

# RULE MAKING ACTIVITIES

---

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

- AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice  
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; 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.

---

---

## Education Department

---

---

### EMERGENCY RULE MAKING

#### Contracts for Excellence

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

**Filing No.** 1247

**Filing date:** Nov. 23, 2007

**Effective date:** Nov. 25, 2007

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

**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 and adopted the revised rule as an emergency action, effective July 31, 2007. A Notice of Emergency Adoption and Revised Rule Making was published in the August 15, 2007 State Register.

At their September 10, 2007 meeting, the Board of Regents readopted the July emergency rule to ensure that the emergency rule remains in effect until the effective date of its adoption as a permanent rule. The September emergency rule will expire on November 24, 2007.

Further revisions to the proposed amendment are being considered, which will require publication of a Notice of Revised Rule Making in the State Register. 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. Since the Board of Regents meets at fixed intervals, 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 January 14-15, 2008 Regents meeting. However, the September emergency adoption will expire on November 24, 2007, 60 days after its filing with the Department of State on September 26, 2007. A lapse in the rule's effectiveness would disrupt implementation of the contract for excellence program under Education Law section 211-d. A fifth emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule that was adopted at the April Regents meeting, revised at the June and July Regents meetings, and readopted at the September Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule.

**Subject:** Contracts for excellence.

**Purpose:** To establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aide expenditures, and other requirements for purposes of preparation of contracts for excellence by certain specified school districts.

**Substance of emergency rule:** The Board of Regents has readopted, by emergency action effective November 25, 2007, the emergency rule adopted at the September 10, 2007 Regents meeting that added a new section 100.13 and amended section 170.12 of the Commissioner's Regulations. 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. The following is a summary of the emergency 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 only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-20-07-00005-EP, Issue of May 16, 2007. The emergency rule will expire January 21, 2008.

**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 215 provides the Commissioner with the authority to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

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 211-d, as added by Chapter 57 of the Laws of 2007, 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 and to prescribe a format by which each affected school district shall publicly report its expenditures of total foundation aid.

#### LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and it is necessary to implement Chapter 57 of the Laws of 2007 by establishing criteria for allowable programs and activities, public reporting by school districts of their total foundation aid expenditures, and other requirements regarding contracts for excellence under Education Law section 211-d.

#### NEEDS AND BENEFITS:

The proposed rule is needed to implement the statutory requirements. The rule establishes systems and processes that provide for transparency, simplicity and accountability in the use of additional aid to districts with the greatest concentrations of students in need who are at the same time, experiencing the greatest obstacles to improving their students' achievement. Moreover, it ensures that districts and schools use new funding on one or more of the following six programs and activities: class size reduction, increased time on task, middle and high school restructuring, full day prekindergarten and kindergarten, teacher and principal quality initiatives and experimental programs.

Research has substantiated that there are strong empirical rationales for the proposed actions enacted under the rule with regard to allowable programs and activities and overall educational achievement. For example, the STAR project was a large scale, four-year experimental study of the effect of reduced class sizes on student achievement in the state of Tennessee. In the formal program evaluation after the intervention, "Carry-over Effects of Small Classes", the research team of J.D. Finn, B.D. Fulton, J.B. Zaharias, and B.A. Nye (the *Peabody Journal*, Vol. 67, No. 1, Fall 1989/1992) found that average pupil performance in the primary years can be increased significantly by reduced class size.

With regard to increased time on task, Aronson, Zimmerman and Carlos in their paper, "Improving Student Achievement by Extending School: Is It Just a Matter of Time?" (Office of Educational Research and Improvement, Washington, DC, 1998) found that time indeed does matter. Their paper reviews the research literature of at least three decades, on the relationship between time and learning. Time, they found, however, is no panacea: an increase in additional educational time only manifests itself in achievement gains when more time is used for instruction, particularly that material in which students are engaged.

The research literature examining the relationship between teacher quality and concomitant student achievement is very substantial. Rivers and Sanders' paper "Teacher Quality and Equity in Educational Opportunity: Findings and Policy Implications" (reprinted in Lance T. Izumi and Williamson Evers' *Teacher Quality*, Hoover Institution Press, 2002) is illustrative. Rivers and Sanders detail the results of their analysis of several years of individual teacher effects on Tennessee pupils. The authors found that differences in teacher ability are substantial. Their study also reveals that successful teachers can elicit significant gains from students of all ethnicities and income levels.

The research of Hayes Mizell and others is illustrative of the empirical rationale for the proposed rule requirement that grade change restructuring must be accompanied by instructional and/or content reforms. In his remarks as keynote speaker (titled "Still Crazy After All These Years: Grade

*Configuration and the Education of Young Adolescents*”) in October 2004, at the annual conference of the National School Board Association’s Council of Urban Boards of Education, Mizell pointed out that many school systems think that for example, a conversion to a K-8 school will solve all their problems. Accordingly, they make the mistake he argued, of not dealing with the difficult, substantive issues of how to engage students in challenging academic work while also providing them with the personal and academic supports necessary to increase their level of proficiency.

Finally, the proposed rule’s rationale for the integration of disabled preschool children in full day prekindergarten and kindergarten allowable programs and activities is based on the research of such authors as Jenkins, Odoms and Speltz. In their paper, titled “*Effects of Social Integration on Preschool Children with Handicaps*” (Exceptional Children, Vol. 55, 1989), they detail the results of a randomly assigned experiment of the inclusion of children with mild and moderate disabilities in classes of non-disabled pupils. What they found was that structuring social interaction between lower and higher performing students can result in benefits to the lower-performing students, particularly in terms of language development.

#### COSTS:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant, additional costs beyond those inherent in the statute.

##### a. Costs to State government:

None.

##### b. Costs to local governments:

The new requirements will result in additional costs to school districts, as follows:

##### (i) Sustained Professional Development

If it is assumed that there will need to be two extra days per year of sustained professional development for contract for excellence programs, for one to two dozen teachers per district at a cost of \$125 per teacher per day, it is estimated that there might be a total annual cost for all of the districts of \$400,000 per year (for purposes of this calculation, NYC was treated as thirty-four districts – one high school district, one special education district and thirty-two community school districts).

##### (ii) Other Costs

Depending on a district’s selection of allowable programs and activities, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-base intervention; and analyzing, gathering and compiling the necessary research to support their proposed Contract for Excellence programs and activities. To estimate the total yearly costs associated with these items, it is estimated that each district (55 plus 34 for NYC (see above) for a total of 89 districts) hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$9,435,000.

##### c. Costs to private, regulated parties:

There are no anticipated additional costs to private, regulated parties.

##### d. Costs to the Education Department of implementation and continuing compliance:

It is anticipated that there may be additional costs to the State Education Department for implementation and continuing compliance, relating to the convening of an expert panel by the Commissioner to determine class size ranges. The cost for this will vary depending on the “formality” of the process. If a study by an outside consultant or firm were commissioned by the panel, for example, the anticipated expense might be in the tens of thousands of dollars. A less formal process might only have costs for travel and necessary supplies.

#### LOCAL GOVERNMENT MANDATES:

Consistent with Chapter 57 of the Laws of 2007, the proposed rule requires that each district so identified prepare a contract for excellence. Allowable programs must be accompanied by sustained professional development and additional instruction provided under such programs must come from appropriately certified or highly qualified teachers. In addition, any allowable programs and activities shall be coordinated with the district’s comprehensive education (improvement) plan. Moreover, depending on the allowable programs and activities chosen, the proposed rule mandates or requires certain actions. For example, those districts choosing to use contract for excellence funding for allowable programs and activities related to middle and high school restructuring must also make instructional changes, in addition to any grade span restructuring they may en-

gage in (such as the conversion of a building housing pupils in grades 7-9 to the creation of a 9th grade academy).

#### PAPERWORK:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant reporting requirements beyond those inherent in the statute. School districts will submit their contracts to the Commissioner for approval, using an automated, web-based application.

#### 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 211-d, as added by Chapter 57 of the Laws of 2007.

#### ALTERNATIVES:

An alternative proposal which was considered was to create a fiscal and program accountability system similar to the comprehensive education plan (CEP) process for districts, not meeting their Adequate Yearly Progress (AYP) targets pursuant to the federal No Child left Behind Act. However, a CEP-like process, which would have required large and comprehensive data collection and paperwork requirements, was rejected as too cumbersome, time-intensive and not flexible enough, relative to the simpler, automated, web-based application and monitoring approach enacted by this proposed rule.

#### FEDERAL STANDARDS:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2006, and does not exceed any minimum federal standards. There are no substantive federal standards that are applicable to this proposal insofar as there is no federal equivalent of the contract for excellence.

#### COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007. The guidelines supplied by the NYS Education Department require school districts to file their 2007-2008 Contracts for Excellence by July 1, 2007. The Education Department will review and approve such contracts on or about August 1, 2007.

#### Regulatory Flexibility Analysis

##### Small Businesses:

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. The proposed rule does not impose any adverse economic impact, reporting, recordkeeping 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 effects of the rule will be borne by local governments, specifically, school districts. The proposed rule applies to those (56) fifty-six school districts in the State that have been determined to meet the statutory requirements in Education Law section 211-d necessitating the submission of a contract for excellence.

#### COMPLIANCE REQUIREMENTS:

The proposed rule mandates these affirmative acts, not imposed by the authorizing statute, on allowable program activities:

- (1) They must be consistent with federal and State statutes and regulations governing the education of students;
- (2) They be developed by reference to practices supported by research or evidence as to what will facilitate student attainment of the State standards;
- (3) They be accompanied by sustained professional development;
- (4) Any additional instruction provided under such programs must come from appropriately certified or highly qualified teachers; and
- (5) They must be coordinated with the district’s comprehensive education (improvement) plan.

Furthermore, each of the six allowable programs and activities mandate and require certain affirmative acts in addition to or notwithstanding those requirements imposed by the authorizing statute.

School districts will submit their contracts to the Commissioner for approval, using an automated, web-based application.

#### PROFESSIONAL SERVICES:

Depending on which allowable programs and activities are chosen, districts may be required to hire or procure experts in: teacher professional

development, curriculum and/or instructional design, school improvement and other related tasks and professional functions.

#### COMPLIANCE COSTS:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant, additional costs beyond those inherent in the statute.

The new requirements will result in additional costs to school districts, as follows:

##### (i) Sustained Professional Development

If it is assumed that there will need to be two extra days per year of sustained professional development for contract of excellence programs, for one to two dozen teachers per district at a cost of \$125 per teacher per day, it is estimated that there might be a total annual cost for all of the districts of \$400,000 per year (for purposes of this calculation, NYC was treated as thirty-four districts – one high school district, one special education district and thirty-two community school districts).

##### (ii) Other Costs

Depending on a district's selection of allowable programs and activities, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-based intervention; and analyzing, gathering and compiling the necessary research to support their proposed contract for excellence programs and activities. To approximate the total yearly costs associated with these items, it is estimated that each district (55 plus 34 for NYC (see above) for a total of 89 districts) hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$9,435,000 for all contract districts.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The economic and technological feasibility of compliance with the rule by local governments is made easier by the fact that the rule imposes very few compliance and no paperwork requirements that are not already imposed by the authorizing statute. Moreover, those reporting requirements imposed by the statute are made feasible by the fact that they are generally automated and web-based, using data entry screens and edit checks. In addition, nothing in the rule prohibits local governments from using funds to procure professional services, such as certified professional accountants, software developers or experts in curriculum and instruction, or education research, all of whom may be necessary to meet the rule's requirements.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007 and is applicable to all identified school districts throughout the State. 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 school districts from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts, including those located in rural areas, in the development of this rule, and to the extent possible, the proposed rule has been drafted incorporating their comments, to provide flexibility in implementing many of the provisions.

#### 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, how the contract would be implemented. Moreover, on April 12, 2007 districts were invited to meet with key Department stakeholders, including teleconferencing abilities for those district personnel unable to travel to Albany. In these memoranda, the Department communicated that staff in the Department's Office of School Operations and Management Services were available to respond to questions from 9 AM to 7:30 PM, from April 9-12. Copies of the proposed rule have also been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment.

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

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

The proposed rule applies to the school districts in the State, so identified pursuant to Education Law section 211-d as having to file a contract for excellence, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a popula-

tion density of 150 per square mile or less. Eight (8) of the school districts that will have to file contracts for excellence for the 2007-2008 school year are rural school districts.

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

The proposed rule mandates these affirmative acts, not imposed by the authorizing statute, on allowable programs and activities:

- (1) They must be consistent with federal and State statutes and regulations governing the education of students;
- (2) They be developed by reference to practices supported by research or evidence as to what will facilitate student attainment of the State standards;
- (3) They be accompanied by sustained professional development;
- (4) Any additional instruction provided under such programs must come from appropriately certified or highly qualified teachers; and
- (5) They must be coordinated with the district's comprehensive education (improvement) plan.

Depending on which allowable programs and activities are chosen, districts may be required to hire or procure experts in: teacher professional development, curriculum and/or instructional design, school improvement and other related tasks and professional functions.

School districts will submit their contracts to the Commissioner for approval, using an automated, web-based application.

#### COSTS:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not impose any significant, additional costs beyond those inherent in the statute.

The new requirements will result in additional costs to school districts, as follows:

##### (i) Sustained Professional Development

If it is assumed that there will need to be two extra days per year of sustained professional development for contract of excellence programs, for 4 teachers per district at a cost of \$125 per teacher per day, it is estimated that there might be a total annual cost for all of the districts of \$8,000 per year.

##### (ii) Other Costs

Depending on a district's selection of allowable program and activity choices, it is possible that there will be additional costs. Particular activities where the cost imposed could be large include the following: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs must be coordinated with school district comprehensive plans; determining if a student responds to scientific, research-based intervention; and analyzing, gathering and compiling the necessary research to support their proposed contract for excellence programs and activities. To approximate the total yearly costs associated with these items, it is estimated that each of the eight rural districts hires two new, appropriately certified teachers at an annual cost of \$53,000 per teacher (salary plus benefits). This yields a total estimated, annual cost of \$848,000 for all of the eight districts.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007 and is applicable to all identified school districts throughout the State. 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 school districts in rural areas from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts, including rural districts, in the development of this rule, and to the extent possible, the proposed rule has been drafted incorporating their comments, to provide flexibility in implementing many of the provisions.

#### RURAL AREA PARTICIPATION:

The proposed rule was submitted for discussion and comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas as well as the Rural Schools Association. In addition, guidance memos dated April 4 and April 9, 2007 were provided to the field outlining changes in the law and providing a working draft outline of the contracts. School districts that are required to file a contract for excellence were also invited to participate in either the teleconference/meeting held on April 12th or a teleconference held on April 13th (Big 5 School districts only). During the period from April 9 - 12, the Education Department offered extended phone hours to provide further opportunity for comments and questions.

#### **Job Impact Statement**

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. 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

Since publication of Notices of Emergency Adoption and Revised Rule Making in the State Register on August 8, 2007 and August 15, 2007, the Department received the following comments on the proposed rule.

#### COMMENT:

Included in the law are mandates for districts to provide an opportunity for public participation. By law the details of the contracts for excellence must be presented to the community in a clear and precise format with opportunity for comments before they are submitted for approval. This school year very few districts solicited community input. As a result parents and concerned community members were denied our right to comment on the details of the Contracts. Parents can have a positive impact on educational quality only if you enforce our right to have our voices heard. We demand the adoption of strong regulations and strict enforcement to ensure that districts comply with the law and solicit meaningful parent involvement. Parent participation is a key element to educating our children to a standard of excellence and is now more important than ever.

#### DEPARTMENT RESPONSE:

The comment misconstrues the statute, which requires school districts to solicit public comment on their contracts for the 2007-2008 school year and does not require that the contracts be developed through a public process, including public hearings, until the 2008-2009 school year and thereafter. The proposed regulation is consistent with the statute. To the extent the comment alleges in a general, conclusory manner that "very few districts solicited community input", this raises issues of enforcement of the existing statutory and regulatory provisions. The statute and the proposed regulation require school districts to have procedures in place by which parents or persons in parental relation may file complaints with the building principal concerning implementation of the school district's contract for excellence, and procedures for appeal, including an appeal to the Commissioner of Education.

Although no changes to the proposed regulation are necessary, the State Education Department will provide guidance concerning the timeline and public participation process.

(1) "Corporation" means the New York State Higher Education Services Corporation.

(2) "Home company" means the volunteer organization which submits the initial application nominating one of their active members for a volunteer recruitment service scholarship.

(3) "Host company" means the volunteer fire or ambulance company which allows a scholarship recipient to volunteer at their organization upon written agreement with the home company.

(4) "Scholarship" means the tuition benefit awarded under the Volunteer Recruitment Service Scholarships as codified in section 669-c of the education law.

(b) Eligibility: In addition to those requirements provided in sections 661 and 669-c of the Education Law, the following requirements shall apply in the selection of the scholarship recipients:

(1) Applications for the volunteer recruitment service scholarships shall be postmarked or electronically transmitted no later than May 1st of each year, provided that this deadline may be extended at the discretion of the corporation;

(2) Applications shall be filed annually on forms prescribed by the corporation; and

(3) The pool of applicants shall be those who have successfully met the filing deadline.

(c) Amounts:

(1) The amount of the scholarship award shall be determined in accordance with section 669-c of the Education Law.

(2) Disbursements shall be made each semester and pro-rated by credit hour.

(3) Scholarship awards shall be reduced by the value of any other scholarships and grants, except that nothing shall require the value of such scholarships and grants applicable to the costs of attendance, other than tuition to reduce the amount of the Volunteer Service Scholarship.

(d) Priorities: If there are more applicants than award funds appropriated or available in any fiscal year, the following provisions shall apply:

(1) returning applicants shall be given priority pursuant to paragraph (e) of subdivision (3) of section 669-c of the education law;

(2) remaining applicants shall be chosen by random selection. Random selection shall be conducted by lottery which shall be the preferred manner of tie breaking.

(e) Out of Area Service: If an applicant for, or recipient of, a volunteer recruitment scholarship is enrolled at an eligible institution of higher education outside the fifty mile radius of the volunteer organization of which he or she is a member, the following provisions shall apply:

(1) The applicant, or recipient, shall offer his services to a host company whose service area includes the school where the student is enrolled.

(2) If the offer is accepted by the host company, the eligible applicant or recipient may be entitled to award payments for attendance at that school only if the home company, the host company, and the recipient enter into an agreement on forms prescribed by the corporation.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 2201.11(b)(1).

**Text of rule and any required statements and analyses may be obtained from:** Cheryl B. Fisher, Supervising Attorney, Higher Education Services Corporation, 99 Washington Ave., Rm. 1350, Albany, NY 12255, (518) 473-1581, e-mail: regcomments@hesc.com

#### Revised Regulatory Impact Statement

This statement is being submitted pursuant to sections 102(9), 202(4-a), and 202-a(6) of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (HESC) Notice of Adoption adding new section 2201.11 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York with a non-substantial revision to the text of the rule.

The proposed rule implements the Volunteer Recruitment Service Scholarship which provides college scholarships to eligible volunteer fire and emergency responders in New York State.

A non-substantial revision has been made to the text of the proposed rule by changing the scholarship application deadline to May 1 from August 1. The application deadline appeared once in the original RIS, but in none of the other regulatory documents. Thus, HESC is filing this Revised Regulatory Impact Statement along with the Notice of Adoption.

HESC did not receive any official public comments in response to the State Register announcement of this proposed rule. However, after HESC filed the Notice of Proposed Rule Making for this proposal, it became aware of issues faced by colleges and students regarding delays in payments due to the application deadline of August 1. For students attending

## Higher Education Services Corporation

### NOTICE OF ADOPTION

#### Volunteer Recruitment Service Scholarship Program

**I.D. No.** ESC-38-07-00001-A

**Filing No.** 1246

**Filing date:** Nov. 21, 2007

**Effective date:** Dec. 12, 2007

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

**Action taken:** Addition of section 2201.11 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 653, 655 and 669-c

**Subject:** Volunteer Recruitment Service Scholarship Program.

**Purpose:** To implement the Volunteer Recruitment Service Scholarship Program.

**Text of final rule:** New section 2201.11 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

*Section 2201.11 Volunteer Recruitment Service Scholarships Program*

(a) *Definitions:*

in the fall term, the August 1 deadline did not leave the colleges enough time to package a scholarship recipient's financial aid in a timely manner and, as such, a recipient's scholarship monies were delayed as a result. Accordingly, the deadline has been changed from August 1 to May 1.

This change will not adversely impact any of the regulated parties. Although the deadline will be moved from August to May, the applications for the new deadline will be mailed in January rather than March. Therefore, applicants will still have ample time to receive notification and apply for the scholarship. Furthermore, the regulation allows the President to extend the application deadline. As such, it is unlikely that applicants will miss the new deadline. Also, by moving the deadline to an earlier date, applicants and their schools will be eligible to receive payment earlier than presently allowed and, as such, colleges will be able to package a recipient's financial aid in a timely manner.

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

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (HESC) Notice of Adoption seeking to add new section 2201.11 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

The proposed rule administers the Volunteer Recruitment Service Scholarship which provides college scholarships to volunteer fire and emergency responders in New York State.

A non-substantial change has been made to the text of the proposed rule changing the scholarship application deadline to May 1 from August 1 for the Fall semester. Upon review of the regulatory statements submitted with the proposal, the changes made to the last published rule do not necessitate revision to the previously published JIS, RFA and RFA.

**Assessment of Public Comment**

The agency received no public comment.

Section 67.4 is amended by increasing the permissible period to defer a mandatory inspection from 5 calendar days to 5 business days, and making other minor editorial and/or grammatical changes.

Section 67.5 is amended by clarifying the requirements for inspection photographs, allowing for use of different mediums for maintaining the inspection reports and photographs, requiring the maintenance of a secure system of internal controls over the storage and retrieval of the inspection reports and photographs, and making other minor editorial and/or grammatical changes.

Section 67.6 is amended by modifying the Standards for Suspensions to reflect the increased permissible period to defer mandatory inspection from 5 calendar days to 5 business days and clarifying the time period for the insurer to mail the confirmation of suspension of physical damage coverage and making other minor editorial and/or grammatical changes.

Section 67.7 is amended by modifying Renewal Inspection Standards to reflect the increased permissible period to defer mandatory inspections from 5 calendar days to 5 business days, and making other minor editorial changes.

Section 67.8 is amended by stating the statutory requirement that NYAIP adopt rules approved by the Superintendent, increasing the permissible period to defer a mandatory inspection from 5 calendar days to 5 business days and making other minor editorial and/or grammatical changes.

Section 67.11 is renumbered to be Section 67.12 and a new Section 67.11 is promulgated, allowing an insurer to use a separate entity to maintain a central repository of its physical damage inspection reports, provided, however, that an insurer may utilize only one central repository at a time. The new section also permits more than one insurer to use the same central repository.

Section 67.12 is amended by allowing the Superintendent to approve substantially equivalent forms, and amending the Acknowledgment of Requirement for Photo Inspection form to reflect the increased permissible period to defer mandatory inspections from 5 calendar days to 5 business days.

**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:** Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: bcheung@ins.state.ny.us

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

**Regulatory Impact Statement**

1. Statutory authority: Sections 201, 301, 3411, 5303, and Article 53 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing requirements placed on insurers with respect to the inspection of private passenger automobiles for physical damage coverage. Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him under the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 3411 requires insurers to inspect private passenger automobiles insured for physical damage coverage except as provided for in a regulation prescribed by the superintendent.

Article 53 authorizes the Superintendent to approve a plan or plans for providing motor vehicle insurance coverage to persons who are unable to obtain coverage in the voluntary insurance market. The "New York Automobile Insurance Plan", also commonly known as the Assigned Risk Plan, is the mechanism for providing such coverage. Section 5303 specifies coverages that are available through the New York Automobile Insurance Plan, and subjects such coverages to the requirements of section 3411 thereof, among other sections.

2. Legislative objectives: Section 3411 of the Insurance Law directs the superintendent to promulgate regulations implementing the section, which includes requirements placed on insurers with respect to the inspection of private passenger automobiles for physical damage coverage.

3. Needs and benefits: Section 3411 of the Insurance Law is intended to set forth a framework for providing physical damage coverage to private passenger automobiles. Inspections of such vehicles have been required since 1977 in order to combat insurance fraud (as where, for instance, coverage is purchased for a non-existent vehicle, or for a damaged vehicle). The existing rule allows insurers to waive the mandatory inspection only under limited circumstances. The proposed rule is necessary to alleviate the cost and burden to insurers, as well as consumers, where circumstances obviate or minimize the need for applicability of the provisions of

---



---

## Insurance Department

---



---

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

**Mandatory Underwriting Inspection Requirements for Private Passenger Automobiles**

**I.D. No.** INS-50-07-00002-P

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

**Proposed action:** Amendment of Part 67 (Regulation 79) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 3411, 5303 and art. 53

**Subject:** Mandatory underwriting inspection requirements for private passenger automobiles.

**Purpose:** To modify the requirements placed on insurers with respect to the inspection of private passenger automobiles for physical damage coverage, with respect to the deferral of the inspection of private passenger automobiles and the issuance of suspension notices. The proposed rule revises and adds definitions, clarifies that the use of digital photography is permitted and permits electronic and digital storage and retrieval of inspection reports and requisite photographs.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.ins.state.ny.us>):** Section 67.0 is amended by deleting obsolete language and making editorial changes.

Section 67.1 is amended by modifying the definition of private passenger automobile, and by creating five new definitions.

Section 67.3 is amended by reducing from, four to two years, the time frame for an additional and/or replacement vehicle to be continuously insured with the same insurer or affiliate for consideration of a waiver of the mandatory inspection, adding two additional voluntary waivers where an insurer may waive or dispense with a mandatory inspection, modifying the requirements of subdivision 67.3(c) to reflect the addition of one of the new voluntary waivers, and making other minor editorial and/or grammatical changes.

this section. The proposed rule allows insurers to waive the mandatory inspection in additional circumstances, as follows:

a. For an additional and/or replacement vehicle, where the named insured has been continuously insured for automobile insurance, with the same insurer or affiliate, for two or more policy years. Previously this threshold was 4 or more policy years;

b. Where the insured under a new policy had the motor vehicle continuously insured for physical damage coverage by a previous insurer, and the previous insurer had inspected the motor vehicle within the prior two years, and the new insurer has obtained a copy of the previous inspection report and photographs from the previous insurer within 10 business days of the effective date of coverage; and

c. When requiring an inspection would cause a serious hardship to the insurer or the insured. The proposed rule modifies some of the requirements placed on insurers with respect to the deferral of the inspection of private passenger automobiles and the issuance of suspension notices. The proposed rule clarifies that the use of digital or video photography is permitted, revises one existing definition, adds five new definitions, permits electronic and digital storage for retrieval of inspection reports and requisite photographs, and provides an option to the insurer to submit forms to the Superintendent for approval if it chooses not to use the forms specified in the regulation.

4. Costs: The proposed rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department.

The insurer is required to maintain a secure system of internal controls over both the storage and retrieval of the inspection reports. The costs related to this should be minimal as the insurer will also incur savings related to the elimination of paper copies and storage related to the paper copies.

Insurers that choose not to use the forms specified in the regulation may incur costs related to the filing of substitute forms with the Superintendent.

The proposed rule modifies some of the current requirements, which will result in an overall reduction of costs to insurers in the areas of administration, processing of paperwork normally associated with governmental compliance, operations and underwriting.

5. Local government mandates: None.

6. Paperwork: Paperwork associated with the submission of the forms by an insurer should already be in place. The filing of the forms is an additional option provided to the insurer if it does not want to use the forms specified in the regulation. The proposed rule reduces the paperwork requirements of insurers by permitting electronic and digital storage for retrieval of inspection reports and requisite photographs.

7. Duplication: None.

8. Alternatives: The Department previously received inquiries from the insurance community regarding increasing the deferral period for inspection of private passenger automobiles. The Department considered increasing the deferral period from 5 calendar days to 10 calendar days but deemed 10 days too long and instead increased the deferral period to 5 business days. The Department previously received inquiries from the insurance community regarding the permissible use of digital photography. The proposed rule clarifies that the use of digital photography is permitted. The Department previously received comments and suggestions from the insurance community concerning various provisions of the regulation currently in effect, including requests for clarification of the definition of what constitutes a new, unused automobile, as well as various methods to increase efficiency, including the electronic storage and retrieval of inspection reports and photographs. After evaluating the comments, the Department decided that various additional revisions to the current regulation were necessary, which resulted in the proposed rule.

9. Federal standards: None.

10. Compliance schedule: It is anticipated that the regulated entities will be able to operate under the amendment's provisions immediately upon their taking effect.

#### **Regulatory Flexibility Analysis**

Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all property/casualty insurance companies licensed to do business in New York State and the New York Automobile Insurance Plan (NYAIP), none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of author-

ized property/casualty insurance companies licensed to do business in New York State, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

Local governments:

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

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

The Insurance Department finds that this rule does not impose any additional burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas.

The entities covered by this regulation, authorized property/casualty insurance companies licensed to do business in New York State, and the New York Automobile Insurance Plan (NYAIP), do business in every county in this state, including rural areas as defined under SAPA 102(10).

#### **Job Impact Statement**

Nature of Impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation modifies some of the requirements placed on insurers with respect to the inspection of private passenger automobiles for physical damage coverage, with respect to the deferral of the inspection of private passenger automobiles and the issuance of suspension notices.

Categories and number affected:

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

Regions of adverse impact:

This rule applies to all property/casualty insurance companies licensed to do business in New York State and the New York Automobile Insurance Plan (NYAIP). There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

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

Self-employment opportunities:

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

---



---

## Office of Mental Health

---



---

### EMERGENCY RULE MAKING

#### **Personalized Recovery-Oriented Services**

**I.D. No.** OMH-29-07-00014-E

**Filing No.** 1251

**Filing date:** Nov. 26, 2007

**Effective date:** Nov. 26, 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); and 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 program (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 Re-

covery-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 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."

- 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 record-keeping 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 collateral) and each IR group will generally be limited to 8 participants (recipients and/or collateral) 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 January 24, 2008.

**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 club-houses, 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 programs 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 record-keeping 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 rulemaking 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.

## **EMERGENCY RULE MAKING**

### **Child and Family Clinic Plus Program**

**I.D. No.** OMH-42-07-00001-E

**Filing No.** 1252

**Filing date:** Nov. 26, 2007

**Effective date:** Nov. 26, 2007

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

**Action taken:** Amendment of sections 587.4 and 587.9 of Title 14 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** These amendments provide authority to establish Child and Family Clinic Plus, a

program by the 2006-2007 enacted budget. Failure to initiate this program immediately would result in children and their families being without services necessary to their health, safety and general welfare.

**Subject:** Child and Family Clinic Plus Program.

**Purpose:** To establish the Child and Family Clinic Plus Program.

**Text of emergency rule:** Part 587 is amended as follows:

Subdivision (b) of Section 587.4 is amended to add a new definition (1) and existing definitions (1) through (5) are renumbered (2) through (6) to read as follows:

587.4 (b) Program definitions.

(1) *Child and Family Clinic Plus provider means a licensed clinic that has been approved by the Office of Mental Health to provide Child and Family Clinic Plus services.*

(2) Off-site locations, for purposes of providing outpatient services and reimbursement, [are] *means* any sites in the community where a recipient may require services.

(2) (3) Program capacity shall mean the number of recipients who can be on site at a given time.

(3) (4) Program space means discrete space dedicated to the purpose of the outpatient program and includes all space used by recipients enrolled in the program.

(4) (5) Provider of service means the entity which is responsible for the operation of a program. Such entity may be an individual, partnership, association or corporation. For purposes of this Part, unless otherwise noted, the term also applies to a psychiatric center or institute operated by the Office of Mental Health.

(5) (6) Satellite location of a primary program means a physically separate adjunct site to a certified clinic treatment program, continuing day treatment program, day treatment program serving children or intensive psychiatric rehabilitation treatment program provides either a full or partial array of outpatient services on a regularly and routinely scheduled basis (full or part time).

Subdivision (c) of Section 587.4 is amended to add new definitions (5), (7), (10), (13) and (16), and to renumber existing definitions (5) as (6), (6) as (8), (7) as (9), (8) as (11), (9) as (12), (10) as (14), (11) as (15) and (12) through (29) as (17) through (34) respectively, to read as follows:

587.4 (c) Service definitions.

(1) Activity therapy means therapy designed to assist a recipient in developing the functional skills and social and environmental supports needed to function more successfully in current or intended life environments (i.e., living, learning, working and social). Such therapy should provide an opportunity for a recipient to practice the skills and build or sustain the supports needed to improve functioning.

(2) Assessment is the continuous clinical process of identifying an individual's behavioral strengths and weaknesses, problems and service needs, through the observation and evaluation of the individual's current mental, physical and behavioral condition and history. The assessment shall be the basis for establishing a diagnosis, treatment plan or psychiatric rehabilitation service plan.

(3) Case management services are the process of linking the individual to the service system and monitoring the provision of services with the objective of continuity of care and service. Case management includes the following components:

(i) Linking. The process of referring the individual to all required services and supports as specified in the individual service plan.

(ii) Case-specific advocacy. The process of interceding on behalf of the individual to gain access to needed services and supports.

(iii) Monitoring. The process of observing the individual to assure that needed services and supports are received.

(4) Carved-out services are those specialized services that are not included in the benefit package of a managed care provider, other than a duly authorized managed special care provider, for all current and future managed care enrollees, regardless of aid category. Such services are long term services for individuals with chronic illnesses and include the following:

- (i) Day Treatment Programs;
- (ii) Continuing Day Treatment Programs;
- (iii) Intensive Psychiatric Rehabilitation Programs;
- (iv) Partial Hospitalization;
- (v) Comprehensive Medicaid Case Management (CMCM);
- (vi) Rehabilitation services provided to a resident of OMH rehabilitation treatment services and family based treatment programs;
- (vii) Services provided to children with serious emotional disturbances in designated clinics.

(5) *Child and Family Clinic Plus Services are Mental Health Screening, Comprehensive Assessment, In-Home Services and Evidence-Based Treatment.*

(6) Clinical support services are services provided to collaterals, by at least one therapist, with or without recipients for the purpose of providing resources and consultation for goal oriented problem solving, assessment of treatment strategies and provision of skill development to assisting the recipient in management of his or her illness.

(7) *Comprehensive Assessment is an assessment that follows the American Academy of Child and Adolescent Psychiatry practice parameters for comprehensive assessment and includes the regular and methodical use of psychometric tools. This will include collecting the recipient's mental health history, and any current signs and symptoms of mental illness or emotional disturbance, identification of child and family strengths, and the assessment of the data to determine the recipient's mental health status and need for treatment.*

[(6)](8) Crisis intervention services are activities and interventions, including medication and verbal therapy, designed to address acute distress and associated behaviors when the individual's condition requires immediate attention.

[(7)](9) Discharge planning is the process of planning for termination of a program or identifying the resources and supports needed for transition of an individual to another program and making the necessary referrals, including linkages for treatment, rehabilitation and supportive services based on assessment of the recipient's current mental status, strengths, weaknesses, problems, service needs, the demands of the recipient's living, working and social environment, and the client's own goals, needs and desires.

(10) *Evidence-Based Treatment is the application of therapeutic and or psychopharmacological approaches that have been scientifically proven to be effective in the treatment of specific emotional disturbances.*

[(8)](11) Family treatment means therapeutic interventions designed to treat the recipient's psychiatric condition (whether the recipient is an adult or a minor) to address family issues that have a direct impact on the symptoms experienced by the recipient, and to promote successful problem solving, communication, and understanding between a recipient and family members as it relates to the recipient's symptoms, treatment, and recovery.

[(9)](12) Health screening service is the gathering of data concerning the recipient's medical history and any current signs and symptoms, and the assessment of the data to determine his or her physical health status and need for referral for noted problems. The data may be provided by the recipient or obtained with his or her participation. The assessment of the data shall be done by a nurse practitioner, physician, physician's assistant, psychiatrist or registered professional nurse. The assessment of physical health status shall be integrated into the patient's treatment plan.

(13) *In-Home Services are clinic services of a minimum duration of 30 minutes provided by a qualified mental health professional to a child and/or his or her family, pursuant to his or her treatment plan, within the child's or family's living environment.*

[(10)](14) Medication therapy means prescribing and/or administering medication, reviewing the appropriateness of the recipient's existing medication regimen through review of records and consultation with the recipient and/or family or caregiver, and monitoring the effects of medication on the recipient's mental and physical health.

[(11)](15) Medication education means providing recipients with information concerning the effects, benefits, risks and possible side effects of a proposed course of medication.

(16) *Mental Health Screening is a broad-based approach to identify children and adolescents with emotional disturbances and intervene at the earliest possible opportunity.*

[(12)](17) Pre-admission screening is the initial face-to-face process of contacting, interviewing and evaluating a potential recipient of mental health services to determine the individual's need for services.

[(13)](18) Psychiatric rehabilitation goal setting is the process by which a recipient selects a specific environment in which he or she intends to live, work, learn, and/or socialize. The psychiatric rehabilitation goal identifies a specific environment, specific time frames, and is mutually agreed upon by the recipient and the staff.

[(14)](19) Psychiatric rehabilitation treatment means therapeutic interventions designed to increase the functioning of a person with psychiatric disabilities so that he or she can succeed in a community environment of living, working, learning and social relationships.

[(15)](20) Psychiatric rehabilitation functional and resource assessment is the process by which the recipient and practitioner develop an

understanding of the skills the recipient can and cannot perform and the social and environmental resources that are available related to achieving the recipient's psychiatric rehabilitation goals.

[(16)](21) Psychiatric rehabilitation readiness determination means an interview and observation process which evaluates rehabilitation readiness based on a recipient's perceived need, motivation, and awareness of the process involved in making a change in his or her life.

[(17)](22) Psychiatric rehabilitation service planning is the process of designing and continuously revising an individualized program to assist the patient in obtaining and maintaining a psychiatric rehabilitation goal.

[(18)](23) Psychiatric rehabilitation skills and resource development is the process of improving a recipient's use of skills and arranging for or adapting social and environmental resources necessary to achieve a psychiatric rehabilitation goal.

[(19)](24) Psychiatric rehabilitation support services are consultation and technical assistance services provided to collaterals, by at least one therapist, with or without recipients. The purpose of this service is to enhance the capacity of the collateral to serve as a resource in assisting the recipient to achieve or maintain his or her psychiatric rehabilitation goal.

[(20)](25) Referral means a post-assessment planning activity with the objective of referring or directing an individual to a program providing the appropriate services.

[(21)](26) Rehabilitation readiness development is the process of building a recipient's skills to proceed with the rehabilitation goal setting process. This service might include confidence building activities, self-awareness activities, or trial visits to various environments.

[(22)](27) Social training is an activity whose purpose is to assist a child in the acquisition or development of age-appropriate social and interpersonal skills.

[(23)](28) Socialization is an activity whose purpose is to develop, improve or maintain a child's capacity for social or recreational involvement by providing age-appropriate opportunities for development, application and practice of social or recreational skills.

[(24)](29) Supportive skills training is the development of physical, emotional and intellectual skills needed to cope with mental illness and the performance demands of personal care and community living activities. Such training is provided through direct instruction techniques including explanation, modeling, role playing and social re-enforcement interventions.

[(25)](30) Symptom management, as a service for adults, means the development and provision of appropriate skills and techniques specific to the individual recipient's condition to enable him or her to recognize the onset of psychiatric symptoms and engage in activities designed to prevent, manage, or reduce such symptoms.

[(26)](31) Symptom management, as a service for children, means a set of skill building interventions, adjunct to verbal therapy.

[(27)](32) Task and skill training is a nonvocational activity whose purpose is to enhance a child's age-appropriate skills necessary for functioning in home, school and community settings. Task and skill training activities shall include, but not be limited to, personal care, budgeting, shopping, transportation, use of community resources, time management, and study skills.

[(28)](33) Treatment planning is the process of developing, evaluating and revising an individualized course of treatment based on an assessment of the recipient's diagnosis, behavioral strengths and weaknesses, problems, and service needs.

[(29)](34) Verbal therapy means providing goal oriented therapy including psychotherapy, behavior therapy, family and group therapy and other face-to-face contacts between staff and recipients designed to address the specific dysfunction of the recipient as identified in his or her treatment plan. As a service in a program serving children with a diagnosis of emotional disturbance, play therapy and expressive art therapy may also be included.

Section 587.9 is amended to add a new paragraph (f), and existing paragraphs (f) through (k) are renumbered (g) through (l), to read as follows:

(f) *A clinic treatment program that has been approved to be a Children and Family Clinic Plus provider shall also provide the following services:*

(1) *Mental Health Screening. Such services shall be provided in a community setting, and shall be provided with the prior written consent of the child's parent or legal guardian.*

(2) *Comprehensive Assessment. A comprehensive assessment can be performed over the course of not more than three (3) visits per client, and is intended to determine the presence and nature of any emotional disturbance and to develop a treatment plan where appropriate.*

(3) *In-Home Services.*

(4) *Evidence-Based Treatment.*

**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. OMH-42-07-00001-P, Issue of October 17, 2007. The emergency rule will expire January 24, 2008.

**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 the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

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

Chapter 54 of the Laws of 2006 provides funding appropriations in support of the Child and Family Clinic Plus Program.

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

3. **Needs and Benefits:** Clinic treatment has been the foundation of the public mental health system for over thirty years. Each year, nearly 100,000 children and families are served in clinic treatment. This presents New York with a unique opportunity to demonstrate the impact that a transformation in State policy, financing and regulation, can make. The structure and financing of the clinic treatment program have remained constant and have not kept pace with findings generated by decades of scientific study in the recognition, diagnosis and treatment of childhood mental illness.

Currently, clinic services are very structured, designed to be delivered within an office-based setting, and require children and families to self-identify. To effectively address the mental health needs of children and their families in a timely manner, services need to be readily available and provided in a larger variety of settings, like the home. In order to achieve this shift in service provision, OMH recognizes the need for changes to be made to current clinic service structure and funding to improve access to effective and flexible services. Building on the knowledge that early and effective intervention increases the likelihood of positive outcomes, the OMH also recognizes the need to systematically identify childhood mental illness early through screening activities and to improve services by incorporating evidenced-based practices. Additionally, the President's New Freedom Commission's goal to address disparities in mental health services must be considered. These disparities are readily seen through the lenses of culture, race, age and gender. The opportunity to reduce these disparities in the children's mental health system is within our grasp. When taken together, these actions are expected to result in the transformation of the children's mental health system into one that more effectively addresses the needs of the children and families of New York State.

By this rulemaking, and as funded and authorized by the 2006-07 enacted State Budget, OMH is seeking to transform local mental health clinics from a passive program waiting for clients to present, to an active program that will intervene earlier in a child's developmental trajectory. Through Child and Family Clinic-Plus, the children's mental health system will adopt a public health approach to the early recognition and treatment of health concerns. With this new approach, children will be screened for emotional disturbance in their natural environment each year. Children in need of treatment will have access to a comprehensive assessment that utilizes the practice parameters from the American Academy of Child and Adolescent Psychiatry as well as evidence-based tools and scales. Children and families requiring treatment will find that Clinic-Plus brings improved access, in-home services, and treatments that have been shown through science to work. The initiative calls for the expansion of clinic services, creating greater access for children and their families receiving clinic treatment and in-home treatment services.

Each Child and Family Clinic-Plus provider will collaborate with its respective County or the City of New York to conduct systematic early recognition activities for the identified priority populations; demonstrate skill in engaging families in treatment; offer a range of evidence-based treatments that are individually determined and family focused; and will provide a constellation of support services in the home and community that lead to skill mastery for the child and family. Each Clinic-Plus will be

licensed by the OMH as an outpatient clinic and will receive Medicaid and State Aid enhancements.

The primary components of Child and Family Clinic-Plus include: broad-based screening in natural environments, comprehensive assessment, expanded clinic capacity, in-home services and evidence based treatment.

Numerous research studies document the lack of adequate identification and treatment for children with serious emotional disturbance. In what was perhaps the largest epidemiological study of its kind, Kessler *et al.* shows that the age of onset for serious mental illness in adulthood occurs in early adolescence, yet identification and treatment are often delayed for years. The age of onset is much earlier than once thought and has profound implications for children's mental health. There is a long and rich scientific history substantiating the fact that there is a developmental progression to behavioral/emotional problems among young children. Emotional or behavioral problems unrecognized in childhood can cascade into full blown psychiatric disorders with serious debilitating consequences in adolescence or adulthood. Furthermore, there is a strong gradient of risk, such that problems left unrecognized and untreated can become far more severe and intractable illnesses in adulthood. In fact, the continuity of young children's behavioral or emotional disorders into later problems in adolescence or adulthood is among the strongest and most unequivocal of scientific findings.

Decades of research support the following:

- (1) mental health problems can be recognized as early as preschool;
- (2) risk factors for development of mental health problems can be identified in childhood and many are modifiable;
- (3) failure to identify and to intervene can have life-long and often devastating effects;
- (4) scientifically-validated tools for early recognition exist; and
- (5) a range of effective intervention service programs exist and they have a strong scientific base.

4. **Costs:**

(a) **Costs to private regulated parties:** There will be no mandated unreimbursed costs to the regulated parties.

(b) **Costs to state and local government:** The annual state cost for the program is estimated to be \$21,500,000.00. There is no local Medicaid share or other costs for this program.

(c) **The cost projection was calculated as follows:**

Screening for approximately 235,000 children	\$ 1,881,000
New clinic admissions for approximately 23,500*	11,679,000
In-home services (17,500)	7,940,000
	<b>Total \$ 21,500,000</b>

\* Includes comprehensive assessments and clinic expansion

5. **Local Government Mandates:** These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

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

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

8. **Alternatives:** A. Alternatives to providing authorization for Child and Family Clinic Plus.

The only alternative would be inaction. As this program, Child and Family Clinic Plus, has been established and funded in statute, this alternative was considered as contrary to the intent of the legislation.

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

10. **Compliance Schedule:** The authority to establish and fund the Child and Family Clinic Plus program is effective on the filing date of this rulemaking.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant negative economic impact on small businesses, or local governments. The clinic expansion associated with Child and Family Clinic Plus contains no local government share of Medicaid. The establishment of the Child and Family Clinic Plus Program is required by the enacted 2006-2007 state budget.

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

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will have no negative impact on services and programs serving residents of rural counties. Child and Family Clinic Plus is an expansion of existing clinic services creating increased access for

children and families statewide. Children and families in the 44 counties designated as rural counties by the New York State Legislature, as well as non-rural counties will benefit from the establishment of this new state-wide program.

#### **Job Impact Statement**

This rulemaking establishes a new program: Child and Family Clinic Plus which will involve new employment opportunities for staff providing these services. It will not have any negative impact on jobs and employment activities.

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### **Comprehensive Psychiatric Emergency Program Rates**

**I.D. No.** OMH-36-07-00001-A

**Filing No.** 1254

**Filing date:** Nov. 26, 2007

**Effective date:** Dec. 12, 2007

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

**Action taken:** Amendment of Part 591 of Title 14 NYCRR.

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

**Subject:** Comprehensive Psychiatric Emergency Program (CPEP) rates.

**Purpose:** To increase the Medicaid reimbursement rates associated with CPEP.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-36-07-00001-P, Issue of September 5, 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, 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

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### **Comprehensive Outpatient Programs**

**I.D. No.** OMH-39-07-00003-A

**Filing No.** 1253

**Filing date:** Nov. 26, 2007

**Effective date:** Dec. 12, 2007

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

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

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

**Subject:** Comprehensive outpatient programs.

**Purpose:** To increase certain Medicaid rate schedules and make other changes consistent with the 2007-08 enacted State budgets.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-39-07-00003-P, Issue of September 26, 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, 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

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

The agency received no public comment.

## Public Service Commission

### NOTICE OF ADOPTION

#### **Liability-Compensation Amounts and Limits by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-16-07-00022-A

**Filing date:** Nov. 23, 2007

**Effective date:** Nov. 23, 2007

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

**Action taken:** The commission, on Nov. 7, 2007, adopted an order concerning Consolidated Edison Company of New York, Inc.'s (Con Edison) request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 9.

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

**Subject:** Liability — compensation amounts and limits.

**Purpose:** To modify Con Edison's liability provision by increasing the compensation amounts and limits on claims and to specify that Con Edison reimburse residential users for medicine spoiled due to lack of refrigeration.

**Substance of final rule:** The Public Service Commission adopted an order concerning Consolidated Edison Company of New York Inc.'s (Con Edison) tariff filing for a liability provision to increase the compensation amounts and limits on claims, and to specify that Con Edison reimburse residential users for medicine spoiled due to lack of refrigeration, subject to the terms and conditions set forth in the order.

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

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0894SA5)

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

#### **Follow-on Merger Savings Compliance by Niagara Mohawk Power Corporation d/b/a National Grid**

**I.D. No.** PSC-50-07-00005-P

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

**Proposed action:** The commission is considering whether to approve, modify or reject, in whole or in part, a compliance filing of Niagara Mohawk Power Corporation d/b/a National Grid (the company) for "follow-on merger credit" in Case No. 01-M-0075 related to the recent acquisition by National Grid USA of KeySpan Corporation.

**Statutory authority:** Public Service Law, section 66

**Subject:** Follow-on merger savings compliance filing related to the recent acquisition by National Grid USA of KeySpan Corporation.

**Purpose:** To determine the ratepayers' share of follow-on merger savings resulting from the KeySpan acquisition in Case 06-M-0878 in compliance with clause 1.2.4.19 and related attachment 10 of the company's merger joint proposal in Case 01-M-0075.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, the October 22, 2007 compliance filing of Niagara Mohawk Power Corporation d/b/a National Grid (the company) for "Follow-on Merger Credit" related to National Grid USA's recent acquisition of KeySpan Corporation. To comply with the ratemaking terms of Clause 1.2.4.19 and Attachment 10 of the company's Merger Joint Proposal in Case No. 01-M-0075, the company's filing proposes to record regulatory credits of \$33,053 million (electric)

and \$7.405 million (gas) for the period September 2007 through December 2011. The Commission may approve, modify or reject, in whole or in part, the company's proposed follow-on merger credit qualifications.

**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.

(01-M-0075SA38)

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

**Gas Meter Access by New York State Electric & Gas Corporation  
I.D. No. PSC-50-07-00006-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 approve or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation (NYSEG) to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service, P.S.C. No. 90 — Gas to become effective March 1, 2008.

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

**Subject:** Meter access.

**Purpose:** To automate NYSEG's meter access notification process.

**Substance of proposed rule:** The Commission is considering New York State Electric & Gas Corporation's (NYSEG) request to revise its method of notifying customers when it is unable to access a customer's meter and obtain a meter reading after six months. The proposed filing has an effective date of March 1, 2008. The Commission may approve, reject or modify, in whole or in part, NYSEG's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-G-1379SA1)

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

**Electric Meter Access by New York State Electric & Gas Corporation  
I.D. No. PSC-50-07-00007-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 approve or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation (NYSEG) to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 119—Electric to become effective March 1, 2008.

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

**Subject:** Meter access.

**Purpose:** To automate NYSEG's meter access notification process.

**Substance of proposed rule:** The Commission is considering New York State Electric & Gas Corporation's (NYSEG) request to revise its method of notifying customers when it is unable to access a customer's meter and obtain a meter reading after six months. The proposed filing has an effective date of March 1, 2008. The Commission may approve, reject or modify, in whole or in part, NYSEG's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-1373SA1)

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

**Transmission and Distribution Capital Investment Plan by Niagara Mohawk Power Corporation d/b/a National Grid  
I.D. No. PSC-50-07-00008-P**

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

**Proposed action:** The commission is considering whether to approve, modify or reject, in whole or in part, the transmission and distribution capital investment plan filed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid).

**Statutory authority:** Public Service Law, section 66

**Subject:** Transmission and distribution capital investment plan for National Grid.

**Purpose:** To consider National Grid's proposed transmission and distribution capital investment plan.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, the Transmission and Distribution Capital Investment Plan filed by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid). The Plan was filed in compliance with one of the conditions of approval of the acquisition of KeySpan Corporation by National Grid the Commission ordered in Case 06-M-0878. The filing also includes a report on the physical condition of National Grid's Transmission and Distribution System in compliance with another condition. The Commission may take such further action as it deems necessary.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-M-0878SA3)

Department of State

EMERGENCY
RULE MAKING

Cease and Desist Zone for County of Kings

I.D. No. DOS-50-07-00003-E
Filing No. 1256
Filing date: Nov. 26, 2007
Effective date: Nov. 26, 2007

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h

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

Specific reasons underlying the finding of necessity: The Department of State held a public hearing on September 6, 2007 to determine whether this rulemaking should be proposed. At the public hearing, testimony was taken and evidence submitted to demonstrate that some residents within the proposed geographic area are subject to intense and repeated solicitation to list their homes for sale.

Subject: Cease and desist zone for the County of Kings.

Purpose: To extend and expand an existing cease and desist zone for the County of Kings.

Text of emergency rule: An Amendment to 19 NYCRR Part 175.17(c)(2) is adopted to read as follows:

(c)(2) The following geographic areas are designated as cease-and-desist zones, and, unless sooner redesignated, the designation for the following cease-and-desist zones shall expire on the following dates:

Zone ... Expiration Date
County of Bronx ... August 1, 2009
Within the County of Bronx as follows:

All that area of land in the County of Bronx, City of New York, otherwise known as Community Districts 9, 10, 11 and 12, and bounded and described as follows: Beginning at a point at the intersection of Bronx County and Westchester County boundary and Long Island Sound; thence southerly along Long Island Sound while including City Island to East River; thence westerly and northwesterly along East River to Bronx River; thence northwesterly and northerly along Bronx River to Sheridan Expressway; thence northeasterly along Sheridan Expressway to Cross Bronx Expressway; thence southeasterly and easterly along Cross Bronx Expressway to Bronx River Parkway; thence northerly and northeasterly along Bronx River Parkway to East 233rd Street; thence westerly along East 233rd Street to Van Cortlandt Park East; thence northerly along Van Cortlandt Park East to the boundary of Westchester County and Bronx County; thence easterly along the boundary of Westchester County and Bronx County to Long Island Sound and the point of beginning.

Zone ... Expiration Date
County of Queens ... August 1, 2009
Cease and Desist Zone
(Mill Basin/Brooklyn)

Zone ... Expiration Date
County of Kings (Brooklyn) ... November 30, [2007] 2012
Within the County of Kings as follows:

All that area of land in the County of Kings, City of New York, otherwise known as the communities of Mill Basin, Mill Island, Bergen Beach, Futurama, [and] Marine Park and Madison Marine, bounded and described as follows: Beginning at a point at the intersection of Flatlands Avenue and the northern prolongation of Paerdegat Basin, thence south-

westerly along Flatlands Avenue to Avenue N; thence westerly along Avenue N to Nostrand Avenue; thence southerly along Nostrand Avenue to [Gerritsen Avenue] Kings Highway; thence [southeasterly along Gerritsen Avenue and the southern prolongation of Gerritsen Avenue] southwesterly along Kings Highway to Ocean Avenue; thence southerly along Ocean Avenue to Shore Parkway; thence northeasterly, southeasterly, northerly, northeasterly and northerly along Shore Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin and the northern prolongation of Paerdegat Basin; thence northwesterly along Paerdegat Basin and northern prolongation of Paerdegat Basin to Flatlands Avenue and the point of beginning.

Cease and Desist Zone
(Canarsie)

Zone ... Expiration Date
County of Kings (Brooklyn) ... May 31, 2008

Within the County of Kings as follows:

All that area of land in the County of Kings, City of New York, bounded and described as follows:

Beginning at a point at the intersection of Ralph Avenue and the Long Island Railroad right-of-way (between Chase Court and Ditmas Avenue); thence northeasterly along the Long Island Railroad right-of-way to the northern prolongation of Bank Street; thence southeasterly along Bank Street to a point at the intersection of Bank Street and Foster Avenue; thence northeasterly continuing to a point at the intersection of Stanley Street and East 108th Street; thence southeasterly along East 108th Street to Flatlands Avenue; thence northeasterly along Flatlands Avenue to the northern prolongation of Fresh Creek Basin; thence southeasterly along Fresh Creek Basin to Shore (Belt) Parkway; thence southwestly along Shore (Belt) Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin, and the northern prolongation of Paerdegat Basin to Flatlands Avenue; thence southwestly along Flatlands Avenue to Ralph Avenue; thence northwesterly along Ralph Avenue to the Long Island Railroad right-of-way and the point of beginning.

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 February 23, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, Division of Licensing Services, P.O. Box 22001, Albany, NY 12231-0001, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Real Property Law section 442-h(3) permits the Department of State to adopt a rule establishing a cease and desist zone for a defined geographic area if it is determined that some owners of residential real property within the defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to place their property for sale with such real estate broker or salesperson. Accordingly, the Department of State has express authority to adopt this rule.

2. Legislative objectives:

In enacting Real Property Law section 442-h, the legislature highlighted the problems faced by some residents from intense and repeated solicitation to list their homes for sale. Recognizing that not all homeowners who are the subject of this solicitation are desirous of being solicited, the legislature established a procedure to determine if a cease and desist zone should be established, and a mechanism for homeowners to notify the Department of State that they do not wish to be solicited after a cease and desist zone has been established.

Thus, Real Property Law section 442-h was designed to protect the public. This rule re-enforces the objectives of the Legislature when it enacted Real Property Law section 442-h by establishing a cease and desist zone for an area that has demonstrated that some residents are the subject of intense and repeated solicitation to list their homes for sale.

3. Needs and benefits:

The Department of State held a public hearing on September 6, 2007 to determine whether this rule making should be proposed. At the public hearing, testimony was taken and evidence submitted to demonstrate that some residents within the proposed geographic area are subject to intense and repeat solicitation to list their homes for sale. The Department of State held the record open after the public hearing to afford others the opportunity to submit written testimony and proof. The testimony and evidence submitted to the Department of State amply demonstrates that some residents within the proposed geographic area are the subject of intense and repeat solicitation to list their homes for sale. This rule making will benefit

residents of the defined area by providing a mechanism for them to notify the Department of State that they do not wish to be solicited.

4. Costs:

a. Costs to regulated parties:

The costs to real estate brokers and salespersons are minimal. The Department of State maintains copies of the cease and desist lists on its website. This list is available for all to view, at no cost. Additionally, the Department of State will mail a copy of the list to any person desiring a copy for the minimal cost of \$10.00.

b. Costs to the Department of State:

The Department of State anticipates that the cost and implementation will be minimal, and administration of this rule will be accomplished using existing resources.

c. Costs to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The rule does not impose any paperwork requirements on licensees.

7. Duplication:

This rule extends an existing cease and desist zone that is due to expire on November 30, 2007. It does not otherwise duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

No alternatives were considered by the Department of State.

9. Federal standards:

There are no federal standards addressing the subject of this rule making.

10. Compliance schedule:

Licensees are currently required to comply with 19 NYCRR 175.17. The rule will extend and expand the cease and desist zone that is due to expire on November 30, 2007. Therefore, regulated parties will be on notice of, and have adequate time to comply with the requirements imposed by the proposed rule making.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The rule affects all licensed real estate brokers and salespersons to the extent that they are prohibited from soliciting a real estate listing from a resident of the defined geographic zone who has notified the Department of State that he or she does not wish to be solicited. Real estate brokers and salespersons will remain free, however, to solicit listings from other residents of the defined zone and to participate in regulated transactions within the zone. Insofar as the rule making seeks to extend and expand an existing cease and desist zone, it is not anticipated that the solicitation limitations will place an undue financial burden, or impose a hardship on real estate brokers and salespersons.

The rule does not apply to local governments.

2. Compliance requirements:

The Department of State publishes and makes available a list of residents within cease and desist zones who have notified the Department of State that they do not wish to be solicited by real estate brokers and salespersons. These lists are made available to real estate brokers and salespersons. To comply with the rule, they need only refer to the list prior to soliciting listings from homeowners within the defined cease and desist zone.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

4. Compliance costs:

Licensees will not incur any significant compliance costs associated with this rule. The Department of State publishes a free list of all cease and desist lists on its website at no cost. Licensees who desire a hard copy of the lists may notify the Department of State and receive a copy of the list by mail for a cost of \$10.00.

5. Economic and technological feasibility:

Small businesses will not incur any additional costs or require technical expertise as a result of implementation of this rule.

6. Minimizing adverse economic impact:

Insofar as no compliance costs are anticipated, the Department of State did not consider any remedies to minimize adverse economic impacts of the rule.

7. Small business and local government participation:

The Department of State held a public hearing to consider proposing this rule making. The hearing was publicized in advance and open to all. In addition, the Department of State kept the hearing record open in order to permit individuals and businesses to submit written testimony and evidence after the open public hearing.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

This rule does not apply to rural areas and, rather, applies only to a defined geographic area within the County of Kings.

2. Reporting, recordkeeping and other compliance requirements:

This rule, which applies only to a portion of urban Kings County, does not impose any reporting and recordkeeping requirements on licensees located within rural areas.

3. Costs:

The rule does not impose any costs on rural areas.

4. Minimizing adverse impact:

Insofar as the rule does not impose any costs on rural areas, no alternatives to minimize adverse impacts were considered by the Department of State.

5. Rural area participation:

Insofar as the rule does not apply to rural areas, rural area participation was not solicited by the Department of State.

**Job Impact Statement**

This rule will not have any substantial adverse impact on jobs and employment opportunities. The rule merely prohibits real estate brokers and salespersons from soliciting real estate listings from residents of a defined geographic zone who have notified the Department of State that they do not wish to be solicited. Real estate brokers and salespersons will remain free to solicit other residents within the defined zone and to engage in real estate transactions within and outside of the defined geographic area.

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

**Energy Standards for Buildings except Low-Rise Residential Buildings**

I.D. No. DOS-50-07-00004-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 1240.1(b) of Title 19 NYCRR.

**Statutory authority:** Energy Law, section 11-103(2)

**Subject:** Energy standards for buildings except low-rise residential buildings.

**Purpose:** To amend the State Energy Conservation Construction Code (the Energy Code) by updating a published standard that is referenced in the Energy Code (viz., ASHRAE 90.1, entitled Energy Standard for Buildings Except Low-rise Residential Buildings) from the 2001 edition of said standard to the 2004 edition of said standard.

**Public hearing(s) will be held at:** 1:00 p.m., Jan. 31, 2008, at Department of State, 41 State St., Rm. 1120, Albany, NY

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

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

**Text of proposed rule:** Subdivision (b) of section 1240.1 of Title 19 NYCRR is amended to read as follows:

(b) Referenced standards.

[(1)] Certain published standards are denoted in the 2007 ECCC-NYS as incorporated by reference into 19 NYCRR Part 1240. [Such] *Except as otherwise provided in subdivision (c) of this section, such standards are incorporated by reference into this Part 1240. Such standards are identified in the 2007 ECCC-NYS, and the names and addresses of the publishers of such standards from which copies of such standards may be obtained are specified in the 2007 ECCC-NYS. Such standards are available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.*

[(2)] (c) *Referenced standards - changes.*

(1) *AAMA 101/I.S.2/NAFS-02.* For the purposes of applying the 2007 ECCC-NYS in this State, [and for the purposes of paragraph (1) of this subdivision,] the 2002 edition of standard AAMA 101/I.S.2/NAFS, entitled Voluntary Performance Specifications for Windows, Skylights and

Glass Doors, published by American Architectural Manufacturers Association (said standard being hereinafter referred to as AAMA 101/I.S.2/NAFS-02) shall be deemed to be one of the standards denoted as incorporated by reference into 19 NYCRR Part 1240. Said standard AAMA 101/I.S.2/NAFS-02 is incorporated by reference in this Part 1240. The name and address of the publisher of AAMA 101/I.S.2/NAFS-02 from which copies of said standard may be obtained are:

American Architectural Manufacturers Association  
1827 Walden Office Square, Suite 104  
Schaumburg, IL 60173-4268.

AAMA 101/I.S.2/NAFS-02 is available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.

(2) ASHRAE 90.1. For the purposes of applying the 2007 ECCCNYs in this State, all references in the 2007 ECCCNYs to the 2001 edition of standard ASHRAE 90.1, entitled *Energy Standard for Buildings Except for Low-Rise Residential Buildings*, published by American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (said standard being hereinafter referred to as ASHRAE 90.1-2001) shall be deemed to be references to the 2004 edition of standard ASHRAE 90.1, entitled *Energy Standard for Buildings Except for Low-Rise Residential Buildings*, published by American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (said standard being hereinafter referred to as ASHRAE 90.1-2004). ASHRAE 90.1-2001 shall not be one of the standards incorporated by reference into this Part 1240. ASHRAE 90.1-2004 shall be one of the standards incorporated by reference into this Part 1240. The name and address of the publisher of ASHRAE 90.1-2004 from which copies of said standard may be obtained are:

American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.  
1791 Tullie Circle, NE  
Atlanta, GA 30329-2305

ASHRAE 90.1-2004 is available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.

**Text of proposed rule and any required statements and analyses may be obtained from:** Raymond Andrews, Department of State, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: Raymond.andrews@dos.state.ny.us

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

**Public comment will be received until:** February 11, 2008.

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

#### Summary of Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Energy Law Section 11-103(2) authorizes the State Fire Prevention and Building Code Council (the "Code Council") to review and amend the State Energy Conservation Construction Code (the "State Energy Code"). This rule will amend the State Energy Code by updating an optional standard (viz., ASHRAE 90.1, entitled *Energy Standard for Buildings Except for Low-Rise Residential Buildings*) which is referenced in the State Energy Code. Specifically, this rule would substitute the 2004 edition of the standard ("ASHRAE 90.1-2001") in place of the 2001 edition of the standard ("ASHRAE 90.1-2001").

##### 2. LEGISLATIVE OBJECTIVES:

Energy Law section 11-101 directs the adoption of a State Energy Code to protect the health, safety and security of the people of the State and to assure a continuing supply of energy for future generations. Energy Law section 11-101 provides that the State Energy Code must mandate that economically reasonable energy conservation techniques be used in the design and construction of all new public and private buildings in New York State.

Energy Law Section 11-103(2) provides the State Energy Code remains cost effective with respect to building construction. Energy Law Section 11-103(2) further provides that the State Energy Code is cost effective if the cost of materials and their installation to meet its standards would be equal to or less than the present value of energy savings that could be expected over a 10-year period in a building where such materials are installed.

##### 3. NEEDS AND BENEFITS:

Effective January 1, 2008, the provisions of the State Energy Code will be set forth in the 2007 edition of a publication entitled *Energy Conservation Construction Code of New York State* (the "2007 ECCCNYs"). This rule would amend the State Energy Code by removing the current references in the 2007 ECCCNYs to ASHRAE 90.1-2001 and replacing them

with references to ASHRAE 90.1-2004. The principal impact of this amendment will be to cause the requirements for lighting power densities for commercial buildings, as set forth in the 2007 ECCCNYs, to be essentially identical to the corresponding provisions as set forth in the referenced ASHRAE 90.1 standard.

Substituting the more current ASHRAE 90.1-2004 in place of ASHRAE 90.1-2001 would affect the construction and alteration of commercial buildings when designed by this reference standard (low rise residential occupancies would be unaffected by this change). It is anticipated that in most cases, this rule will decrease the number of lighting fixtures that may be installed in commercial buildings, resulting in a decrease in initial capital costs. It is also anticipated that in most cases, this rule will decrease energy consumption by lighting fixtures in commercial buildings, resulting in lower annual costs. One of the studies which served as the basis for this rule (Analysis of Energy Savings Impacts of ASHRAE A90.1-2004 for the State of New York) indicates that on average, designing commercial buildings to ASHRAE 90.1-2004, rather than ASHRAE 90.1-2001, will decrease the initial cost of installing lighting fixtures by \$0.88 per square foot, and will decrease energy usage by 0.39 watts per square foot. Since both initial construction costs and long term operating costs will be reduced by this rule, the payback is immediate.

The study mentioned above identifies possible exceptions to immediate payback in four of the thirty two building types analyzed in Appendix C of the study:

First, initial lighting equipment installation costs in "cafeteria / fast food" buildings would increase by \$0.11 per square foot; however, this expense will be offset by a 0.40 watt per square foot decrease in energy usage, resulting in a simple payback of the increased installation costs in 0.47 years.

Second, initial lighting equipment installation costs in "family dining" buildings would increase by \$0.40 per square foot; however, this expense will be offset by a 0.30 watt per square foot decrease in energy usage, and the simple payback of the increased installation costs will occur in 2.4 years.

Third, initial lighting equipment installation costs in parking garages would increase by \$0.12 per square foot. However, the increase in installation costs is attributable to changes in market availability in lighting technology choices, and not to the amendment to be implemented by this rule. Further, the maximum lighting power density for parking garages is 0.3 watts per square foot in both ASHRAE 90.1-2001 and ASHRAE 90.1-2004. Therefore, the amendment to be implemented by this rule is neutral on both installation costs and long term energy use in parking garages.

Fourth, initial lighting equipment installation costs in performing arts theaters would increase by \$0.04 per square foot, and energy use in such theaters would increase by 0.10 watt per square foot. However, the maximum lighting power density ("LPD") for performing arts theaters specified in ASHRAE 90.1-2004 (viz., 1.6 watts per square foot) is the same as the maximum LPD for such theaters specified in the text of the 2007 ECCCNYs. Therefore, even without this rule making, the owner of a performing arts theater could install 1.6 watts per square foot by using the 2007 ECCCNYs compliance path.

In summary, the study indicates that this rule will result in immediate payback in 28 of 32 building types, payback in 0.47 years in 1 building type, and payback in 2.4 years in 1 other building type. This rule should be neutral on energy use in the remaining 2 building types. The study concludes that "... on a State level, adoption of the new lower (lighting power density) values found in ASHRAE 90.1-2004 are cost effective at any cost recovery base period and well below a 10-year recovery base."

ASHRAE 90.1-2001 and ASHRAE 90.1-2004 contain identical provisions for additional lighting power allowances for retail buildings. The allowances are based on display area, not floor area.

While the most significant difference between ASHRAE 90.1-2001 and ASHRAE 90.1-2004 is the change in permitted lighting power densities in commercial buildings, there are a number of other differences between the two standards. It appears that the majority of the changes are either clarifications of requirements, having minimal energy impact, or changes which may have impacts on specific building designs that incorporate specific systems or features, but which have minimal impact on commercial buildings as a whole. However, a number of separately published "addenda" to ASHRAE 90.1-2001 which have been incorporated into ASHRAE 90.1-2004 are seen to have potential for energy impacts on commercial building as a whole.

Those addenda are:

- Addendum "m" to ASHRAE 90.1-2001, which adds performance requirements for heat pump pool heaters;

- Addendum “q” to ASHRAE 90.1-2001, which revises the provisions relating to exterior lighting requirements;
- Addendum “y” to ASHRAE 90.1-2001, which provides that variable air volume (VAV) fan motors 15 hp and larger are subject to load fan power limitations requirements (ASHRAE 90.1-2001 provides that VAV fan motors 30 hp and larger are subject to such requirements); and
- Addendum “x” to ASHRAE 90.1-2001, which provides that HVAC systems 15,000 Btu/hr and larger are subject to specified off-hour control requirements (ASHRAE 90.1-2001 provides that HVAC systems 65,000 Btu/hr and larger are subject to such requirements), and which requires ventilation fans with motors greater than ¾ hp to have automatic controls that are capable of shutting fans off when not required.

ASHRAE 90.1-2004 also includes new interior lighting control requirements not found in ASHRAE 90.1-2001. Specifically, section 9.4.1.2 of ASHRAE 90.1-2004 requires each interior space enclosed by ceiling-height partitions to have at least one control device for independently controlling the general lighting in the space. In general, the control device must have an automatic shut-off feature.

The Department of State believes that this proposed rule is cost effective and technologically feasible as required by Article 11 of the Energy Law.

The studies which served as a basis for this rule include New York State Code Adoption Analysis: Lighting Requirements, E. E. Richman, Pacific Northwest National Laboratory for the United States Department of Energy, June, 2004, and Analysis of Energy Savings Impacts of ASHRAE A90.1-2004 for the State of New York, K. Gowri, M.A. Halverson, E.E. Richman, Pacific Northwest National Laboratory for the United States Department of Energy, August 2007. These studies are summarized in the full Regulatory Impact Statement.

#### 4. COSTS:

##### a. Costs to regulated parties.

For most regulated parties, this rule should result in an immediate decrease in initial costs, since lower allowable lighting power densities will reduce the number of fixtures installed, and a long term decrease in building operation costs, since lower allowable lighting power densities will reduce energy consumption.

##### b. Costs to the Agency, the State and Local Governments.

The Department of State will not incur any significant cost associated with the implementation of, or continuing compliance with, this rule.

The State must comply with the State Energy Code when it constructs or substantially alters buildings, and local governments must comply with the State Energy Code when they construct or alter buildings. However, as with other regulated parties, it is anticipated that in most cases, this rule will result in an immediate decrease in initial costs, since lower allowable lighting power densities will reduce the number of fixtures installed, and a long term decrease in building operating costs, since lower allowable lighting power densities will reduce energy consumption.

Under existing law, most cities, towns and villages in this State are responsible for administration and enforcement of the State Energy Code within their boundaries. This rule will not place any additional administrative and enforcement burdens on such cities, towns and villages.

#### 5. LOCAL GOVERNMENT MANDATES:

A local government that builds or alters a building must comply with the State Energy Code, and would be required to comply with the State Energy Code as amended by this rule. However, in most cases this rule should decrease both initial construction costs and long term building operation costs.

Under existing law, most cities, towns and villages in this State are responsible for administration and enforcement of the State Energy Code within their boundaries. This rule will not place any additional administrative and enforcement burdens on such cities, towns and villages.

#### 6. PAPERWORK:

This rule will not impose any additional reporting or record keeping requirements. No additional paperwork is anticipated.

#### 7. DUPLICATION:

The Department of State is not aware of any rule or other legal requirement of the State government or Federal government that duplicates, overlaps or conflicts with this proposed rule.

#### 8. ALTERNATIVES:

In most cases, substituting ASHRAE 90.1-2004 in place of ASHRAE 90.1-2001 should result in both lower initial construction costs and lower long term energy costs. Consequently, the alternative of maintaining ASHRAE 90.1-2001 as the standard referenced in the 2007 ECCCNY was rejected.

The study cited in Item 3 above indicates that there would be modest increases in the cost of the initial installation of lighting fixtures in “cafeteria / fast food” buildings and “family dining” buildings. However, the study also indicates that the increased installation costs would be more than offset by decreased energy costs, with payback periods of 0.47 and 2.4 years, respectively. Therefore, the alternative of retaining ASHRAE 90.1-2001 for “cafeteria / fast food” buildings and “family dining” buildings was rejected.

The maximum permitted lighting power density (LPD) for parking garages specified in ASHRAE 90.1-2001 (0.30 watts per square foot) is the same as that specified in ASHRAE 90.1-2004. Therefore, the amendment to be implemented by this rule will have no effect on energy used in lighting of parking garages. Accordingly, the alternative of maintaining ASHRAE 90.1-2001 for parking garages was rejected.

In the case of performing arts theaters, the permitted LPD specified in ASHRAE 90.1-2004 (1.6 watts per square foot) is the same as that specified in the 2007 ECCCNY. Therefore, even without this rule making, the owner of a performing arts theater would have the option of installing 1.6 watts per square foot by using the 2007 ECCCNY compliance path. Accordingly, the alternative of maintaining ASHRAE 90.1-2001 for performing arts theaters was rejected.

#### 9. FEDERAL STANDARDS:

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

#### 10. COMPLIANCE SCHEDULE:

The amendment of the State Energy Code will be effective immediately upon publication of the Notice of Adoption in the State Register. It is anticipated that regulated parties will be able immediately to comply with the amendment to the State Energy Code.

#### *Regulatory Flexibility Analysis*

##### 1. SMALL BUSINESSES AND LOCAL GOVERNMENTS TO WHICH THE RULE WILL APPLY:

Effective January 1, 2008, the provisions of the State Energy Conservation Construction Code (the “State Energy Code”) will be set forth in the 2007 edition of a publication entitled Energy Conservation Construction Code of New York State (the “2007 ECCCNY”). The rule making will update an optional standard referenced in the 2007 ECCCNY. Specifically, this rule would substitute the 2004 Edition of the standard ASHRAE 90.1, entitled Energy Standard for Buildings Except for Low-Rise Residential Buildings, in place of the 2001 Edition of the standard which is currently referenced in the 2007 ECCCNY.

The State Energy Code, which is adopted pursuant to Article 11 of the Energy Law, is applicable in all areas of the State. Therefore, all areas of the State will be affected by this proposed rule making.

Small businesses that construct, own, or operate buildings or structures will be required to comply with the State Energy Code, as amended by this rule making. Businesses that provide services to building owners, such as facility managers, design professionals (e.g., architects and engineers), general and specialty contractors and product suppliers, though not directly regulated by this rule, may be impacted by this rule. It is not possible to calculate the exact number of businesses that will be affected by this rule, but the number is likely to be large. For example, as of January 1, 2007, there were 14,124 active registered architects and 25,174 active registered engineers in New York State.

Similarly, all local governments that construct, own, or operate buildings or structures will be required to comply with the State Energy Code, as amended by this rule making. In that respect, all or most of the local governments in this State may be affected by this rule making. However, the impact of this rule making on local governments, in their capacity as building owners and operators, will be essentially identical to the impact of this rule making on all other parties, public or private, that own or operate buildings.

This rule making may have an additional impact on most cities, towns and villages in this State. Energy Law section 11-107 provides that the administration and enforcement of the State Energy Code within any municipality shall be the responsibility of the governmental entity responsible for administration and enforcement of the building construction code or the fire prevention and building construction code applicable within the municipality. Executive Law section 381 provides that every city, town, and village of the State shall administer and enforce the Uniform Fire Prevention and Building Code within their boundaries except in limited specified circumstances. Consequently, most cities, towns and villages in the State are currently responsible for the administration and enforcement of the current State Energy Code within their boundaries, and will remain responsible for administering and enforcing the State Energy Code as

amended by this rule making. In that respect, those cities, towns and villages may be affected by this rule making.

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

This rule will impose no new reporting or recordkeeping requirements. Currently, construction documents, including documents demonstrating compliance with the State Energy Code, are submitted when a building permit is requested. Code enforcement officers may also request energy calculations as part of the permitting process. The amendment of the State Energy Code to be implemented by this rule making will not change these procedures.

As discussed in Item 1 of the Regulatory Flexibility Analysis, most local governments are responsible for the administration and enforcement of the State Energy Code. Local governments' administration and enforcement responsibilities will not be changed by the amendment of the State Energy Code to be implemented by this rule making.

Local governments currently maintain inspection records. This will continue under the State Energy Code, as amended by this rule making.

#### 3. PROFESSIONAL SERVICES:

Building owners typically rely on design, construction and energy conservation professionals for their expertise in building and energy conservation regulations. Regulated parties will continue to rely upon such professionals to advise them of the requirements of the State Energy Code as amended by this rule making. This rule should have no significant effect on the extent to which such professional services will be required.

#### 4. COMPLIANCE COSTS:

It is anticipated that in most cases, this rule will decrease the number of lighting fixtures that may be installed in commercial buildings, resulting in a decrease in initial capital costs. It is also anticipated that in most cases, this rule will decrease energy consumption by lighting fixtures in commercial buildings, resulting in lower annual costs. Variations in such initial capital costs (or savings) and annual costs (or savings) are likely to be attributable to the type of building to be constructed or altered; and variations in such costs for small businesses and local governments of different types and sizes will be a function of the types of buildings owned by such small businesses and local governments.

The report entitled "Analysis of Energy Savings Impacts of ASHRAE 90.1-2004 for the State of New York" mentioned in the Regulatory Impact Statement for this rule making (the "Report") analyzed five building types (offices, schools, hospitals, retail buildings and multi-family buildings), and concluded that buildings constructed to the ASHRAE 90.1-2004 standard would save a significant amount of energy for all building types and in all climate zones.

Appendix C of the Report includes an analysis of thirty two building types, and indicates that on average, designing commercial buildings to ASHRAE 90.1-2004, rather than ASHRAE 90.1-2001, will decrease the initial cost of installing lighting fixtures by \$0.88 per square foot, and will decrease energy usage by 0.39 watts per square foot. Since both initial construction costs and long term operating costs will be reduced by this rule, the payback is immediate.

Appendix C of the Report identifies four possible exceptions to immediate payback. First, in the case of "cafeteria / fast food" buildings, initial lighting equipment installation costs would increase by \$0.11 per square foot; however, the Report indicates that this expense will be offset by a 0.40 watt per square foot decrease in energy usage, resulting in a simple payback of the increased installation costs in 0.47 years. Second, in the case of "family dining" buildings, initial lighting equipment installation costs would increase by \$0.40 per square foot; however, the Report indicates that this expense will be offset by a 0.30 watt per square foot decrease in energy usage, and the simple payback of the increased installation costs would occur in 2.4 years. Third, the Report indicates that in the case of parking garages, changes in available technology choices will cause expected lighting equipment installation costs to increase by \$0.12 per square foot, with no expected decrease in energy use. Fourth, the Report indicates that lighting equipment installation costs for performing arts theaters would increase by \$0.04 per square foot and that energy use in such building would increase by 0.10 watt per square foot. However, notwithstanding these four exceptions to immediate payback, Appendix C of the Report concludes that "... on a State level, adoption of the new lower (lighting power density) values found in ASHRAE 90.1-2004 are cost effective at any cost recovery base period and well below a 10-year recovery base."

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

As indicated in Item 4 of this regulatory Flexibility Analysis, it is anticipated that in most cases, the initial cost of the materials and equip-

ment required to comply with the applicable provisions of the 2004 Edition of ASHRAE 90.1 will be lower than the initial cost of the materials and equipment required to comply with the corresponding provisions of the 2001 Edition of ASHRAE 90.1. The materials and equipment required to comply with the applicable provisions of the 2004 Edition of ASHRAE 90.1 are readily available, and are familiar to design professionals, builders, and other involved in the construction industry. Consequently, the Department of State and the State Fire Prevention and Building Code Council believe that compliance with the changes to the State Energy Code to be made by this rule making will be economically and technologically feasible.

#### 6. MINIMIZING ADVERSE ECONOMIC IMPACTS:

As indicated in Item 4 of this regulatory Flexibility Analysis, it is anticipated that in most cases, the economic impacts of this rule are expected to be positive, and not adverse. The ability of small businesses and local governments to comply with this rule should be no less than the ability of other regulated parties to do so. This rule imposes no new reporting requirements. For the foregoing reasons, exemption of small businesses and local governments from coverage by the rule was not considered to be an appropriate option.

As discussed in Item 1 of the Regulatory Flexibility Analysis, most local governments are responsible for the administration and enforcement of the State Energy Code. To minimize adverse economic impacts on such local governments, the Department of State's Division of Code Enforcement and Administration will provide training to local governmental code enforcement personnel throughout the State. The Division is already planning such training in connection with the separate rule which implemented a major update of the entire State Energy Code and which was recently adopted by the State Fire Prevention and Building Code Council. This already planned training will be modified to reflect the further change to the State Energy Code to be implemented by this rule making.

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

To inform small businesses and other interested parties, as well as code enforcement personnel of local governments throughout New York State, an information bulletin describing the additional change to the State Energy Code to be made by this rule making was e-mailed to approximately 5,000 building professionals, interested persons, and local government employees throughout the State, and a posted on the Department of State website, in August 2007.

Public hearings will be held after the notice of proposed rule making has been published in the State Register in accordance with the provisions of the State Administrative Procedure Act.

#### *Rural Area Flexibility Analysis*

##### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS TO WHICH THIS RULE WILL APPLY:

Effective January 1, 2008, the provisions of the State Energy Conservation Construction Code (the "State Energy Code") will be set forth in the 2007 edition of a publication entitled Energy Conservation Construction Code of New York State (the "2007 ECCCNY"). The 2007 ECCCNY contains references to the 2001 edition of standard ASHRAE 90.1, entitled Energy Standard for Buildings Except for Low-Rise Residential Buildings ("ASHRAE 90.1-2001"). This rule would amend the State Energy Code by replacing the references to ASHRAE 90.1-2001 with references to the 2004 edition of that standard ("ASHRAE 90.1-2004").

The State Energy Code, as it now exists and as it will be amended by this rule making, is applicable in all areas of the State. Therefore, all rural areas of the State will be affected by this rule making.

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

This rule will impose no new reporting or recordkeeping requirements. Currently, construction documents, including documents demonstrating compliance with the State Energy Code, are submitted when a building permit is requested. Code enforcement officers may also request energy calculations as part of the permitting process. The amendment of the State Energy Code to be implemented by this rule making will not change these procedures.

Energy Law section 11-107 provides that the administration and enforcement of the provisions of the State Energy Code within any municipality shall be the responsibility of that governmental entity which is responsible for the administration and enforcement of the provisions of the building construction code or the fire prevention and building construction code applicable within such municipality. Therefore, New York State local governments are, generally, responsible for the administration and enforcement of the State Energy Code. Local governments' administration

and enforcement responsibilities will not be changed by the amendment of the State Energy Code to be implemented by this rule making.

Local governments currently maintain inspection records. This will continue under the State Energy Code as amended by this rule making.

### 3. PROFESSIONAL SERVICES:

Building owners typically rely on professionals for their expertise in building and energy conservation regulations. Regulated parties will continue to rely upon design, construction and energy conservation professionals to properly advise them of the requirements of the State Energy Code, as amended by this rule making. This rule should have no significant effect on the extent to which such professional services will be required.

### 4. COSTS:

It is anticipated that in most cases, this rule will decrease the number of lighting fixtures that may be installed in commercial buildings, resulting in a decrease in initial capital costs. It is also anticipated that in most cases, this rule will decrease energy consumption by lighting fixtures in commercial buildings, resulting in lower annual costs. Variations in such initial capital costs (or savings) and annual costs (or savings) are likely to be attributable to the type of building to be constructed or altered, and variations in such costs for different types of public and private entities in rural areas will be a function of the types of buildings owned by such entities.

The report entitled "Analysis of Energy Savings Impacts of ASHRAE 90.1-2004 for the State of New York" mentioned in the Regulatory Impact Statement for this rule making (the "Report") analyzed five building types (offices, schools, hospitals, retail buildings and multi-family buildings), and concluded that buildings constructed to the ASHRAE 90.1-2004 standard would save a significant amount of energy for all building types and in all climate zones.

Appendix C of the Report includes an analysis of thirty two building types, and indicates that on average, designing commercial buildings to ASHRAE 90.1-2004, rather than ASHRAE 90.1-2001, will decrease the initial cost of installing lighting fixtures by \$0.88 per square foot, and will decrease energy usage by 0.39 watts per square foot. Since both initial construction costs and long term operating costs will be reduced by this rule, the payback is immediate.

Appendix C of the Report identifies four possible exceptions to immediate payback. First, in the case of "cafeteria / fast food" buildings, initial lighting equipment installation costs would increase by \$0.11 per square foot; however, the Report indicates that this expense will be offset by a 0.40 watt per square foot decrease in energy usage, resulting in a simple payback of the increased installation costs in 0.47 years. Second, in the case of "family dining" buildings, initial lighting equipment installation costs would increase by \$0.40 per square foot; however, the Report indicates that this expense will be offset by a 0.30 watt per square foot decrease in energy usage, and the simple payback of the increased installation costs would occur in 2.4 years. Third, the Report indicates that in the case of parking garages, changes in available technology choices will cause expected lighting equipment installation costs to increase by \$0.12 per square foot, with no expected decrease in energy use. Fourth, the Report indicates that lighting equipment installation costs for performing arts theaters would increase by \$0.04 per square foot and that energy use in such building would increase by 0.10 watt per square foot. However, notwithstanding these the four exceptions to immediate payback, Appendix C of the Report concludes that "... on a State level, adoption of the new lower (lighting power density) values found in ASHRAE 90.1-2004 are cost effective at any cost recovery base period and well below a 10-year recovery base."

### 5. MINIMIZING ADVERSE IMPACT:

As indicated in Item 4 of this Rural Area Flexibility Analysis, it is anticipated that the impact of this rule will be positive, rather than adverse. The ability of regulated parties in rural areas to comply with this rule should be no less than the ability of regulated parties in other parts of the State. This rule imposes no new reporting requirements. For the foregoing reasons, exemption of rural areas from coverage by the rule was not considered to be an appropriate option.

### 6. RURAL AREA PARTICIPATION:

To inform interested parties, including those in rural areas, of this proposed rule making, a bulletin describing the proposed amendment was e-mailed to approximately 5,000 building professionals, code officials and municipal employees in all areas of the State, including rural areas of the State, and posted on the Department of State's webpage in August 2007. Public hearings will be held after a notice of proposed rule making has been published in the State Register in accordance with the provisions of the State Administrative Procedure Act.

### Job Impact Statement

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule making that it will not have a substantial adverse impact on jobs and employment opportunities.

Effective January 1, 2008, the provisions of the State Energy Conservation Construction Code (the "State Energy Code") will be set forth in the 2007 Edition of a publication entitled Energy Conservation Construction Code of New York State (the 2007 ECCCNY). The 2007 ECCCNY currently references the 2001 Edition of standard ASHRAE 90.1, entitled Energy Standard for Buildings Except for Low-Rise Residential Buildings. The rule making would substitute the 2004 Edition of ASHRAE 90.1 in place of the 2001 Edition of ASHRAE 90.1.

As a performance-based, rather than a prescriptive code, the State Energy Code provides for alternative methods of achieving code compliance, thereby allowing regulated parties to choose the most cost effective method. The principal impact of substituting the 2004 edition of the ASHRAE 90.1 standard in place of the 2001 edition of that standard will be to reduce permitted lighting power densities in most commercial buildings. It is anticipated that, in most cases, this will reduce initial construction costs, since fewer light fixtures will be installed, as well as long term operating costs, since energy consumption for lighting will be reduced. As a consequence, the Department of State and the State Fire Prevention and Building Code Council conclude that substituting the 2004 edition of the ASHRAE 90.1 in place of the 2001 edition will provide a greater incentive to building construction and the rehabilitation of existing commercial buildings than exists with the current State Energy Code. Therefore, this rule making will not have a substantial adverse impact on jobs and employment opportunities within New York. In fact, the proposed rule may result in an increase in employment opportunities by providing developers and building owners with more capital for investment in New York, since standard update is anticipated to save building first costs as well as ongoing operating costs over the life of a building in most cases. These operating cost savings become more dramatic as energy costs continue to rise.

Residential buildings three stories and less will not be affected by this rule making.

---



---

## State University of New York

---



---

### NOTICE OF ADOPTION

#### Policies of the Board of Trustees of the State University of New York

**I.D. No.** SUN-38-07-00002-A

**Filing No.** 1255

**Filing date:** Nov. 27, 2007

**Effective date:** Dec. 12, 2007

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

**Action taken:** Amendment of Part 341 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 355(2)(b) and (h)

**Subject:** Policies of the Board of Trustees of the State University of New York governing the articles of organization of the student assembly of the State University of New York.

**Purpose:** To make changes to the requirements for eligibility for office in the student assembly in order to increase effectiveness of the university-wide student governance organization.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SUN-38-07-00002-P, Issue of September 19, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Marti Anne Ellermann, Senior Counsel, State University of New York, University Plaza, S-315, Albany, NY, (518) 443-5400, e-mail: Marti.Ellermann@SUNY.edu

**Assessment of Public Comment**

The agency received no public comment.

---



---

## Department of Transportation

---



---

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

#### New York State Supplement to the National Manual on Uniform Traffic Control Devices for Streets and Highways

I.D. No. TRN-50-07-00001-P

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

**Proposed action:** This is a consensus rule making to amend Chapter V of Title 17 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, section 1680, subd. (a); and Transportation Law, section 14, subd. 18

**Subject:** New York State Supplement to the National Manual on Uniform Traffic Control Devices for Streets and Highways - 2003 Edition.

**Purpose:** To amend the New York State Supplement to the National Manual on Uniform Traffic Control Devices for Streets and Highways - 2003 Edition regarding standards for traffic control devices.

**Substance of proposed rule (Full text is posted at the following State website: <https://www.nysdot.gov/portal/page/portal/divisions/operating/oom/transportation-systems/traffic-operations-section/mutcd>):** This rulemaking makes 44 changes to sections of 17 NYCRR Chapter V ("New York State Supplement"), hereafter referred to as the "Supplement." These changes are being made to further refine the Supplement into a document that best suits the need of New York State by: correcting technical errors and inadvertent omissions; clarifying information in the National MUTCD that has proven confusing to the public; and providing additional information in instances where the National MUTCD guidance is deficient for the needs of New York State.

The majority of changes in this rulemaking essentially allow for the continuance of traffic control practices already used in New York State. The only changes representing new information are:

- Extending the compliance time for five signs allowed by the National MUTCD but disallowed by the Supplement.
- Replacing National MUTCD warning sign placement table with new State table.
- Guidance on how to establish advisory speeds.
- Guidance on when to use advisory speed plaques.
- Guidance on how to sign a route with both a number and facility sign.
- Option to use 4" letters on Street Name signs on highways with a speed limit of up to 30 mph.
- Mandate to use a six-panel Specific Service Ramp sign instead of two assemblies.

The changes are grouped by their main purpose as follows:

- 18 changes add information to the Supplement that existed in the previous 17 NYCRR.
- 11 changes make corrections to graphics/tables that were necessitated by changes to text.
- 8 changes correct or clarify information in the Supplement that was either inadvertently omitted, or written incorrectly.
- 7 changes add information to the Supplement that did not exist in the previous 17 NYCRR, but was deemed necessary in order to address deficiencies in the National MUTCD guidance.

**Text of proposed rule and any required statements and analyses may be obtained from:** David Woodin, Department of Transportation, Traffic Operations Section, Transportation System Operations Bureau, 50 Wolf Rd., POD 4-2, Albany, NY 12232, (518) 457-7436, e-mail: dwoodin@dot.state.ny.us

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

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

#### Consensus Rule Making Determination

The Department of Transportation has determined that no person is likely to object to the adoption of this rule as written because these amendments merely: allow certain traffic control devices to continue being used in their existing manner (*e.g.*, the use of 4" letters on highways with speed limits up to, and including, 30 mph); provide guidance to help clarify confusing provisions in the National MUTCD (*e.g.*, placement of warning signs); and

make other technical and editorial changes that are not controversial in nature.

#### Job Impact Statement

##### 1. Nature of impact:

These revisions to the Supplement will generally maintain the same or a greater level of employment related to the manufacture, distribution, installation and upkeep of traffic control devices.

##### 2. Categories and numbers affected:

This revision will affect all governments that install traffic control devices, all highway users, all businesses that depend on transportation, and all businesses that make, distribute or install traffic control devices.

##### 3. Regions of adverse impact:

These regulations will not have a disproportionate adverse impact on jobs or employment in any regions of the state.

##### 4. Minimizing adverse impact:

The Department has minimized the adverse impact of this rulemaking by providing advance notice to businesses and local governments of changes to traffic control devices, and by incorporating previous public comments into the Supplement wherever possible. This advance notification was provided by conducting training sessions in every NYSDOT Region in the State, with both State and local persons in attendance.

Essentially, the rulemaking serves to minimize the adverse effects of portions of the National MUTCD that would have otherwise been a burden on the public.