**Specific reasons underlying the finding of necessity:** The proposed rule is necessary to delegate to the Commissioner of Education the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

Effective July 1, 2007, Education Law section 2857(1) was amended by section 7 of Part D-2 of Chapter 57 of the Laws of 2007 to require, among other things, school districts in which charter schools are located to hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter. In addition, a new Education Law section 2857(1-a) was enacted that provides that "[i]n the event the school district fails to conduct a public hearing, the board of regents shall conduct a public hearing to solicit comments from the community in connection with the issuance, revision, or renewal of a charter."

Having the Board of Regents personally conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter is not deemed to be the most appropriate and efficacious means to address this matter, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation of such responsibility to the Commissioner will provide for the most efficient and expeditious means to conduct such hearings.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for regular adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the October 22-23, 2007 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment,

if adopted at the October meeting, would be November 15, 2007, the date a Notice of Adoption would be published in the State Register. However, it is anticipated that the Board of Regents may need to conduct public hearings in accordance with these new requirements as early as August 2007. Emergency action is therefore necessary for the preservation of the general welfare to immediately delegate to the Commissioner the Board's authority to conduct hearings pursuant to Education Law 2857(1-a), and thereby ensure that any such hearings are expeditiously conducted pursuant to statutory requirements during the 2007-2008 school year.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their October 22-23, 2007 meeting, which is the first scheduled meeting after expiration of the 45 day public comment period mandated by the State Administrative Procedure Act.

**Subject:** Charter schools.

**Purpose:** To delegate to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

**Text of emergency rule:** Section 3.16 of the Rules of the Board of Regents is amended, effective July 31, 2007, as follows:

§ 3.16 Delegation of authority with respect to [charter school complaints] *charter schools*.

(a) *Complaints against charter schools.* The Board of Regents delegates to the Commissioner of Education the authority to receive, investigate and respond to complaints presented to the Board of Regents pursuant to Education Law section 2855(4), the authority to issue appropriate remedial orders pursuant to Education Law section 2855(4), and the authority to place a charter school on probationary status and to develop and impose a remedial action plan pursuant to Education Law section 2855(3).

(b) *Hearings.* The Board of Regents delegates to the Commissioner of Education the authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a).

**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. EDU-32-07-00007-P, Issue of August 8, 2007. The emergency rule will expire October 28, 2007.

**Text of emergency 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

#### **Regulatory Impact Statement**

##### STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 206 authorizes the Regents, any committee thereof, the Commissioner, the deputy and any associate and assistant commissioner of education and the counsel of the State Education Department to take testimony or hear proofs relating to their official duties, or in any matter which they may lawfully investigate.

Education Law section 207 empowers the Regents and Commissioner to adopt rules and regulations to carry out the State laws regarding education and the functions and duties conferred on the Department.

Education Law section 305(1) provides that the Commissioner is the chief executive officer of the State system of education and of the Board of Regents, and charged with the enforcement of all general and special laws relating to the educational system of the State and the execution of all educational policies determined by Regents. Section 305(2) provides that the Commissioner shall have general supervision over all schools and institutions subject to the Education Law or any statute relating to education. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Effective July 1, 2007, Education Law section 2857(1) was amended by section 7 of Part D-2 of Chapter 57 of the Laws of 2007 to require, among other things, school districts in which charter schools are located to hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter. In addition, a new Education Law section 2857(1-a) was enacted that pro-

vides that "[i]n the event the school district fails to conduct a public hearing, the board of regents shall conduct a public hearing to solicit comments from the community in connection with the issuance, revision, or renewal of a charter."

##### LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to delegate to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

##### NEEDS AND BENEFITS:

The proposed amendment is necessary to delegate to the Commissioner of Education the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a). Having the Board of Regents personally conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter is not deemed to be the most appropriate and efficacious means to address this matter, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation of such responsibility to the Commissioner will provide for the most efficient and expeditious means to conduct such hearings.

##### COSTS:

(a) Costs to State government: none. The proposed amendment is necessary to delegate to the Commissioner the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a), and will not impose any additional costs on the State beyond those inherent in the statute.

(b) Costs to local government: none. The proposed amendment does not impose any costs on school districts or charter schools. The proposed amendment merely delegates to the Commissioner the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

(c) Cost to private regulated parties: none. The proposed amendment does not affect any private regulated parties.

(d) Cost to regulating agency for implementation and continued administration of this rule: none. The proposed amendment merely delegates to the Commissioner the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a). The proposed amendment will not impose any additional costs on the State Education Department beyond those inherent in the statute.

##### LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon school districts, charter schools or other local governments. It merely delegates to the Commissioner the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

##### PAPERWORK:

The proposed amendment does not impose any additional reporting, recordkeeping or other paperwork requirements upon school districts or charter schools. It merely delegates to the Commissioner the Board's authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

##### DUPLICATION:

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

##### ALTERNATIVES:

Having the Board of Regents personally conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter was not deemed to be the most appropriate and efficacious means to address this matter, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation of such responsibility to the Commissioner will provide for the most efficient and expeditious means to conduct such hearings.

**FEDERAL STANDARDS:**

There are no applicable Federal standards.

**COMPLIANCE SCHEDULE:**

The proposed amendment does not impose any compliance requirements or costs on charter schools, but merely delegates to the Commissioner the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

**Regulatory Flexibility Analysis****Small Businesses:**

The proposed amendment applies to school districts and charter schools, and will delegate to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a). The proposed amendment does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local Governments:****EFFECT OF RULE:**

The proposed rule applies to all school districts and charter schools in the State. There are currently 97 charter schools in existence.

**COMPLIANCE REQUIREMENTS:**

The proposed amendment does not establish any reporting, recordkeeping or other compliance requirements on school districts or charter schools. It merely delegates to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

**PROFESSIONAL SERVICES:**

The proposed amendment does not impose any additional professional services requirements on school districts or charter schools.

**COMPLIANCE COSTS:**

The proposed amendment does not impose any compliance costs on school districts or charter schools. It merely delegates to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any compliance costs or new technological requirements on school districts or charter schools.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any compliance requirements or compliance costs on school districts or charter schools. It merely delegates to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a). It has been determined that delegation of such responsibility to the Commissioner will provide for the most efficient and expeditious means to conduct such hearings.

**LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Copies of the proposed amendment have been provided to each charter school for review and comment.

**Rural Area Flexibility Analysis****TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to all school districts and charter schools within the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

**REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

The proposed amendment does not establish any reporting, recordkeeping or other compliance requirements, or impose any additional professional services requirements on school districts or charter schools in rural areas. It merely delegates to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments

from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

**COSTS:**

The proposed amendment does not impose any compliance costs on school districts or charter schools in rural areas. It merely delegates to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a).

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any compliance requirements or compliance costs on school districts or charter schools. It merely delegates to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a). Having the Board of Regents personally conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter is not deemed to be the most appropriate and efficacious means to address this matter, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation of such responsibility to the Commissioner will provide for the most efficient and expeditious means to conduct such hearings.

**RURAL AREA PARTICIPATION:**

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee. Comments on the proposed amendment were also solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed rule have been provided to each charter school for review and comment.

**Job Impact Statement**

The proposed amendment applies to school districts and charter schools, and will delegate to the Commissioner of Education the Board of Regents' authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law section 2857(1-a). The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**EMERGENCY  
RULE MAKING****Fiscal Maintenance of Effort**

**I.D. No.** EDU-32-07-00009-E

**Filing No.** 800

**Filing date:** July 31, 2007

**Effective date:** July 31, 2007

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

**Action taken:** Addition of section 170.13 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided) and 305(1) and (2) and 2576(5-b); and L. 2007, ch. 57, section 9

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, to require maintenance of local effort by certain specified school districts.

Education Law section 2576(5-b) requires each school district in cities having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants to maintain their fiscal effort in support of education. The statute requires the Commissioner to establish by regulation the definition of state and private sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

State Administrative Procedure Act (SAPA) section 202 generally provides that a rule may not be adopted until at least 45 days after publication of a Notice of Proposed Rule Making in the State Register. Because the Board of Regents meets at fixed intervals, the earliest the proposed rule could be presented for adoption by the Board of Regents, after expiration of the 45-day public comment period prescribed by SAPA, is the October 22-23, 2007 Regents meeting. Pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the October meeting, would be November 15, 2007, the date a Notice of Adoption would be published in the State Register. However, affected school districts need to know now the definition of "city funds" necessary to implement Education Law section 2576(5-b), so that they may timely align their 2007-2008 school year budgets with the provisions of the statute.

Emergency action to adopt the proposed rule is necessary for the preservation of the general welfare in order to immediately establish a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, so that school districts subject to such requirement may timely align their budgets to comply with the statute's requirements for the 2007-2008 school year.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the October 22-23, 2007 meeting of the Board of Regents, which is the first scheduled Regents meeting after expiration of the 45-day public comment period prescribed by the State Administrative Procedure Act.

**Subject:** Fiscal maintenance of effort.

**Purpose:** To define "city funds" for purposes of determining maintenance of effort in cities having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants pursuant to Education Law, section 2576(5-b), including State and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement.

**Text of emergency rule:** Section 170.13 of the Regulations of the Commissioner of Education is added, effective July 31, 2007, as follows:

*§ 170.13 Definition of "city funds" for purposes of determining maintenance of effort for cities having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants pursuant to Education Law section 2576(5-b).*

*For purposes of this section and Education Law section 2576(5-b), "city funds" shall mean funds of each city having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants derived from any source except:*

- (a) funds contained within the capital budget;*
- (b) funds from county sales tax revenues shared with such city;*
- (c) funds derived from any federal source; and*
- (d) funds derived from any state or private sources over which the city has no discretion, including:*

- (1) gifts for specific purposes;*
- (2) grants in aid for specific purposes; or*
- (3) insurance proceeds authorized pursuant to Education Law section 1718(2) in addition to that which has been previously budgeted.*

**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. EDU-32-07-00009-P, Issue of August 8, 2007. The emergency rule will expire October 28, 2007.

**Text of emergency 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

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the Chief Administrative Officer of the Department, which is charged with the general management and supervision of all public schools and the educational work of the State.

Education Law section 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or any statute relating to education, and shall be responsible for executing all educational policies determined by the Regents.

Education Law section 2576(5-b), as added by section 9 of Part B of Chapter 57 of the Laws of 2007, requires each school district in cities having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants to maintain their fiscal effort in support of education. The statute requires the Commissioner to establish by regulation the definition of state and private sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement.

##### **LEGISLATIVE OBJECTIVES:**

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, by defining state and private sources over which the city has no discretion.

##### **NEEDS AND BENEFITS:**

The proposed rule is needed to implement the statutory requirements. The rule establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

State Education Department research on the maintenance of local effort in support of schools has documented that school districts tend to reduce local effort when they receive State Aid increases. Without a statutory requirement or formula structure that requires maintenance of local effort there is no way to ensure that State Aid increases provided for the purpose of increasing student achievement will result in additional programs and services for students, rather than tax relief or the funding of other city services.

##### **COSTS**

- a. Costs to State government: None.
- b. Costs to local governments: None.
- c. Costs to private, regulated parties: None.
- d. Costs to the Education Department of implementation and continuing compliance: None.

The rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not impose any costs beyond those inherent in the statute. The rule establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

##### **LOCAL GOVERNMENT MANDATES:**

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not impose any additional program, service, duty or responsibility on local governments. The rule establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

##### **PAPERWORK:**

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not impose any reporting requirements beyond those inherent in the statute. The rule establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control. School districts will demonstrate compliance with the proposed rule through the submission of fiscal data submitted for the receipt of State aid.

##### **DUPLICATION:**

The proposed rule will not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007.

#### ALTERNATIVES:

There were no significant alternatives and none were considered. Education Law section 2576(5-b) requires the Commissioner to establish by regulation the definition of state and private sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the statute's maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

#### FEDERAL STANDARDS:

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not exceed any minimum federal standards. Federal maintenance of effort requirements exist for specific federal funding programs, but there are no substantive federal standards that are applicable to the use of state funds for education.

#### COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007. The maintenance of effort requirements imposed on certain school districts are effective for school year 2007-08. School districts will submit data demonstrating they maintained their effort in relation to the prior school year in their annual financial reports filed with the State Education Department on September 1 of each year.

#### **Regulatory Flexibility Analysis**

##### Small Businesses:

The proposed amendment is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, relating to the calculation of fiscal maintenance of effort requirements for certain city school districts, by defining funds from state and private sources over which the city has no discretion. The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### EFFECT OF RULE:

The proposed rule applies to those four school districts in the State that have been determined to meet the statutory requirements in Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, necessitating compliance with the statute's maintenance of effort requirements. These are the large city school districts of Rochester, Syracuse, Buffalo and Yonkers.

#### COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not impose any additional reporting, recordkeeping or other compliance requirements on affected school districts. The rule establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

#### PROFESSIONAL SERVICES:

Compliance with the proposed rule can be incorporated in existing district procedures for budgeting, accounting and reporting and does not necessitate any additional professional services.

#### COMPLIANCE COSTS:

The rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not impose any costs beyond those inherent in the statute. The rule establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, and does not impose any additional technological requirements or costs on affected school districts. The rule merely establishes a definition of "city funds" for purposes of determining the fiscal maintenance of effort requirement in Education Law section 2576(5-b), including state and private funding sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement, thus ensuring that the requirement pertains only to funds over which the cities have control.

#### MINIMIZING ADVERSE IMPACT:

Education Law section 2576(5-b), as added by section 9 of Part B of Chapter 57 of the Laws of 2007, requires each school district in cities having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants to maintain their fiscal effort in support of education. The statute requires the Commissioner to establish by regulation the definition of state and private sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement.

The proposed rule is necessary to implement Education Law section 2576(5-b) and is applicable to the four large city school districts of Rochester, Syracuse, Buffalo and Yonkers. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt affected school districts from coverage by the rule. The development of the proposed rule took into account Department consultation with the large city districts over the years.

#### LOCAL GOVERNMENT PARTICIPATION:

Guidance memos to the regulated parties that are local governments – school districts and their component schools – were sent out from the Senior Deputy Commissioner for P-16 education of the State Education Department on April 4, and April 9, 2007. In these two documents, the Education Department sought the input, impact, questions and feedback of the proposed rule on districts as well as communicating in broad terms, the nature of the requirement. Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

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

The proposed rule is necessary to implement Education Law section 2576(5-b), as added by section 9 of Part B of Chapter 57 of the Laws of 2007, which requires each school district in cities having a population of one hundred twenty-five thousand or more inhabitants and less than one million inhabitants to maintain their fiscal effort in support of education, and further requires the Commissioner to establish by regulation the definition of state and private sources over which the city has no discretion and which are to be excluded from the calculation of city funds subject to the maintenance of effort requirement.

Accordingly, the proposed rule applies to the large city school districts of Rochester, Syracuse, Buffalo and Yonkers, and does not apply to any school districts located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed rule does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on public or private entities in rural areas. Because it is evident from the nature of the proposed rule that it does not affect rural areas, no further measures were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

#### **Job Impact Statement**

The proposed amendment is necessary to implement Education Law section 2576(5-b), as added by Chapter 57 of the Laws of 2007, relating to the calculation of fiscal maintenance of effort requirements for certain city school districts, by defining funds from state and private sources over which the city has no discretion. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## EMERGENCY RULE MAKING

### State Aid for Public Library Construction

**I.D. No.** EDU-32-07-00011-E

**Filing No.** 797

**Filing date:** July 31, 2007

**Effective date:** July 31, 2007

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

**Action taken:** Amendment of section 90.12 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 215 (not subdivided) and 273(5); L. 2007, ch. 53, section 1, and L. 2007, ch. 57, part B, section 4

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is needed to ensure that the Commissioner's Regulations comply with recent amendments made to Education Law section 273-a. Chapter 53 of the Laws of 2007 appropriates \$14 Million for public library construction and renovation projects. Chapter 57 of the Laws of 2007 amends Education Law section 273-a to change the payment schedule from a 90/10 percent basis to a 50/40/10 percent basis.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for regular adoption, after publication in the State Register and expiration of the 45-day public comment period, is the October 22-23, 2007 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest effective date of the proposed amendment, if adopted at the October meeting, would be November 15, 2007, the date a Notice of Adoption would be published in the State Register. However, this would delay implementation of public library construction projects until well into the 2007-2008 State fiscal year.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to immediately conform section 90.12 of the Commissioner's Regulations, relating to State aid for library construction, to Education Law section 273-a so that funds appropriated pursuant to Chapter 53 of the Laws of 2007 for public library construction and renovation projects may be timely awarded pursuant to statutory requirements to eligible public libraries and public library systems.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at the October 22-23, 2007 meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

**Subject:** State aid for public library construction and renovation projects.

**Purpose:** To prescribe eligibility requirements and criteria for applications for State aid for library construction and renovation projects; and conform the commissioner's regulations to recent changes made to Education Law, section 273-a by chapter 57 of the Laws of 2007.

**Text of emergency rule:** Pursuant to sections 207, 215 and 273-a of the Education Law and Chapter 57 of the Laws of 2007.

1. Paragraph (5) of subdivision (a) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective July 31, 2007, as follows:

(5) Renovation means the overall improvement or conversion of an existing building, *exclusive of routine maintenance*, resulting in increased operational efficiency and economy.

2. Subdivision (c) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective July 31, 2007, as follows:

(c) Content of applications. Each application shall assure that:

(1) . . .

(2) the nonstate share of the cost of the project is or will be available[, that];

(3) the project has been started or will begin within 180 days after approval by the commissioner[,] and [that the project] will be completed promptly and in accordance with the application;

[(3)] (4) the approved project will be conducted in accordance with all applicable Federal, State, and local laws and regulations;

[(4)] (5) the project has not been completed prior to the date of the application;

[(5) for all new projects or] (6) where [otherwise] required by law, competitive bidding procedures will be followed; and

[(6)] (7) the premises constructed, acquired, renovated, rehabilitated or leased will be usable for library purposes for at least [20] 10 years from completion of the project.

3. Paragraph (1) of subdivision (e) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective July 31, 2007, as follows:

(1) Costs eligible for approval shall include:

(i) . . .

(ii) . . .

(iii) . . .

(iv) purchase and installation of initial equipment and furnishings *as a project component of subparagraphs (i), (ii) or (iii) of this paragraph;*

(v) *site preparation and grading as a project component of subparagraphs (i), (ii) or (iii) of this paragraph;*

(vi) *replacement of a library building's mechanicals, including, but not limited to, heating, ventilation, air conditioning, cooling, electrical, and plumbing systems;*

(vii) *replacement of permanent components of a library building, including, but not limited to, windows, doors, roofs, and lighting systems;*

(viii) supervision of the construction, renovation or rehabilitation;

and

(ix) such other costs as may be approved by the commissioner.

4. Paragraph (2) of subdivision (e) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective July 31, 2007, as follows:

(2) Costs ineligible for approval shall include, but shall not be limited to:

(i) . . .

(ii) . . .

(iii) . . .

(iv) purchase of books and other library materials; [and]

(v) landscaping; *and*

(vi) *routine maintenance.*

5. Subdivision (f) of section 90.12 of the Regulations of the Commissioner of Education is amended, effective July 31, 2007, as follows:

(f) Schedule of payment of State aid for library construction. (1) [Ninety-percent] *Fifty-percent* payment of awarded State aid for approved costs of the project will be made after notification of applicant by the commissioner of approval for funding.

(2) *Forty percent of such aid shall be payable in the State fiscal year following the year in which funding was provided.*

(3) The 10-percent final payment will be made after submission of satisfactory evidence that the project has been completed *in accordance with the terms of the approved application* [according to the approved application and has been accepted by the applicant].

**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. EDU-32-07-00011-P, Issue of August 8, 2007. The emergency rule will expire October 28, 2007.

**Text of emergency 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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by Law.

Education Law section 215 authorizes the Board of Regents, the Commissioner of Education, or their representatives, to visit, examine and inspect schools or institutions under the educational supervision of the State and other institutions admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports indicating the results of such examinations and inspections in a form prescribed by the Board of Regents and the Commissioner of Education.

Education Law section 273-a provides for State aid for projects for the acquisition, construction, renovation and rehabilitation of buildings of public libraries and public library systems chartered by the Regents of the State of New York or established by act of the Legislature, upon approval by the Commissioner of Education. Subdivision (5) of section 273-a authorizes the Commissioner of Education to adopt rules and regulations as are necessary to carry out the purposes and provisions of this section.

Section 1 of Chapter 53 of the Laws of 2007 appropriates \$14 Million for public library construction and renovation projects approved pursuant to Education Law section 273-a.

Section 4 of Part B of Chapter 57 of the Laws of 2007 amended Education Law section 273-a to change the payment schedule for State aid for library construction and renovation projects from a 90/10 percent basis to a 50/40/10 percent basis. 50 percent of State aid shall be payable to each public library system or public library upon approval of the application. 40 percent shall be payable in the next State fiscal year. The remaining 10 percent shall be payable upon project completion.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement Education Law section 273-a, as amended by Chapter 57 of the Laws of 2007.

#### 3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes made to Education Law section 273-a by Chapter 57 of the Laws of 2007, so that the payment schedule of State aid for library construction is changed to a 50/40/10 percent basis from a 90/10 percent basis and further, so that funds for public library construction and renovation projects, appropriated pursuant to Chapter 53 of the Laws of 2007, are timely awarded, pursuant to statutory requirements, to eligible public libraries and public library systems. Chapter 53 of the Laws of 2007 appropriates \$14 Million for public library construction and renovation projects.

#### 4. COSTS:

(a) Costs to the State: none.

(b) Costs to local governments: none.

(c) Costs to private, regulated parties: none.

The proposed amendment relates to State aid for public library systems and public libraries and does not affect private parties.

(d) Costs to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 273-a, as amended by Chapter 57 of the Laws of 2007, and does not impose any additional costs on the State, local governments, or the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment concerns applications for State aid for library construction and applies to all public library systems and public libraries seeking such aid, including public libraries established by local governments, but does not directly impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district, or other special district. The proposed amendment is needed to conform the Commissioner's Regulations to recent changes made to Education Law section 273-a, as discussed in the Needs and Benefits section above.

#### 6. PAPERWORK:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 273-a, as amended by Chapter 57 of the laws of 2007, and does not impose any additional paperwork requirements upon the State beyond those inherent in the statute. The proposed amendment substitutes a 50/40/10 percent payment schedule for a 90/10 percent payment schedule, which will result in additional paperwork for public library systems and public libraries in order to draw down their funds.

#### 7. DUPLICATION:

The proposed amendment duplicates no existing State or federal requirements and is necessary to conform the Commissioner's Regulations to recent amendments made to Education Law section 273-a by Chapter 57 of the Laws of 2007.

#### 8. ALTERNATIVES:

There were no significant alternatives to the proposed amendment and none were considered.

#### 9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standard of the federal government.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated that public library systems and public libraries will be able to achieve compliance with these changes within two weeks from the adoption of the amended rule.

#### **Regulatory Flexibility Analysis**

(a) Small businesses:

The proposed amendment concerns applications for State aid for library construction by public library systems and public libraries and does

not impose any adverse economic impact, or any adverse reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local Governments:

#### EFFECT OF RULE:

The proposed rule applies to public library systems and public libraries who seek State aid for library construction, including 395 public libraries established by local governments.

#### COMPLIANCE REQUIREMENTS:

The proposed rule applies to public library systems and public libraries who seek State aid for library construction, including those public libraries established by local governments, but does not directly impose any compliance requirements on local governments.

The proposed amendment is needed to conform the Commissioner's Regulations to recent changes made to Education Law section 273-a by Chapter 57 of the Laws of 2007, so that the payment schedule of State aid for library construction is changed to a 50/40/10 percent basis from a 90/10 percent basis and further, so that funds for public library construction and renovation projects, appropriated pursuant to Chapter 53 of the Laws of 2007, are timely awarded, pursuant to statutory requirements, to eligible public library systems and public libraries. Chapter 53 of the Laws of 2007 appropriates \$14 Million for public library construction and renovation projects.

#### PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

#### COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes made to Education Law section 273-a by Chapter 57 of the Laws of 2007, and will not impose any additional compliance costs on local governments.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on local governments.

#### MINIMIZING ADVERSE IMPACT:

The proposed amendment is needed to conform the Commissioner's Regulations to recent changes made to Education Law section 273-a by Chapter 57 of the Laws of 2007. The proposed amendment applies to public library systems and public libraries that seek State aid for library construction, including those public libraries established by local governments, but does not directly impose any compliance requirements or costs on local governments. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on public libraries and public library systems. The proposed amendment will permit public libraries greater flexibility in applying for grant funds.

#### LOCAL GOVERNMENT PARTICIPATION:

The recent legislation that provides \$14 Million in construction funding originated with the ten recommendations of the Regents Commission on Library Services. It is a component of the proposed New Century Libraries legislation, which was based on the recommendations made by the Commission after two years of studying the State's libraries, including 14 public meetings held throughout the State to solicit input from the public and the library community.

In addition, in 2003, staff of the New York State Library's Division of Library Development participated in a conference call with representatives of the Public Library System Directors Organization (PULISDO) and also attended the annual PULISDO meeting to discuss the construction program which resulted in suggestions for changing the program.

The proposed amendments to Regulation 90.12 are required by Education Law, and additional changes have been made to facilitate the application procedures at the recommendation of the State's public library systems.

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

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

The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those located in the 44 rural counties having less than 200,000 inhabitants and in the 71 towns within urban counties having a population density of 150 persons per square mile or less.

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

The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those public libraries located in rural areas. The proposed amendment is needed to conform the Commissioner's Regulations to recent amendments made to Education Law section 273-a. Chapter 57 of the Laws of 2007 amended section 273-a to change the payment schedule for State aid for library construction from a 90/10 percent basis to a 50/40/10 percent basis.

The proposed amendment does not impose any additional professional services requirements. The proposed amendment provides greater flexibility to public libraries and public library systems in applying for State aid for library construction, and does not impose any additional compliance requirement on public libraries or public library systems located in rural areas.

### 3. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 273-a, as amended by Chapter 57 of the Laws of 2007, and will not impose any additional costs on public libraries or public library systems located in rural areas.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to public library systems and public libraries who seek State aid for library construction, including those public libraries and public library systems located in rural areas. The proposed amendment is needed to conform the Commissioner's Regulations to recent amendments made to Education Law section 273-a by Chapter 57 of the Laws of 2007. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on public libraries and public library systems.

The proposed amendment applies to public libraries and public library systems across the State, and accordingly, it was not possible to provide for a lesser standard or an emergency exemption for public libraries located in rural areas.

### 5. RURAL AREA PARTICIPATION:

The recent legislation that provides \$14 Million in construction funding originated with the ten recommendations of the Regents Commission on Library Services. It is a component of the proposed New York Knowledge Initiative legislation and builds on the New Century Libraries proposal, which was based on the recommendations made by the Commission after two years of studying the State's libraries, including 14 public meetings held throughout the State to solicit input from the public and the library community.

In addition, in 2003, staff of the New York State Library's Division of Library Development participated in a conference call with representatives of the Public Library System Directors Organization (PULISDO) and also attended the annual PULISDO meeting to discuss the construction program which resulted in suggestions for changing the program.

The proposed amendments to Regulation 90.12 are required by Education Law, and additional changes have been made to facilitate the application procedures at the recommendation of the State's public library systems.

### Job Impact Statement

The proposed amendment concerns applications for State aid for library construction by public library systems and public libraries and will not have an adverse impact on job or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no adverse impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## EMERGENCY RULE MAKING

### Procedures for Public Hearings Concerning Charter Schools

**I.D. No.** EDU-32-07-00012-E

**Filing No.** 799

**Filing date:** July 31, 2007

**Effective date:** July 31, 2007

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

**Action taken:** Addition of section 119.4 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 206 (not subdivided), 207 (not subdivided), 305(1), (2) and (20) and 2857(1); and L. 2007, ch. 57, part D-2, section 7

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

**Specific reasons underlying the finding of necessity:** The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts pursuant to Education Law section 2857(1).

Effective July 1, 2007, Education Law section 2857(1) was amended by section 7 of Part D-2 of Chapter 57 of the Laws of 2007 to require, among other things, school districts in which charter schools are located to hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter.

Because the Board of Regents meets at fixed intervals, the earliest the proposed rule could be presented for regular adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the October 22-23, 2007 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed rule, if adopted at the October meeting, would be November 15, 2007, the date a Notice of Adoption would be published in the State Register. However, it is anticipated that school districts will need to commence public hearings regarding the issuance, revision, or renewal of a charter starting in July 2007, because of the receipt before July 1, 2007 by the various charter entities of such applications to establish new charter schools and to renew existing charters. Emergency action is therefore necessary for the preservation of the general welfare to immediately establish procedures for the conduct of charter school public hearings pursuant to Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007, so that school districts may timely conduct such hearings pursuant to statutory requirements during the 2007-2008 school year.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their October 22-23, 2007 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by SAPA.

**Subject:** Procedures for public hearings concerning charter schools pursuant to Education Law, section 2857(1-a).

**Purpose:** To establish procedures for the conduct of public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter pursuant to Education Law, section 2857(1).

**Text of emergency rule:** Section 119.4 of the Regulations of the Commissioner of Education is added, effective July 31, 2007, as follows:

§ 119.4 *Hearings prior to the issuance, revision, or renewal of a charter school pursuant to Education Law section 2857(1).*

*Within thirty days of initially receiving notice of the receipt of an application for the formation of a new charter school, of an application for the renewal of an existing charter school, or of a charter school's request to revise its existing charter, the school district in which the charter school is located shall hold a public hearing to solicit comments from the community in connection with the foregoing. Such hearing shall be held within the community potentially impacted by the proposed action or charter school. When a revision involves the relocation of a charter school to a different school district, the proposed new school district shall also hold a hearing within such thirty-day period. The school district shall, at the time of its dissemination, provide the State Education Department with a copy of the public hearing notice. The school district shall, no later than the business day next following the hearing, provide written confirmation to both the charter school's charter entity and the State Education Department that the hearing was held, along with the date and time of the hearing. In addition, such school district shall submit copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department within 15 business days of the hearing.*

**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. EDU-32-07-00012-P, Issue of August 8, 2007. The emergency rule will expire October 28, 2007.

**Text of emergency 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

### Regulatory Impact Statement

#### STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the chief administrative officer of the Department, which is charged with the general

management and supervision of public schools and the educational work of the State.

Education Law section 206 authorizes the Regents, any committee thereof, the Commissioner, the deputy and any associate and assistant commissioner of education and the counsel of the State Education Department to take testimony or hear proofs relating to their official duties, or in any matter which they may lawfully investigate.

Education Law section 207 empowers the Regents and Commissioner to adopt rules and regulations to carry out the State laws regarding education and the functions and duties conferred on the Department.

Education Law section 305(1) provides that the Commissioner is the chief executive officer of the State system of education and of the Board of Regents, and charged with the enforcement of all general and special laws relating to the educational system of the State and the execution of all educational policies determined by Regents. Section 305(2) provides that the Commissioner shall have general supervision over all schools and institutions subject to the Education Law or any statute relating to education. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 2857(1), as amended by section 7 of Part D-2 of Chapter 57 of the Laws of 2007, provides that prior to the issuance, revision, or renewal of a charter, the school district in which the charter school is located shall hold a public hearing to solicit comments from the community in connection with the foregoing. Such hearing must be held in the community potentially impacted by the proposed charter school. When a revision involves the relocation of a charter school to a different school district, the proposed new school district shall also hold such hearing.

#### LEGISLATIVE OBJECTIVES:

Consistent with the statutory authority set forth above, the proposed rule will establish procedures for the conduct of charter school public hearings by the school district pursuant to Education Law section 2857(1).

#### NEEDS AND BENEFITS:

The proposed rule is necessary to prescribe procedures for the conduct of charter school public hearings by a school district to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1). It has been determined that the procedures set forth in the proposed rule will provide for the most efficient, thorough and expeditious means to conduct such hearings.

#### COSTS:

(a) Costs to State government: none. The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts pursuant to Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007, and will not impose any additional costs on the State beyond those inherent in the statute.

(b) Costs to local government: none. The proposed rule does not impose any additional costs on school districts beyond those inherent in Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007. Such costs would be associated with school districts' submission of copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department.

(c) Cost to private regulated parties: none. The proposed rule does not affect any private regulated parties.

(d) Cost to regulating agency for implementation and continued administration of this rule: none. The proposed rule will not impose any additional costs on the State beyond those inherent in Education Law section 2857, as amended by Chapter 57 of the Laws of 2007.

#### LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007, and will not impose any additional program, service, duty or responsibility upon school districts beyond those inherent in the statute.

Consistent with the statute, proposed section 119.4 provides that within thirty days of initially receiving notice of the receipt of an application for the formation of a new charter school, of an application for the renewal of an existing charter school, or of a charter school's request to revise its existing charter, the school district in which the charter school is located shall hold a public hearing to solicit comments from the community in connection with the foregoing. Such hearing shall be held within the community potentially impacted by the proposed action or charter school.

When a revision involves the relocation of a charter school to a different school district, the proposed new school district shall also hold a hearing within such thirty day period. The school district shall, no later than the business day next following the hearing, provide written confirmation to both the charter school's charter entity and the State Education Department that the hearing was held, along with the date and time of the hearing. In addition, such school district shall submit copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department within five business days of the hearing.

#### PAPERWORK:

The school district shall, at the time of its dissemination, provide the State Education Department with a copy of the public hearing notice. The school district shall, no later than the business day next following the hearing, provide written confirmation to both the charter school's charter entity and the State Education Department that the hearing was held, along with the date and time of the hearing. In addition, such school district shall submit copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department within 15 business days of the hearing.

#### DUPLICATION:

The proposed rule does not duplicate any existing State or Federal requirements.

#### ALTERNATIVES:

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts pursuant to Education Law section 2857(1). There are no significant alternatives and none were considered.

#### FEDERAL STANDARDS:

There are no applicable Federal standards.

#### COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed rule by its effective date.

#### **Regulatory Flexibility Analysis**

##### Small Businesses:

The proposed rule applies to school districts and charter schools, and will establish procedures for the conduct of charter school public hearings by the school district to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1). The proposed rule does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

##### EFFECT OF RULE:

The proposed rule applies to all school districts and charter schools in the State. There are currently 97 charter schools in existence.

##### COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1), and will not impose any additional reporting, recordkeeping or other compliance requirements on school districts or charter schools beyond those inherent in the statute.

Consistent with the statute, proposed section 119.4 provides that within thirty days of initially receiving notice of the receipt of an application for the formation of a new charter school, of an application for the renewal of an existing charter school, or of a charter school's request to revise its existing charter, the school district in which the charter school is located shall hold a public hearing to solicit comments from the community in connection with the foregoing. Such hearing shall be held within the community potentially impacted by the proposed action or charter school. When a revision involves the relocation of a charter school to a different school district, the proposed new school district shall also hold a hearing within such thirty day period. The school district shall, no later than the business day next following the hearing, provide written confirmation to both the charter school's charter entity and the State Education Department that the hearing was held, along with the date and time of the hearing. In addition, such school district shall submit copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department within five business days of the hearing.

**PROFESSIONAL SERVICES:**

The proposed rule does not impose any additional professional services requirements on school districts or charter schools.

**COMPLIANCE COSTS:**

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts pursuant to Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007, and will not impose any additional costs on school districts or charter schools beyond those inherent in the statute. Such costs would be associated with school districts' submission of copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed rule does not impose any additional compliance costs on school districts or charter schools beyond those inherent in the statute. The proposed rule does not impose any additional technological requirements on school districts or charter schools.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt affected school districts from coverage by the rule. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on school districts and charter schools.

**LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Copies of the proposed amendment have been provided to each charter school for review and comment.

**Rural Area Flexibility Analysis****TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to all school districts and charter schools within the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

**REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1), and will not impose any additional reporting, recordkeeping or other compliance requirements on school districts or charter schools in rural areas beyond those inherent in the statute.

Consistent with the statute, proposed section 119.4 provides that within thirty days of initially receiving notice of the receipt of an application for the formation of a new charter school, of an application for the renewal of an existing charter school, or of a charter school's request to revise its existing charter, the school district in which the charter school is located shall hold a public hearing to solicit comments from the community in connection with the forgoing. Such hearing shall be held within the community potentially impacted by the proposed action or charter school. When a revision involves the relocation of a charter school to a different school district, the proposed new school district shall also hold a hearing within such thirty day period. The school district shall, no later than the business day next following the hearing, provide written confirmation to both the charter school's charter entity and the State Education Department that the hearing was held, along with the date and time of the hearing. In addition, such school district shall submit copies of any and all written records or comments generated from the hearing to the charter school's charter entity and the State Education Department within five business days of the hearing.

The proposed rule does not impose any additional professional services requirements on school districts or charter schools in rural areas.

**COSTS:**

The proposed rule is necessary to establish procedures for the conduct of charter school public hearings by school districts pursuant to Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007, and will not impose any additional costs on school districts or charter schools in rural areas beyond those inherent in the statute. Such costs would be associated with school districts' submission of copies of any and all written

records or comments generated from the hearing to the charter school's charter entity and the State Education Department.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to implement Education Law section 2857(1), as amended by Chapter 57 of the Laws of 2007 by establishing procedures for the conduct of charter school public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1). Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing requirements or to exempt school districts or charter schools from coverage by the rule. Furthermore, because this amendment implements statutory provisions that are applicable to school districts and charter schools across the State, it was not possible to provide for a lesser standard or an exemption for those located in rural areas. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on school districts and charter schools.

**RURAL AREA PARTICIPATION:**

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee. In addition, copies of the proposed rule have been provided to each charter school for review and comment.

**Job Impact Statement**

The proposed rule applies to school districts and charter schools, and will establish procedures for the conduct of charter school public hearings by school districts to solicit comments from the community in connection with the issuance, revision, or renewal of a charter pursuant to Education Law section 2857(1). The proposed rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

**Contracts for Excellence**

**I.D. No.** EDU-20-07-00005-ERP

**Filing No.** 798

**Filing date:** July 31, 2007

**Effective date:** July 31, 2007

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

**Emergency action taken:** Addition of section 100.13 and amendment of section 170.12 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 211-d(1-9); and L. 2007, ch. 57

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts.

Education Law section 211-d requires each school district: (1) that has at least one school currently identified as (i) requiring academic progress or (ii) in need of improvement or (iii) in corrective action or (iv) in restructuring; and (2) that receives an increase in either (i) total foundation aid compared to the base year in an amount that equals or exceeds either \$15 million dollars or 10 percent of the amount received in the base year, whichever is less, or (ii) a supplemental educational improvement plan grant, to prepare a contract for excellence, which shall describe how the total foundation aid and supplemental educational improvement plan grants shall be used to support new programs and new activities or expand the use of programs and activities demonstrated to improve student achievement. The statute requires the Commissioner to establish by regulation the allowable programs and activities for such purposes. The statute also requires the Commissioner to prescribe a format by which each

affected school district shall publicly report its expenditures of total foundation aid.

The proposed amendment was adopted at the April 23-24, 2007 Regents meeting as an emergency measure, effective April 27, 2007, in order to immediately establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures, and other requirements for contracts for excellence under Education Law section 211-d, so that affected school districts may timely prepare such contracts for the 2007-2008 school year pursuant to statutory requirements. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on May 16, 2007.

At their June 25-26, 2007 meeting, the Regents substantially revised the proposed rule, and adopted the revised rule by emergency action, effective July 26, 2007. A Notice of Emergency Adoption and Revised Rule Making was published in the August 8, 2007 State Register.

At their July 25, 2007 meeting, the Board of Regents further revised the proposed rule in response to public comment, as set forth in the Statement Concerning the Regulatory Impact Statement and Assessment of Public Comment submitted herewith. Pursuant to the State Administrative Procedure Act section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the State Register. The earliest a Notice of Revised Rule Making could appear in the State Register would be the August 15, 2007 edition. Since the Board of Regents meets at fixed intervals, and there is no meeting scheduled for August 2007 and the September Regents meeting is scheduled for September 10-11, 2007, the earliest the proposed amendment can be adopted by regular action, after expiration of the 30-day public comment period for a revised rule making, is the October Regents meeting. However, the June emergency adoption will expire on September 21, 2007, 60 days after its filing with the Department of State on July 24, 2007. A lapse in the rule's effectiveness would disrupt implementation of the contract for excellence program under Education Law section 211-d. A third emergency adoption is therefore necessary for the preservation of the general welfare to adopt revisions to the rule in response to public comment and to otherwise ensure that the emergency rule adopted at the April Regents meeting, and revised at the June Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule.

**Subject:** Contracts for excellence.

**Purpose:** To implement Education Law section 211-d, as added by chapter 57 of the Laws of 2007, by establishing allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures, and other requirements for purposes of preparation of contracts for excellence by certain specified school districts.

**Substance of emergency/revised rule:** The Board of Regents has repealed the emergency rule adopted at the June 25-26, 2007 Regents meeting and added a new section 100.13 and amended section 170.12 of the Commissioner's Regulations, as an emergency action effective July 31, 2007. The rule is necessary to implement Education Law section 211-d to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on August 8, 2007, the rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith. The following is a summary of the revised rule.

Section 100.13(a) defines: (1) total foundation aid; (2) supplemental educational improvement plan grant; (3) contract amount; (4) base year; (5) experimental programs; (6) highly qualified teacher; and (7) response to intervention program.

Section 100.13(b) establishes applicability provisions for determining whether a school district is required to prepare a contract for excellence. A contract shall be prepared by each district: (1) that has at least one school currently identified under section 100.2(p) as: (a) requiring academic progress; or (b) in need of improvement; or (c) in corrective action; or (d) in restructuring; and (2) that receives: (a) an increase in total foundation aid compared to the base year in an amount that equals or exceeds either fifteen million dollars or ten percent of the amount received in the base year, whichever is less; or (b) a supplemental educational improvement plan grant. For the 2007-2008 school year, such increase in total foundation aid shall be the amount of the difference between total foundation aid received for the current year and the total foundation aid base as defined in Education Law section 3602(1)(j). In the NYC school district, a contract shall be prepared for the city school district and each community district meeting the above criteria.

Section 100.13(c) establishes requirements for preparation and submission of contracts. Each contract shall be in a format, and submitted pursuant to a timeline, prescribed by the Commissioner and shall:

(1) describe how the contract amount shall be used to support new programs and new activities or expand use of programs and activities demonstrated to improve student achievement, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(d);

(2) specify the new or expanded programs, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(d), for which each sub-allocation of the contract amount shall be used and affirm that such programs shall predominately benefit students with the greatest educational needs including, but not limited to: (a) limited English proficient (LEP) students and students who are English language learners (ELL); (b) students in poverty; and (c) students with disabilities;

(3) state, for all funding sources, whether federal, state or local, the instructional expenditures per pupil, the special education expenditures per pupil, and the total expenditures per pupil, projected for the current year and estimated for the base year; provided that no later than February 1 of the current school year, the district shall submit a revised contract stating such expenditures actually incurred in the base year;

(4) include any programmatic data projected for the current year and estimated for the base year, as the Commissioner may require; and

(5) in the NYC school district, include a plan that meets the requirements of section 100.13(d)(2)(i)(a), to reduce average class sizes within five years for the following grade ranges: (a) prekindergarten through grade three; (b) grades four through eight; and (c) grades nine through twelve. Such plan shall be aligned with the capital plan of the NYC school district and include continuous class size reduction for low performing and overcrowded schools beginning in the 2007-2008 school year and thereafter and include the methods to be used to achieve proposed class sizes, such as the creation or construction of more classrooms and school buildings, the placement of more than one teacher in a classroom or methods to otherwise reduce the student to teacher ratio. Beginning in the 2008-2009 school year, such plan shall provide for reductions in class size that, by the end of the 2011-2012 school year, will not exceed the prekindergarten through grade 12 class size targets prescribed by the Commissioner after consideration of the recommendation of an expert panel appointed to review class size research.

The Commissioner shall approve each contract meeting the provisions of section 100.13(c) and certify, for each contract, that the expenditure of additional aid or grant amounts is in accordance with Education Law section 211-d(2). Approval shall be given to contracts demonstrating to the Commissioner's satisfaction that the allowable programs selected:

(i) predominately benefit students with the greatest educational needs, including but not limited to: (a) LEP and ELL students; (b) students in poverty; and (c) students with disabilities;

(ii) predominately benefit students in schools identified as requiring academic progress, or in need of improvement, or in corrective action, or restructuring and address the most serious academic problems in those schools; and

(iii) are based on practices supported by research or other comparable evidence in order to facilitate student attainment of State learning standards.

Section 100.13(d) establishes the allowable programs and activities, including experimental programs. Section 100.13(d)(1) establishes general requirements, including that such programs and activities: (1) predominately benefit students with the greatest educational needs including, but not limited to: LEP and ELL students; students in poverty; and students with disabilities; (2) predominately benefit students in schools identified as requiring academic progress, in need of improvement, in corrective action, or restructuring and address the most serious academic problems in those schools; (3) be consistent with federal and State statutes and regulations governing the education of such students; (4) be developed in reference to practices supported by research or other comparable evidence in order to facilitate student attainment of State learning standards; (5) where applicable, be accompanied by high quality, sustained professional development focused on content pedagogy, curriculum development, and/or instructional design in order to ensure successful implementation of each program and activity; (6) ensure that expenditures of the contract amount shall be used to supplement and not supplant funds expended by the district in the base year for such purposes; (7) ensure that all additional instruction is provided by appropriately certified teachers or highly qualified teachers where required by section 120.6 of this Title, emphasizing skills and

knowledge needed to facilitate student attainment of State learning standards; and (8) be coordinated with all other allowable programs and activities included in the district's contract as part of the district's comprehensive educational plan.

Section 100.13(d)(2) establishes criteria for specific allowable programs and activities, which shall include: (1) class size reduction for (a) the NYC school district and (b) all other school districts; (2) student time on task; (3) teacher and principal quality initiatives; (4) middle school and high school restructuring; and (5) full-day kindergarten or prekindergarten programs.

Section 100.13(d)(2)(i) establishes requirements for class size reduction, including special provisions for NYC. NYC must allocate some of its total contract amount to class size reduction according to a plan, included in their contract and approved by the Commissioner pursuant to section 100.13(c), to reduce the average class size for the following grade ranges: prekindergarten to grade three, grades four through eight, and grades nine through twelve, commencing in the 2007-2008 school year and ending in the 2011-2012 school year, to target levels recommended by the expert panel appointed by the Commissioner. Districts outside of NYC shall establish class size reduction goals in the 2007-2008 school year and demonstrate measurable progress towards meeting such goals; and beginning with the 2008-2009 school year, shall demonstrate measurable progress towards meeting the target levels recommended by the expert panel. The rule also mandates NYC give priority to prekindergarten through grade 12 students in schools requiring academic progress, correction, improvement or in restructuring and to overcrowded schools. Furthermore, it requires that classrooms created shall provide adequate and appropriate physical space to students and staff, among others. Class size reduction may be accomplished through the creation of additional classrooms and buildings, through assignment of more than one teacher to a classroom or, in NYC, by other methods to reduce the student to teacher ratio, as approved by the Commissioner.

Section 100.13(d)(2)(ii) provides that allowable programs and activities related to student time on task may be accomplished by: (1) lengthened school days, (2) lengthened school years and (3) dedicated instructional time, including individual intervention, tutoring and student support services.

Section 100.13(d)(2)(iii) prescribes requirements for teacher and principal quality initiatives, including: (1) recruitment and retention of teachers, (2) mentoring for teachers and principals in their first or second year of a new assignment, (3) incentive programs for teacher placement, (4) instructional coaches, and (5) school leadership coaches. Districts shall ensure that an appropriately certified, or highly qualified teacher where required under section 120.6, is in every classroom and an appropriately certified principal is assigned to every school.

Section 100.13(d)(2)(iv) provides that allowable programs and activities for middle and high school restructuring include: (1) instructional program changes to improve student achievement and attainment of the State learning standards and (2) structural organization changes. The section further requires that districts choosing to make organization changes must also make instructional program changes.

Section 100.13(d)(2)(v) provides that allowable programs and activities for full-day kindergarten or prekindergarten programs include: (1) a minimum full school day program, (2) a minimum full school day program with additional hours for children and families, (3) a minimum full school day program with additional hours in collaboration with community based agencies (prekindergarten only), and (4) classroom integration programs for students with disabilities (specifically for full-day prekindergarten).

Section 100.13(d)(3) lists the following requirements for experimental programs, not included in the allowable programs and activities described above: (1) a maximum percentage of the contract amount that may be used for experimental programs, (2) a plan must be submitted to the Commissioner, (3) the program must be based on an established theoretical base supported by research or other comparable evidence, (4) the implementation plan for an experimental program must be accompanied by a program evaluation plan based on empirical evidence to assess the impact on student achievement, and (5) the experimental program may be in partnership with an institution of higher education or other organization with extensive research experience and capacity.

Section 100.13(d)(3)(ii) states provides a maximum amount of up to \$30 million dollars or twenty-five percent of the contract amount, whichever is less, that districts may use in the 2007-2008 school year to maintain existing programs and activities listed in Education Law section 211-d(3)(a).

Section 100.13(e) establishes criteria for the development of the contract for excellence pursuant to a public process, in consultation with parents or persons in parental relation, teachers, administrators, and any distinguished educator appointed pursuant to Education Law section 211-c, which shall include at least one public hearing. Special provisions for NYC's development of the contracts are included.

Section 100.13(f) establishes requirements to assure procedures are in place by which parents may bring complaints concerning implementation of a district's contract for excellence, including special provisions for the NYC.

Section 100.13(g) establishes requirements for the public reporting by districts of their school-based expenditures of total foundation aid.

Section 170.12(e)(1), relating to requirements of an annual audit of school district records, is amended to provide that, for schools required to prepare a contract for excellence pursuant to Education Law section 211-d, the annual audit for the year such contract is in effect shall also include a certification by the accountant or, where applicable, the NYC comptroller, in a form prescribed by the Commissioner, that the increases in total foundation aid and supplemental educational improvement plan grants have been used to supplement, and not supplant funds allocated by the district in the base year for such purposes.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on May 16, 2007, I.D. No. EDU-20-07-00005-EP. The emergency rule will expire September 28, 2007.

**Revised rule making(s) were previously published in the State Register** on August 8, 2007.

**Emergency rule compared with proposed rule:** Substantial revisions were made in sections 100.13(a)(7), (c)(2) and (3), (d)(1), (2)(ii), (iv), (iii)(a), (b), (c), (d) and (e), (3)(i)(e) and (f), (e)(2) and 170.12(e)(1).

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

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

#### **Regulatory Impact Statement**

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the *State Register* on August 8, 2007, the following substantial revisions were made to the proposed rule.

Section 100.13(a)(7) has been revised to replace the definition of a response to intervention program with a cross-reference to section 100.2(ii). Section 100.2(ii) was adopted by emergency action at the June Regents meeting, effective July 1, 2007, and now provides the definition of a response to intervention program.

Section 100.13(c)(2) has been revised to clarify that the allowable programs and activities selected by the district must be made pursuant to the requirements of section 100.13(d).

Section 100.13(c)(3) has been added to prescribe procedures for the amendment of contracts for excellence.

Sections 100.13(d)(1), 100.13(d)(2)(ii) and 100.13(d)(2)(iv) have been revised in response to public comment to clarify that visual arts, music, dance and/or theatre programs; career and technical education programs; programs involving the use of instructional technology; and after-school programs and summer camp programs offering supplemental instruction, tutoring, and/or other academic support and enrichment may be included as allowable programs and activities, provided the programs meet the applicable requirements of section 100.13(d) and are approved by the Commissioner pursuant to 100.13(c)(2).

Section 100.13(d)(2)(iii) has been revised to clarify that teacher and principal quality initiatives shall ensure that an appropriately certified teacher, or a highly qualified teacher where required by section 120.6 of this Title, is assigned to every classroom.

Section 100.13(d)(2)(iii)(a) has been revised in response to public comment to include within teacher and principal quality initiatives, programs and activities to recruit and retain appropriately certified principals.

Section 100.13(d)(2)(iii)(b) has been revised in response to public comment to also permit mentoring to improve the performance of teachers and principals who are not newly appointed, consistent with collective bargaining and other applicable requirements; and to delete the provision

limiting mentoring to teachers and principals who are in their first or second year of a new assignment.

Section 100.13(d)(2)(iii)(c) has been revised to conform to Education Law section 211-d.

Section 100.13(d)(2)(iii)(e) has been revised in response to public comment to allow individuals holding school district administrator, school administrator and supervisor and/or school business administrator title certifications to be eligible to serve as school leadership coaches.

Section 100.13(d)(2)(iii)(d) has been revised in response to public comment to also permit instructional coaches to provide professional development to teachers in pedagogy and/or classroom management, to improve student attainment of State learning standards.

Section 100.13(d)(3)(i)(e) has been revised to make it an option, rather than a requirement, that experimental programs be in partnership with an institution of higher education or other organization with extensive research experience. While such partnerships are highly encouraged, it is recognized that some school districts seeking to implement experimental programs may be unable to find institutions and organizations with which to form such partnerships.

Section 100.13(d)(3)(i)(f) has been added to clarify that experimental programs involving the use of instructional technology may be included as allowable programs and activities, provided the programs meet the requirements of section 100.13(d)(3).

Section 100.13(e)(2) has been revised in response to public comment, and to ensure consistency with Education Law section 211-d(4), to clarify that the requirements in former section 100.13(e)(3) that the contracts for excellence for community districts in New York City shall be consistent with the citywide contract and be submitted by the community superintendent to the community district education council for review and comment at a public meeting, are applicable to the 2008-2009 school year and thereafter.

Section 170.12(e)(1) has been revised to clarify that the requirement for certification in a district's annual audit that the increases in total foundation aid and supplemental educational improvement plan grants have been used to supplement and not supplant funds allocated by the district in the base year for such purposes, is applicable only to school districts required to prepare a contract for excellence pursuant to Education Law section 211-d.

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

#### **Regulatory Flexibility Analysis**

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on August 8, 2007, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revision to the proposed rule does not require any revisions to the previously published Regulatory Flexibility Analysis.

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

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on August 8, 2007, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revision to the proposed rule does not require any revisions to the previously published Rural Area Flexibility Analysis.

#### **Job Impact Statement**

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on August 8, 2007, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

The agency received no public comment.

## NOTICE OF ADOPTION

### **Fingerprinting and Criminal History Record Check**

**I.D. No.** EDU-20-07-00013-A

**Filing No.** 796

**Filing date:** July 31, 2007

**Effective date:** Aug. 16, 2007

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

**Action taken:** Amendment to of sections 80-1.11, 87.1, 87.2, 87.4, 87.5, 87.6 and 87.8; and addition of section 87.10 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(30), 3001-d(2), (3) and (4) and 3035(1) and (3)

**Subject:** The fingerprinting and criminal history record check of prospective employees of nonpublic and private elementary or secondary schools.

**Purpose:** To set forth the requirements and procedures for the fingerprinting and criminal history record check of prospective school employees for nonpublic and private elementary or secondary schools in order to implement the requirements of chapter 630 of the Laws of 2006.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-20-07-00013-P, Issue of May 16, 2007.

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

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

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

The proposed amendment was published in the State Register on May 16, 2007. Below is a summary of written comments received by the State Education Department (SED) and SED's assessment of issues raised.

**COMMENT:** Our principal concern is that when a nonpublic school applicant is found to have a criminal record, the hiring decision is made by SED. The commentor expressed concern regarding their inability to make their own clearance determinations.

**RESPONSE:** Pursuant to Education Law §§ 305(30)(a) and (b) and 3035(1) and (3), the Commissioner of Education is required or authorized to make clearance for employment determinations for prospective employees of a school district, charter school, board of cooperative educational services or non-public and private elementary and/or secondary schools. When making these determinations in instances where the criminal history record check reveals that the prospective employee was convicted of a crime or has a pending criminal charge, SED reviews this record and applies the standards for the granting or denial of a license or employment application set forth in Correction Law § 752 and considers the factors specified in Correction Law § 753. This review is also conducted in accordance with Executive Law § 296(16).

However, the fact that SED grants a clearance does not require the school to hire the individual. The clearance determination simply means that the individual is employable. The employer may still consider other employment factors when determining whether to hire an individual. The clearance determination simply means that there is nothing in the individual's criminal history which would serve as a bar to employment in that particular position, in that particular setting.

**COMMENT:** Two commentors have also requested that the proposed regulations be amended so that parents are notified when SED approves/disapproves a prospective employee for employment.

**RESPONSE:** Chapter 630 of the Laws of 2006 only authorizes the Commissioner to notify the non-public or private elementary or secondary school of the clearance or denial of clearance for employment. Any additional notifications would require a statutory change.

**COMMENT:** Two commentors have requested that SED continue and extend the time period for the public comment period, pursuant to Section 202(3) of the State Administrative Procedure Act (SAPA), so that additional notifications can be sent to as many nonpublic school parent groups as possible.

**RESPONSE:** The Department believes that publication of a Notice of Proposed Rule Making in the State Register on May 16, 2007 and the ensuing 45-day period for the Department's receipt of public comment (May 16th through July 2nd), pursuant to SAPA Section 202(1), provided sufficient opportunity for interested parties to comment upon the proposed rule. The commentors' assertion that the rule making is not widely known in the nonpublic school parent community is merely speculative, and nothing precludes the commentors, one of which is an unincorporated,

state-wide parent association, from taking appropriate measures to notify their constituency. Furthermore, there is no provision in SAPA that authorizes SED to extend the comment period after the Notice of Proposed is published. While SAPA section 202(4-a) provides for an additional 30 day public comment period upon filing of a Notice of Revised Rule Making, no revised rule has been filed with respect to this proposed rule making. SAPA section 202(3), cited by the commentors, is inapplicable to the proposed rule making since it relates to the extension of a rule making, rather than the 45-day public comment period, for an additional 90 days beyond the 365 day period after which a notice of rule making expires pursuant to SAPA section 202(2), provided a notice of revised rule making is submitted within 90 days of rule making's expiration date.

COMMENT: The regulations, if amended as proposed, merely extend the same criteria for clearance to participating private schools as have been in place for public schools. Some 75% of applicants for employment who have criminal records will be cleared. The school will not be informed of the existing conviction record.

RESPONSE: Chapter 630 of the Laws of 2006 authorizes nonpublic or private elementary or secondary schools to elect to have their prospective employees cleared for employment by the department, upon the department's review of the prospective employee's criminal history record. The proposed regulation does not establish different criteria than those currently prescribed for public schools, charter schools or boards of cooperative educational services for evaluating criminal histories for the purpose of clearance determinations. Different standards for nonpublic or private schools would require a statutory change.

Moreover, pursuant to Section 3035(1) of the Education Law, criminal history records sent to the commissioner shall be confidential pursuant to the applicable federal and state laws, rules and regulations, and shall not be published or in any way disclosed to persons other than the commissioner, unless authorized by law. There is no provision in law authorizing SED to notify a nonpublic or private school of a prospective employee's existing conviction record. This would require a statutory change.

COMMENT: The procedures enacted pursuant to Section 3035 of the Education Law have been in place for public schools for several years. It is clear that, by having SED be the sole authority to make the determination as to whether the applicant is suitable for employment, the legislature intended a certain uniformity to result statewide in the judgment calls as to the weight and applicability of the factors in Section 752 and 753 of the Corrections Law.

However, this is not necessarily the case regarding the newly-added entities, non-public and private schools. There is nothing in the new statutory language that prevents SED from enacting procedures that conform to the New York State public policy that countenances a broad diversity of programs and curriculum in private schools, a diversity that does not exist in the current public school scheme. The protection of the right of parent to have a child educated in a specific program is in fact one of the justifications for maintaining the licensing and legitimacy of non-public schools.

Many of the programs in private schools have a strong therapeutic component, or a highly emphasized religious component, that is absent in public schools. The degree to which these respective components can be conveyed with fidelity by all employees of the school can have a profound impact on the welfare of the students, according to the lights of the schools philosophy or credo. On the other hand, if it is clear that a specific applicant has evidenced a course of conduct contrary to the tenets of the private school, the risk to the welfare of the children he teaches can include emotional trauma even when such course of conduct would be innocuous in a public school setting.

RESPONSE: SED is required to make clearance determinations in accordance with Correction Law §§ 752 and 753. However, the fact that SED grants a clearance does not require the school to hire the individual. The clearance determination simply means that the individual is employable. The employer may still consider other employment factors when determining whether to hire an individual. The clearance determination simply means that there is nothing in the individual's criminal history which would serve as a bar to employment in that particular position in that particular setting.

Also, as stated above, pursuant to Section 3035(1) of the Education Law, criminal history records sent to the commissioner shall be confidential and there is no provision in law authorizing SED to notify the nonpublic or private school of the prospective employee's existing conviction record. This would require a statutory change.

COMMENT: SED should promulgate clearance procedures that allow each participating private school to specify to SED those convictions that,

in the school's judgment, make the applicant an acceptable risk to the welfare of its students. The schools could be asked to justify why the specific position applied for requires a person free of such conviction. Once this statement by the school has been accepted, it should be incumbent on SED to conduct the consideration of the factors set forth in Corrections Law Section 752 and 753 in light of the individual school's stated policy.

SED should design the regulation so as to recognize the right of the school - especially religious schools (which are exempt from the state's Human Rights Law) to require a self-disclosure statement of previous convictions to be filled out by the applicant. (Whether the regulations could or should permit this affidavit to be executed under the penalties of perjury is a question about which the legal community and participating schools should be polled). SED should consider whether the school could submit this form to SED so that it can be compared for veracity with the actual criminal history record received from the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation ("FBI").

RESPONSE: Chapter 630 of the Laws of 2006 requires SED to make clearance determinations pursuant to Correction Law §§ 752 and 753. There is no provision in the law to allow for any additional factors. Further, the fact that SED grants a clearance does not require the school to hire the individual. The clearance determination simply means that the individual is employable. The employer may still consider other employment factors when determining whether to hire an individual. The clearance determination simply means that there is nothing in the individual's criminal history which would serve as a bar to employment in that particular position in that particular setting.

COMMENT: One commentor noted that language in the proposed amendment authorizing SED to be able to consider "any related information obtained by the department pursuant to the review of an applicant's criminal history record" is beyond the scope of the authority conferred upon SED by Section 3035(2), (3) of the Education Law.

RESPONSE: Section 3035(3) of the Education Law specifically states that "[a]fter receipt of a criminal history record from the division of criminal justice services and the federal bureau of investigation the commissioner shall promptly notify the appropriate school district, charter school or board of cooperative educational services whether the prospective employee to which such report relates is cleared for employment based upon his or her criminal history." This statutory language authorizes SED to make a clearance determination based upon the prospective employee's criminal history.

Oftentimes when SED receives a criminal history record from DCJS and the FBI, the record is incomplete, i.e., dispositions for some or all of the charges against a prospective school employee do not appear. SED then needs to seek additional information from the court regarding the disposition of such charges in order to obtain the complete criminal history record for the prospective employee. If SED is unable to obtain the dispositions for these charges, then these "open" or "unresolved" charges will be considered as pending charges for clearance for employment determination purposes. In the absence of this proposed amendment, both the prospective employee and the school may be negatively impacted by unnecessarily subjecting the prospective employee to a lengthy due process review which will delay a clearance for employment in situations where the pending criminal charges appearing on the rap sheet have actually been dismissed or reduced. These missing dispositions are part of the applicant's criminal history and without them, SED does not have all the information needed to do the analysis required under Executive Law § 296(16) and Correction Law § 752 and 753.

Moreover, Education Law § 3035(3) states that if the Commissioner denies the clearance for employment, the applicant must be provided with notice and an opportunity to be heard and offer proof in opposition to such determination in accordance with the regulations. Section 87.5(a)(4)(viii) of the Regulations of the Commissioner was adopted to permit the Department, after the issuance of an intent to deny, to consider the applicant's criminal record and any related information obtained by the Department pursuant to the review of such criminal history record when the applicant timely submits a response to the intent to deny. The proposed language merely codifies SED's current practice of considering "related information" earlier on in the clearance process to provide the prospective employee with the opportunity to clear his or her name earlier on in the process and become employable as quickly as possible.

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

**Excelsior Scholars Program**

**I.D. No.** EDU-33-07-00012-P

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

**Proposed action:** Addition of sections 100.14 and 100.15 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2) and sections 3641-a(1), (2) and (3) and 3641-b (not subdivided), as added by L. 2007, ch. 57, part B, section 39

**Subject:** Excelsior Scholars Program and grants for summer institutes for mathematics and science teachers.

**Purpose:** To establish criteria for the award of grants for the Excelsior Scholars Program pursuant to Education Law, section 3641-a and grants for summer institutes for mathematics and science teachers pursuant to Education Law, section 3641-b.

**Text of proposed rule:** 1. Section 100.14 of the Regulations of the Commissioner of Education is added, effective November 15, 2007, as follows:

§ 100.14 *Excelsior scholars programs for grade seven mathematics and science students.*

(a) *Purpose.* The purpose of this section is to establish requirements for summer programs for high performing students in mathematics and science who have completed seventh grade that are offered pursuant to Education Law section 3641-a.

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

(1) "Advanced coursework" means advanced instruction in mathematics and science that leads to attainment of the State learning standards in mathematics and science at the commencement level.

(2) "Eligible student" means a student nominated by the superintendent to participate in a summer program administered pursuant to this section who:

(i) will have completed seventh grade prior to the start of such summer program;

(ii) has demonstrated distinguished work in mathematics and science as determined by multiple measures, including, but not limited to:

(a) the student has maintained a grade point average of 90 or above in mathematics and science in grades five, six and seven; and

(b) has scored at level four on the state assessment in mathematics in grades five and six;

(iii) has received recommendations from at least one teacher of mathematics and at least one teacher of science who have taught such student in grades five, six and/or seven; and

(iv) has written consent from a parent or person in parental relation to participate in such summer program following completion of seventh grade.

(3) "Excelsior scholars" means students who have successfully completed a summer program of advanced coursework during the summer following the completion of seventh grade administered in accordance with this section.

(4) "Other high performing student" means a student who meets the definition of eligible student in this section and has scored at level four on the state assessment in English language arts in grades five and six.

(5) "Centers of Excellence in Technology" shall include those centers identified through the State's economic development agency to support State research facilities and other technology and biotechnology capital projects.

(c) The superintendent may nominate up to ten percent of a school's eligible grade seven students to participate in the programs described in this section. The superintendent shall nominate equal numbers of male and female students, as practicable.

(d) Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities to administer summer programs as described in this section. Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include, but not be limited to, the following:

(1) a description of the process used to promote the Excelsior Scholars program among local school districts and to engage in student outreach;

(2) a description of the selection process and criteria, which shall be based on demonstrated academic achievement, used by the college or university to review and select eligible students and, where applicable, other high performing students, from those nominated for participation in the program. Such selection process and criteria shall ensure:

(i) the selection of students who have demonstrated the highest level of academic achievement in mathematics and science; and

(ii) a balanced number of male and female participants, as practicable;

(3) a description of the advanced coursework to be provided to such students, including how such coursework is aligned with the State learning standards;

(4) a description of the academic qualifications of the faculty who will provide the advanced coursework to students participating in the program, and programmatic capacity of the site and staff; and

(5) a description of the criteria to be used to determine whether such students have successfully completed the program.

(e) Competitive grants will be awarded to eligible public and independent colleges and universities to implement program(s) pursuant to this section based on, but not limited to, the following criteria:

(1) the provision of appropriate advanced coursework and the program's alignment with the State learning standards;

(2) the extent to which participation was solicited through student outreach and program promotion;

(3) the expertise of faculty and programmatic capacity of site and staff;

(4) coordination with programs offered by the centers of excellence in technology, to the extent practicable; and

(5) the availability of appropriated funds for such purpose.

2. Section 100.15 of the Regulations of the Commissioner of Education is added, effective November 15, 2007, as follows:

§ 100.15 *Summer institutes for mathematics and science teachers in middle grades five through eight.*

(a) *Purpose.* The purpose of this section is to establish requirements for a competitive grant program to public and independent colleges and universities offering teacher education programs, in partnership with school districts, to conduct summer institutes for teachers of mathematics and science pursuant to Education Law section 3641-b.

(b) Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities offering teacher education programs, registered pursuant to section 52.21 of this Title, that partner with school districts to conduct summer institutes for teachers of mathematics and science in grades five through eight in middle schools, junior high schools, intermediate schools or junior/senior high schools.

(1) Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include a description of how the program will advance the content knowledge and pedagogy of participating teachers in the areas of mathematics and science, including, but not limited to, how the program is:

(i) aligned to State learning standards for mathematics and science; and

(ii) aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this Part, to the extent practicable, as well as with other State and federal programs with similar purposes.

(2) Teachers shall be selected for participation in such summer institutes by principals who shall give priority to teachers who meet the following criteria:

(i) first and second year teachers of grades five through eight;

(ii) teachers who are changing assignments and would benefit from professional development to improve student learning; and

(iii) teachers who have been identified as needing additional professional development in building content knowledge in mathematics and science and understanding of pedagogy.

(c) Competitive grants will be awarded to public and independent colleges and universities submitting a proposal pursuant to subdivision (b) of this section based on, but not limited to, the following criteria:

(1) the program is aligned to the State learning standards for mathematics and science;

(2) the program is designed to advance the content knowledge and pedagogy of participating mathematics and science teachers based on local measures of need assessment;

(3) the program is aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this

*Part, to the extent practicable, as well as other State and federal programs with similar purpose; and*

*(4) priority is given, as practicable, to teachers in schools identified as schools in need of improvement, corrective action or restructuring status, schools under registration review or schools requiring academic progress.*

**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, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

### Regulatory Impact Statement

#### STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Board of Regents and the Commissioner to adopt rules and regulations to carry out laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 215 authorizes the Board of Regents, the Commissioner or their representatives to visit, examine, and inspect schools or other educational institutions, and require and verify reports from those entities.

Education law 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 3641-a, as added by Chapter 57 of the Laws of 2007, provides that the Commissioner shall establish an Excelsior Scholars program for grade seven mathematics and science students, and award grants on a competitive basis to public and independent colleges and universities to conduct summer programs providing advanced coursework in mathematics and science to students designated as Excelsior Scholars. The statute requires the Commissioner to prescribe by regulation the maximum number of students that may be nominated by each school, which shall include equal numbers of male and female students. The statute also provides that the Commissioner's regulations shall provide for coordination of the program with the centers for excellence in technology and the programs offered by such centers, to the extent practicable.

Education Law section 3641-b, as added by Chapter 57 of the Laws of 2007, provides that the Commissioner shall establish a program of competitively awarded grants to public and independent colleges and universities offering teacher education programs, in partnership with school districts, to conduct summer institutes for teachers of science and mathematics in grades five through eight in middle, junior high, intermediate or junior/senior high schools with priority given as practicable to teachers in schools identified as schools in need of improvement or in corrective action or restructuring status, schools under registration review or schools requiring academic progress. The institutes shall be designed to advance the content knowledge and pedagogy of participating science and mathematics teachers and shall, to the extent practicable, be aligned and integrated with programs offered to Excelsior Scholars pursuant to Education Law section 3641-a.

#### LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority of the Commissioner to establish criteria for the award of grants for the Excelsior Scholars program for high performing students in mathematics and science who have completed seventh grade and grants for summer institutes for teachers of mathematics and science in middle grades five through eight.

#### NEEDS AND BENEFITS:

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007. The proposed rule establishes criteria for the award of grants for the Excelsior Scholars summer programs for high performing students in mathematics and science who have completed

seventh grade, and grants for summer institutes for teachers of mathematics and science in grades five through eight in middle schools, junior high schools, intermediate schools or junior/senior high schools. Superintendents will be responsible for nominating students to participate in summer programs. Students who successfully complete such summer programs will be certified by the Governor of the State of New York as Excelsior Scholars. Principals will be responsible for nominating teachers of mathematics and science in middle grades five through eight to participate in summer institutes.

#### COSTS:

- (a) Costs to State government: None.
- (b) Costs to local government: None.
- (c) Costs to private regulated parties: None.
- (d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, and does not impose any additional costs beyond those inherent in the statute. Participation in the Excelsior Scholars program and the grant program for summer institutes for teachers of mathematics and science is voluntary.

#### LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, and does not impose any additional program, service, duty or responsibility on school districts or local governments. Participation in the Excelsior Scholars program and the grant program for summer institutes for teachers of mathematics and science is voluntary.

#### PAPERWORK:

The proposed rule provides the opportunity for superintendents to nominate students, and principals to nominate teachers, to participate in summer programs and institutes for mathematics and science, which necessitate the submission of written applications and supporting recommendations.

The superintendent of schools may nominate up to ten percent of a school's eligible grade seven students to participate in the Excelsior Scholars program. The superintendent shall nominate equal numbers of male and female students, as practicable.

Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities to administer an Excelsior Scholars program. Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include, but not be limited to, the following:

- (1) a description of the process used to promote the Excelsior Scholars program among local school districts and to engage in student outreach;
- (2) a description of the selection process and criteria, which shall be based on demonstrated academic achievement, used by the college or university to review and select eligible students and, where applicable, other high performing students, from those nominated for participation in the program. Such selection process and criteria shall ensure:
  - (i) the selection of students who have demonstrated the highest level of academic achievement in mathematics and science; and
  - (ii) a balanced number of male and female participants, as practicable;
- (3) a description of the advanced coursework to be provided to such students, including how such coursework is aligned with the State learning standards;
- (4) a description of the academic qualifications of the faculty who will provide the advanced coursework to students participating in the program, and programmatic capacity of the site and staff; and
- (5) a description of the criteria to be used to determine whether such students have successfully completed the program.

Teachers shall be selected for participation in summer institutes for teachers of mathematics and science for middle grades five through eight by principals who shall give priority to teachers who meet the following criteria:

- (1) first and second year teachers of grades five through eight;
- (2) teachers who are changing assignments and would benefit from professional development to improve student learning; and
- (3) teachers who have been identified as needing additional professional development in building content knowledge in mathematics and science and understanding of pedagogy.

Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and

independent colleges and universities offering teacher education programs, registered pursuant to section 52.21 of this Title, that partner with school districts to conduct summer institutes for teachers of mathematics and science in grades five through eight in middle schools, junior high schools, intermediate schools or junior/senior high schools.

(1) Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include a description of how the program will advance the content knowledge and pedagogy of participating teachers in the areas of mathematics and science, including, but not limited to, how the program is:

- (i) aligned to State learning standards for mathematics and science; and
- (ii) aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this Part, to the extent practicable, as well as with other State and federal programs with similar purposes.

Participating colleges and universities awarded grant funding may require additional paperwork from districts depending on the recruitment, design, and implementation of the programs and institutes.

**DUPLICATION:**

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, and does not duplicate existing State or federal regulations.

**ALTERNATIVES:**

There are no significant alternatives and none were considered.

**FEDERAL STANDARDS:**

There are no related federal standards.

**COMPLIANCE SCHEDULE:**

School districts, colleges, and universities will be given the opportunity to comply with a schedule based upon adoption of the regulations in October 2007 and issuance of the related request for proposal (RFP). It is anticipated the RFP will be issued in the fall of 2007, contracts will be awarded in late 2007 or early 2008, recruitment of participants will occur in early 2008, and programs will run in the summer of 2008.

**Regulatory Flexibility Analysis**

**Small businesses:**

The proposed rule establishes requirements for the Excelsior Scholars program for high performing students in mathematics and science who have completed seventh grade pursuant to Education Law section 3641-a, and requirements for the grant program for Summer Institutes for Mathematics and Science Teachers in grades five through eight in middle, junior high, intermediate or junior/senior high schools pursuant to Education Law section 3641-b. The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small business, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local government:**

**EFFECT OF RULE:**

The proposed rule applies to all public school districts within the state who choose to partner with public and independent colleges and universities for purposes of conducting an Excelsior Scholars program pursuant to Education Law section 3641-a and/or conducting a Summer Institute for Mathematics and Science Teachers pursuant to Education Law section 3641-b.

**COMPLIANCE REQUIREMENTS:**

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, by establishing criteria for the Excelsior Scholars summer programs for high performing students in mathematics and science who have completed seventh grade, and for the grant program for Summer Institutes for Mathematics and Science Teachers. The proposed rule does not impose any additional reporting, record keeping or other compliance requirements on school districts. Participation in the Excelsior Scholars program and the grant program for Summer Institutes for Mathematics and Science Teachers is voluntary.

The proposed rule provides the opportunity for superintendents to nominate students, and principals to nominate teachers, to participate in summer programs and institutes for mathematics and science, which necessitate the submission of written applications and supporting recommendations.

The superintendent of schools may nominate up to ten percent of a school's eligible grade seven students to participate in the Excelsior Schol-

ars program. The superintendent shall nominate equal numbers of male and female students, as practicable.

Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities to administer an Excelsior Scholars program. Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include, but not be limited to, the following:

- (1) a description of the process used to promote the Excelsior Scholars program among local school districts and to engage in student outreach;
- (2) a description of the selection process and criteria, which shall be based on demonstrated academic achievement, used by the college or university to review and select eligible students and, where applicable, other high performing students, from those nominated for participation in the program. Such selection process and criteria shall ensure:
  - (i) the selection of students who have demonstrated the highest level of academic achievement in mathematics and science; and
  - (ii) a balanced number of male and female participants, as practicable;
- (3) a description of the advanced coursework to be provided to such students, including how such coursework is aligned with the State learning standards;
- (4) a description of the academic qualifications of the faculty who will provide the advanced coursework to students participating in the program, and programmatic capacity of the site and staff; and
- (5) a description of the criteria to be used to determine whether such students have successfully completed the program.

Teachers shall be selected for participation in Summer Institutes for Mathematics and Science Teachers by principals who shall give priority to teachers who meet the following criteria:

- (1) first and second year teachers of grades five through eight;
- (2) teachers who are changing assignments and would benefit from professional development to improve student learning; and
- (3) teachers who have been identified as needing additional professional development in building content knowledge in mathematics and science and understanding of pedagogy.

Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities offering teacher education programs, registered pursuant to section 52.21 of this Title, that partner with school districts to conduct Summer Institutes for Mathematics and Science Teachers in grades five through eight in middle schools, junior high schools, intermediate schools or junior/senior high schools.

(1) Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include a description of how the program will advance the content knowledge and pedagogy of participating teachers in the areas of mathematics and science, including, but not limited to, how the program is:

- (i) aligned to State learning standards for mathematics and science; and
- (ii) aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this Part, to the extent practicable, as well as with other State and federal programs with similar purposes.

Participating colleges and universities awarded grant funding may require additional paperwork from districts depending on the recruitment, design, and implementation of the programs and institutes.

**PROFESSIONAL SERVICES:**

The proposed rule imposes no additional professional services requirements on school districts.

**COMPLIANCE COSTS:**

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, and does not impose any additional costs on school districts beyond those inherent in the statute. Participation in the Excelsior Scholars program and the grant program for Summer Institutes for Mathematics and Science Teachers is voluntary.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed rule imposes no additional costs or new technological requirements on school districts.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, by establishing requirements for the Excelsior Scholars summer programs for high performing students in mathematics and science who have completed seventh grade, and requirements for Summer Institutes for Mathematics and Science Teachers for

middle grades five through eight. The proposed rule does not impose any additional reporting, record keeping or other compliance requirements or costs on school districts. Participation in the Excelsior Scholars program and the grant program for Summer Institutes for Mathematics and Science Teachers is voluntary.

#### LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

#### *Rural Area Flexibility Analysis*

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

The proposed rule applies to all public school districts and public and independent colleges and universities within the State who choose to participate in an Excelsior Scholars program pursuant to Education Law section 3641-a and/or a Summer Institute for Mathematics and Science Teachers pursuant to Education Law section 3641-b, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, by establishing criteria for the Excelsior Scholar summer program for high performing students in mathematics and science who have completed seventh grade, and for the grant program for Summer Institutes for Mathematics and Science Teachers in grades five through eight in middle, junior high, intermediate or junior/senior high schools. The proposed rule does not impose any additional reporting, record keeping or other compliance requirements on school districts in rural areas. Participation in the Excelsior Scholars program and the grant program for Summer Institutes for Mathematics and Science Teachers is voluntary. The proposed rule imposes no new professional services requirements on school districts in rural areas.

The proposed rule provides the opportunity for superintendents to nominate students, and principals to nominate teachers, to participate in summer programs and institutes for mathematics and science, which necessitate the submission of written applications and supporting recommendations.

The superintendent of schools may nominate up to ten percent of a school's eligible grade seven students to participate in the Excelsior Scholar program. The superintendent shall nominate equal numbers of male and female students, as practicable.

Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities to administer an Excelsior Scholars program. Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include, but not be limited to, the following:

(1) a description of the process used to promote the Excelsior Scholars program among local school districts and to engage in student outreach;

(2) a description of the selection process and criteria, which shall be based on demonstrated academic achievement, used by the college or university to review and select eligible students and, where applicable, other high performing students, from those nominated for participation in the program. Such selection process and criteria shall ensure:

(i) the selection of students who have demonstrated the highest level of academic achievement in mathematics and science; and

(ii) a balanced number of male and female participants, as practicable;

(3) a description of the advanced coursework to be provided to such students, including how such coursework is aligned with the State learning standards;

(4) a description of the academic qualifications of the faculty who will provide the advanced coursework to students participating in the program, and programmatic capacity of the site and staff; and

(5) a description of the criteria to be used to determine whether such students have successfully completed the program.

Teachers shall be selected for participation in Summer Institutes for Mathematics and Science Teachers by principals who shall give priority to teachers who meet the following criteria:

(1) first and second year teachers of grades five through eight;

(2) teachers who are changing assignments and would benefit from professional development to improve student learning; and

(3) teachers who have been identified as needing additional professional development in building content knowledge in mathematics and science and understanding of pedagogy.

Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities offering teacher education programs, registered pursuant to section 52.21 of this Title, that partner with school districts to conduct Summer Institutes for Mathematics and Science Teachers in grades five through eight in middle schools, junior high schools, intermediate schools or junior/senior high schools.

(1) Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include a description of how the program will advance the content knowledge and pedagogy of participating teachers in the areas of mathematics and science, including, but not limited to, how the program is:

(i) aligned to State learning standards for mathematics and science; and

(ii) aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this Part, to the extent practicable, as well as with other State and federal programs with similar purposes.

Participating colleges and universities awarded grant funding may require additional paperwork from districts depending on the recruitment, design, and implementation of the programs and institutes.

#### COMPLIANCE COSTS:

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, and does not impose any additional costs on school districts beyond those inherent in the statute. Participation in the Excelsior Scholars program and the grant program for Summer Institutes for Mathematics and Science Teachers is voluntary.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law sections 3641-a(1), (2) and (3) and 3641-b, as added by section 39 of Part B of Chapter 57 of the Laws of 2007, by establishing requirements for the Excelsior Scholars summer programs for high performing students in mathematics and science who have completed seventh grade, and requirements for Summer Institutes for Mathematics and Science Teachers. Because the proposed rule implements statutory provisions that are applicable to school districts across the State, it was not possible to provide for a lesser standard or an exemption for school districts in rural areas. The proposed rule does not impose any additional reporting, record keeping or other compliance requirements or costs on school districts. Participation in the Excelsior Scholars program and the grant program for Summer Institutes for Mathematics and Science Teachers is voluntary.

#### RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

#### *Job Impact Statement*

The proposed rule relates to the establishment of requirements for the Excelsior Scholars program for high performing students in mathematics and science who have completed seventh grade, and requirements for grants for Summer Institutes for Mathematics and Science Teachers in grades five through eight in middle, junior high, intermediate or junior/senior high schools, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the proposed rule that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Department of Environmental Conservation

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### NOTICE OF WITHDRAWAL

**New Major Facilities and Major Modifications to Existing Facilities**

I.D. No. ENV-36-06-00012-W

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

**Action taken:** Notice of proposed rule making, I.D. No. ENV-36-06-00012-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on September 6, 2006.

**Subject:** Requirements for proposed new major facilities and major modifications to existing facilities located in attainment and nonattainment areas of the State.

**Reason(s) for withdrawal of the proposed rule:** The department has made substantial revisions to the original proposal and, therefore, has decided to withdraw the notice of proposed rule making originally published in the *State Register* on Sept. 6, 2006, and publish a new notice of proposed rule making.

## Insurance Department

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

#### Rules Relating to the Processing of Claims

**I.D. No.** INS-33-07-00003-P

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

**Proposed action:** Addition of Part 56 (Regulation 183) to Title 11 NYCRR.

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

**Subject:** Rules relating to the processing of claims.

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

**Text of proposed rule:** A new Part 56 is added to read as follows:

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

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

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

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

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

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

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

*Section 56.3 Claim review requirements for surgical services.*

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

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

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

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

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

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

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

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

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

(f). *Common Procedural Terminology (CPT code) and Description*  
11200 Removal of skin tags, multiple fibrocuteaneous tags, any area; up to and including 15 lesions

11201 Removal of skin tags; each additional 10 lesions

11950 Subcutaneous injection of filling material (eg, collagen); 1 cc or less

11951 Subcutaneous injection of filling material (eg, collagen); 1.1 to 5.0 cc

11952 Subcutaneous injection of filling material (eg, collagen); 5.1 to 10.0 cc

11954 Subcutaneous injection of filling material (eg, collagen); over 10.0 cc

15775 Punch graft for hair transplant; 1 to 15 punch grafts

15776 Punch graft for hair transplant; more than 15 punch grafts

15780 Dermabrasion; total face (e.g. for acne scarring, fine wrinkling, rhytids, general keratosis)

15781 Dermabrasion, segmental, face

15782 Dermabrasion, regional, other than face

15783 Dermabrasion, superficial, any site, (eg, tattoo removal)

15786 Abrasion; single lesion (eg, keratosis, scar)

15787 Abrasion; each additional four lesions or less

15788 Chemical peel, facial; epidermal

15789 Chemical peel, facial; dermal

15790 Chemical peel; total face

15791 Chemical peel; face, hand or elsewhere

15792 Chemical peel, nonfacial; epidermal

15793 Chemical peel, nonfacial; dermal

15810 Salabrasion; 20 sq cm or less

15811 *Salabrasion; over 20 sq cm*  
 15819 *Cervicoplasty*  
 15820 *Blepharoplasty, lower eyelid;*  
 15821 *Blepharoplasty, lower eyelid; with extensive herniated fat pad*  
 15824 *Rhytidectomy; forehead*  
 15825 *Rhytidectomy; neck with platysmal tightening (platysmal flap, P-flap)*  
 15826 *Rhytidectomy; glabellar frown lines*  
 15828 *Rhytidectomy; cheek, chin, and neck*  
 15829 *Rhytidectomy; superficial musculoaponeurotic system (SMAS) flap*  
 15832 *Excision, excessive skin and subcutaneous tissue (including lipectomy); thigh*  
 15833 *Excision, excessive skin and subcutaneous tissue (including lipectomy); leg*  
 15834 *Excision, excessive skin and subcutaneous tissue (including lipectomy); hip*  
 15835 *Excision, excessive skin and subcutaneous tissue (including lipectomy); buttock*  
 15836 *Excision, excessive skin and subcutaneous tissue (including lipectomy); arm*  
 15837 *Excision, excessive skin and subcutaneous tissue (including lipectomy); forearm or hand*  
 15838 *Excision, excessive skin and subcutaneous tissue (including lipectomy); submental fat pad*  
 15839 *Excision, excessive skin and subcutaneous tissue (including lipectomy); other area*  
 15876 *Suction assisted lipectomy; head and neck*  
 15877 *Suction assisted lipectomy; trunk*  
 15878 *Suction assisted lipectomy; upper extremity*  
 15879 *Suction assisted lipectomy; lower extremity*  
 17340 *Cryotherapy (CO2 slush, liquid N2) for acne*  
 17360 *Chemical exfoliation for acne (eg, acne paste, acid)*  
 17380 *Electrolysis epilation, each = hour*  
 19316 *Mastopexy*  
 19355 *Correction of inverted nipples*  
 21120 *Genioplasty; augmentation (autograft, allograft, prosthetic material)*  
 30430 *Rhinoplasty, secondary; minor revision (small amount of nasal tip work)*  
 36468 *Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); limb or trunk*  
 36469 *Single or multiple injections of sclerosing solutions, spider veins (telangiectasia); face*  
 36470 *Injection of sclerosing solution; single vein*  
 36471 *Injection of sclerosing solution; multiple veins, same leg*  
 69090 *Ear piercing*  
 69300 *Otoplasty, protruding ear, with or without size reduction*  
 S0800 *Laser in situ keratomileusis*  
 S0810 *Photorefractive keratectomy*  
 S0812 *Phototherapeutic keratectomy*  
 65760 *Keratomileusis*  
 65765 *Keratophakia*  
 65767 *Epikeratoplasty*  
 65771 *Radial keratotomy*  
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**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

**Data, views or arguments may be submitted to:** Lisette Johnson, Insurance Department, Health Bureau, One Commerce Plaza, Albany, NY 12257, (518) 474-4098, e-mail: ljohnson@ins.state.ny.us

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

#### **Consolidated Regulatory Impact Statement**

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

Sections 201 and 301 authorize the Superintendent to effectuate any power granted to the Superintendent under the Insurance Law, and to prescribe forms or otherwise make regulations.

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

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

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

Section 4235 establishes requirements for group accident and health insurance.

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

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

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

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

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

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

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

To address the concerns of health plans that certain procedures usually considered cosmetic would be subject to the utilization review and external review requirements when medical information is not submitted, Part 56 further provides that a request for coverage of surgery, other than a request for pre-authorization, that is solely identified by a code on a designated list, and is submitted without medical information, may be denied by a health plan without subjecting the request to Title I and Title II of Article 49 of

the Insurance Law and Public Health Law. However, if a request for surgery identified by a code on the designated list is submitted with medical information, or as a preauthorization request, then the Article 49 utilization review process must be followed to adjudicate the claim. In addition, if the automatic denial process is used for the designated codes, the denial must explain that the insured may request a medical necessity review and submit medical information, in which case the plan must review as a utilization review appeal and provide external appeal rights.

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

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

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

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

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

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

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

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

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

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

9. **Federal Standards:** The U.S. Department of Labor Claims Payment Regulation, 29 C.F.R. 2560.503 issued pursuant to the Employee Retirement Income Security Act (ERISA) creates federal standards for the treat-

ment of medical necessity denials and the processing of such claims. However, the federal regulation does not include standards for surgical services. Therefore, these regulatory actions do not effect, modify, or duplicate any existing federal standards.

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

#### **Consolidated Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

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

2. **Reporting, Recordkeeping and Other Compliance Requirements, and Professional Services:** Insurance companies and HMOs may have to modify their claim processing procedures and/or make new filings to the Insurance Department to conform to the regulations. No professional services will be necessary to comply with the proposed rule. Health care providers and consumers requesting coverage of certain procedures usually considered to be cosmetic, other than for requests involving preauthorization, will need to submit medical information, if not previously submitted. However, current law permits insurers and HMOs to

request information from providers and consumers in order to make coverage determinations.

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

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

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

#### **Consolidated Job Impact Statement**

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

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

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

**I.D. No.** INS-33-07-00004-P

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

**Proposed action:** Amendment of section 52.16(c)(5) (Regulation 62) of Title 11 NYCRR.

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

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

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

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

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

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

**Data, views or arguments may be submitted to:** Lisette Johnson, Insurance Department, Health Bureau, One Commerce Plaza, Albany, NY 12257, (518) 474-4098, e-mail: ljohnson@ins.state.ny.us

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

#### **Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. INS-33-07-00003-P, Issue of August 15, 2007.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. INS-33-07-00003-P, Issue of August 15, 2007.

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

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was

previously printed under a notice of proposed rule making, I.D. No. INS-33-07-00003-P, Issue of August 15, 2007.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. INS-33-07-00003-P, Issue of August 15, 2007.

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## **Interest on Lawyer Account Fund**

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### **NOTICE OF ADOPTION**

#### **Trustees' Regulations and Procedures**

**I.D. No.** IOL-22-07-00020-A

**Filing No.** 806

**Filing date:** July 31, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Repeal of Part 7000 and addition of new Part 7000 to Title 21 NYCRR.

**Statutory authority:** State Finance Law, section 97-v; and Judiciary Law, section 497

**Subject:** Standards for IOLA accounts.

**Purpose:** To revise the standards for IOLA accounts.

**Text of final rule:** The existing Part 7000 of 21 NYCRR is repealed and a new Part 7000 is adopted as follows:

#### **CHAPTER LXIX. INTEREST ON LAWYER ACCOUNT FUND PART 7000**

##### **TRUSTEES' REGULATIONS AND PROCEDURES**

##### **Section 7000.1 Purpose of fund.**

*The purpose of the Interest on Lawyer Account Fund is to provide funding for providers of civil legal services in order to ensure effective access to the judicial system for all citizens of the State and to provide stable, economical and high quality delivery of civil legal services to the poor throughout the State. The fund is authorized to receive funds from any source for disbursement to nonprofit legal services providers for charitable purposes, including the delivery of legal services in civil matters to poor persons. The fund will receive interest or dividends earned by qualified client funds held by attorneys in unsegregated interest-bearing or dividend-bearing accounts at banking institutions to the extent that such institutions choose to offer and receive the benefits of providing IOLA accounts, and will utilize the interest or dividends so received for the above-stated purposes.*

##### **Section 7000.2 Definitions.**

(a) *Banking institutions are banks, trust companies, savings banks, savings and loan associations, credit unions or foreign banking corporations whether incorporated, chartered, organized or licensed under the laws of this State or the United States, provided that such banking institutions have a banking office in this State.*

(b) *Eligible bank or eligible banking institution means a banking institution that maintains IOLA accounts that comply with section 497 of the New York Judiciary Law, section 97-v of the New York State Finance Law and the criteria provided in these regulations, and has been approved by the Board of Trustees to maintain IOLA accounts.*

(c) *Funds received in a fiduciary capacity are funds received by an attorney or a law firm from a client or third person in the course of the practice of law, including but not limited to funds received in an escrow capacity, but not including funds received as trustee, executor, administrator, guardian or receiver in bankruptcy.*

(d) *Interest on Lawyer Account or IOLA account means an unsegregated interest-bearing or dividend-bearing account, as approved by the Board of Trustees of the IOLA fund, maintained in an eligible bank for the deposit by an attorney or law firm as a fiduciary of qualified funds.*

(e) *Qualified funds are moneys received by an attorney or a law firm in a fiduciary capacity from a client or a third person and which, in the sole*

discretion and judgment of the attorney or law firm, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient income to justify the expense of administering a segregated account for the benefit of the client or third person and cannot earn income for a client or third person in excess of the costs incurred to secure such income. Qualified funds do not include those moneys which are deposited for the particular client or client's matter on which the interest will be paid to the client or an interest-bearing trust account at a banking institution with provision by the bank or by the depositing attorney or law firm for computation of interest earned by the client funds and the payment thereof to the client.

(f) New York Interest on Lawyer Account fund or IOLA fund means the fiduciary fund established by subdivision (1) of section 97-v of the New York State Finance Law and administered by the IOLA Board of Trustees.

(g) IOLA board of trustees, board of trustees or board means the body of individuals appointed by the Governor pursuant to subdivision (2) of section 97-v of the New York State Finance Law that is authorized to administer the IOLA fund.

#### Section 7000.3 Organization.

(a) The IOLA fund shall be administered by a board of trustees appointed by the Governor.

(b) The board of trustees shall consist of 15 members, at least eight of whom shall be attorneys licensed to practice in New York. Two of the appointments, at least one of whom shall be an attorney, shall be appointed on the recommendation of the President of the Senate; two of the appointments, at least one of whom shall be an attorney, shall be appointed on the recommendation of the Speaker of the Assembly; one appointment shall be on the recommendation of the Minority Leader of the Senate and one on the recommendation of the Minority Leader of the Assembly. Two of the appointments, both of whom shall be attorneys, shall be appointed on the recommendation of the Court of Appeals. The Governor shall designate one member of the board as chair. No member of the Senate or Assembly shall be eligible to serve as a member of the board.

(c) The term of a trustee shall be three years. Of the trustees first appointed, five shall be appointed for terms expiring December 31, 1984; five shall be appointed for terms expiring December 31, 1985; and five shall be appointed for terms expiring December 31, 1986. As each term expires, each new appointment shall be for a term of three years. Vacancies shall be filled in the manner of the original appointment for the remainder of the term.

(d) The trustees shall employ an executive director to serve as the chief administrative officer of the fund.

(e) The trustees shall serve without compensation, but shall be entitled to receive their actual and necessary expenses incurred in the discharge of their duties.

#### Section 7000.4 Meetings.

(a) The trustees shall meet at least quarterly each year at such locations, and in such manner, as the chair shall designate. Special meetings may be called by the chair, and shall be called by the chair upon the request of at least four trustees. The chair shall provide reasonable notice of all meetings.

(b) Eight trustees shall constitute a quorum. A majority of the trustees present at any meeting of the board may exercise any powers held by the trustees, except as otherwise provided in this Part.

#### Section 7000.5 Powers and duties of trustees.

(a) In the exercise of the authority granted the trustees, the trustees have the power to:

(1) receive, hold and distribute the moneys remitted to the IOLA fund pursuant to the provisions of section 497 of the Judiciary Law and to receive such other moneys and property received from any source, including voluntary contributions, together with any interest accrued thereon. All such revenue not distributed shall be secured and invested as required by the provisions of sections 97-v and 98 of the State Finance Law;

(2) require eligible banking institutions that apply to be considered eligible to accept the deposit of IOLA funds to verify their current compliance with New York Judiciary Law 497, New York State Finance Law 97-v and these regulations and determine eligibility for the deposit of IOLA funds;

(3) make available to the public the names of eligible banking institutions;

(4) allocate no less than 75 percent of the net funds distributed after covering administrative expenses in any fiscal year as grants and contracts to not-for-profit tax-exempt "qualified legal services providers," as defined by section 7000.12(a)(1) of this Part, for the provision of civil legal services to the poor allocated according to the geographic distribution of

poor persons throughout the State based on the latest available figures from the United States Department of Commerce, Bureau of Census;

(5) allocate the remaining funds to "administration of justice providers," as defined by section 7000.12(a)(2) of this Part, for purposes related to the improvement of the administration of justice, including but not limited to the provision of civil legal services to groups currently underserved by legal services, such as the elderly and the disabled, and the enhancement of civil legal services to the poor through innovative and cost-effective means, such as volunteer lawyer programs and support and training services;

(6) adopt and amend regulations for the administration of the fund and procedures for the distribution of grants and contracts;

(7) review applications for grants and contracts using staff and other available resources;

(8) determine, pursuant to the provisions of section 97-v of the State Finance Law, the award of grants and contracts, including the amount to be awarded and the terms under which the awards of grants and contracts shall be made;

(9) employ and remove, at their pleasure, employees, agents and consultants and fix their compensation within the amounts available therefor, but in no event shall more than 10 percent of the funds available in any fiscal year be spent on personnel and related services, including necessary nonpersonnel administrative costs of the program; provided, however, that pursuant to section 97-v of the State Finance Law as amended by the Laws of 1984, such limitation may be waived by the board of trustees by the adoption of a resolution, and such waiver shall remain in effect until the board determines by a subsequent resolution that the program is fully operational;

(10) furnish the Governor, the Court of Appeals, the Legislature and the State Comptroller with an annual report of the activities and operations of the fund; and

(11) perform all other acts necessary or proper for the fulfillment of the purpose of the fund and its effective administration, including but not limited to the creation of subcommittees of the board and the appointment of officers other than chair.

(b) Powers and duties of officers. The duties of the officers of the fund shall be as follows:

(1) the chair shall preside at all meetings of the trustees, generally supervise the administration of the fund and exercise such other functions and duties that the trustees may assign or delegate, or that are customary to the office of the chair;

(2) the vice-chair shall assume the duties of the chair in the absence or disability of the chair;

(3) the treasurer shall maintain the financial records of the fund and, jointly with the chair, certify vouchers of the fund that authorize the State Comptroller to make payments of grants and contracts; and

(4) the executive director shall assist the trustees, supervise the implementation of regulations, coordinate the review of applications, supervise staff, serve as secretary at meetings and fulfill such other duties as may be assigned or delegated by the chair or the trustees.

#### Section 7000.6 Conflict of interest.

A trustee with a past or present affiliation with an applicant (including employee, officer, director, trustee, counsel or business relationship) for distribution of funds shall declare such affiliation to the trustees, and that trustee shall not participate in a vote on any matter relating directly to such applicant.

#### Section 7000.7 Reports.

(a) On or after the first day of April each year, the trustees shall prepare an annual report of the activities and operations of the fund during the preceding year. The report shall be transmitted to the Governor, the Legislature, the Court of Appeals and the State Comptroller.

(b) The trustees may issue periodic reports to the public concerning the activities and procedures of the fund.

Section 7000.8 Establishment of IOLA accounts by attorneys and law firms.

(a) Participation in IOLA is mandatory. Each attorney or law firm that receives qualified funds shall establish and maintain an IOLA account in an eligible banking institution of the attorney's or law firm's choosing. An attorney or law firm which receives qualified funds in the course of its practice of law and establishes and maintains an IOLA account shall (i) designate the account as "(name of attorney/law firm IOLA account)" with the approval of the banking institution and (ii) notify the IOLA fund within 30 days of establishing the IOLA account of the account number and the name and address of the eligible banking institution where the account is deposited. Such attorney or law firm:

(1) shall have discretion, in accordance with the code of professional responsibility, to determine whether moneys received by the attorney or law firm in a fiduciary capacity from a client or third person shall be deposited in a nonsegregated IOLA account;

(2) shall, if in the judgment of the attorney or law firm any moneys received are qualified funds, deposit such funds in an IOLA account;

(3) shall, ordinarily, in determining the type of account into which to deposit particular funds held for a client or third person, take into consideration the following factors:

(i) the amount of the funds received, the interest or dividends the funds would earn during the period they are expected to be deposited, the expected duration of the deposit, the rates of interest or yield and service charges or fees at a banking institution where the funds may be deposited;

(ii) the cost of establishing and administering non-IOLA accounts for clients or third persons, including the cost of the lawyer or law firm's services, and including the cost of obtaining tax identification information, the necessity or propriety of completing tax reports and forms, and remitting interest to a client;

(iii) the capability of the banking institution, or attorney or law firm, to calculate and pay interest earned by each client's fund, net of any service charges, fees or other applicable costs, to the particular clients, including through the use of subaccounting;

(iv) any other circumstances that affect the ability of the funds to earn income for a client or third person in excess of the costs incurred to secure such income while the funds are held.

(b) Notwithstanding the deposit requirements of this subdivision, no attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys into an IOLA account pursuant to the attorney's good faith judgment that such moneys were qualified funds.

(c) Attorneys with accounts in a financial institution which ceases for any reason to be an eligible banking institution for IOLA accounts shall move such accounts to an eligible banking institution.

(d) An attorney or law firm that establishes that compliance with the foregoing provisions of this section has resulted in any banking service charges or fees to such attorney or law firm shall be entitled to reimbursement of such charges or fees from the interest on the IOLA account of such attorney or law firm by filing a claim with supporting documentation with the IOLA fund within 90 days of the imposition of such charges or fees, as approved by the Board. In no event, however, shall the attorney or law firm be entitled to reimbursement in excess of the interest earned by such IOLA account.

#### Section 7000.9 Interest and dividends.

(a) To be considered presumptively eligible for the deposit of IOLA funds, an IOLA account shall pay an interest or dividend rate on IOLA accounts which is not less than the highest rate available among the following types of accounts, as paid by the banking institution to its best customers on accounts maintained at that institution which are determined to be similar to its IOLA accounts:

(1) A money market account with or tied to check writing capability;

(2) A government (such as for municipal deposits) checking account;

(3) An open-end money market fund investment offered through the banking institution that is (i) tied to check writing capability at the institution, (ii) and which fund is solely invested in, or fully collateralized by, U.S. Government securities and (iii) has total assets of at least \$250,000,000; or

(4) Any other interest- or dividend-paying product with or tied to check-writing capability at the institution.

(b) As alternatives to the foregoing, the institution requesting designation by the trustees of an account as eligible to accept the deposit of IOLA funds may offer:

(1) 60% of the Federal Funds Target Rate paid on an interest-bearing checking account; or

(2) A yield specified by the IOLA fund, if it so chooses, which is agreed to by the financial institution and would be in effect for a period to be mutually agreed upon.

(c) The following additional provisions are applicable. As indicated by their terms, some apply only to one or some of the options set forth above.

(1) The Federal Funds Target Rate referenced in paragraph (1) of subdivision (b) shall be calculated as of the first day of each month.

(2) A bank may elect to offer the highest rates that it pays on government or high-yield money market accounts on another qualifying IOLA checking account, instead of actually offering such account.

(3) Institutions may elect to pay a higher interest or dividend rate than provided for in this section.

(4) All participating financial institutions shall report, in the form and manner prescribed by the IOLA fund, on the best rate paid to their best customers for each of the types of accounts they offer within the definitions specified in paragraphs (1) through (4) of subdivision (a) above. To enable attorneys and law firms to open and maintain an IOLA account, an eligible banking institution shall, within 60 days of the effective date of these regulations and as requested thereafter, provide to the IOLA board information that demonstrates compliance with the provisions of this section.

(5) Where there is reasonable cause to believe a financial institution is willfully misrepresenting its best rate information, the IOLA fund may condition continued approval status on a finding by the institution's auditor that its certifications have been accurate.

(d) The IOLA Board shall periodically monitor the effectiveness of this standard.

#### 7000.10 Eligible banking institutions.

With respect to IOLA accounts, eligible banking institutions that choose to offer, establish, accept or maintain IOLA accounts:

(a) shall have no duty to inquire or determine whether deposits consist of qualified funds;

(b) shall charge only equitable service charges or fees against the interest earned on IOLA accounts which shall not be greater than it imposes on similar accounts maintained at the institution and shall be limited to per check charges, per deposit charges, monthly maintenance fees, a fee in lieu of a minimum balance, federal deposit insurance fees, or a service charge for the preparation and issuance of reports required by this section, as approved by the trustees of the fund. All other fees for special services requested by the account-holder are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLA account;

(c) may elect to waive any charges or fees on IOLA accounts;

(d) shall remit at least quarterly any interest earned on IOLA accounts to the IOLA fund, after deduction of equitable service charges or fees, if any;

(e) shall not take any equitable service charges or fees in excess of the interest or dividends earned on an IOLA account for any month or quarter from interest or dividends earned on another IOLA account or from the principal of the account and such charges or fees in excess of the interest or dividends earned on an IOLA account may be carried over to the next remitting periods and deducted from interest or dividends earned in such account;

(f) shall transmit to the IOLA fund with each remittance a report that shall identify each lawyer or law firm for whom the remittance is sent, the amount of remittance attributable to each IOLA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average balance for each IOLA account for the period in which the report is made;

(g) shall transmit to each attorney or law firm who maintains an IOLA account a report in accordance with the normal procedures for reporting to its depositors;

(h) shall have no liability for any claims by any person or entity for payments from an IOLA account to or upon the order of the attorney or law firm maintaining the account;

(i) shall have no liability for any claims by any person or entity for any remittance of interest to the IOLA fund pursuant to the provisions of section 97-v of the State Finance Law; and

(j) shall not be subject to any action solely by reason of its opening, offering or maintaining an IOLA account, accepting any funds for deposit to any such accounts or remitting any interest to the IOLA fund. If in the sole discretion of the board of trustees of the IOLA fund, a banking institution has, because of a mistake of fact, error in calculation or erroneous interpretation of section 97-v of the State Finance Law, section 497 of the Judiciary Law or of this Part, remitted to the IOLA fund any moneys not required by such provision to be remitted, the board of trustees shall refund such moneys upon application of any aggrieved party. Any such refund shall be paid from the IOLA fund without interest and without the deduction of any service charge and shall constitute a full satisfaction and discharge of any claim for such refund.

#### Section 7000.11 Confidentiality.

(a) All records, documents or other information identifying an attorney or law firm, client or third person of an IOLA account shall be confidential and shall not be disclosed by a banking institution except with the consent of the attorney or law firm maintaining the account or as required by law, regulation, administrative requirement or compulsory legal process.

(b) The board of trustees shall maintain all papers, records, documents or other information identifying an attorney or law firm, client or third

person of an IOLA account on a private and confidential basis, and shall not disclose such information unless such disclosure is (1) necessary to accomplish the purposes of section 497 of the Judiciary Law and section 97-v of the State Finance Law or (2) made pursuant to compulsory legal process.

Section 7000.12 Qualified recipients.

(a) Qualified recipients shall be not-for-profit entities, tax-exempt under section 501(a) of the Internal Revenue Code, or any successor provision, eligible to receive distributions of IOLA funds pursuant to one or both of the following categories:

(1) Qualified legal services providers which shall be an entity which operates within New York State and provides direct civil legal services without charge to poor persons within a geographical area in New York State; or

(2) Administration of justice providers which shall be an entity which operates within New York State and which:

(i) enhances civil legal services to the poor through innovative and cost-effective means;

(ii) provides direct civil legal services either to groups of clients currently underserved by legal services, such as the elderly or the disabled, or in an area of representation, whether substantive or geographical, that cannot be or is not effectively served by individual qualified legal services providers;

(iii) provides legal, management or operational training, or legal, management, support service, or technical assistance, or direct legal assistance, informational advocacy or litigation support to qualified legal services providers; or

(iv) which otherwise promotes the improvement of the administration of justice.

(b) All qualified recipients shall:

(1) ensure that the funds received are expended in accordance with the provisions of section 97-v of the State Finance Law, section 497 of the Judiciary Law and this Part;

(2) preserve the attorney-client privilege in all cases;

(3) ensure that no one shall interfere with any attorney funded in whole or in part by IOLA funds in fulfilling a professional responsibility to a client as established by the code of professional responsibility and the provisions of section 97-v of the State Finance Law, section 497 of the Judiciary Law and this Part; and

(4) prohibit discrimination, as defined by the applicable laws of the United States and the State of New York, against (i) any person applying for employment or employed by the qualified recipient; or (ii) any person seeking participation in, or the benefits or proceeds of, a program or programs supported in whole or in part by IOLA funds.

(c) Recognizing that the IOLA funds available for distribution may not be sufficient to make distributions to all qualified recipients submitting applications for such funds which merit funding, the board of trustees shall from time to time establish funding priorities. Among the factors to be considered by the board of trustees in establishing the priorities shall be:

(1) if there are two or more qualified recipients in a geographical area who have applied for IOLA funding, the board shall distribute available funds annually based upon a determination by the board in its discretion of the merits of the applications of the qualified recipients and the impact that distribution to the qualified recipients will have on ensuring the delivery of stable, economical and high quality civil legal services to that area;

(2) absent special circumstances, qualified recipients shall have substantial sources of income used for the provision of civil legal services to the poor in addition to the funds requested;

(3) expansion and improvement of existing qualified recipients shall be preferred over requests to provide IOLA funding to establish new qualified recipients, except in instances of unique and difficult to serve areas and groups;

(4) requests shall be encouraged for applications for IOLA funds which will result in the development and strengthening of pro bono programs which generate the provision of substantial voluntary legal services to the poor;

(5) the level of professional standards and efficiency and quality of services;

(6) the provisions for client participation in program planning, priority setting and operation;

(7) provisions which prohibit attorneys employed full time in legal assistance activities supported all or in part by IOLA funds from engaging in any compensated outside practice of law;

(8) the encouragement of cooperative proposals from multiple qualified recipients in a given service area;

(9) the level of client and community support for the services for which IOLA funds are being sought;

(10) whether a qualified support and training provider applicant seeking IOLA funds to provide training and support services to qualified legal service providers has obtained the approval of a majority of the programs it seeks to assist; and

(11) qualified support and training provider applicants seeking IOLA funds to provide direct legal services either to groups of clients currently underserved by legal services or in areas of representation that cannot effectively be serviced by individual qualified legal services providers shall demonstrate the need for such services.

7000.13 Use of funds.

(a) No IOLA funds distributed pursuant to section 97-v of the State Finance Law, section 497 of the Judiciary Law and this Part may be used for any of the following purposes:

(1) the provision of legal services with respect to any fee-generating case unless adequate representation is unavailable;

(i) for the purposes of this subparagraph, fee-generating case shall mean any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party;

(ii) other adequate representation is deemed unavailable if any one of the following factors are met:

(a) it has been determined that free referral is not possible for any of the following reasons:

(1) the case has been rejected by the local lawyer referral service or by two attorneys in private practice who have experience in the subject matter of the case;

(2) neither the referral service nor at least two attorneys in private practice who have experience in the subject matter of the case will consider the case without payment of a consultation fee;

(3) the case is of the type which attorneys in private practice in the area ordinarily do not accept without prepayment of a fee;

(4) emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with the code of professional responsibility, referral will be attempted at a later time;

(b) recovery of damages is not the principal object of the case and a request for damages is ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims;

(c) a court has appointed a qualified recipient or an attorney employed by a qualified recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction;

(d) the case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(b) Criminal proceedings. No funds distributed pursuant to this Part shall be used for the provision of legal assistance with respect to any criminal proceeding or any action in the nature of habeas corpus collaterally attacking a criminal conviction.

(c) Prohibition on the use of funds for political purposes. No funds distributed pursuant to this Part shall be used either directly or indirectly to contribute to any political party or association, or any candidate for public or party office, and no political test or qualification shall be used in making any decision, taking any action, or performing any function under these regulations.

7000.14 Client financial eligibility for services.

(a) A person eligible to receive legal services from funds allocated pursuant to this Part must have an income that does not exceed 125 percent of the official poverty threshold as defined by the United States Office of Management and Budget, except in the following circumstances:

(1) the person is seeking legal assistance to secure benefits provided by a governmental program for the poor;

(2) the person would be eligible but for the receipt of benefits provided by a governmental income maintenance program; or

(3) the person's circumstances require that eligibility should be allowed on the basis of one or more of the factors set forth in subdivision (b) of this section.

(b) In addition to income, a recipient shall consider other relevant factors in determining whether a person is eligible to receive legal assistance. Factors to be considered shall include:

- (1) current income, taking into account seasonal variations in income;
- (2) liquid assets;
- (3) fixed debts and obligations, including Federal and local taxes and medical expenses;
- (4) child care, transportation, mandatory payroll deductions and other expenses necessary for employment;
- (5) age or physical infirmity of resident family members;
- (6) the cost of obtaining private legal representation with respect to the particular matter in which assistance is sought;
- (7) the consequences for the individual if legal assistance is denied; and
- (8) any other factors related to financial inability to afford legal assistance.

(c) A recipient may provide legal assistance to a group, corporation, or association if it:

- (1) is primarily composed of persons eligible for legal assistance under these regulations; or
- (2) has as its primary purpose the furtherance of the interests of persons in the community who are unable to afford legal assistance; and
- (3) provides information showing that it lacks, and has no practical means of obtaining, funds to retain private counsel.

(d) A recipient shall adopt a simple form and procedure to obtain information to determine eligibility in a manner that promotes the development of trust between attorney and client. If there is substantial reason to doubt the accuracy of the information, a recipient shall make appropriate inquiry to verify it in a manner consistent with the attorney-client relationship. Information furnished to a recipient by a client to establish financial eligibility shall not be disclosed to any person who is not employed by the recipient in a manner that permits identification of the client without the express written consent of the client.

(e) If an eligible client becomes ineligible due to a change in circumstances, a recipient shall discontinue representation if the change in circumstances is sufficiently likely to continue for a period which will enable the client to retain private legal assistance, and discontinuation is not inconsistent with the attorney's professional responsibility.

#### 7000.15 Applications for grants and contracts.

(a) The board of trustees shall seek submissions of grant and contract applications on a regular and periodic basis, and distribute available IOLA funds, after the payment of administrative expenses, to qualified recipients pursuant to the provisions of this Part on the basis of the merits of the applicants. The board of trustees may delegate the screening of the funding applications to its staff or other entity it deems appropriate.

(b) All applicants seeking funds pursuant to this Part shall:

- (1) submit a written grant proposal;
- (2) respond adequately to the recommended grant proposal format and any additional requests for information;
- (3) agree to carry out the program for which funds are requested, report on its progress and results, and return any funds not utilized in accordance with the grant;
- (4) cooperate with all data collection and evaluation activities requested and submit annually an audited financial statement by a certified public accountant and a report of the programs on which the IOLA funds were expended.

(c) All grant and contract applications submitted to the board of trustees shall include the following information:

- (1) community characteristics demonstrating the need for legal services and describing the affiliation with existing legal services providers, volunteer lawyer programs and local bar associations;
- (2) organizational structure of the applicant, including policy board composition, sources and amounts of other funding, planning and priority setting processes, and client and community input and support;
- (3) description of the applicant, including community outreach, office and staffing patterns, staff qualifications, specialty units, client statistics, client screening, intake and referral procedures, systems of quality control (case assignment and review, supervision and follow-up training, technical assistance and other support), client grievance procedures and staff and program evaluation;
- (4) description of the program for which IOLA funding is sought;
- (5) program budget which sets forth the proposed use of the requested IOLA funds and a timetable and self-assessment plan to monitor the implementation and operation of the proposed program;

(6) the documentation to be provided by the applicants shall include: (i) tax-exempt status; (ii) latest audited financial statements; (iii) affirmative action policy; (iv) current professional liability coverage; and (v) approval of the proposal by the applicant's board of directors; and

(7) any other relevant information requested by the executive director.

#### 7000.16 Processing applications.

Review and approval of the grant and contract applications shall be completed within three months of the date set for the submission of the funding application, and if the amount to be distributed differs from the funds requested, within 30 days after notification of such proposed distribution, each qualified recipient shall submit a modified budget and narrative explaining how the funds will be utilized.

#### 7000.17 Payment of grants and contracts.

All payments from the IOLA fund shall be made by the State Comptroller upon certification and authorization of the trustees of the fund.

#### 7000.18 Denial of grants and contracts.

(a) The board of trustees shall have the power to determine that an applicant for funding is not qualified to receive funding or is not the most meritorious of competing applicants, to deny or reduce future funding, or to terminate existing funding.

(b) In reaching a decision, the board of trustees shall take into consideration the amount of funds available for distribution, the continuity, competence and cost-effectiveness of the services provided, the provider's compliance with the terms and conditions of the grant and the requirements of these regulations, the standing of the recipient in the client community being served, the viability of an alternate provider of services and the disruption of services caused by a change in the identity of the provider. If a decision is made to terminate or deny refunding of a grant, the board of trustees may authorize temporary funding if necessary to enable a grant recipient to close or transfer current matters in a manner consistent with its professional responsibilities to its current clients. Where the board of trustees has funded an applicant for general operating support on a recurring basis, a decision to terminate funding or deny refunding will normally only be based on:

- (1) a substantial failure to comply with the terms and conditions of the grant or the requirements and restrictions of these regulations;
- (2) a substantial failure to use the grant to provide economical and effective legal assistance as measured by generally accepted professional standards and the provisions of these regulations; or
- (3) a lack of sufficient funds available for distribution pursuant to these regulations.

(c) The provisions of subdivision (b) of this section shall not apply to any grant awards which the board of trustees designates, at the time such award is made, as onetime in nature.

#### 7000.19 Advisory council.

The board of trustees may from time to time establish one or more advisory councils made up of representatives of qualified recipients and members of the private bar and communities serviced in order to assist in the promotion of IOLA accounts and to provide advice in the development and implementation of the programs initiated by this Part. The members of the advisory council will receive no compensation for their services but, in the discretion of the board, may be entitled to receive reimbursement for their actual and necessary expenses incurred in the discharge of their duties.

#### 7000.20 Adoption and amendment of regulations.

New regulations may be adopted, and any regulation may be amended or repealed, by the trustees at any regular or special meeting, provided that notice of the proposed adoption, amendment or repeal has been given to all trustees at least seven days before the meeting and, provided further, that any amendment of a provision of this Part, which by its terms requires action by a special vote, shall become effective only if adopted by such special vote. In addition, any such regulation proposed by the board of trustees to be adopted, amended or repealed may be so adopted, amended or repealed only in accordance with Article 2 of the State Administrative Procedure Act. Copies of all regulations shall be made available to the public at all offices of the fund.

#### 7000.21 Construction of regulations.

This Part shall be liberally construed to accomplish the objectives of the fund and the policies of the trustees.

#### 7000.22 Fiscal year.

The fund's fiscal year shall begin April 1 and end March 31.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 7000.1, 7000.2(d) and (g), 7000.5(a)(2) and

(5), 7000.6, 7000.9(a), (a)(3) and (4), (b), (b)(2), (c)(3), (4), (5) and (6), 7000.10(b) and (e), 7000.18(c); and 7000.22.

**Text of rule and any required statements and analyses may be obtained from:** Stephen Brooks, General Counsel, Interest on Lawyer Account Fund, 11 E. 44th St., New York, NY 10001, (646) 865-1541, e-mail: sgbrooks@iola.org

### **Regulatory Impact Statement**

#### 1. Statutory Authority:

The Interest on Lawyer Account's Board of Trustees (Board) is authorized to adopt rules for the administration of the Interest on Lawyer Account (IOLA) fund pursuant to State Finance Law (SFL) § 97-v and Judiciary Law (Jud. L) § 497. SFL § 97-v(3)(d) authorizes the Board to adopt rules for the "administration of the IOLA fund to carry out the purposes and provisions of this section and of section four hundred ninety-seven of the judiciary law." Jud. L § 497(6)(b) requires attorneys to deposit certain client funds into an IOLA account for which the banking institution pays an interest rate not less than the rate paid on "similar accounts" and which does not impose charges or fees greater than those imposed on such "similar accounts."

Canon 9 of the Code of Professional Responsibility provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Ethical Consideration 9-5 requires attorneys to maintain client funds separately from their own. Disciplinary Rule 9-102 provides that an attorney who has received client funds incident to his or her practice of law has a fiduciary responsibility to safeguard such funds. The Disciplinary rule further provides guidance for the maintenance of client funds in an account separate from the lawyer's business or personal accounts, as well as the requisite record keeping for such accounts. Jud. L §§ 497(2-a) similarly provides that funds received by an attorney from a client in the course of his or her practice of law are "funds received in a fiduciary capacity." Jud. L § 497(2) provides that certain funds received in a fiduciary capacity may, in the professional judgment of the lawyer, be deemed "qualified funds" to be deposited in an IOLA account.

In addition, the Code of Professional Responsibility Canon 1 requires that "A Lawyer Should Assist in Maintaining the Integrity of the Legal Profession." Ethical Consideration 1-1 prescribes as a basic tenet that attorneys have a professional responsibility to help to ensure that every person in our society has ready access to independent legal services. Canon 2 requires that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." Ethical Consideration 2-1 requires, among other things, that it is an important function of a lawyer to make legal services fully available.

The proposed rule is critical to fulfilling the statutory responsibility to provide adequate funding to assist in the delivery of funding for legal services to the poor and other underserved citizens of the State. The rule will also assist lawyers to fulfill their professional responsibility to make legal services available while adhering to their fiduciary responsibility to safeguard client funds.

#### 2. Legislative Objectives:

The purpose of the IOLA Fund is to provide funding through grants and contracts to not-for-profit entities that are engaged or assist in the delivery of civil legal services to the poor, and the improvement of the administration of justice. The Fund's revenue is entirely derived from the interest earned on lawyers' IOLA escrow accounts.

The proposed rule furthers that purpose by explicating the existing statutory requirement that banking institutions set interest rates on IOLA accounts that are not less than those they pay on similar accounts.

#### 3. Needs and Benefits:

Created in 1983, the IOLA program requires an attorney to open an IOLA bank account to deposit nominal or short term funds held by the attorney on behalf of a client or third party. This means that funds that would otherwise generate no net interest can be pooled to generate interest income. The bank then sends the interest earned, net of charges and fees, to the IOLA fund. The money is used to award grants to civil legal service providers.

Most IOLA accounts, however, bear extremely low rates of interest in New York, compared to those in other leading states. Through this regulation, the IOLA Board, which administers the IOLA system, is seeking to increase the interest rates paid on IOLA accounts to meet the statutory requirement that the interest rate payable on IOLA accounts be not less than the rate paid by the bank on "similar accounts." The current regulations provide the same standard as the statute. Historically, this standard has been interpreted by financial institutions to require the payment of interest rates comparable to the type of interest bearing accounts that pay the lowest interest, that is, "NOW" accounts.

The most significant revision will be to require attorneys to maintain their IOLA accounts only in banks that meet a "best customer" standard for the interest paid on such accounts. That is, the interest rate paid on the IOLA account must be at least as great as the rate the bank offers its best customers on similar accounts at that bank. Establishment of the best customer standard in regulation has been shown to be necessary to detail what the statutory provision "similar account" means and how such statutory requirement must be fulfilled.

This change should result in many millions of dollars of additional interest payments to the IOLA fund.

#### 4. Costs:

If between 75% and 85% of the December 2006 total estimated balance of \$3.1 billion in IOLA accounts were subject to an interest rate of 2.75%, instead of a weighted average rate of .57%, the range of increased annual revenue would be between \$45 million and \$55 million, approximately.

Account management, record keeping and reporting costs have not been assessed by banks to the Fund in the past, except for routine fees and charges typically applied to retail accounts.

#### 5. Local Government Mandates:

Local governments are not affected by the proposed rule.

#### 6. Paperwork / Reporting Requirements:

No additional paperwork will be required of attorneys to open or maintain IOLA accounts. Under existing rules, attorneys and law firms must notify the IOLA fund within 30 days after establishing an IOLA account and provide certain identifying information. These requirements will continue.

All participating financial institutions will have to report, in the form and manner prescribed by the IOLA fund, on the best rate paid to their best customers for each of the types of accounts specified in the rule. To enable attorneys and law firms to open and maintain an IOLA account, an eligible banking institution will be required to provide to the IOLA Board within 60 days of its effective date information that demonstrates compliance with the provisions of the rule. In addition, eligible banks will be required to provide such information thereafter as requested by the Board.

#### 7. Duplication:

The proposed rule does not duplicate existing State or federal requirements. It is comparable to rule in effect in many other states.

#### 8. Alternatives:

One alternative was to make no changes to the existing rules; however, this alternative was rejected, because the goal is to enable the IOLA Fund to enforce its existing statute and receive increased revenue from IOLA accounts to increase the availability of high quality civil legal services for the poor. Maintaining the status quo would fail to increase such funding.

Another alternative considered by the IOLA Board was to require financial institutions to pay a rate of interest on IOLA accounts equal to the interest rates paid on similar accounts at other financial institutions. This alternative was rejected based on the interpretation of statutory authority. Judiciary Law § 497(6)(b) provides that the interest rate on IOLA accounts must be not less than the rate paid by the banking institution on similar accounts at that bank. The Board interprets this provision as not authorizing a comparison of the rates paid at various banks to establish what the rate on "similar accounts" is.

#### 9. Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government. The federal government does not regulate IOLA accounts.

#### 10. Compliance Schedule:

Attorneys and law firms are currently required by existing regulation to maintain IOLA accounts for client funds. There are no changes to the requirement to maintain IOLA accounts, or to prepare certain paperwork or maintain certain records. Therefore, attorneys and law firms should be able to comply with the proposed rule upon its adoption.

Financial institutions must provide to the IOLA Board within 60 days of the proposed rule's adoption and periodically thereafter information that demonstrates compliance with the regulatory requirements.

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

Although non-substantive changes have been made to the text of the rule, no changes were made that affect the Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, or Job Impact Statement.

### **Assessment of Public Comment**

The comments received by the IOLA Board for the proposed IOLA Account regulations (21 NYCRR Part 7000) were generally favorable. A few banking institutions and a representative of banking institutions, al-

though generally in favor of the IOLA Account program, raised the following contentions:

- The proposed § 7000.9 specification of the types of accounts that may be considered “similar” to IOLA accounts for purposes of determining the appropriate interest rate exceeds the Board’s statutory authority. The IOLA Board disagrees; no changes have been made to the rule text to remove references to the types of accounts that may be considered similar to IOLA accounts. However, the rule has been clarified to indicate that although certain types of accounts may “presumptively” be considered similar to IOLA accounts, determining the matter of similarity, in consultation with the bank, is to be based on the facts provided as to each bank’s products.
- proposed § 7000.9(a) reference to “similar-sized accounts” is inconsistent with the Judiciary Law § 497(6)(b) provision as to “similar accounts,” because the statutory provision addresses aspects of an account other than its size, such as the costs to a bank for administering or maintaining such accounts, or reserve requirements. The IOLA Board agrees with this comment; the rule text has been amended accordingly.
- The proposed § 7000.9(c)(3), which would have required that “All account types will provide immediately available funds as otherwise required of attorney trust accounts,” may contradict federal banking regulations. The IOLA Board agrees with this comment; this provision has been removed from the rule text.
- The proposed text may address matters where state activity is preempted under federal law. The rule text has been revised to clarify that there is no conflict with federal law or regulation.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### Personalized Recovery-Oriented Services

**I.D. No.** OMH-29-07-00014-E

**Filing No.** 793

**Filing date:** July 30, 2007

**Effective date:** July 30, 2007

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

**Action taken:** Repeal of Part 512 and addition of new Part 512 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a), 41.05, 43.02(a), (b) and (c); Social Services Law, sections 364(3) and 364-a(1)

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

**Specific reasons underlying the finding of necessity:** In order to continue to provide essential services to individuals now served by Personalized Recovery-Oriented Services Programs (PROS) and to prevent a loss of services to potential recipients as new PROS programs are approved, it is necessary to adopt this regulation on an emergency basis.

**Subject:** Program and fiscal requirements for personalized recovery-oriented services.

**Purpose:** To establish revised standards for personalized recovery-oriented services.

**Substance of emergency rule:** This rule will repeal the current Part 512 which established a new licensed program category for Personalized Recovery-Oriented Services (PROS) programs. It will adopt a new Part 512 which has significant clarifications and expanded guidance. The revisions are noted in this summary.

#### OVERVIEW OF CURRENT STANDARDS

The purpose of PROS programs is to assist individuals to recover from the disabling effects of mental illness through the coordinated delivery of a customized array of rehabilitation, treatment and support services. Such services are available both in traditional program settings and in off-site locations where such individuals live, learn, work or socialize. Providers are expected to create a therapeutic environment which fosters awareness,

hopefulness and motivation for recovery, and which supports a harm reduction philosophy.

Depending upon program configuration and licensure category, PROS programs are required to include the following four components:

1) Community Rehabilitation and Support (CRS): designed to engage and assist individuals in managing their illness and in restoring those skills and supports necessary to live in the community.

2) Intensive Rehabilitation (IR): designed to intensively assist individuals in attaining specific life roles such as those related to competitive employment, independent housing and school. The IR component may also be used to provide targeted interventions to reduce the risk of hospitalization or relapse, loss of housing or involvement with the criminal justice system, and to help individuals manage their symptoms.

3) Ongoing Rehabilitation and Support (ORS): designed to assist individuals in managing symptoms and overcoming functional impairments as they integrate into a competitive workplace. ORS interventions focus on supporting individuals in maintaining competitive integrated employment. Such services are provided off-site.

4) Clinical Treatment: designed to help stabilize, ameliorate and control an individual’s symptoms of mental illness. Clinical Treatment interventions are expected to be highly integrated into the support and rehabilitation focus of the PROS program. The frequency and intensity of Clinical Treatment services must be commensurate with the needs of the target population.

There are 3 license categories for PROS programs: Comprehensive PROS with clinical treatment (provides all 4 components), Comprehensive PROS without clinical treatment (provides CRS, IR and ORS components), and limited license PROS (provides IR and ORS components only).

All PROS providers, regardless of licensure category, are required to offer individualized recovery planning services and pre-admission screening services. Furthermore, depending on the licensure category, providers are required to offer a specified array of services that are delineated in Part 512. Any additional services may be offered if they are clinically appropriate and approved in advance by OMH. Persons eligible for admission to a PROS program must: be 18 years of age or older; have a designated mental illness diagnosis; have a functional disability due to the severity and duration of mental illness; and have been recommended for admission by a licensed practitioner of the healing arts. Such recommendation may be made by a member of the PROS staff, or through a referral from another provider.

A PROS provider is required to continuously employ an adequate number and appropriate mix of clinical staff consistent with the objectives of the program and the number of individuals served. Providers must maintain an adequate and appropriate number of professional staff relative to the size of the clinical staff. In Comprehensive PROS programs, at least one of the members of the provider’s professional staff must be a licensed practitioner of the healing arts, and must be employed on a full-time basis. IR services must be provided by, or under the direct supervision of, professional staff. The regulation provides that if a PROS provider has recipient employees, such employees must adhere to the same requirements as other PROS staff, and must receive specified training.

An Individualized Recovery Planning process must be carried out by, or under the direct supervision of, a member of the professional staff, and must be in collaboration with the individual and any persons the individual has identified for participation. The regulation sets out the contents and the time frames for development of the Individualized Recovery Plan (IRP).

The regulation provides standards and requirements that must be met in order for providers to receive Medicaid reimbursement. The reimbursement is a monthly case payment based on the services provided to a PROS participant or collateral in each of the PROS components and the total amount of program participation for the individual during the month. The rate of payment will be a monthly fee determined by the Commissioner and approved by the Division of the Budget. Fee schedules, based on defined Upstate and Downstate geographic area, are included in the regulation.

Part 512 also addresses requirements relating to the content of the case record, co-enrollment in PROS and other mental health programs, quality improvement, organization and administration, governing body, recipient rights, and physical space and premises.

#### REVISIONS REGARDING REIMBURSEMENT METHODOLOGY

To ensure that the PROS reimbursement standards more clearly support the programmatic intent of the PROS model, and more clearly articulate the billing expectations, the Office of Mental Health (OMH), in collaboration with the Department of Health, has revised the PROS reimbursement methodology. While the concept of a monthly tiered case pay-

ment is unchanged, the building blocks of the methodology are now based on program “units.”

PROS units are determined by a combination of program participation (measured in time) and service frequency (measured in number), and are accumulated during the course of each day that the individual participates in the PROS program. The units are then aggregated to a monthly total to determine the level of the PROS monthly base rate that can be billed each month. These program units support the billing concept of a “modified threshold visit.”

- Program participation is defined as the length of allowable time that recipients or collaterals participate in the PROS program, both on-site and off-site.
  - Scheduled meal periods or planned recreational activities that are not specifically designated as medically necessary are excluded from the calculation of program participation.
  - Time spent in the provision of services with collaterals, other than a period of the program day that is simultaneously being credited to the recipient, may be included in the calculation of program participation.
  - An individual must have at least 15 minutes of continuous program participation within a program day to accumulate any units.
  - Program participation is measured and accumulated in 15 minute increments. Increments of less than 15 minutes must be rounded down to the nearest quarter hour to determine the program participation for the day.
- Service frequency is defined as the number of medically necessary services delivered to a recipient, or his or her collateral, during the course of a program day.
  - A minimum of one service must be delivered during the course of a program day to accumulate any units.
    - Services provided in a group format must be at least 30 minutes in duration.
    - Services provided in an individual modality must be at least 15 minutes in duration.
  - Medically necessary PROS services include:
    - Crisis intervention services;
    - Pre-admission screening services;
    - Services provided in accordance with the screening and admission note; and
    - Services provided in accordance with the IRP.
- PROS units are calculated in accordance with the following rules:
  - PROS units are accumulated in .25 increments.
  - The maximum number of PROS units per individual per day is five.
  - The formula for accumulating PROS units during a program day is as follows:
    - If one medically necessary PROS service is delivered, the number of PROS units is equal to the duration of program participation, rounded down to the nearest quarter hour, or two units, whichever is less.
    - If two medically necessary PROS services are delivered, the number of PROS units is equal to the duration of program participation, rounded down to the nearest quarter hour, or four units, whichever is less.
    - If three or more medically necessary PROS services are delivered, the number of PROS units is equal to the duration of program participation, rounded down to the nearest quarter hour, or five units, whichever is less.
  - A minimum of two PROS units must be accrued for an individual during a calendar month in order to bill the monthly base rate.
- Under the revised methodology, providers will continue to bill on a monthly case payment basis.
- To determine the monthly base rate, the daily PROS units accumulated during the calendar month are aggregated and translated into one of the five payment levels. While the current rate codes and billing process will continue to be utilized, new PROS rates are effective for the 2006-07 State fiscal year. The 2005-06 rate adjustment for OMH licensed clinics has been applied to the PROS Clinical Treatment rate.

#### REVISIONS REGARDING DOCUMENTATION

The PROS documentation standards have been revised in order to clarify the recordkeeping requirements for documenting medical necessity, as well as to support the revised reimbursement methodology.

Within a PROS program, evidence of medical necessity is supported through a combination of screening and assessments, the IRP, and periodic progress notes. In an effort to strengthen the evidence of medical necessity

within the IRP, consistent with the principles of person-centered planning, the related requirements have been modified to clarify the programmatic intent. To that end, there is a more explicit requirement for an identified connection between an individual’s recovery goals, the barriers to the achievement of those goals that are due to the individual’s mental illness, and the recommended course of action. Furthermore, there is a more precise requirement related to justifying the need for services that are more expensive or intensive than those in the CRS component (i.e., IR, ORS or Clinical Treatment services). Finally, there are specific and detailed requirements for the documentation of service delivery used as the basis for the monthly bill.

#### REVISIONS REGARDING GROUP SIZE

In many instances, PROS services will be provided in a group format. While the PROS program model did not contemplate groups of excessive size, the existing regulations did not explicitly address this issue. To ensure that group services are delivered in a clinically optimal manner, the PROS standards are being revised to limit the size of groups. Each CRS or Clinical Treatment group will generally be limited to 12 participants (recipients and/or collaterals) and each IR group will generally be limited to 8 participants (recipients and/or collaterals) with specified exceptions. From a program operations perspective, the size of the groups (consistent with the above limitations) cannot be exceeded on a “regular and routine” basis. This standard will be monitored and addressed through OMH’s certification process.

From a fiscal perspective, reimbursement on behalf of participating group members will be subject to certain limits (assuming that all services are medically necessary).

#### REVISIONS REGARDING STAFFING

As the result of feedback from a variety of stakeholders, two components of the existing PROS staffing requirements are being revised. One of the modifications relates to the use of psychiatric nurse practitioners in lieu of a portion of the psychiatrist coverage; the second revision relates to the transition of newly licensed providers to full compliance with the professional staffing requirements.

#### REVISIONS REGARDING REGISTRATION SYSTEM

Following the original promulgation of the PROS regulations, OMH developed and implemented a PROS registration system. The intent of this system is to establish a process whereby PROS providers and other service providers can be informed, at the earliest possible date, of potential co-enrollment situations that are not otherwise authorized. Therefore, the use of the registration system is intended to prevent duplicative Medicaid billing, and thus reduce the need for post-payment adjustments. The PROS regulations have been revised to accommodate the concept of registration.

#### REVISIONS REGARDING TRANSITION

With the Commissioner’s permission, providers operating pursuant to a PROS operating certificate on or before November 1, 2006, may, subject to certain conditions, continue to operate pursuant to the requirements of Part 512 in effect prior to that date.

**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 October 27, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Joyce Donohue, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

#### Regulatory Impact Statement

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health (OMH) the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

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

Section 41.05 of the Mental Hygiene Law provides that a local governmental unit shall direct and administer a local comprehensive planning process for its geographic area in which all providers of service shall participate and cooperate through the development of integrated systems of care and treatment for people with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law provides that payments under the medical assistance program for services approved by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget. Subdivision (b) of Section 43.02 of the Mental Hygiene Law gives the Commissioner authority to request from operators of facilities licensed by

the OMH such financial, statistical and program information as the Commissioner may determine to be necessary. Subdivision (c) of Section 43.02 of the Mental Hygiene Law gives the Commissioner of Mental Health authority to adopt rules and regulations relating to methodologies used in establishment of schedules of rates for services.

Sections 364(3) and 364-a(1) of the Social Services Law give OMH responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

2. Legislative Objectives: Articles 7, 31 and 43 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs and establish rates of payments for services under the Medical Assistance program. Sections 364 and 364-a of the Social Services Law reflect the role of the Office of Mental Health regarding Medicaid reimbursed programs.

3. Needs and Benefits: The Personalized Recovery-Oriented Services (PROS) initiative creates a framework to assist individuals and providers in improving both the quality of care and outcomes for people with serious mental illness in New York State.

In 2005, OMH, with input from local government, consumers, family members and provider organizations, developed a new Medicaid license: PROS. This license takes advantage of the flexibility offered through the Rehabilitation Option of the Federal Medicaid Program. The license gives local government and providers the ability to integrate multiple programs into a comprehensive rehabilitation service. Providers may combine clubhouses, intensive psychiatric rehabilitation treatment (IPRT) programs and other rehabilitation program categories, reducing fragmentation and increasing continuity of care and accountability for achieving recovery goals. Also, there is the option to incorporate Continuing Day Treatment (CDT) programs and clinical treatment into a PROS license. These two program categories are currently licensed separately under mental health regulations.

The PROS license gives service providers the ability to support consumers as they progress with their recovery. The purpose of PROS program is to assist individuals in recovering from the disabling effects of mental illness through the coordinated delivery of a customized array of rehabilitation, treatment and support services. Such services are expected to be available both in traditional program settings and in off-site locations where such individuals live, learn, work or socialize. Providers must create a therapeutic environment which fosters awareness, hopefulness and motivation for recovery, and which supports a harm reduction philosophy.

The PROS program structure combines under one license basic rehabilitation services; time limited, goal focused intensive rehabilitation, which a consumer can access at various points in the recovery process; ongoing mental health supports to individuals who have secured employment; and an optional clinical treatment component, which allows treatment services to be fully integrated into rehabilitation planning and service provision. All these components are coordinated toward a person's recovery using an Individualized Recovery Plan (IRP).

The PROS license is used to advance the adoption on the front lines of care of several scientifically proven practices which have produced superior outcomes for individuals with severe and persistent psychiatric conditions. These include wellness self-management (also referred to as illness management and recovery), family psycho-education, ongoing rehabilitation and support related to the evidence based practice of supported employment, integrated treatment for co-occurring mental illness and substance abuse, and evidence-based medication practices. By using the comprehensive nature of the PROS license and the IRP, these practices will be able to be provided in combination, offering the potential to amplify recovery outcomes.

Providers collect outcome data in the areas of psychiatric hospitalization, emergency room use, contact with the criminal justice system, consumer satisfaction, employment, education and housing stability. These data are used to help determine program effectiveness and each provider will be asked to develop an ongoing quality improvement process using their outcome data.

The design of PROS addresses many of the care delivery system problems. Access to the range of services needed to facilitate recovery will be increased due to the comprehensive nature of the license. The use of an IRP promotes consumer and provider collaboration toward recovery and fosters integration of rehabilitation, support and treatment, thereby reducing fragmentation. The flexibility of the license stimulates creative development of recovery-oriented services. Consumers are allowed to choose services from more than one PROS provider, so consumer choice is preserved. The design encourages a provider to work with a consumer

throughout the recovery process, enhancing accountability for outcomes. By collecting outcome data and using it to help improve individual outcomes and program effectiveness, a data-based continuous quality improvement process is introduced. The various aspects of the PROS license, when viewed as a whole, support and encourage a recovery-focused culture and service delivery system.

To ensure that the PROS reimbursement standards more clearly support the programmatic intent of the PROS model, and more clearly articulate the billing expectations, OMH, in collaboration with the Department of Health, has revised the PROS reimbursement methodology. While the current concept of a monthly tiered case payment is unchanged, the building blocks of the methodology are now based on program "units."

PROS units are determined by a combination of program participation (measured in time) and service frequency (measured in number), and are accumulated during the course of each day that the individual participates in the PROS program. The units are then aggregated to a monthly total to determine the level of the PROS monthly base rate that can be billed each month. These program units support the billing concept of a "modified threshold visit." The revised methodology, using units, provides for a more accurate and effective approach to billing.

Under the revised methodology, providers will continue to bill on a monthly case payment basis. To determine the monthly base rate, the daily PROS units accumulated during the calendar month are aggregated and translated into one of the five payment levels. While the current rate codes and billing process will continue to be utilized, new PROS rates are effective for the 2006-07 State fiscal year. The 2005-06 rate adjustment for OMH licensed clinics has been applied to the PROS Clinical Treatment rate.

The PROS documentation standards have been revised in order to clarify the recordkeeping requirements for documenting medical necessity, as well as to support the revised reimbursement methodology. Within a PROS program, evidence of medical necessity is supported through a combination of screening and assessments, the IRP, and periodic progress notes. In an effort to strengthen the evidence of medical necessity within the IRP, consistent with the principle of person-centered planning, the related requirements have been modified to clarify the programmatic intent. To that end, there will be a more explicit requirement for an identified connection between an individual's recovery goals, the barriers to the achievement of those goals that are due to the individual's mental illness, and the recommended course of action. Furthermore, there will be a more precise requirement related to justifying the need for services that are more expensive or intensive. Finally, there are specific and detailed requirements for documentation of service delivery used as the basis for the monthly bill.

In many instances, PROS services offered will be provided in a group format. While the PROS program model did not contemplate groups of excessive size, the previous regulation did not explicitly address this issue. To ensure that group services are delivered in a clinically optimal manner, the PROS standards have been revised to limit the size of certain groups. From a program operations perspective, the size of the groups cannot be exceeded on a "regular and routine" basis. This standard will be monitored and addressed through OMH's certification process. From a fiscal perspective, reimbursement on behalf of participating group members will be subject to certain limits (assuming that all services are medically necessary).

As the result of feedback from a variety of stakeholders, two components of the existing PROS staffing requirements have been revised. One of the modifications relates to the use of psychiatric nurse practitioners in lieu of a portion of the psychiatrist coverage; the second revision relates to the transition of newly licensed providers to full compliance with the professional staffing requirements.

Following the original promulgation of the PROS regulations, OMH developed and implemented a PROS registration system. The intent of this system is to establish a process whereby PROS providers and other service providers can be informed, at the earliest possible date, of potential co-enrollment situations that are not otherwise authorized. The use of the registration system is intended to prevent duplicative Medicaid billing, and thus reduce the need for post-payment adjustments. The PROS regulations have been revised to accommodate the concept of registration. The revised PROS regulation will support the growth of the PROS program as it develops to its full potential. Note: The Commissioner may permit providers operating pursuant to a PROS operating certificate on or before November 1, 2006, to continue to operate pursuant to the requirements of Part 512 in effect prior to November 1, 2006. Such permission shall be granted only if such providers shall have submitted and the Commissioner shall

have approved a transition plan setting forth a timetable for complying with the requirements of this Part.

4. Costs:

a. Any additional costs to existing efficiently and economically run programs that are converting to PROS will be fully funded through the PROS Medicaid fee and/or startup funding provided by the Office of Mental Health.

b. Sufficient funding has been included in the current enacted budget to enable economically and efficiently run programs to convert to PROS. Approximately 350 providers have programs that are eligible for conversion to PROS. Existing resources associated with these programs include approximately \$251 million in gross program funding, of which \$139 million is State funding, \$14 million is local funding and \$97 million is Federal funding. After conversion to PROS, gross program funding is estimated to be \$283 million of which State resources are \$129 million, local resources are \$14 million and Federal resources are \$140 million. The implementation of PROS is estimated to result in no increase in local funding.

5. Local Government Mandates: The regulation will not mandate any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts. The regulation will provide for optimal county involvement in the process of evaluating the quality and appropriateness of PROS programs. Counties may choose to participate in this process with the Office of Mental Health, but it is not required.

6. Paperwork: This rule making will require programs that participate to complete the paperwork which is necessary to receive medical assistance payments and will not result in a substantial change in paperwork requirements.

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

8. Alternatives: The only alternative considered was to continue to use the current program and licensing standards without revision. This alternative was rejected because of the need for further clarification of the current standards and additional regulatory guidance to ensure compliance with programmatic intent and federal requirements for Medicaid reimbursement.

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 regulatory amendment will be effective when adopted.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not submitted with this notice because this new rule will not impose an adverse economic impact on small businesses or local governments. This rule, which repeals Part 512, the current regulation authorizing the Personalized Recovery-Oriented Services (PROS) program, and adds a new Part 512, will revise certain PROS program standards including those relating to the process of obtaining reimbursement, reimbursement rates, establishing group size, staffing and registration.

The providers who will be subject to this rule will be organizations that now hold or in the future apply to establish a PROS program. The majority of these provider organizations are not-for-profit corporations and county governments who currently operate outpatient programs funded and licensed by the Office of Mental Health and/or provide mental health services under contract with local governments and/or OMH and are supported by state and/or local funding.

The existing programs and services that have transitioned or will transition into PROS include Intensive Psychiatric Rehabilitation Treatment and Continuing Day Treatment, currently licensed by the Office of Mental Health (OMH). They also include services previously or currently funded by OMH, but not licensed, such as Psychosocial Clubs, On-Site Rehabilitation, Ongoing Integrated Employment, Enclave in Industry, Affirmative Business, Client Worker and Supported Education.

The licensed programs are currently required to be established through a process that is subject to Part 551 of 14NYCRR and must comply, on an ongoing basis, with the appropriate program and fiscal regulations as contained in Title 14, including standards for receiving Medicaid reimbursement. The unlicensed programs are established and provide services under contracts with OMH and/or the local governmental unit (the county or the City of New York, depending on location) and are subject to contractual program and fiscal requirements. The requirements are, in part, specific to the funding streams involved, which include: Local Assistance Regular, Community Support Services, Reinvestment, Ongoing Integrated Employment, Psychiatric Rehabilitation, Flexible Funding and Medicaid.

While many of the fiscal contractual requirements are the same, there are certain fiscal requirements specific to certain funding streams. Most funding passes from the State to local governments and then to providers and is subject to both State and local government contract requirements.

The PROS program, as revised, will continue to promote comprehensive and coordinated services, foster continuity, and result in more effective program organization and service delivery. It will reduce program-related paper work involved with transfers; for example, an Intensive Psychiatric Rehabilitation Treatment Program must currently discharge an individual when that person achieves the stated goal even if the person needs ongoing support to maintain that goal. That individual's ongoing needs may then require transfer to another program in order to obtain necessary clinical services. The PROS program provides for integration of programs and services, and it will serve to reduce the paperwork required in such a situation, as what were formerly separate programs and services will now be service components under a single PROS license.

The revised PROS regulation continues to provide for a case payment approach to reimbursement which simplifies the Medicaid billing process. The multiple program and service components that formerly had to comply with separate contract requirements for each program funding stream and/or Medicaid fee-for-service with a more complex billing process will, under the revised PROS regulation, come together into a single program and be funded by a comprehensive per client case payment, billed on a monthly basis. For a number of service providers, billing Medicaid, as opposed to contract funding, may be a new experience. In recognition of this, OMH has and will continue to provide start-up funding for Medicaid billing development costs for providers transitioning to a PROS license in Phase I of implementation. Such start-up funds will be provided in accordance with need and availability of appropriations. Model record-keeping forms will also be developed by OMH and made available to all providers, for use at their discretion. The case payment rate has been enhanced under the revised regulation to a level sufficient to fund the costs of providing the PROS services, including the costs of documenting compliance and billing for services.

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

A Rural Area Flexibility Analysis is not submitted with this notice because the amended rule will not impose any adverse economic impact on rural areas. Rural and non-rural programs will benefit from the integration of now separate programs and services and the revisions will not have a unique or negative impact on Personalized Recovery-Oriented Services (PROS) programs in rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this notice because it will have no negative impact on jobs and employment opportunities. It is expected that employment opportunities for individuals receiving services from a new Personalized Recovery-Oriented Services (PROS) provider will increase when compared to the current fragmented service system and that the revised PROS regulation will not significantly differ from the current regulation in terms of impact on jobs and employment opportunities.

## NOTICE OF ADOPTION

#### **Use of Space**

**I.D. No.** OMH-20-07-00011-A

**Filing No.** 794

**Filing date:** July 30, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Repeal of Part 561 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Use of space.

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-20-07-00011-P, Issue of May 16, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

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

The agency received no public comment.

## Power Authority of the State of New York

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Rates for the Sale of Power and Energy

I.D. No. PAS-33-07-00010-P

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

**Proposed action:** To amend the tariffs for the authority's Economic Development Power programs.

**Statutory authority:** Public Authorities Law, section 1005

**Subject:** Rates for the sale of power and energy.

**Purpose:** To recover the authority's cost of providing firm power and energy services.

**Public hearing(s) will be held at:** 10:30 a.m., Sept. 18, 2007 at Power Authority of the State of New York, 123 Main St., Jaguar Rm., White Plains, NY

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

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

**Substance of proposed rule:** POWER AUTHORITY OF THE STATE OF NEW YORK

#### NOTICE OF PROPOSED RULE MAKING PUBLIC FORUM SCHEDULED

Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes to amend the service tariffs for its Economic Development Power, High Load Factor and Industrial Economic Development served by Municipal Distribution Agencies to increase rates for customers who have long-term price commitments that expire on October 31, 2007.

The Authority proposes an average 11% price increase based on the "as delivered" rates beginning November 1, 2007.

Written comments on the proposed revisions will be accepted through Monday, October 1, 2007, at the address below. For further information, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK  
Anne B. Cahill, Corporate Secretary  
123 Main Street, 15M  
White Plains, New York 10601  
(914) 390-8036  
(914) 681-6949 (fax)  
secretarys.office@nypa.gov

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne B. Cahill, Corporate Secretary, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8026, e-mail: secretarys.office@nypa.gov

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

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

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

Statements and analyses are not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Freedom of Information Law

I.D. No. PAS-33-07-00011-P

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

**Proposed action:** Amendment of Part 453 of Title 21 NYCRR.

**Statutory authority:** Public Officers Law, section 87(1) and Public Authorities Law, section 1004

**Subject:** Freedom of Information Law.

**Purpose:** To clarify and update the Power Authority's FOIL regulations.

**Public hearing(s) will be held at:** 2:00 p.m., Sept. 18, 2007 at Power Authority's White Plains Office, 123 Main St., (Jaguar Rm. - Lobby Level), White Plains, NY.

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

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

**Text of proposed rule:** Section 453.1 is amended to read as follows:

§ 453.1 Public records

(a) The public records of the Power Authority of the State of New York, which are required to be made available under article 6 of the New York Public Officers Law, shall be available for inspection and copying upon written request, reasonably describing the record or records sought, during the hours of 9 a.m. – 5 p.m. at the authority's office at 123 Main Street, 15th Floor, White Plains, NY 10006.

§ 453.2 Procedures

(a) A request for inspection or copying of a public record of the authority shall be made to the corporate secretary of the authority in writing, and shall contain sufficient information to identify the particular record sought, including, if possible, information regarding the date, file designation or other information describing the record sought. Any request shall be made either:

(1) in person [during regular business hours] between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday at the authority's office at 123 Main Street, [15th Floor,] White Plains, NY 10601; or

(2) by mailing such request, postage prepaid, to the corporate [S]secretary, Power Authority of the State of New York, at the foresaid address; or

(3) by faxing such request to the office of the corporate secretary of the authority; or

(4) by e-mailing such request to [foil@nypa.gov](mailto:foil@nypa.gov).

(b)(1) Upon receipt of a written request for a record reasonably described, the corporate secretary shall promptly determine whether [or not] the record requested is required to be made available under the provisions of article 6 of the New York Public Officers Law and will, within five business days of the receipt of such request, either:

(i) make such record available to the person requesting it by notifying such person where and when the record may be inspected and copied;

(ii) deny such request in writing; or

(iii) furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with the procedure prescribed in section 89(5) of the New York Public Officers Law regarding trade secrets.

(2) If access to records is neither granted nor denied within [10] 20 business days after the date of acknowledgement of receipt of the request, the request may be construed as a denial of access that may be appealed.

(c) Trade secrets. (1) Records or portions of records constituting trade secrets shall be so designated by the authority and shall be filed or maintained in secure facilities of the authority to which access is limited. Records or portions of records constituting trade secrets shall be made available for inspection and study to the trustees, the president, the general counsel, the officers and department heads of the authority and their designees.

(2) (3) A person acting pursuant to law or regulation who, on or after January 1, 1982, submits any record to the authority may, at the time of submission, request that the authority, in accordance with the provisions of section 89(5) of the New York Public Officers Law, designate such record or any portion thereof as a trade secret and except such information from public disclosure under section 87(d)(2) of such law. Any such request shall identify in writing the record or part thereof alleged to be a trade secret and state reasons why such record or portion thereof should be excepted from public disclosure. Within 15 business days of receipt of a written request for an exception, the authority will either grant or deny such request in writing.

(d) (1) Records required to be made available for public inspection will be either provided to the requester electronically if practicable or, in

*the alternative*, photocopied by the authority if practicable and the person requesting a copy will be charged a fee of \$.25 per page for copies not exceed 9 x 14 inches, or the actual cost of reproducing such records if larger copies are required. If it is not practicable for the authority to photocopy any such record, it will be copied commercially and the person requesting the copy will be charged a fee equal to the cost of such commercial reproduction.

(2) Upon payment of [, or offer to pay,] the fee determined by the authority for copying a record required to be made available for public inspection, the authority will provide a copy of such record and the *corporate* secretary will certify to the correctness of such copy if so requested in writing, or, as the case may be, shall certify that the authority does not have possession of such record or that such record cannot be found after diligent search.

(3) Any fee charged by the authority pursuant to this Part shall be paid by the person making the request in cash or *by money order or [certified] check [or bank cashier's check]*, in advance of the delivery of [copies] a copy of any record referred to in this Part.

(e) Any person who is denied access to a public record of the authority by the *corporate* secretary of the authority may, within 30 days of such denial, file an appeal from such denial with the authority's general counsel. Appeals pursuant to this subdivision shall be decided by the general counsel. If an appeal is denied, the reasons therefore shall be explained fully in writing to the person requesting the record within 10 business days of the date on which such appeal is received by the general counsel. The general counsel will forward to the Committee on Open Government a copy of such appeal and the determination thereon.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne B. Cahill, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8036, e-mail: secretarys.office@nypa.gov

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

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

#### **Regulatory Impact Statement**

1. Statutory authority: Public Officers Law Section 87(1) and Public Authorities Law Section 1004 authorize the New York Power Authority ("Authority") to adopt, amend and modify rules and regulations to implement Article 6 of the New York State Public Officers Law, commonly referred to as the Freedom of Information Law ("FOIL"). The Authority initially adopted such FOIL rules in 1978.

2. Legislative objectives: The Authority's proposed amendments to its 21 NYCRR Part 453 regulations incorporate certain changes made to FOIL since 1978 and clarify and update the Authority's existing rules where appropriate.

3. Needs and benefits: It is appropriate for the Authority to periodically amend its NYCRR regulations to reflect statutory changes and to clarify and update existing rules. Although the Authority's proposed amendments do not attempt to replicate FOIL regulations promulgated by the New York State Committee on Open Government ("COOG") at 21 NYCRR Part 1401, it may nevertheless be noted that most of the amendments will enhance the consistency of the two. Other changes are typically procedural, non-substantive and/or minor in nature. Thus:

The amendment to subsection (a) of Section 453.1 conforms to the COOG regulations at Section 1401.3 of Title 21 NYCRR.

The amendments of subsections (a)-(d) of Section 453.2 that clarify the existing definition of "Secretary" as meaning the Authority's Corporate Secretary are non-substantive.

The amendment of paragraph (1) of subsection (a) of Section 453.2 clarifies the actual hours the Authority is regularly open for business in accordance with the COOG regulations at subsection (a) of Section 1401.4 of Title 21 NYCRR.

The additions of paragraphs (3) and (4) of subsection (a) of Section 453.2 capture and reflect statutory amendments to paragraph (b) of subsection (3) of Section 89 of the Public Officers Law and make the Authority more accessible to the public by accepting requests via e-mail or facsimile in addition to U.S. mail or hand delivery.

The amendment to subparagraph (i) of paragraph (1) of subsection (b) of Section 453.2 is non-substantive and conforms to COOG regulations at Section 1401.5 of Title 21 NYCRR.

The amendments to paragraph (2) of subsection (b) of Section 453.2 conform to the Public Officers Law and COOG regulations at subsection (3) of paragraph (c) of Section 1401.5 of Title 21 NYCRR.

The amendment to paragraph (1) of subsection (c) of Section 453.2 is non-substantive and adds the title of "general" counsel as the counsel granted access to trade secret information.

The amendment to paragraph (2) of subsection (c) of Section 453.2 notifies an entity requesting an exception for trade secret or competitively sensitive information submitted to the Authority of the right to and procedure for appeal.

The first amendment of paragraph (1) of subsection (d) of Section 453.2 conforms to COOG regulations at paragraph (b) of Section 1401.5 of Title 21 NYCRR to allow the Authority to provide records electronically to reduce the cost of reproduction to the public. The second amendment of paragraph (1) of subsection (d) of Section 453.2 allows the Authority's regulations regarding the cost of reproduction to consistently conform to statutory amendments of Article 6 of the Public Officers Law.

The amendment of paragraph (2) of subsection (d) of Section 453.2 clarifies that the requesting party must pay the statutory fee imposed by the Authority before the Authority releases such records. The second amendment of paragraph (2) of subsection (d) of Section 453.2 is non-substantive and is included for grammatical accuracy.

The first amendment of paragraph (3) of subsection (d) of Section 453.2 updates payment methods a requester shall use to submit payment of the statutory fee for security and tracking purposes. The second amendment of paragraph (3) of subsection (d) of Section 453.2 is non-substantive and reflects the fact that there may be one or many records produced in response to a request and that only one copy of such record(s) will be provided to the requester.

The addition of subsection (f) of Section 453.2 ensures that the public is guided by a uniform FOIL procedure when requesting documents from the Authority.

4. Costs: There will be no additional costs to the public or the State of New York for implementation of and continued compliance with the Authority's modifications to its FOIL rules. There are no anticipated additional expenses to the Authority or to the state and local governments for implementation and continuation of the Authority's modifications to its FOIL rules.

5. Local government mandates: The Authority's modifications to its 21 NYCRR 453 regulations do not impose any additional programs, service, duty or responsibility on any county, town, village, school district or other special district.

6. Paperwork: The Authority's modifications to its 21 NYCRR 453 regulations do not impose any additional need for any reporting requirements, including forms or other paperwork.

7. Duplication: The modifications to the Authority's 21 NYCRR 453 regulations do not duplicate, overlap or conflict with any relevant rules of the state or federal governments.

8. Alternatives: Before determining to amend its FOIL rules as indicated, the Authority also considered leaving the existing 1978 version of the rules unchanged (and relying on the statute and advisories on [www.nypa.gov](http://www.nypa.gov) reflecting statutory changes to FOIL procedures) and also repealing these rules in toto. The first alternative was rejected because the advisories or the statute would be inconsistent and confusing to members of the public trying to make a FOIL request. The second alternative was rejected because the Authority believes that FOIL requires clarification as applied to individual entities depending on how individual records are maintained, business hours and organization of the public entities subject to FOIL.

9. Federal standards: The Authority's modifications to its 21 NYCRR 453 regulations do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: It is anticipated that regulated persons will be immediately able to achieve compliance with the Authority's modifications to its 21 NYCRR 453 regulations.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: It is anticipated that small businesses and local governments will be unaffected by the Authority's modifications to its 21 NYCRR Part 453 Regulations.

2. Compliance requirements: Small businesses and local governments will not have to undertake any additional reporting, recordkeeping, or other affirmative acts because of the Authority's modifications to its 21 NYCRR Part 453 Regulations.

3. Professional services: Small businesses and local governments will not require any additional professional services to comply with the Authority's modifications to its 21 NYCRR Part 453 Regulations.

4. Compliance costs: Regulated business, industry, or local government will not incur any additional initial capital costs or annual costs for contin-

uing compliance because of the Authority's modifications to its 21 NYCRR Part 453 Regulations.

5. Economic and technological feasibility: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not affect the economic and technological feasibility of compliance by small businesses and local governments.

6. Minimizing adverse impact: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not have any additional adverse impact on small businesses or local governments.

7. Small business and local government participation: Under State Administrative Procedure Act Section 202-b(6), the Authority will ensure that small businesses and local governments have an opportunity to participate in the rule making process by publishing the Notice of Proposed Rule Making in the *State Register* and conducting a public hearing.

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

1. Types and estimated numbers of rural areas: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not affect the number of rural areas to which these regulations will apply. These modifications will not impose any additional requirements on rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not require any additional reporting, recordkeeping, professional services, or other compliance requirements in rural areas.

3. Costs: It is estimated that there will be no additional initial capital costs or annual costs for any public and private entities in rural areas because of the Authority's modifications to its 21 NYCRR Part 453 Regulations.

4. Minimizing adverse impact: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not cause any additional adverse impact to public and private sector interests in rural areas.

5. Rural area participation: The Authority will comply with State Administrative Procedure Act Section 202-bb(7) by publishing the Notice of Proposed Rule Making in the *State Register* and conducting a public hearing.

#### **Job Impact Statement**

1. Nature of impact: The Authority's modifications to its 21 NYCRR Part 453 Regulations will have no impact on jobs and employment opportunities.

2. Categories and numbers affected: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not affect any categories of jobs or employment opportunities.

3. Regions of adverse impact: The Authority's modifications to its 21 NYCRR Part 453 Regulations will not have a disproportionate adverse impact on jobs or employment in any region of the state.

4. Minimizing adverse impact: This item is not applicable to the Authority's modifications to its 21 NYCRR Part 453 Regulations.

5. Self-employment opportunities: This item is not applicable.

New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C26998.

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

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0540SA1)

### **NOTICE OF ADOPTION**

#### **High Pressure Gas Service by The New York and Presbyterian Hospital**

**I.D. No.** PSC-27-06-00014-A

**Filing date:** July 30, 2007

**Effective date:** July 30, 2007

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

**Action taken:** The commission, on July 18, 2007, denied the petition of The New York and Presbyterian Hospital for high pressure service and penalty action against Consolidated Edison Company of New York, Inc. (Con Edison).

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** The New York and Presbyterian Hospital's request for a direct connection to Con Edison's gas transmission system.

**Purpose:** To deny the request of The New York and Presbyterian Hospital for a direct connection to Con Edison's gas transmission system.

**Substance of final rule:** The Commission denied the petition of The New York and Presbyterian Hospital for high pressure service and penalty action against Consolidated Edison Company of New York, Inc.

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

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-G-0723SA1)

### **NOTICE OF ADOPTION**

#### **Merger between Thames Water Aqua US Holdings, Inc., et al. and American Water Works Co., Inc.**

**I.D. No.** PSC-45-06-00019-A

**Filing date:** July 26, 2007

**Effective date:** July 26, 2007

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

**Action taken:** The commission, on July 18, 2007, adopted an order approving a joint petition of Thames Water Aqua Holdings GmbH, Thames Water Aqua US Holdings, Inc., American Water Works Company Inc. and Long Island Water Corp. for the merger of Thames Water Aqua US Holdings, Inc. with and into American Water Works Co., Inc. and the subsequent sale of the shares of common stock of American Water Works Co., Inc.

**Statutory authority:** Public Service Law, sections 89-f and 89-h

**Subject:** Merger of Thames Water Aqua US Holdings, Inc. with and into American Water Works Co., Inc. and the subsequent sale of the shares of common stock of American Water Works Co., Inc.

**Purpose:** To approve the merger.

**Substance of final rule:** The Commission adopted an order approving a joint petition of Thames Water Aqua Holding GmbH, Thames Water Aqua

## **Public Service Commission**

### **NOTICE OF ADOPTION**

#### **Submetering of Electricity by Augustus & James Corporation**

**I.D. No.** PSC-22-06-00026-A

**Filing date:** July 25, 2007

**Effective date:** July 25, 2007

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

**Action taken:** The commission, on July 18, 2007, adopted an order in Case 06-E-0540 approving the petition filed by Augustus & James Corporation, to submeter electricity at 515 W. 59th St., New York, NY.

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

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

**Purpose:** To submeter electricity at 515 W. 59th St., New York, NY.

**Substance of final rule:** The Commission approved a petition by Augustus & James Corporation, to submeter electricity at 515 West 59th Street,

US Holdings, Inc., American Water Works Company Inc. (American Water) and Long Island Water Corp. for approval of the merger of Thames Water Aqua US Holding, Inc. into American Water with American Water being the surviving entity and the subsequent sale of the shares of common stock, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0490SA1)

**NOTICE OF ADOPTION**

**Issues of Stock, Bonds and other Forms of Indebtedness; Charges by Beaver Dam Lake Water Corporation**

**I.D. No.** PSC-04-07-00018-A

**Filing date:** July 26, 2007

**Effective date:** July 26, 2007

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

**Action taken:** The commission, on July 18, 2007, adopted an order approving the petition of Beaver Dam Lake Water Corporation for a 30 year loan agreement in the amount of \$1,842,900 with the Environmental Facilities Corporation and to increase water rates and surcharges.

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

**Subject:** Issues of stock, bonds and other forms of indebtedness.

**Purpose:** To approve Beaver Dam Lake Water Corporation to enter into a loan agreement and increase charges.

**Substance of final rule:** The Commission adopted an order approving the petition of Beaver Dam Lake Water Corporation for a 30 year loan agreement in the amount of \$1,842,900 and increase customer water rates and surcharges to repay the Environmental Facilities Corporation loan, subject to the terms and conditions of the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-1561SA1)

**NOTICE OF ADOPTION**

**New Types of Gas Meters and Accessories by KeySpan Energy Delivery**

**I.D. No.** PSC-07-07-00014-A

**Filing date:** July 26, 2007

**Effective date:** July 26, 2007

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

**Action taken:** The commission, on July 18, 2007, approved an application by KeySpan Energy Delivery of New York for the use of the Roots MicroCorrector Model IMCW2 for customer billing applications in New York State.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of types of gas meters and accessories.

**Purpose:** To approve the Roots MicroCorrector Model IMCW2 meters to be utilized in New York State.

**Substance of final rule:** The Commission adopted an order approving a petition by KeySpan Energy Delivery of New York for the use of the Roots

MicroCorrector Model IMCW2 gas volume corrector manufactured by Dresser Incorporated to be used in customer billing applications for commercial and industrial use in New York State.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-G-0115SA1)

**NOTICE OF ADOPTION**

**Submetering of Electricity by CRP/Extell Parcel I, LP**

**I.D. No.** PSC-17-07-00011-A

**Filing date:** July 25, 2007

**Effective date:** July 25, 2007

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

**Action taken:** The commission, on July 18, 2007, adopted an order in Case 07-E-0357 approving the petition filed by CRP/Extell Parcel I, LP, to submeter electricity at 80 Riverside Blvd., New York, NY.

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

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

**Purpose:** To submeter electricity at 80 Riverside Blvd., New York, NY.

**Substance of final rule:** The Commission approved a petition by CRP/Extell Parcel I, LP, to submeter electricity at 80 Riverside Boulevard, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C26998.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-0357SA1)

**NOTICE OF ADOPTION**

**Submetering of Electricity by American Metering and Planning Services, Inc.**

**I.D. No.** PSC-17-07-00012-A

**Filing date:** July 25, 2007

**Effective date:** July 25, 2007

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

**Action taken:** The commission, on July 18, 2007, adopted an order in Case 07-E-0380 approving the petition filed by American Metering and Planning Services, Inc., on behalf of Kalahari Apartments Condominium, to submeter electricity at 40 W. 115th St., New York, NY.

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

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

**Purpose:** To submeter electricity at 40 W. 115th St., New York, NY.

**Substance of final rule:** The Commission approved a petition by American Metering and Planning Services, Inc., on behalf of Kalahari Apartments Condominium, to submeter electricity at 40 West 115th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C26998.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-0380SA1)

**NOTICE OF ADOPTION**

**Submetering of Electricity by 360 Brooklyn Investors, LLC**

**I.D. No.** PSC-18-07-00009-A

**Filing date:** July 25, 2007

**Effective date:** July 25, 2007

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

**Action taken:** The commission, on July 18, 2007, adopted an order in Case 07-E-0407 approving the petition filed by 360 Brooklyn Investors, LLC, to submeter electricity at 360 Furman St., Brooklyn, NY.

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

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

**Purpose:** To submeter electricity at 360 Furman St., Brooklyn, NY.

**Substance of final rule:** The Commission approved a petition by 360 Brooklyn Investors, LLC, to submeter electricity at 360 Furman Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc., filed in C26998.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-0407SA1)

**NOTICE OF ADOPTION**

**Romet RM38000 DCID Temperature Compensated Rotary Meter by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-21-07-00009-A

**Filing date:** July 26, 2007

**Effective date:** July 26, 2007

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

**Action taken:** The commission, on July 18, 2007, approved a petition by Consolidated Edison Company of New York, Inc. for the use of the Romet RM380000 DCID rotary gas meter for customer billing applications in New York State.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of types of gas meters and accessories.

**Purpose:** To approve the family Romet RM38000 DCID temperature-compensated meters to be utilized in New York State.

**Substance of final rule:** The Commission adopted an order approving a petition by Consolidated Edison Company of New York, Inc. for the use of the Romet RM38000 DCID rotary gas meter to be used in billing applications for commercial and industrial use in New York State.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-G-0485SA1)

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

**Waiver of Tariff by New York University**

**I.D. No.** PSC-33-07-00006-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, a petition filed by New York University for a waiver of Consolidated Edison Company of New York, Inc.'s (Con Edison) tariff leaf No. 278 prohibiting the redistribution of power delivered under SC-9 to a dormitory with living units equipped with separate kitchens and bathroom facilities located at 334 E. 26th St., New York, NY.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (5), 66(1), 12(a)

**Subject:** Petition for waiver of Con Edison tariff leaf No. 278 prohibiting the redistribution of power delivered under SC-9 to a dormitory with living units equipped with separate kitchens and bathroom facilities.

**Purpose:** To prohibit the redistribution of power delivered under SC-9 to a dormitory with living units equipped with separate kitchens and bathroom facilities.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, a petition filed by New York University for a waiver of Consolidated Edison Company of New York, Inc.'s tariff Leaf No. 278 prohibiting the redistribution of power delivered under SC-9 to a dormitory with living units equipped with separate kitchens and bathroom facilities located at 334 East 26th Street, NY, NY.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-0820SA1)

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

**Submetering of Electricity by 1094 Group, LLC**

**I.D. No.** PSC-33-07-00007-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 1094 Group, LLC, to submeter electricity at 132 Lakefront Blvd., Buffalo, NY.

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

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

**Purpose:** To submeter electricity at 132 Lakefront Blvd., Buffalo, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 1094 Group, LLC, to submeter electricity at 132 Lakefront Boulevard, Buffalo, New York, located to the territory of Niagara Mohawk Power Corporation.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:* Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

*Data, views or arguments may be submitted to:* Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0845SA1)

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

**Submetering of Electricity by 53rd and 2nd Associates, LLC**

**I.D. No.** PSC-33-07-00008-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 53rd and 2nd Associates, LLC, to submeter electricity at 250 E. 53rd St., New York, NY.

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

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

**Purpose:** To submeter electricity at 250 E. 53rd St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 53rd and 2nd Associates, LLC, to submeter electricity at 250 East 53rd Street, New York, New York, located to the territory of Consolidated Edison Company of New York, Inc.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:* Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

*Data, views or arguments may be submitted to:* Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0857SA1)

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

**Submetering of Electricity by Herbert E. Hirschfeld, P.E., on behalf of The Jack Parker Corporation**

**I.D. No.** PSC-33-07-00009-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of the Jack Parker Corporation, to submeter electricity at 104-20, 104-40 and 104-60 Queens Blvd., Queens, NY.

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

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

**Purpose:** To submeter electricity at 104-20, 104-40 and 104-60 Queens Blvd., Queens, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of The Jack Parker Corporation, to submeter electricity at 104-20, 104-40 and 104-60 Queens Boulevard, Queens, New York, located in the territory of Consolidated Edison Company of New York, Inc.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:* Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

*Data, views or arguments may be submitted to:* Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0865SA1)

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## Racing and Wagering Board

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**NOTICE OF ADOPTION**

**Post-Race Blood Gas Testing Procedures for Thoroughbred and Harness Race Horses**

**I.D. No.** RWB-19-07-00004-A

**Filing No.** 805

**Filing date:** July 31, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Addition of sections 4038.19(g), 4043.8, 4043.9, 4043.10, 4109.7(f), 4120.13, 4120.14 and 4120.15 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305 and 902

**Subject:** Post-race blood gas testing procedures for thoroughbred and harness race horses.

**Purpose:** To detect and deter the prohibited practice known as "milkshaking."

**Text of final rule:** A new section 4043.8 is added to read as follows:

*4043.8 TCO2 blood gas testing program*

*(a) The board may obtain pre-race blood samples from horses for subsequent testing for total carbon dioxide level (TCO2). The board may also obtain post-race blood samples from horses for subsequent testing for TCO2, after a minimum one-hour standing at rest period after its race. It shall be a violation of this rule where the horse's TCO2 level equals or exceeds thirty-seven (37) millimoles per liter or, for horses administered furosemide pursuant to Rule 4043.2(b)(6), thirty-nine (39) millimoles per liter.*

*(b) It shall be an affirmative defense that the horse's physiologically normal TCO2 level was not exceeded. To demonstrate a horse's physiologically normal TCO2, its owner or trainer must comply with the following procedure. The owner or trainer must, in writing to the stewards within three calendar days of receiving notice of the horse's TCO2 test result, contend that the horse's reported TCO2 level is physiologically normal and request that the horse be held in guarded quarantine. If so, the racetrack operator shall make available a guarded quarantine for a time determined by the state steward, not to exceed 72 hours, at the sole expense of the requesting licensee. During the quarantine, the horse shall be retested periodically, and although the horse shall not race, it may be exercised and trained at times prescribed by the racetrack operator provided this does not interfere with monitoring, sampling, and testing the horse. The state steward shall then determine whether the horse's pre-race TCO2 level was physiologically normal for it. The state steward may also*

require, at least 45 days later, that the horse re-establish its normal TCO<sub>2</sub> level with another guarded quarantine to be made available at the sole expense of the racetrack operator.

(c) Any guarded quarantine provided by the racetrack operator shall ensure that, at a minimum:

1) Such horse shall be under direct surveillance by at least one guard at all times;

2) Access to the horse shall be restricted to licensed persons who are directly affiliated with such horse, track stewards, or employees of the New York State Racing and Wagering Board, all of whom shall provide their respective track identification badge or Board-issued photo identification card prior to entry;

3) A written or electronic log of all persons who have had access to the horse shall be maintained by the guard, indicating the name and license number or track identification badge number of the person, the date and time of the visit (including time in and out of the restricted area), the nature and purpose of the visit, a description of any and all equipment, paraphernalia, tack, medications, or feed brought to the horse, and all activity observed by the guard during the visit; and

4) The racetrack operator shall maintain such written or electronic logs of guarded quarantine activity for a minimum period of 90 days after the conclusion of the applicable guarded quarantine period.

(d) The penalty for violations of this rule shall be not less than (i) for a first violation, a 60-day license suspension and one-thousand dollar (\$1000) fine; (ii) for a second violation, a 75-day license suspension and two-thousand five-hundred dollar (\$2500) fine; and (iii) for additional violations, a one-year suspension and five-thousand dollar (\$5000) fine together with a referral to the board for further action including a possible license revocation. Where independent evidence shows that the horse was treated within 24 hours of its race by means not permitted by section 4043.2 of this subtitle, however, every license suspension shall be for at least two years. Every suspension shall include denial of the privileges of the grounds.

(e) For a violation of this rule, a horse shall be disqualified, any purse monies shall be forfeited and redistributed pursuant to Rule 4043.5, and pre-race detention shall be imposed.

A new section 4043.9 is added to read as follows:

**4043.9 Pre-race detention**

(a) A horse that tests in violation of Rule 4043.8 shall be placed under pre-race detention, without regard to whether the horse is transferred to a new trainer, for a period of six (6) months from the date of violation. If during the detention period a horse again tests in violation of Rule 4043.8, then the detention period shall be extended as the stewards shall deem appropriate. The racetrack operator sponsoring the race shall make such pre-race detention available, at the sole expense of the trainer, for at least six (6) hours before the start of the race program and as required by the stewards. Where a claimed horse is found to have excess TCO<sub>2</sub>, the costs of a pre-race detention shall be the responsibility of the party requesting detention.

(b) All horses of a trainer who has violated Rule 4043.8 more than once in the preceding 12 months shall be placed under pre-race detention, without regard to whether the horses are transferred to a new trainer, for a period of eight (8) months from the date of the most recent violation. The racetrack operator sponsoring the race shall make such pre-race detention available, at the sole expense of the trainer, for at least six (6) hours before the start of the race program and as required by the stewards. If during a detention period a trainer violates Rule 4043.8, then the detention period shall be extended for such time as the stewards deem appropriate.

A new section 4043.10 is added to read as follows:

**4043.10 TCO<sub>2</sub> testing: punishment for failure to cooperate**

It shall be a violation of Rule 4042.1(f) for any person subject to the jurisdiction of the Board to fail to cooperate with the blood gas testing program.

A new subdivision (g) of section 4038.19 is added to read as follows:

(g) Excess TCO<sub>2</sub> levels. In the event that a claimed horse tests in violation of Rule 4043.8, and it is not determined that such TCO<sub>2</sub> level is physiologically normal for that particular horse, the claimant or his trainer shall have the option to void the claim upon written notice to the stewards within five (5) days of receiving notice of the violation.

A new section 4120.13 is added to read as follows:

**4120.13 TCO<sub>2</sub> blood gas testing program**

(a) The board may obtain pre-race blood samples from horses for subsequent testing for total carbon dioxide level (TCO<sub>2</sub>). The board may also obtain post-race blood samples from horses for subsequent testing for TCO<sub>2</sub>, after a minimum one-hour standing at rest period for the horse

after its race. It shall be a violation of this rule where the horse's TCO<sub>2</sub> level equals or exceeds thirty-seven (37) millimoles per liter or, for horses administered furosemide pursuant to Rule 4120.2(b)(6), thirty-nine (39) millimoles per liter.

(b) It shall be an affirmative defense that the horse's physiologically normal TCO<sub>2</sub> level was not exceeded. To demonstrate a horse's physiologically normal TCO<sub>2</sub>, its owner or trainer must comply with the following procedure. The owner or trainer must, in writing to the judges within three calendar days of receiving notice of the horse's TCO<sub>2</sub> test result, contend that the horse's reported TCO<sub>2</sub> level is physiologically normal and request that the horse be held in guarded quarantine. If so, the racetrack operator shall make available a guarded quarantine for a time determined by the presiding judge, not to exceed 72 hours, at the sole expense of the requesting licensee. During the quarantine, the horse shall be retested periodically, and although the horse shall not race, it may be exercised and trained at times prescribed by the racetrack operator provided this does not interfere with monitoring, sampling, and testing the horse. The presiding judge shall then determine whether the horse's pre-race TCO<sub>2</sub> level was physiologically normal for it. The presiding judge may also require, at least 45 days later, that the horse re-establish its normal TCO<sub>2</sub> level with another guarded quarantine to be made available at the sole expense of the racetrack operator.

(c) Any guarded quarantine provided by the racetrack operator shall ensure that, at a minimum:

1) Such horse shall be under direct surveillance by at least one guard at all times;

2) Access to the horse shall be restricted to licensed persons who are directly affiliated with such horse, judges, or employees of the New York State Racing and Wagering Board, all of whom shall provide their respective track identification badge or Board-issued photo identification card prior to entry;

3) A written or electronic log of all persons who have had access to the horse shall be maintained by the guard, indicating the name and license number or track identification badge number of the person, the date and time of the visit (including time in and out of the restricted area), the nature and purpose of the visit, a description of any and all equipment, paraphernalia, tack, medications, or feed brought to the horse, and all activity observed by the guard during the visit; and

4) The racetrack operator shall maintain such written or electronic logs of guarded quarantine activity for a minimum period of 90 days after the conclusion of the applicable guarded quarantine period.

(d) The penalty for violations of this rule shall be not less than (i) for a first violation, a 60-day license suspension and one-thousand dollar (\$1000) fine; (ii) for a second violation, a 75-day license suspension and two-thousand five-hundred dollar (\$2500) fine; and (iii) for additional violations, a one-year suspension and five-thousand dollar (\$5000) fine together with a referral to the board for further action including a possible license revocation. Where independent evidence shows that the horse was treated within 24 hours of its race by means not permitted by section 4120.2 of this subtitle, however, every license suspension shall be for at least two years. Every suspension shall include denial of the privileges of the grounds.

(e) For a violation of this rule, a horse shall be disqualified, any purse monies shall be forfeited and redistributed pursuant to Rule 4120.5, and pre-race detention shall be imposed.

A new section 4120.14 is added to read as follows:

**4120.14 Pre-race detention**

(a) A horse that tests in violation of Rule 4120.13 shall be placed under pre-race detention, without regard to whether the horse is transferred to a new trainer, for a period of six (6) months from the date of violation. If during the detention period a horse again tests in violation of Rule 4120.13, then the detention period shall be extended as the judges shall deem appropriate. The racetrack operator sponsoring the race shall make such pre-race detention available, at the sole expense of the trainer, for at least six (6) hours before the start of the race program and as required by the judges. Where a claimed horse is found to have excess TCO<sub>2</sub>, the costs of a pre-race detention shall be the responsibility of the party requesting detention.

(b) All horses of a trainer who has violated Rule 4120.13 more than once in the preceding 12 months shall be placed under pre-race detention, without regard to whether the horses are transferred to a new trainer, for a period of eight (8) months from the date of the most recent violation. The racetrack operator sponsoring the race shall make such pre-race detention available, at the sole expense of the trainer, for at least six (6) hours before the start of the race program and as required by the judges. If during a

detention period a trainer violates Rule 4120.13, then the detention period shall be extended for such time as the judges deem appropriate.

A new section 4120.15 is added to read as follows:

**4120.15 TCO2 testing: punishment for failure to cooperate**

*It shall be a violation of Rule 4119.7 for any person subject to the jurisdiction of the Board to fail to cooperate with the blood gas testing program.*

A new subdivision (f) of section 4109.7 is added to read as follows:

*(f) Excess TCO2 levels. In the event that a claimed horse tests in violation of Rule 4120.13, and it is not determined that such TCO2 level is physiologically normal for that particular horse, the claimant or his trainer shall have the option to void the claim upon written notice to the stewards within five (5) days of receiving notice of the violation.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 4038.18.

**Text of rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

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

A revised Regulatory Impact Statement and a revised Consolidated Statement of Non-assessment is not necessary because this Notice of Adoption contains a minor revision to the rule text that corrects a typographical error. It is not a substantive change to the rule, and therefore it does not change the accuracy of the previously published Regulatory Impact Statement and Consolidated Statement of Non-Assessment.

This Notice of Adoption corrects a typographical error in the rule text numbering that was published in the Notice of Proposed Rulemaking. The text in the May 9, 2007 State Register stated that a new subdivision (f) of section 4038.18 of 9 NYCRR would be added. In fact, this rulemaking will create a new subdivision (g) of section 4038.18 of 9 NYCRR.

**Assessment of Public Comment**

The Board received public comments from Jim Gallagher, Executive Director of the New York Thoroughbred Horsemen's Association, Inc., and Dr. W. T. Hill, a veterinarian and the Jockey Club Steward in New York State. No changes were made as a result of the comments received.

Mr. Gallagher stated that while NYTHA is generally supportive of the adoption of the TCO2 testing rules, the NYTHA has "serious reservations and concerns about the proposed penalties as outlined" and requested that "mitigating and aggravating circumstances should be considered by the New York State Racing and Wagering Board for a high concentration" in light of factors that may cause a horse to have excessive TCO2 levels other than from the administration of alkalizing agents.

Board staff considered these factors in drafting the rule and has included a provision in the rules that allow horses that exhibit naturally high TCO2 levels to re-test and demonstrate that the horse does in fact have naturally high TCO2 levels [see sections 4043.8(b) and 4120.13(b)]. Board staff also considered the affect of furosemide on TCO2 levels in a horse and established a higher threshold level for horses that compete on furosemide. The threshold levels for a horse competing on furosemide is 39 millimoles per liter, while threshold levels for all others are 37 millimoles per liter. In the event that there is a violation, the trainer is afforded an opportunity to appeal the penalty before a hearing officer as prescribed by Board rules and present evidence of factors that may have produced elevated levels other than the administration of alkalizing agents.

Mr. Gallagher suggested lower penalties and recommended the adoption of uniform penalties prescribed by the Racing Medication and Testing Consortium for TCO2 violations. Those uniform penalties include: first offense, 15- to 60-day suspension and/or \$500 to \$1,000 fine; second offense, 30- to 180-day suspension and/or \$1,000 to \$2,500 fine; and third offense, 60-day to 1 year suspension. The Board considered the entire spectrum of penalty levels in light of the grave impact of "milkshaking" on the integrity of horse racing, the loss of public confidence in pari-mutuel wagering, a cost/benefit analysis of average purse sizes versus fines, and the need for hefty suspensions. Unlike other horse racing violations, such as equipment violations or riding violations, administering alkalizing agents to a horse in order to intentionally gain an advantage is cheating, plain and simple, and as such undermines the sport itself. The best way to deter cheating is to make it more costly than the possible benefits to be gained through cheating. This can only be achieved through hefty fines and lengthy suspensions (some of which exceed the length of the race meet season itself, rather than a shorter suspension which some licensees view as a state-imposed "vacation" rather than a punishment.) As such, the Board developed penalties that are fixed, uniform, and unambiguous.

The Board also considered that, while the Racing Medication and Testing Consortium has worked nationally to develop uniform rules which take into consideration the needs of smaller racing jurisdictions, New York State racing is held to a higher standard and offers a superior racing product, and therefore has a duty to impose more stringent penalties to protect both the legacy and future of New York horse racing. It should be noted that the New York penalties are identical to the New Jersey penalties for TCO2 violations.

Mr. Gallagher also asks whether the Board has a standard operating procedure for sample collection and custody, and notes that such procedures aren't in the rules. Dr. Hill also asked if the Board has a written protocol for sampling and custody. The Board does have standard collection and custody procedures, which have been established by the College of Veterinary Medicine at Cornell University, which conducts the Board's equine medication and TCO2 testing. These collection and custody procedures are not incorporated into the rules because they are implemented through agency directives and policies. These collection and custody procedures are routinely examined in the hearings and appeals process for cases of equine drug violations. The Board's collection and custody procedures are uniform and designed to achieve accuracy of testing and integrity of the process.

Dr. Hill commented that the 37 millimole per liter for non-furosemide horses was too high, noting that the International Federation of Horseracing Authorities has lowered the TCO2 blood gas threshold to 36 mmol/liter, and the Racing Medication and Testing Consortium also recommends a lower threshold. According to Dr. Hill, a review of TCO2 blood gas testing results conducted by the New York Racing Association indicates that "some trainers may still be beating the system and frequently have numbers (under) 33 or 34 (mmol/liter), while the mean of all horses is just over 31." Dr. Hill added that "Our sample size is quite small, but interesting nonetheless."

The Board has decided to remain with the current levels of 37 mmol/liter for non-furosemide horse and 39 mmol/liter for horses competing on furosemide because these are generally accepted thresholds in various jurisdictions, including New Jersey, Illinois, California and Canada. The Board acknowledges the fact that ongoing assessment of these threshold levels is appropriate and necessary in light of new research and studies. Nevertheless, the current peer-reviewed scientific data that the Board evaluated with the Cornell University lab indicates that the 37/39 threshold is sound and reliable and should remain as the regulatory standard.

Dr. Hill also commented that the RMTTC recommends a 1.5 hour post-race rest period prior to blood sampling, compared to the one-hour post-race rest period required by the Board's rules. The Board elected to implement the one-hour rest period based upon the best available scientific information and sampling currently available. The Board will continue to review authoritative sources regarding testing standards and make appropriate changes to the TCO2 testing rule if such compelling data is obtained. For the current rule, based upon the best available scientific data, the current one-hour post-race rest period will be the regulatory testing standard.

**NOTICE OF ADOPTION**

**Treasure Chest Raffle and Search for the Queen of Hearts**

**I.D. No.** RWB-19-07-00005-A

**Filing No.** 804

**Filing date:** July 31, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Addition of sections 5620.23 and 5620.24 to Title 9 NYCRR.

**Statutory authority:** General Municipal Law, art. 9-a, sections 186(c) and 188-a

**Subject:** Treasure Chest Raffle and Search for the Queen of Hearts.

**Purpose:** To authorize the games of chance known as the Treasure Chest Raffle and Search for the Queen of Hearts.

**Text or summary was published** in the notice of proposed rule making, I.D. No. RWB-19-07-00005-P, Issue of May 9, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Use of the Whip**

**I.D. No.** RWB-20-07-00006-A

**Filing No.** 803

**Filing date:** July 31, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of section 4117.8 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Use of the whip at one-quarter of a mile before the finish of the race instead of the current restriction at one-eighth of one-mile before the finish.

**Purpose:** To enable the board to preserve the public's confidence in the integrity of the sport, while generating reasonable revenue for the support of government.

**Text or summary was published** in the notice of proposed rule making, I.D. No. RWB-20-07-00006-P, Issue of May 16, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Wagering While on Duty**

**I.D. No.** RWB-20-07-00007-A

**Filing No.** 801

**Filing date:** July 31, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of sections 4005.4 and 4122.10 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Pari-mutuel corporation employees prohibited from making wagers while on duty.

**Purpose:** To prohibit employees who are employed in the pari-mutuel department of any corporation or association licensed to conduct harness racing or thoroughbred racing in the State of New York from betting on duty; and to avoid the actual or apparent misconduct of a pari-mutuel employee given his or her unique position in the pari-mutuel wagering system.

**Text or summary was published** in the notice of proposed rule making, I.D. No. RWB-20-07-00007-P, Issue of May 16, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Single-Service Use and Disposal of Syringes and Needles**

**I.D. No.** RWB-20-07-00008-A

**Filing No.** 802

**Filing date:** July 31, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Addition of sections 4120.16 and 4043.11 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Single-service use and disposal of syringes and needles used in the administration of equine medication at race tracks.

**Purpose:** To prevent the inadvertent administration of a prohibited or harmful drug to a horse, which may affect the health or performance of a race horse and prevent the contamination of the horse's blood, which could result in a positive drug test and the subsequent disqualification and penalty for a drug positive.

**Text or summary was published** in the notice of proposed rule making, I.D. No. RWB-20-07-00008-P, Issue of May 16, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Internet and Telephone Account Wagering on Horseracing**

**I.D. No.** RWB-33-07-00005-P

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

**Proposed action:** Addition of Part 5300 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 222, 301, 401, 518, 520, 1002 and 1012

**Subject:** Internet and telephone account wagering on horseracing.

**Purpose:** To ensure the integrity of pari-mutuel wagering by adopting licensing and regulatory standards for internet and telephone account wagering; establish reporting, recordkeeping, operational and application requirements for race track operators and off-track betting corporations within New York State that offer internet and telephone account wagering.

**Substance of proposed rule (Full text is posted at the following State website: [www.racing.state.ny.us](http://www.racing.state.ny.us)):** 5300.1 Definitions and general provisions.

Contains definitions of various words and terms, when used in this chapter including: Account, Account holder, Account wager, Account wagering, Account wagering center, Account activity, Authorized pari-mutuel wagering entity, Board, Internet, Official, Stored value instrument, Totalisator system, and Wagering device.

5300.2 Account wagering, general.

Allows authorized pari-mutuel wagering entities (hereinafter "entity") to offer account wagering with prior board approval, restricting accounts to wagering purposes only; and determines which entities account wagers are deemed to be on track wagers and which are to be deemed off-track;

5300.3 Approval of account wagering.

Provides that entities authorized to conduct account wagering shall have a Board approved written plan of operation, including at least a proposed system of accepting wagers, internal controls, system security details, account wagering rules, and an independent recording for each transaction.

5300.4 Establishment of an account.

(a) Sets forth minimum criteria for establishment of accounts, allowable purposes, information to be provided, who may open an account, standards for verification of identity, notification standards, information allowed to be collected.

(b) Bearer accounts.

Provides standards for the use of bearer accounts evidenced by a card with a PIN number for customers without collecting identity information.

5300.5 Official address.

Provides that the entity may use the address listed on the account wagering application for listed purposes, until the entity is informed by the account holder of a change in address.

5300.6 Changes to account information.

Requires the entity to provide a method for the account-wagering holder to make official changes to his/her account information.

5300.7 Right to refuse an account.

Provides for refusal of account based on business judgment, and mandatory exclusion of certain persons.

5300.8 Segregation of funds.

Requires the entity to deposit account holder's money within 72 hours of receipt in a segregated account.

5300.9 Conduct of wagering.

Provides rules for acceptance of wagers from established account holders via the telephone, internet, or other means subject to an approved plan of operation.

5300.10 Record of wager; pari-mutuel tickets.

This section deems all wagers placed through the account wagering system pari-mutuel tickets subject to all rules and laws governing pari-mutuel tickets.

5300.11 Withdrawals and other debits to accounts.

Sets forth standards for withdrawals from accounts, including identity, means, record keeping and time requirements; authorizes electric fund transfers.

5300.12 Credits to accounts.

States requirements for making and crediting deposits and winning payoffs, effect of IRS requirements, and other credits.

5300.13 Account statements.

Sets requirements for frequency, means of delivery and content of account statements.

5300.14 Record keeping.

Sets forth record keeping requirements for entities, including details and time required to be kept, and how account liabilities are to be recorded on books and records.

5300.15 Confidentiality of accounts.

Requirement for keeping accounts confidential, states exceptions.

5300.16 Closing of accounts.

Sets requirements for closing of accounts at request of account holders.

5300.17 Dormant accounts.

States rule for distribution of dormant accounts.

5300.18 Surcharge.

States rule for suspension of surcharge on accounts.

5300.19 Vouchers.

Defines vouchers and states these are not accounts or account wagers.

5300.20 Reports to board.

Sets forth time and content requirements for reports on handle, number of accounts or other reports.

5300.21 Yearly audit.

Contains minimum frequency requirements for audits.

5300.22 Disputes/Complaints.

Sets forth requirements for handling customer disputes including documentation and audit requirements.

5300.23 Cooperation with officials.

Sets forth requirement for entity to cooperate with Board officials upon request.

**Text of proposed rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2533, (518) 395-5400, e-mail: info@racing.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**

(a) Statutory Authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 104, 222, 301, 401, 518, 520, 1002 and 1012. Subdivision 1 of section 101 of the Racing, Pari-Mutuel Wagering and Breeding Law (RPWBL) vests the Racing and Wagering Board (the Board) with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 222 authorizes the conduct of pari-mutuel betting on horse races for the purpose of deriving a reasonable revenue for the support of government and to promote agriculture and breeding of horses in New York State. Subdivision 1 of section 301 grants the Board the authority to supervise generally all harness race meetings in New York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly. Subdivision 1 of section 401 grants the Board the power to supervise generally all quarterhorse race meetings in the state at which pari-mutuel betting is conducted. Section 518 authorizes off-track pari-mutuel betting so long as it is conducted under the administration of the Board. Subdivision 1 of section 520 grants general jurisdiction to the Board over the operation of all off-track pari-mutuel betting facilities within the state, and directs the Board to issue rules and regulations regarding off-track pari-mutuel betting activity. Subdivision 1 of

section 1002 grants the Board general jurisdiction and rulemaking power over the simulcasting of horse races within the state. Subdivision 4 of section 1012 requires that the maintenance and operation of telephone accounts for wagers placed on licensed pari-mutuel racing shall be subject to rules and regulations of the New York State Racing and Wagering Board. Subdivision 4-a of section 1012 was added by Chapter 314 of the Laws of 2006 to expand authorized telephone account wagering to include wired or wireless communications, including the internet.

(b) Legislative Objectives: These amendments give regulatory force and effect to the statutory amendments contained in Chapter 314 of the Laws of 2006 as codified in Section 1012 of the RPWBL. Specifically, the amendments provide the necessary definitions, guidelines and safeguards that allow for the use of state-of-the-art communication equipment in account wagering while preserving the integrity of pari-mutuel wagering in New York State, thereby ensuring substantial revenue for state and local governments and strengthening and furthering the racing, breeding and pari-mutuel wagering industry in New York State.

(c) Needs And Benefits: The New York State and the Racing and Wagering Board needs to ensure that the hundreds of millions of dollars that may potentially be wagered by telephone and the Internet in any given year can be accounted for using uniform and reliable methods. These regulatory amendments are necessary to implement the statutory provisions of Chapter 314 of the Laws of 2006, which becomes effective January 22, 2007 and amends Section 1012 of the Racing, Pari-Mutuel Wagering and Breeding Law (RPWBL) by expanding the authorized method of placing account wagers to include all those wagers which utilize any wired or wireless communication device, including but not limited to wireline telephones, wireless telephones, wireless telephones, and the internet. This rule is necessary to ensure the integrity of Internet and telephone account wagering in New York State. While Chapter 314 authorized in general terms the use of certain electronic devices in pari-mutuel wagering activities, this rule establishes the specific guidelines necessary for practical implementation of the statutory amendments. Telephone account wagering has been available in New York State for approximately 30 years, but there have been no comprehensive Board rules for account wagering. This will establish such rules. The New York State Legislature has recognized the potential of Internet account wagering in bolstering New York horse racing, and these rules will ensure that the use of the Internet in pari-mutuel wagering will be conducted in an open and honest manner.

(d) Costs

(i) The costs for the implementation of, and continuing compliance with, the rule to regulated persons will be negligible. Racetrack operators and off-track betting corporations already make telephone account wagering available and can comply with this rule by using existing accounting equipment and personnel. Such entities also have their own web sites and web server networks.

(ii) There would be no new costs for the implementation of, and continued administration of, the rule to the New York State Racing and Wagering Board, and the state and local governments. The Board and the Department of Taxation and Finance currently monitor telephone account wagering, and can continue to use current resources to administer this rule. The addition of internet wagering as a method of account wagering will not impose any new costs given the inherent accountability qualities of Internet servers and software systems. There would be no new costs to local governments because they do not regulate pari-mutuel wagering.

(iii) The information regarding costs was determined by Board staff. It made this determination based upon practical knowledge of the existing telephone account wagering systems, which it currently supervises pursuant to its general powers under the RPWBL.

(e) Paperwork: This rule does not impose any specific form requirement, but does include reporting requirements.

Authorized pari-mutuel wagering entities will be required to maintain for three years documentation of all persons excluded from opening an internet wagering account. Entities will also be required to maintain documentation of customer disputes and complaints for three years. All such documents must be made available to the Racing and Wagering Board upon request.

Authorized pari-mutuel wagering entities will be required to submit a written plan of operations for approval by the Racing and Wagering Board.

Authorized pari-mutuel wagering entities will be required to furnish monthly account statements to their customers.

Authorized pari-mutuel entities will be required submit annual reports detailing handle information and account activity from the previous calen-

dar year. Entities will also be required to conduct annual audits of the account wagering system data input and account updates.

(f) Local government mandates: There are no local government mandates. Pari-mutuel wagering activities in New York State are exclusively regulated by the New York State Racing and Wagering Board.

(g) Duplication: Because the New York State Racing and Wagering Board has exclusive regulatory authority over pari-mutuel wagering activity, there are no other state or federal rules that duplicate, overlap or conflict with this rule. This rule is intended to give force and effect to Chapter 314 of the Laws of 2006. This rule is consistent with the provisions of the federal Unlawful Internet Gambling Enforcement Act of 2006, which amends Chapter 53 of Title 31, United States Code.

(h) Alternative approaches: Several alternatives were considered. Board staff considered the Advance Deposit Wagering Rules of the Association of Racing Commissioners International and the telephone account wagering practices currently used in New York State. Board staff also reviewed and considered the account wagering rules of other jurisdictions, including Maryland, Louisiana, Massachusetts, Idaho, South Dakota, Washington, California and New Jersey. All of these similar rules and practices are relatively uniform.

In drafting this rule, the Board solicited and considered public comment from all entities engaged in pari-mutuel wagering in the State of New York, including thoroughbred and harness track operators, off-track betting corporations, and pari-mutuel wagering totalizator companies. There was general support for the Board's approach to accountability and reporting. The Board did revise certain aspects of the rule based upon public comments, but ultimately retained the overall regulatory approach as originally proposed.

Board staff considered the need for general age proof requirements in the rule and determined that none were necessary. Paragraph 1 of subdivision (a) of section 5300.4 requires that an account holder "shall be a natural person eighteen (18) years of age or older." This requirement is consistent with section 104 of the Racing, Pari-Mutuel Wagering and Breeding Law, which states that "No association or corporation which is licensed or franchised by the board shall permit any person who is actually and apparently under eighteen years of age to bet on a horse race conducted by it nor shall such person be permitted to bet at an establishment of a regional corporation conducting off-track betting." The association, corporation or off-track regional corporation is responsible for ensuring that no person – including persons who hold bearer accounts or wish to wager under a bearer account – is under the age of eighteen if they wish to place a bet. Section 5300(a)(1) simply reiterates the section 104 restriction so as to provide clear language and guidance to regulated parties. No additional rules were included in regard to general age proof requirements because Board staff has determined that Section 104 is self-executing and does not require additional rules in order to effectively enforce its provisions. The Board expects licensees to apply the same age proof requirements for section 5300.4(a)(1) as it does for section 104 of RPWBL.

(i) Federal standards: There are no federal standards which specifically govern these pari-mutuel wagering activities. The Unlawful Internet Gambling Act of 2006 states that "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 *et seq.*).

(j) Compliance schedule: These rules will become effective upon the date of publication in the *State Register* subsequent to final adoption by the Board. It is anticipated that regulated entities can achieve compliance on the date of publication of this rule.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment addresses the limited issue of operational and administrative aspects of Internet and telephone account wagering. This rule would affect race track operators and off-track betting corporations throughout New York State, all of who currently offer telephone account wagering. This rule is consistent with current practices employed by such entities, as well as certain disclosure and operational plan requirements of the Racing and Wagering Board. This rule is intended to modify the Board's rules to properly regulate the expansion of pari-mutuel wagering into the realm of the Internet and telephone wagering as authorized by the Legislature in 2006. It does not limit job opportunities. In fact, the increased revenue from pari-mutuel wagering over the Internet may help preserve and expand economic opportunities in the New York State horse racing industry by capturing revenue that is wagered over the Internet on horseracing in other states and countries. Establishing Internet and telephone account wagering

standards does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8) because race track operators and off-track betting corporations are not small businesses. Nor does this rule affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry because the race track operators and off-track betting corporations are able to use the current telephone account wagering and Internet server technology that they currently possess.

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## Triborough Bridge and Tunnel Authority

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### NOTICE OF ADOPTION

**Ready-Mix Concrete Vehicles**

**I.D. No.** TBA-19-07-00002-A

**Filing No.** 783

**Filing date:** July 30, 2007

**Effective date:** Aug. 15, 2007

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

**Action taken:** Amendment of section 1022.1(n) of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 553(5)

**Subject:** Use of TBTA bridges and tunnels by ready-mix concrete vehicles.

**Purpose:** To allow for the expedited and efficient reconstruction of the World Trade Center site.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TBA-19-07-00002-P, Issue of May 9, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Joyce Mulvaney, Director of Public Affairs, Triborough Bridge and Tunnel Authority, 2 Broadway, 22nd Fl., New York, NY 10004, (646) 252-7416, e-mail: JMulvane@mtabt.org

**Assessment of Public Comment**

The agency received no public comment.