

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Correctional Services

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### NOTICE OF ADOPTION

#### **Inmate Telephone Calls**

**I.D. No.** COR-38-07-00004-A

**Filing No.** 1308

**Filing date:** Nov. 29, 2007

**Effective date:** Dec. 19, 2007

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

**Action taken:** Amendment of sections 723.3(d), (e) and 723.5(b), (c) of Title 7 NYCRR.

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

**Subject:** Inmate telephone calls.

**Purpose:** To better document public requests not to be contacted by specific inmates, prohibit inmates from contacting their victims or people with court orders of protection.

**Text or summary was published** in the notice of proposed rule making, I.D. No. COR-38-07-00004-P, Issue of Sept. 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:** Anthony J. Annucci, Executive Deputy Commissioner, Department of Correctional Services, 1220 Washington Avenue, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

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

Since publication of a Notice of Proposed Rule Making in the State Register on September 19, 2007, the Department of Correctional Services (DOCS) received the following comment on the proposed amendment.

##### COMMENT:

One letter was received from an incarcerated inmate with comments to the proposed amendments concerning inmate telephone calls (COR-38-07-00004P), inmate correspondence program (COR-38-07-00005P) and packages and articles sent or brought to institutions (COR-24-07-00008E).

The first comment stated that the filing of any proposed rule by DOCS should include an urban area flexibility analysis and not just a rural area flexibility analysis since the majority of the prison population is comprised of minority groups from urban areas.

The second comment stated that DOCS does not hold public hearings when proposing rules and believes that public hearings should be held in every urban community because these proposed rules directly effect them.

The third comment stated that the New York State Register is not available in urban areas which should be investigated by the New York State Legislature.

Two additional comments concerned the filing of amendment for packages and articles sent or brought to institutions (COR-24-07-00008E).

The first comment stated that this rule continues to be more restrictive as to what is allowed and permitted since some facilities allowed the inmate population to vote as to whether they will become a television facility (inmates who elect to become a television facility are allowed personal televisions in their cells but agree to restrict their package room privileges in exchange).

The second comment stated that DOCS usage of emergency rulemaking as unjustified and an attempt to adopt a rule without public comment.

##### RESPONSE:

No revision to the proposed regulation is necessary. The comments to these amendments are based upon procedural requirements and filings of the proposed rules and not on the content or subject matter of the proposed regulations.

The submission of a rural area flexibility analysis statement by DOCS is required by the Department of State in accordance with the State Administrative Procedure Act (SAPA), § 202-bb. The legislative intent for requiring a rural area flexibility analysis is noted in the beginning of this section and explains why agencies' proposed rules should be analyzed as to its possible impact on rural areas as compared to suburban and metropolitan areas of the state. A change to this filing requirement is beyond the purview of DOCS.

SAPA itself does not require DOCS to have public hearings on any proposed rules. Regulated parties and the public are given at least 45 days to comment on a rule after it has been published in the New York State Register. Most proposed rules submitted by DOCS directly effect the inmate population with little or no impact on the majority of the public citizens of New York. To hold public hearings in every urban community would add significant costs and extend the processing time for adopting rules submitted by DOCS. The comments presented have not demonstrated any benefit in having public hearings as compared to the current process which has served the public and DOCS well.

Executive Law, article 6-a, §§ 146 & 148, requires the New York State Register to be the primary publication for proposed and adopted rules by agencies and is distributed to the office of the clerk of every county, to every library designated by the commissioner of education, and upon written request, to the office of the clerk of any city, town or village. Such copies shall be made available for public inspection by such offices and

libraries for not less than one year. Additionally, access to the New York State Register is available to the public on the Department of State (DOS) website. Again, the comment for a different publication is beyond the purview of DOCS. DOCS does provide copies of the New York State Register for all of its correctional facilities' law libraries, except for work release facilities since the inmates have access to outside libraries. Inmates do have access to the New York State Register as demonstrated when the letter DOCS received had attached current photocopies of the proposed amendments.

The comment that DOCS use of emergency rulemaking is an attempt to adopt a rule without public comment, as noted in the emergency rulemaking filing for packages and articles sent or brought to institutions, is inaccurate. DOCS does acknowledge that the publication of both the emergency rule and adoption of the same rule on September 12, 2007 may have been confusing. This was an unusual circumstance since the notice of emergency/proposed rule was filed on May 29, 2007 and published on June 13, 2007. The time period for public comment expired on August 13, 2007. The emergency rule expired on August 26, 2007. There was insufficient time to file and publish the adoption prior to August 26, 2007 so DOCS was required to file another emergency rule on August 24, 2007 to avoid the expiration of the earlier emergency rule. Subsequently, both the adoption and the second emergency rule were published in the September 12, 2007 issue of the New York State Register. There was an opportunity for public comment on this proposed rule.

Finally, the justification for filing this emergency rule was noted in a four paragraph statement under "Specific reasons underlying the finding of necessity" during the June 13, 2007 and September 12, 2007 publications.

## NOTICE OF ADOPTION

### Inmate Correspondence Program

**I.D. No.** COR-38-07-00005-A

**Filing No.** 1307

**Filing date:** Nov. 29, 2007

**Effective date:** Dec. 19, 2007

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

**Action taken:** Amendment of sections 720.3(a), (b), 720.4(a), (d), 720.7(e) and 720.8(d) of Title 7 NYCRR.

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

**Subject:** Inmate Correspondence Program.

**Purpose:** To improve recording of requests from the public not to be contacted by specific inmates, refer requestors to the Office of Victim Services and better define contraband mail.

**Text or summary was published** in the notice of proposed rule making, I.D. No. COR-38-07-00005-P, Issue of Sept. 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:** Anthony J. Annucci, Executive Deputy Commissioner, Department of Correctional Services, 1220 Washington Avenue, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

### Assessment of Public Comment

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#### COMMENT:

One letter was received from an incarcerated inmate with comments to the proposed amendments concerning inmate telephone calls (COR-38-07-00004P), inmate correspondence program (COR-38-07-00005P) and packages and articles sent or brought to institutions (COR-24-07-00008E).

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The third comment stated that the New York State Register is not available in urban areas which should be investigated by the New York State Legislature.

Two additional comments concerned the filing of amendment for packages and articles sent or brought to institutions (COR-24-07-00008-E).

The first comment stated that this rule continues to be more restrictive as to what is allowed and permitted since some facilities allowed the inmate population to vote as to whether they will become a television facility (inmates who elect to become a television facility are allowed personal televisions in their cells but agree to restrict their package room privileges in exchange).

The second comment stated that DOCS usage of emergency rulemaking as unjustified and an attempt to adopt a rule without public comment.

#### RESPONSE:

No revision to the proposed regulation is necessary. The comments to these amendments are based upon procedural requirements and filings of the proposed rules and not on the content or subject matter of the proposed regulations.

The submission of a rural area flexibility analysis statement by DOCS is required by the Department of State in accordance with the State Administrative Procedure Act (SAPA), § 202-bb. The legislative intent for requiring a rural area flexibility analysis is noted in the beginning of this section and explains why agencies proposed rules should be analyzed as to its possible impact on rural areas as compared to suburban and metropolitan areas of the state. A change to this filing requirement is beyond the purview of DOCS.

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Finally, the justification for filing this emergency rule was noted in a four paragraph statement under Specific reasons underlying the finding of necessity during the June 13, 2007 and September 12, 2007 publications.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

**Migratory Game Bird Hunting Regulations for the 2007-2008 Season**

**I.D. No.** ENV-41-07-00004-A

**Filing No.** 1312

**Filing date:** Dec. 4, 2007

**Effective date:** Dec. 19, 2007

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

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

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

**Subject:** Migratory game bird hunting regulations for the 2007-2008 season.

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

**Text of final rule:** Subparagraph 2.30(d)(6)(viii) is repealed and a new subparagraph (viii) is adopted to read as follows:

(viii) *The Western Long Island Goose Hunting Area is that area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Roanoke Avenue in the Town of Riverhead; then south on Roanoke Avenue (which becomes County Route 73) to State Route 25; then west on Route 25 to Peconic Avenue; then south on Peconic Avenue to County Route (CR) 104 (Riverleigh Avenue); then south on CR 104 to CR 31 (Old Riverhead Road); then south on CR 31 to Oak Street; then south on Oak Street to Potunk Lane; then west on Stevens Lane; then south on Jessup Avenue (in Westhampton Beach) to Dune Road (CR 89); then due south to international waters.*

Subparagraphs 2.30(e)(1)(i) through (iv) are amended to read as follows:

(i) ducks, coot and mergansers

- (a) Western Zone Open for [47] 45 consecutive days beginning on *the Tuesday after the third Saturday* in October, and for [13] 15 consecutive days beginning on *the last Saturday* in December [26].
- (b) Northeastern Zone Open for 9 consecutive days beginning on the first Saturday in October, and for 51 consecutive days beginning on the Wednesday following the third Saturday in October.
- (c) Lake Champlain Zone Open for [9] 5 consecutive days beginning on *the Wednesday after the first Saturday* in October, and for [51] 55 consecutive days beginning on [the Wednesday following] the [third] *fourth Saturday* in October.
- (d) Southeastern Zone Open for 9 consecutive days beginning on the second Saturday in October, and for 51 consecutive days beginning on the second Saturday in November.
- (e) Long Island Zone Open for [5] 5 consecutive days beginning on the Wednesday just prior to Thanksgiving Day, and for [55] 60 consecutive days ending on the last Sunday in January.

(ii) Canada geese, cackling geese, and white-fronted geese

- (a) Lake Champlain Goose Hunting Area Open for 45 consecutive days beginning on the first Saturday after October 19.
  - (b) Northeast Goose Hunting Area Open for 45 consecutive days beginning on the fourth Saturday in October.
  - (c) West Central Goose Hunting Area Open for 30 consecutive days beginning on the first Saturday in November, and for 15 consecutive days beginning on *the last Saturday* in December [26].
  - (d) East Central Goose Hunting Area Open for [21] 30 consecutive days beginning on the [fourth] *first Saturday* in [October] *November*, and for [24] 15 consecutive days beginning on the [fourth] *last Saturday* in [November] *December*.
  - (e) Hudson Valley Goose Hunting Area Open for 21 consecutive days beginning on the fourth Saturday in October, and for 24 consecutive days beginning on the [first] *third Saturday* in December.
  - (f) South Goose Hunting Area Open for [50] 51 consecutive days beginning on the fourth Saturday in October, and for [20] 19 consecutive days beginning on December 26, *and from March 1 through March 10*.
  - (g) Western Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone, and for 10 consecutive days immediately following the regular duck season.
  - (h) Eastern Long Island Goose Hunting Area Open the same 60 days as the regular duck season in the Long Island Zone.
- (iii) snow geese and Ross' geese
- (a) Western Zone Open for [85] 34 consecutive days beginning on the [fourth] *first Saturday* in [October] *November*, and for [22] 73 days ending on March 10.
  - (b) Northeastern Zone Open for [85] 66 consecutive days beginning on the first Saturday in October, and for [22] 41 days ending on March 10.
  - (c) Lake Champlain Zone Open for [84] 81 consecutive days beginning on *the Wednesday after the first Saturday* in October.
  - (d) Southeastern Zone Open for 85 consecutive days beginning on the fourth Saturday in October, and for 22 days ending on March 10.
  - (e) Long Island Zone Open for 107 consecutive days beginning on [the first day of the regular duck season in the Long Island Zone] *November 1*.
- (iv) brant
- (a) Western Zone Open for [the first 30] 50 *consecutive days* [of the regular duck season in the Western Zone] *beginning on October 1*.
  - (b) Northeastern Zone Open for [the first 30] 50 *consecutive days beginning on the first day of the regular duck season in the Northeastern Zone*.
  - (c) Lake Champlain Zone Open for [30] 50 consecutive days beginning on the first day of the regular duck season in the Lake Champlain Zone.
  - (d) Southeastern Zone Open for the first [30] 50 days of the regular duck season in the Southeastern Zone.

- (e) Long Island Zone      Open for [the first 5 days, and] the last [25] 50 days of the regular duck season in the Long Island Zone.

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

- (iii) Hunters may take Canada geese in the Special Late Canada Goose Hunting Area from February [8th] 7th through February [15th] 14th.

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

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

- (a) Western Zone      Saturday and Sunday [and Monday] of the [Columbus Day] second full weekend in October.
- (b) Northeastern Zone      Saturday and Sunday of the [last] fourth full weekend in September.
- (c) Lake Champlain Zone      Saturday and Sunday of the last full weekend in September.
- (d) Southeastern Zone      Saturday and Sunday of the [last] fourth full weekend in September.
- (e) Long Island Zone      Saturday and Sunday of the second full weekend in November.

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

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

\* The daily bag limit for ducks includes mergansers, and may include no harlequin ducks and no more than 4 mallards (no more than 2 hens), 1 black duck, 2 wood ducks, 1 pintail, [1] 2 canvasbacks, 2 redheads, 2 scaup, 4 scoters or 2 hooded mergansers. Possession limits for all duck species are twice the daily limit.

**Final rule as compared with last published rule:** Nonsubstantive changes were made section 2.30(e)(1).

**Text of rule and any required statements and analyses may be obtained from:** Bryan L. Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, e-mail: blswift@gw.dec.state.ny.us

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

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

Non-substantive changes were made to the text of the final rule as adopted. The final text of the proposed rule corrects a typographical error pertaining to the Canada goose hunting season in the West Central Goose Hunting Area. The original proposal stated that the hunting season would open on December 26th, 2007, but it should have been listed as December 29th, 2007. The final text of the rule that is being adopted contains the December 29th date.

All of the supporting documents for the original proposed rule remain valid and do not need to be amended to address this typographical error. The substance of the rule remains unchanged. Therefore, the Department of Environmental Conservation has determined that it is not necessary to revise the previously published RIS, RFA, RAFA, and JIS.

**Assessment of Public Comment**

The agency received no public comment.

**Department of Health**

**EMERGENCY  
RULE MAKING**

**Enactment of a Serialized New York State Prescription Form**

**I.D. No.** HLT-51-07-00008-E  
**Filing No.** 1316  
**Filing date:** Dec. 4, 2007  
**Effective date:** Dec. 4, 2007

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

**Action taken:** Addition of Part 910 and amendment of Parts 80 and 85 of Title 10 NYCRR; and amendment of section 505.3 and repeal of sections 528.1 and 528.2 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 21

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

**Specific reasons underlying the finding of necessity:** We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety and to meet statutory requirements. The budget proposal enacting Section 21 contains explicit authority for the Commissioner to promulgate emergency regulations. This was done recognizing the need to provide for the implementation of the use of statewide forge proof prescriptions by the April 19, 2006 date mandated by the law.

Immediate adoption of these regulations is necessary to allow the implementation of Section 21 of Public Health Law, achieve the health care cost savings and to enhance the quality of health care by preventing drug diversion resulting from forged or stolen prescriptions.

The practitioner groups affected by this proposal, PSSNY, MSSNY and the Health Plan Association of New York were consulted during budget negotiations. Their concerns are addressed in the statutory proposal set forth in the state budget and in these regulations.

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

**Purpose:** To enact a serialized New York State prescription form.

**Substance of emergency rule:** Part 910 (10 NYCRR)

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

The emergency regulations consist of a new Part 910 to Title 10 NYCRR. Section 910.1 defines terms used in the Part. Section 910.2 states requirements for practitioner prescribing, including that, until April 19, 2007, hospitals and comprehensive voluntary non-profit community diagnostic and treatment centers designated by the Department are exempted from the requirement for their staff practitioners to prescribe non-controlled substances on an official prescription form. The exemption will continue beyond April 19, 2007 if the hospital and the comprehensive voluntary non-profit community diagnostic and treatment center implements and utilizes an electronic prescribing system to transmit prescriptions to pharmacies capable of receiving them. The exemption also will continue beyond April 19, 2007 for those facilities approved by the Department that have implemented a computerized provider order entry system that generates paper prescriptions. This exemption will allow staff practitioners to issue printed prescriptions—which minimize medication errors due to misinterpretations of handwritten prescriptions for—non-controlled substances on the prescription form of the facility until the Department approves and provides an alternative form of serialized official New York State prescription. Section 910.3 covers registration with the Department, which practitioners and healthcare facilities are required to do to order official prescriptions. Section 910.4 states the manner in which official prescriptions will be issued by the Department, while section 910.5 lists the practitioner and facility requirements for safeguarding the official prescriptions against theft, loss or unauthorized use. Section 910.6 states pharmacy requirements for dispensing official prescriptions and out-of-state prescriptions, which may be dispensed in lieu of an offi-

cial prescription. Section 910.6 also states pharmacy requirements for submission of official prescription data to the Department. Section 910.6 also authorizes pharmacies to fill prescriptions for non-controlled substances until October 19, 2006 that are not written on an official prescription provided that the pharmacy notify the Department of the prescribing practitioner so that the practitioner may be contacted and issued official prescriptions for subsequent prescribing.

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

Section 505.3 (18 NYCRR)

- Language included to reflect use of facsimile prescriptions.
- Language included to allow electronically transmitted prescriptions.
- Language included to mandate that all claims for payments of drugs or supplies under the Medicaid program shall contain the serial number of the Official NYS Prescription Form.

- Delete language prohibiting telephone orders for OTCs.

● Language amended—telephone prescriptions for non-controlled substances WILL NOT require a follow-up hard copy prescription (even with refills).

● Delete Estimated Acquisition Cost—defined in Social Services Law section 367-a(9)(b)(ii).

● Delete language referencing “triplicate” prescriptions and update to language consistent with Official NYS Prescription Form and Article 33 of the Public Health Law.

● Delete language referencing other Sections that have been deleted (i.e. 10 NYCRR 85.25).

● Delete language referencing dispensing fees—in Social Services Law section 367-a(9)(d).

● Language is added to reference prescription drugs filled in compliance with section 6810 of the Education Law, Article 33 of the Public Health Law and new 10 NYCRR Part 910.

● A change was made to a prior version of the emergency filing for 18 NYCRR 505.3(b)(7). The words “or supplies” were deleted since the enacting legislation (Section 21 of the Public Health Law) only mandated that forge proof prescriptions be utilized for prescription drugs. This change conforms the regulations to the law.

Part 528 (18 NYCRR)

● Section 528.1 is deleted—obsolete listing of non-prescription drugs covered under the Medicaid program. Listing of reimbursable drugs and rate is available on-line at the NYS eMedNY website.

● Section 528.2 is deleted—language regarding “dispensing fees include routine delivery charges” is moved to 18 NYCRR 505.3(f)(6). Compounding fee language in 18 NYCRR 505.3 [6] (3).

Part 85 (10 NYCRR)

● Section 85.21 amended—OTC List—quantities and dosage forms have been deleted to allow greater flexibility in coverage. Remove OTC categories that are no longer marketed.

● Section 85.22 amended—establishment of OTC prices amended to more accurately reflect OTC pricing (Ad Hoc Committee is obsolete) and removal of references to deleted Sections (i.e., 18 NYCRR 528.2 and 10 NYCRR 85.25)

● Section 85.23 deleted—Revisions to list of OTCs and Maximum Reimbursable Prices—in Social Services Law 365-a(4)(a).

● Section 85.25 deleted—Prescription drug list covered under Medicaid—obsolete. Drug list available on line at NYS eMedNY website.

Part 80 (10 NYCRR)

● Part 80 table of contents has been revised to reflect amendments in titles of sections of regulations.

● Sections have been amended throughout Part 80 to revise the previous title of ‘Bureau of Narcotic Control’ and ‘Bureau of Controlled Substances’ to the current title of ‘Bureau of Narcotic Enforcement’.

● Sections have been amended throughout Part 80 to revise the previous title of ‘Bureau of Narcotics and Dangerous Drugs’ to the current title of ‘Drug Enforcement Administration’.

● Section 80.1—language added to define ‘automated dispensing system’.

● Section 80.5—language deleted for 3b Institutional Dispenser license due to registration of facilities to be issued official prescriptions. Language added for retail pharmacy license, installation, and operation of automated dispensing system in Residential Healthcare Facility (RHCF).

● Section 80.11—language added to make requirements for supervising pharmacist of controlled substance manufacturer and distributor consistent with pharmacist licensure requirements in New York State Education Law.

● Section 80.46—language added to require supervising physician countersignature of medical order of physician’s assistant if deemed necessary by supervising physician or hospital to bring regulation into consistency with PHL 3703.

● Section 80.47—language revised to except administration of controlled substances in emergency kits to patients in Title 18 adult care facilities.

● Section 80.49—language revised from prescription serial number to pharmacy prescription number.

● Section 80.50—language added to require pharmacies to maintain separate stocks of controlled substances received for use in automated dispensing system in RHCF and to authorize storage of non-controlled substances in such system.

● Section 80.60—language added for female gender reference to practitioner.

● Section 80.63—deleted definition of written prescription and added definition of out-of-state prescription. Language added to authorize printed prescriptions generated by computer or electronic medical record system. Language added regarding practitioner oral prescribing requirement.

● Section 80.67—midazolam and quazepam added to list of benzodiazepine controlled substances, as per PHL 3306. Language added requiring quantity of dosage units to be indicated in both numerical and written word form. Language amended to include chorionic gonadotropin as controlled substance for prescribing up to a 3-month supply. Language added to assign code letters to medical conditions for prescribing more than a 30-day supply.

● Section 80.67(con’t)—language deleted regarding Department’s issuance of official New York State prescriptions, due to added language in section 80.72. Language deleted for face and back of prescription to facilitate timely pharmacist dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.

● Section 80.68—language added for certain other controlled substances. Language deleted requiring pharmacist to endorse pharmacy DEA number on official NYS prescription to facilitate timely dispensing. Language added requiring electronic transmission of prescription data to Department.

● Section 80.69—language added requiring quantity of dosage units to be indicated in numerical and written word form. Language added to assign letters for condition codes. Deleted reference to PHL sections 3335 and 3336, which were deleted by PHL section 21, and added reference PHL sections 3332 and 3333, which are now the relevant sections. Deleted written prescription and added official prescription. Deleted back of the prescription and face of the prescription to facilitate timely dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.

● Section 80.70—Language added specifying oral prescriptions for 30-day supply or 100 dosage units does not apply to substance limited to 5-day supply by section 80.68. Deleted serial prescription number and added pharmacy prescription number. Added female gender language in reference to pharmacist. Language added requiring filing of prescription information with Department.

● Section 80.71—Deleted section (b) to reflect that practitioners are no longer required by PHL section 3331 to complete an official prescription when dispensing controlled substances. Corrected spelling of chorionic gonadotropin. Added reference to condition codes in sections 80.67 and 80.69. Added packaging and labeling requirements for practitioner dispensing of controlled substances. Added requirement for practitioners to submit dispensing information to Department by electronic transmission.

● Section 80.72—deleted all references to practitioner dispensing and labeling requirements because practitioner dispensing now covered by section 80.71. Language added regarding practitioner registration with Department and Department issuance of official NYS prescription forms.

● Section 80.73—added language specifying pharmacist dispensing of schedule II and controlled substances listed in section 80.67. Added female gender language in reference to pharmacist. Deleted requirement for pharmacist to endorse pharmacy DEA number on prescription for timely dispensing. Language added requiring pharmacy to verify identity of person picking up dispensed prescription. Language added requiring pharmacy electronic transmission of prescription data to Department.

● Section 80.73(con’t)—language added specifying emergency oral prescriptions for schedule II and controlled substances listed in section 80.67 and filing of emergency oral prescription memorandum. Language added requiring pharmacy electronic transmission of oral prescription data

to Department. Language added specifying partial filling of official prescription for schedule II and controlled substances listed in section 80.67. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.

- Section 80.74—language added in section title specifying pharmacist dispensing of controlled substances. Language added for prescription labeling requirements. Added female gender reference to pharmacist. Added requirement for filing prescription data with Department. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.

- Section 80.74(con't)—language added for pharmacy requirement to verify identification of person picking up prescription. Deleted reference to schedule II controlled substances and those substances listed in section 80.67 because all controlled substances now require official NYS prescription. Deleted labeling requirement reference to section 80.72 and added reference to section 80.71.

- Section 80.75—deleted language regarding requirement to purchase official prescriptions. Added language regarding registration and issuance of official prescriptions for institutional dispenser.

- Section 80.78—Added a new section regarding pharmacist requirements for dispensing of out-of-state prescriptions for controlled substances, to be dispensed in conformity with provisions set forth for official prescriptions.

- Section 80.84—deleted language requiring group practice providing treatment of opiate dependence with buprenorphine to be limited to 30 patients at any one time, making New York State regulations consistent with the federal Drug Addiction Treatment Act. Deleted language requiring practitioners and pharmacies to register with Department to prescribe and dispense buprenorphine. Deleted language requiring pharmacy to file prescription data and report loss of controlled substances because redundant. Deleted reference to PHL sections 3335 and 3336 because deleted by PHL 21 and added reference to PHL sections 3332 and 3333 because now relevant sections.

- Section 80.106—added language requiring separate record-keeping for pharmacies installing automated dispensing system in RHCF.

- Section 80.107—added language authorizing Department to notify practitioner of patient treatment with controlled substances by multiple practitioners, consistent with PHL section 3371.

- Section 80.131—deleted written prescription, added official prescription and out-of-state prescription. Language added increasing oral prescription for hypodermic needles and syringes to quantity of one hundred hypodermic needles and syringes.

**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 March 2, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqa@health.state.ny.us

#### Regulatory Impact Statement

##### Statutory Authority:

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

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

##### Legislative Objectives:

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

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

the State of New York and the Pharmacist Society of the State of New York.

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

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

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

These regulations are found in amendments to 10 NYCRR Part 80 and in the newly promulgated regulations in 10 NYCRR Part 910. Included in the Part 910 regulations is an exemption allowing hospital practitioners or practitioners in a comprehensive voluntary non-profit diagnostic and treatment center designated by the Department to prescribe non-controlled substances on a non-official hospital prescription until April 19, 2007. The exemption will continue beyond April 19, 2007 for hospitals and designated comprehensive voluntary non-profit diagnostic and treatment centers that implement and utilize an electronic prescription system to transmit prescriptions to pharmacies capable of receiving them. The exemption also will continue beyond April 19, 2007 for those facilities approved by the Department that have implemented a computerized provider order entry system that generates printed paper prescriptions. This exemption will address concerns expressed by the facilities regarding the expense of safeguarding official prescription paper and purchasing and installing additional dedicated computer printers in order to comply with the regulations. The exemption will allow staff practitioners to issue printed prescriptions for non-controlled substances on the prescription form of the facility until the Department approves and provides an alternative form of serialized official New York State prescription. Printed prescriptions enhance patient care by minimizing medication errors due to misinterpretations of handwritten prescriptions.

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

Title 18, Section 505.3 has also been amended to clarify for pharmacy providers that serial numbers reporting by billing pharmacy providers is required in all instances where a prescriber or orderer of services used a serialized prescription, whether or not the prescription is for prescription drugs. This change is requested in recognition of the opportunity serialized prescriptions offer to reduce the incidence of prescription theft. The reporting of prescription serial numbers on claims allows the MMIS claims system to provide feedback and alerts to pharmacy providers, at the point of service, about stolen prescriptions. Lack of serial numbers on a claim hampers this capability.

##### Costs:

##### Costs to Regulated Parties:

This program is being funded by an annual assessment on the State Insurance Department of \$16.9 million. The assessment funds the costs of providing 180 million official prescriptions annually as well as administrative and enforcement staffing to operate and enforce the program. The

current fee to practitioners and institutions for the official prescription has been eliminated. Private insurers and the Medicaid program will realize, respectively, an estimated \$75 million and \$25 million in annual savings due to the reduction of fraudulent prescription claims.

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

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

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

#### Costs to State and Local Government:

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

#### Costs to the Department of Health:

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

#### Local Government Mandates:

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

#### Paperwork:

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

#### Duplication:

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

#### Alternatives:

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

As a result of consultations with the hospital community, hospitals were granted a one-year exemption, until April 19, 2007, from the requirement for their staff practitioners to prescribe non-controlled substance medications on the official prescription. The purpose of the exemption is to serve as an incentive for hospitals to develop electronic prescription systems. The exemption will be extended if the hospital implements and utilizes an electronic prescription system to transmit such prescriptions directly to a pharmacy in lieu of an official prescription. The exemption also will be extended beyond April 19, 2007 for a hospital approved by the Department that has implemented a computerized provider order entry system that generates printed paper prescriptions. This exemption will address concerns expressed by the facilities regarding the expense of safeguarding official prescription paper and purchasing and installing additional dedicated computer printers. The exemption will allow staff practitioners to issue printed prescriptions—which minimize medication errors due to misinterpretation of handwritten prescriptions—for non-controlled substances on a hospital prescription form until the Department approves and provides an alternative form of official New York State prescription.

#### Federal Standards:

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

#### Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State.

#### **Regulatory Flexibility Analysis**

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

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

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

#### Compliance Requirements:

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

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

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

#### Professional Services:

No additional professional services are necessary.

#### Compliance Costs:

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

#### Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process utilizes existing electronic systems for reporting of dispensing by pharmacies. The regulations encourage the use of electronic prescribing by practitioners. Electronic prescribing is not only more efficient than the current paper process, it is also a secure procedure that will reduce prescription fraud. Electronic prescribing will protect the public health and result in substantial savings to the Medicaid program and private insurance as well as enhancing public safety.

#### Minimize Adverse Impact:

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

#### Small Business and Local Government Participation:

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

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

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

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

#### Compliance Requirements:

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

#### Professional Services:

None necessary.

#### Compliance Costs:

The new law requires all pharmacies in New York State to electronically transmit information from controlled substance prescriptions to the Department on a monthly basis, for monitoring and analysis purposes in

combating prescription fraud. Pharmacies may require minor adjustments in computer software programming due to this additional prescription data submission requirement.

**Economic and Technological Feasibility:**

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

**Minimize Adverse Impact:**

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

**Rural Area Participation:**

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

**Job Impact Statement**

**Nature of Impact:**

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

## NOTICE OF ADOPTION

### Criminal History Record Check

**I.D. No.** HLT-16-07-00027-A

**Filing No.** 1309

**Filing date:** Dec. 4, 2007

**Effective date:** Dec. 19, 2007

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

**Action taken:** Repeal of section 400.23 and amendment of sections 763.13(b) and 766.11(f) of Title 10 NYCRR; and amendment of section 505.14(d)(4)(v) of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201, 2800, 2803, 2812, 3600 and 3612; and Social Services Law, section 363-a

**Subject:** Criminal history record check.

**Purpose:** To request a criminal history record check for any prospective employee covered under the statute.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-16-07-00027-P, Issue of April 18, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqa@health.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Payment for Nursing Services Provided to Medically Fragile Children

**I.D. No.** HLT-51-07-00002-P

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

**Proposed action:** Amendment of section 505.8(g) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 363-a

**Subject:** Payment for nursing services provided to medically fragile children.

**Purpose:** To authorize payment of Medicaid reimbursement for private duty nursing services at an enhanced rate when provided to medically fragile children in the community upon submission of a certification to the Department of Health that the provider is trained and experienced in caring for medically fragile children.

**Text of proposed rule:** A new paragraph (6) of subdivision (g) of Section 505.8 is added to read as follows:

6. *Effective January 1, 2007 through January 1, 2009, payment for nursing services provided to medically fragile children shall be at an enhanced rate which exceeds the provider's nursing services payment rate established by the Department of Health and approved by the State Budget Director under this subdivision.*

(a) *Medically fragile children means children who are at risk of hospitalization or institutionalization, but who are capable of being cared for at home if provided with appropriate home care services, including but not limited to case management services and continuous nursing services, and includes any children under the age of 21 receiving continuous nursing services pursuant to this section.*

(b) *The enhanced rate shall be determined by applying thirty percent (30%) of the provider's approved rate in addition to the rate otherwise payable under this subdivision, which increase is at least equivalent to the reimbursement rate for the AIDS Home Care Program specified in section 86-1.46(b) of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Licensed Home Care Services Agency (LHCSA) providers receiving reimbursement at the enhanced rate shall use such amounts only to recruit and retain nurses to ensure the delivery of nursing services to medically fragile children.*

(c) *The enhanced rate shall only be payable upon submission of a certification by a nurse provider, on forms and procedures prescribed by the Department, that he or she has satisfactory training and experience to provide nursing services to medically fragile children. A LHCSA provider shall make and submit such certifications on behalf of nurses rendering services to children under this subdivision.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqa@health.state.ny.us

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

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

### Regulatory Impact Statement

**Statutory Authority:**

Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the Medical Assistance (Medicaid) program, pursuant to titles eleven, eleven-A, and eleven-B of the Social Services Law (SSL). Section 363 of the SSL states that the goal of the Medicaid program is to make available to everyone, regardless of race, age, national origin or economic standing, uniform, high quality medical care. Section 363-a of the SSL designates the Department as the single state agency for the administration of the Medicaid program authorizes the Department to establish such regulations as may be necessary to implement the Medicaid program. Section 365-a of the SSL defines Medicaid to include payment of part or all of the cost of medically necessary care, services, and supplies, including the care and services of private duty nurses. Section 367-r(1-a) of the SSL authorizes the Department to increase the Medicaid payment rate for private duty nursing services provided to medically fragile children, in order to recruit and retain private duty nurses and ensure service delivery to medically fragile children.

**Legislative Objectives:**

The proposed regulatory amendment is necessary to implement the payment of enhanced Medicaid rates for private duty nursing services provided to medically fragile children, and to require such providers to certify that they are trained and experienced to care for medically fragile children.

**Needs and Benefits:**

Effective January 1, 2007, rates of payment for private duty nursing services provided to medically fragile children were increased to ensure the availability of a sufficient number of qualified providers to deliver services to these children in the community setting. Previously, providers were reimbursed at the hourly nursing services rate established for their geographic area, without regard to the relative acuity of the pediatric non-institutional population, the corresponding intensity of continuous medical

intervention and supervision necessary to sustain these children safely in the community setting, or a shortage of qualified providers. The need for continuous coverage by nurses possessing the specialized training and experience these cases require often resulted in a shortage of available qualified providers sufficient to ensure service delivery in a geographic area. The increased rate of payment will facilitate the recruitment and retention of qualified private duty nurses by providing adequate financial incentive to attract and retain skilled providers sufficiently qualified to meet the complex medical needs of these children. The proposed regulatory amendment requires providers to certify to the Department their requisite training and experience in order to receive the enhanced rate, to ensure that only qualified providers are recruited. Social Services Law Section 367-r requires the Department to consider several factors in establishing the enhanced rate, including the case mix adjustment factor used for AIDS home care program services. The proposed regulatory amendment calculates the enhanced rate as a thirty percent (30%) add-on to the provider's standard nursing services rate, which is equivalent to using the AIDS home care case mix adjustment factor. Because the entire population of pediatric patients receiving continuous at-home private duty nursing services is by definition medically fragile, the regulation provides for payment of the enhanced rate for such services when provided to any Medicaid enrollee under age 21 in a community setting.

#### Costs:

There should be no additional costs associated with this regulatory amendment. While the regulatory amendment will result in the payment of increased Medicaid reimbursements to qualified providers, this will be offset by cost savings achieved from caring for increased numbers of children in the more cost-effective community setting. Consequently, rates of payment established through this regulatory amendment will result in budget neutrality to the Medicaid program.

#### Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates to local social services districts.

#### Paperwork:

The proposed regulatory amendment will result in a minimal amount of additional paperwork for medical providers, since they must complete and submit a one-page certification of training and experience to Department, upon which a specialty code will be added to the provider's enrollment file to enable the provider to receive the enhanced rate.

#### Duplication:

This proposed regulatory amendment does not duplicate, overlap, or conflict with any other State or federal law or regulations.

#### Alternatives:

Section 367-r of the SSL authorizes the payment of an enhanced rate to qualified providers upon demonstration of satisfactory training and experience to the Department. No alternatives were considered.

#### Federal Standards:

The proposed regulatory amendment does not exceed any minimum federal standards.

#### Compliance Schedule:

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

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not required because the proposed rule will not have a substantial adverse impact on small businesses or local governments.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required because the proposed rule will not have any adverse impact on rural areas.

#### Job Impact Statement

A Job Impact Statement is not required because the proposed rule will not have any adverse impact on jobs and employment opportunities.

## Insurance Department

### NOTICE OF ADOPTION

#### Excess Line Placements Governing Standards

**I.D. No.** INS-40-07-00002-A

**Filing No.** 1311

**Filing date:** Nov. 29, 2007

**Effective date:** Dec. 19, 2007

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

**Action taken:** Amendment of Part 27 (Regulation 41) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2105, 2118 and art. 21

**Subject:** Excess line placements governing standards.

**Purpose:** To change the amount of funds required to be held in trust by alien excess line insurers and an association of insurance underwriters. The rule also requires the report required by section 27.14(f) to be certified by an actuary.

**Text or summary was published** in the notice of proposed rule making, I.D. No. INS-40-07-00002-P, Issue of October 3, 2007.

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

**Text of 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

#### Assessment of Public Comment

The agency received no public comment.

## Office of Mental Health

### EMERGENCY RULE MAKING

#### Comprehensive Outpatient Programs

**I.D. No.** OMH-46-07-00001-E

**Filing No.** 1313

**Filing date:** Dec. 4, 2007

**Effective date:** Dec. 4, 2007

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

**Action taken:** Amendment of Parts 588 and 592 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a); and Social Services Law, sections 364(3) and 364-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 simplify and make equitable Comprehensive Outpatient Program (COPS) Funding and Non-COPS Funding as authorized by the 2006-2007 enacted budget. Failure to initiate this program immediately would result in recipients losing access to services necessary to their health, safety and the general welfare.

**Subject:** Comprehensive outpatient programs.

**Purpose:** To equalize Comprehensive Outpatient Program (COPS) and Non-COPS Funding.

**Text of emergency rule:** 1. Subdivision (g) of Section 588.13 of Title 14 NYCRR is amended to read as follows:

(g) Clinic, continuing day treatment, and/or day treatment programs for which an operating certificate has been issued and which are not designated as *Level I* comprehensive outpatient programs pursuant to Part 592 of this Title may qualify to become *Level II* comprehensive outpatient programs under such Part, and shall comply with the applicable provisions of such Part. [, may be eligible to receive supplemental medical

assistance reimbursement for services rendered. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;

(2) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;

(3) be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(4) have received a current operating certificate that is of at least a total of six months duration; and

(5) be a current enrollee in good standing in the medical assistance program.]

2. Section 592.4 of Title 14 NYCRR is amended to read as follows:

§ 592.4 Definitions

(a) *Level I Comprehensive Outpatient Program* means a provider of services which has been licensed to operate an outpatient mental health program in accordance with Part 587 of Title 14 and has been annually designated by a local governmental unit to be eligible to receive supplemental medical assistance reimbursement for a specific program or specific programs under its auspice which agrees to provide the services required of a *Level I Comprehensive Outpatient Program as set forth in this Part*.

(b) *Level II Comprehensive Outpatient Program* means a provider of services, other than a *Level I Comprehensive Outpatient Program*, which has been licensed to operate a mental health clinic, day treatment or continuing day treatment program in accordance with Part 587 of this Title, which is not also licensed under Article 28 of the Public Health Law, and which agrees to provide the services required of a *Level II Comprehensive Outpatient Program as set forth in this Part*.

(c) Grant means the funds received by the provider pursuant to section 41.18, 41.23 or 41.47 of the mental hygiene law including State aid and any mandatory local contribution provided by a local government or a voluntary agency.

[c] (d) Provider, for the purpose of this Part, means the specific location of the licensed mental health outpatient program which received the mental health grant utilized in the initial calculation of the supplemental rate under the medical assistance program.

[d] (e) Eligible deficit means those funds received by the provider as a grant which are used as the basis for the supplemental Medicaid rate calculation in subdivision 592.8(c). The original grants may have been adjusted in accordance with this Part, where necessary.

[e] (f) Comprehensive outpatient program allocation means the maximum amount of comprehensive outpatient program reimbursement that a provider is allowed to retain in each local fiscal year.

3. The heading, and subdivision (a), of Section 592.5 of Title 14 NYCRR are amended to read as follows:

§ 592.5 Designation as a *Level I* comprehensive outpatient program.

(a) A *Level I* comprehensive outpatient program shall be designated by the local governmental unit in accordance with the criteria provided in section 592.7 of this Part. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) be determined by the commissioner or his or her designee to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(2) have received a current operating certificate that is of at least a total of six months in duration; and

(3) be a current enrollee in good standing in the medical assistance program.

4. Subdivision (a) of Section 592.6 of Title 14 NYCRR is amended to read as follows:

(a) The local governmental unit shall designate and enter into written agreements with appropriate providers of services as *Level I* comprehensive outpatient programs. Such agreements shall, at a minimum reflect the requirements established in sections 592.6 and 592.7 of this Part;

5. The heading, subdivision (a), and paragraph (a)(2) of Section 592.7 of Title 14 NYCRR are amended to read as follows:

§ 592.7 *Level I* comprehensive outpatient program – criteria for designation and responsibilities

(a) In order to be designated as a *Level I* comprehensive outpatient program, a provider of services:

(2) shall have been designated as a *Level I* comprehensive outpatient program pursuant to subdivision 592.8(j) of this Part and shall:

6. Subdivisions (a), (c) (d), (h), (i), and (k) of Section 592.8 of Title 14 NYCRR are amended to read as follows:

(a) In addition to the medical assistance reimbursement rates available pursuant to [Parts 579 and] Part 588 of this Title, providers with at least one *Level I* comprehensive outpatient program are eligible to receive supplemental medical assistance reimbursement in accordance with the rules of this Part.

(c) The supplemental rate, for providers with at least one *Level I* comprehensive outpatient program, shall be calculated as follows:

(1) For outpatient mental health programs which are designated *Level I* providers pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

(2) The sum of grants received by the provider, as recalculated under paragraph (1) of this subdivision, shall be divided by the projected number of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

(i) The combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

(ii) Rates calculated pursuant to subparagraph (i) of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within one year after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph (3) of this subdivision.

(3) The supplemental rate for a provider operating [an] a *licensed* outpatient mental health program shall be the lesser of the rate calculated in paragraph (2) of this subdivision or a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget[, provided, however, the supplemental rate of an Article 31 provider which operates a comprehensive outpatient program shall not be less than an amount that, when added to the base fee, yields an amount that is less than the total of the corresponding fee and supplemental reimbursement for any provider which is not eligible to be designated as comprehensive outpatient program].

(d) In order to recoup supplemental payments for those visits in excess of 110% of the number of visits used to calculate the supplemental rate for a *Level I* provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

(h) The Office of Mental Health may amend the supplemental rate and/or the comprehensive outpatient program allocation to account for program changes required by the Office of Mental Health, local governmental unit, or other administrative agency, or approved by the commissioner pursuant to Part 551 of this Title.

(1) When a *Level I* provider receives reimbursement under this part which is less than its comprehensive outpatient program allocation in a local fiscal year (beginning with Calendar Year 2001 for upstate or Long Island based providers or Local Fiscal Year 2000-01 for New York City based providers), the local governmental unit may, subject to the approval of the Commissioner of Mental Health and the Director of the Division of Budget, allocate any amount of the provider's comprehensive outpatient program reimbursement which is less than its comprehensive outpatient program allocation to [one or more designated comprehensive outpatient program allocation to] one or more designated *Level I* comprehensive outpatient programs within the same county beginning in the following fiscal year. In making such adjusted allocations, the local governmental

unit shall consider the extent to which a provider receiving an additional allocation is in compliance with the program requirements set forth in Section 592.7 of this Part. This adjusted allocation process shall be accomplished through the revision of each affected provider's comprehensive outpatient program allocations for the previous fiscal year. In no case shall such adjusted allocation be less than the amount of comprehensive outpatient program reimbursement received by a provider consistent with its applicable comprehensive outpatient program allocation received in either the 2000 local fiscal year or the local fiscal year before the year in which such reimbursement is received, whichever amount is less.

(2) When a provider closes down one or more program location, but continues to operate the other locations of the designated program, the supplemental revenue to the designated program shall be reduced proportionately by the number of Medicaid visits associated with the closed location(s). The State share of the reduced Medicaid supplemental revenue may be allocated to the county in the form of additional local assistance grants, or the visits previously reimbursed to the closed program location(s) may be added to the visits of one or more other designated outpatient programs of the same outpatient category in the same county.

(i) When a designated *Level I* program has ceased or will cease to provide services or the local governmental unit has not designated an eligible or previously designated *Level I* program and discontinued all grants to that program, visits reimbursed under the medical assistance program to that program may be added to the visits of one or more other outpatient programs of the same outpatient category in the same county to be included in the supplemental rate adjustments pursuant to subdivisions (e)-(g) of this section subject to the following:

(1) the local governmental unit must recommend such consideration to the commissioner prior to June 1, 1991 for the initial year and the commencement of the local fiscal year in all succeeding years;

(2) the recommendation must specify the volume of visits to be allowed to each alternative provider;

(3) each alternative provider must be licensed in the same program category as the eligible provider;

(4) each alternative provider must be eligible to be designated prior to the local governmental unit's recommendation under this subdivision;

(5) the local governmental unit recommendation may be less than, but may not exceed, the volume of visits reimbursed, in the base year under the medical assistance program, to the provider not designated as a *Level I* comprehensive outpatient program;

(6) the allowance of additional visit volume approved by the commissioner under this subdivision may be less than the volume recommended by the local governmental unit where the calculated supplemental rate of payment for the alternative provider is greater than that for the provider not designated. In no instance will the supplemental revenue to all designated providers in the county exceed the estimated supplemental revenue to all eligible providers in the county; and

(7) if a program ceases to provide services in all program locations it shall not be eligible for designation as a *Level I* comprehensive outpatient program or for any additional local assistance grants for the period of at least one local fiscal year following the year during which the program ceased to provide services.

(j) When a [designated] *comprehensive outpatient* program has ceased or will cease to provide services and the local governmental unit determines that no existing, [designated] *comprehensive outpatient* program of the same outpatient category within the same county is capable of providing services to the clients of the program ceasing operation, the local governmental unit, with the approval of the commissioner, may designate any not-for-profit or municipally operated agency operating an outpatient mental health program of the same category as a comprehensive outpatient program. When no agency operating an outpatient program in the same category is available, the local governmental unit may, with the approval of the commissioner, designate an agency already designated in another outpatient program category which has not previously been licensed in the category of the closing program. The designation of such program shall not be effective until the designated program commences operation within the designating county. Supplemental rates or supplemental rate adjustments for successor programs designated pursuant to this subdivision shall be calculated as follows:

(1) Supplemental rates shall be based upon the lesser of the successor program's budgeted eligible grant amount recommended by the local governmental unit and approved by the Office of Mental Health pursuant to Part 551 of this Title, or the supplemental revenue and Medicaid visit volume used to establish the supplemental rate for the closing provider for the year of closure.

(2) The rate established in paragraph (1) of this subdivision shall be approved on an interim basis until receipt of a consolidated fiscal report including one complete local fiscal year of operation as a comprehensive outpatient program, after which the Office of Mental Health shall recalculate the final supplemental rate or supplemental rate adjustments subject to the limitations in paragraph (1) of this subdivision.

(3) Such rates shall not be otherwise limited by the provisions of paragraphs (i)(3) and (4) of this section.

(k) Each general hospital, as defined by Article 28 of the Public Health Law, which is operated by the New York City Health and Hospitals Corporation, which received a grant pursuant to Section 41.47 of the Mental Hygiene Law for the local fiscal year ending in 1989 shall be designated as a *Level I* comprehensive outpatient program for all outpatient programs licensed pursuant to [Parts 585 and] *Part 587* of this Title. For purposes of calculating supplemental Medicaid rates pursuant to this Part, all such programs in the New York City Health and Hospitals Corporation are combined for a uniform supplemental Medical Assistance program rate.

7. Subdivisions (c) and (d) of Section 592.9 of Title 14 NYCRR are amended to read as follows:

(c) A program which the Commissioner determines has failed to substantially comply with the requirements of this section or any other requirements established by the local governmental unit shall be referred to the local governmental unit with a recommendation that it not be designated as a *Level I* comprehensive outpatient program for the subsequent local fiscal year.

(1) The local governmental unit may designate such provider of services as a *Level I* comprehensive outpatient program for the following local fiscal year, but shall notify the Commissioner of such designation and the reason(s) therefore.

(2) The Commissioner shall review such program prior to the end of the following local fiscal year. If the program is found to have continued to have failed to substantially comply with the requirements of this Part, or any other requirements established by the local governmental unit, the Commissioner shall instruct the local governmental unit that such provider of services shall not be designated as a *Level I* comprehensive outpatient provider for the next local fiscal year.

(3) A determination that a provider of services shall not be designated as a *Level I* comprehensive outpatient program does not affect the status of such provider of services as a licensed provider of outpatient services.

(d) A provider of services that has been discontinued as a *Level I* comprehensive outpatient program pursuant to Paragraph (c)(2) of this section, may be designated by the local governmental unit as a *Level I* comprehensive outpatient program in the local fiscal year subsequent to the local fiscal year for which such designation was discontinued, providing that the local governmental unit shall provide assurances to the Commissioner that such program has taken such steps as are necessary to substantially comply with the requirements of this Part and all other requirements established by the local governmental unit.

8. A new Section 592.10 is added to Title 14 NYCRR to read as follows:

§ 592.10 *Level II Comprehensive Outpatient Program*

(a) *A clinic, continuing day treatment, and/or day treatment provider, other than a provider licensed under Article 28 of the Public Health Law, that has not been designated as a Level I Comprehensive Outpatient Program pursuant to this Section shall be eligible to be a Level II Comprehensive Outpatient Program and shall be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to be a Level II Comprehensive Outpatient Program and receive supplemental medical assistance reimbursement, a program shall:*

(1) *agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;*

(2) *directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;*

(3) *be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;*

(4) *have received a current operating certificate that is of at least a total of six months duration; and*

(5) *be a current enrollee in good standing in the medical assistance program.*

(b) In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

9. A new Section 592.11 is added to Title 14 NYCRR to read as follows:

§ 592.11 Comparability of fees

The sum of the base fee, as established in Section 588.13(a)(1) of this Part, and the supplement, calculated in accordance with Section 592.8 of this Part, received by a clinic treatment program that is not licensed under Article 28 of the Public Health Law and which has been designated as a Level I comprehensive outpatient program, shall not be less than the base fee and the supplement received by any Level II comprehensive outpatient provider in the region.

**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-46-07-00001-P, Issue of November 14, 2007. The emergency rule will expire February 1, 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.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

Sections 364(3) and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Chapter 54 of the Laws of 2006 provides funding appropriations in support of programs not formerly designated as Comprehensive Outpatient Programs. (Section 1, State Agencies, Office of Mental Health, line 44, page 277.)

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 43 of the Mental Hygiene Law gives the Commissioner authority to set certain rates. Under Section 364(3) and 364-a of the Social Services Law, OMH is granted responsibility for standards of care for certain Medicaid funded programs under its jurisdiction.

3. Needs and benefits: The intent and impact of this regulatory change is to simplify and make more equitable the Medicaid reimbursement which outpatient mental health providers receive. Every provider, and the clients they serve, will either be unaffected by or will benefit from these amendments.

Generally, outpatient Medicaid rates are separated into two components: a base fee and either a COPs supplement or a Non-COPs supplement. COPs providers generally receive a higher base rate than Non-COPs providers. Some providers received neither a COPs nor a Non-COPs component.

COPs providers are required to meet both higher standards than Non-COPs providers. They also must have received State deficit financing when the program was established in 1993. Many Non-COPs providers currently meet many of the standards applicable to COPs providers, but still cannot qualify for COPs reimbursement. These amendments attempt to mitigate this by combining all of the above providers into COPs, leveling up the base fees they receive, and allowing providers previously categorized as Non-COPs to bill for COPs-only visits on behalf of managed care recipients. Providers who were neither COPs nor Non-COPs will now be included as well.

In order to accomplish this, two levels, of COPs have been established by this rulemaking. The first level, Level I, contains the current nine special programmatic standards and deficit funding requirement of COPs. The second level, Level II, contains the five special programmatic stan-

dards for Non-COPs. Both tiers will receive the same base fees and operate under the same set of billing rules.

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 \$2,122,500.00. These additional funds are included in an appropriation for the State share of Medicaid. There is no local Medicaid share or other costs for this program.

(c) The cost projection was calculated by adding the \$2,000,000 available in the appropriation for leveling up to the \$122,500 available in the appropriation to address the non-COPS only adjustment, for a total of \$2,122,500.00.

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 do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative would be inaction. As this initiative has been established and funded in statute, this alternative was rejected, since it is 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 this initiative deemed effective on April 1, 2006, consistent with the enacted budget.

**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 establishment of this initiative, which equalizes Article 31 outpatient fees and non-COPS programs, 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. Recipients of services 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 statewide program.

**Job Impact Statement**

The proposed amendments to 14 NYCRR will not adversely impact jobs or employment opportunities in New York, nor should these amendments impact existing employees of Comprehensive Outpatient Programs for adults (COPs), non-COPs programs, or other programs under the jurisdiction of OMH. The purpose of this rulemaking is to equalize funding for Article 31 outpatient fees and non-COPs programs, as required by the enacted 2006-2007 state budget.

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

**Communication and Patient Visiting Rights**

**I.D. No.** OMH-51-07-00004-P

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

**Proposed action:** Repeal of Part 21 and amendment of Part 527 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, art. 7 and section 33.05

**Subject:** Communication and patient visiting rights.

**Purpose:** To amend regulations governing patients' rights to communication and visitation.

**Text of proposed rule:** 1. Part 21 of Title 14 NYCRR is repealed.

2. Subdivision (c) of Section 527.2 is amended, a new subdivision (d) is added, and subdivisions (d) and (e) are renumbered as (e) and (f) to read as follows:

(c) [Article 33] *Section 33.02* of the Mental Hygiene Law establishes statutory rights of [mentally disabled persons. Section 33.02 of such law] *persons with mental disabilities* and requires the commissioner to publish

regulations informing [patients] residents of facilities or programs operated or licensed by the Office of Mental Health of their rights under law.

(d) Section 33.05 of the Mental Hygiene Law provides that each patient or resident in a facility shall have the right to communicate freely and privately with persons outside the facility as frequently as he or she wishes, subject to regulations of the commissioner designed to assure the safety and welfare of patients and to avoid serious harassment to others.

(e) Article 29-C of the Public Health Law establishes the right of competent adults to appoint an agent to make health care decisions in the event they lose decision-making capacity. Article 29-C further empowers the Office of Mental Health to establish regulations regarding the creation and use of health care proxies in mental health facilities.

[(e)] (f) The Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, sections 4206 and 4751) requires that institutional providers participating in the Medicare or Medical Assistance program inform patients about their rights, under State law, to express their preferences regarding health care decisions.

3. Subdivision (e) of Section 527.4 is amended to read as follows:

(e) Plans of treatment or services developed for persons who are non-English speaking, deaf, [or] hard of hearing, or are unable, for any reason, to read or write, shall identify any significant related impact on such persons' functioning and treatment, and identify associated recommendations for treatment, including any reasonable accommodations.

4. New Sections 527.10, 527.11, and 527.12 are added to this Part to read as follows:

§ 527.10 Visiting at facilities.

(a) Subject to the provisions of Section 527.12 of this Part, residents of facilities operated or licensed by the Office of Mental Health have a right to receive visitors at reasonable times, to have privacy when visited, to authorize those family members and other adults who will be given priority to visit, and to communicate freely with persons within or outside the facility.

(b) Visiting rights at facilities.

(1) Recognizing that, in general, having visitors and visiting outside of the facility is part of the recovery process which maintains ties with family and the rest of the community, all facilities shall establish visiting hours and policies which are designed to facilitate the exercise of the right to receive visitors. Such policies:

(i) must not be unduly onerous to residents;

(ii) must be as flexible as administratively feasible;

(iii) shall not require prior notification or request by either the resident or the visitor, except when such visits would interfere with the regularly scheduled therapeutic activities in which patients are engaged, or as provided in Section 527.12 of this Part;

(iv) should, in order to preserve the therapeutic environment of the facility, be tailored in a manner that facilitates visiting while avoiding interference with the regularly scheduled activities in which residents are engaged, such as school attendance, program participation, and mealtime, by ensuring that in individual cases where an accommodation can be made without compromising the clinical care of the resident or other residents, facilities shall make reasonable efforts to do so;

(v) shall require the establishment of regular visiting hours during every day and every evening of the week, provided, however, that facilities operated by the Office shall establish regular visiting hours based on the facility's security needs and the needs of the specific population served (i.e., adults, children, or persons residing in forensic or secure treatment facilities), their families, and the community, as well as all other requirements of this subdivision; and

(vi) with respect to facilities which serve minors eighteen years of age or under, may require prior authorization of visitors by the person or entity with legal authority to consent to treatment for such minor, if in the best clinical interests of the resident.

(2) Each facility shall establish a space where visitors may meet with residents in comfortable surroundings with a reasonable degree of privacy. Visitors should be encouraged to visit in the living, dining, and recreational areas with patients, as well as to visit outside the facility with the resident.

(3) In exceptional instances, it may be necessary to restrict a resident's visiting right. Such restriction can only be imposed in accordance with Section 527.12 of this Part.

527.11 Communicating freely with others within and outside the facility.

(a) Residents of facilities or programs operated or licensed by the Office of Mental Health have the right to communicate freely and privately

with persons within and outside the facility, subject to the provisions of Section 527.12 of this Part.

(b) To assist in the exercise of this right, facilities shall provide residents with reasonable access to stationery and telephones to assist them in freely communicating with others outside the facility.

(c) Residents shall have full opportunity to communicate freely with clergy and with their legal representatives, and these communications shall not be restricted. With respect to other correspondence, there shall be no censorship or restriction of incoming or outgoing letters or packages, except in the following circumstances:

(1) To assure the safety and welfare of residents, facilities subject to this Part may institute policies governing possession of contraband. Letters or packages which are reasonably suspected to contain contraband or, in the case of facilities operated by the Office, otherwise implicate significant security or safety concerns, shall be processed in accordance with such facility policies.

(2) To assure the safety and welfare of residents and avoid harassment to others, any resident whose condition, in the opinion of the treatment team, warrants some selectivity, may have incoming and/or outgoing letters or packages not subject to a facility's contraband policy censored or restricted in accordance with Section 527.12 of this Part.

(d) With the exception of mail that is processed or restricted in accordance with subdivision (c) of this Section, incoming letters and packages should be delivered sealed and unopened to all residents, and all outgoing letters and packages shall be mailed in a like manner, provided, however, in an individual case where there exists an unanticipated, overriding compelling safety or security concern, the reasons why the letter or package was not delivered sealed or unopened to the resident, and a description of how the matter was handled (e.g., in consultation with the United States Postal Service, or other appropriate security intervention) should be appropriately documented in accordance with facility procedure.

527.12 Restriction of rights.

(a) A right set forth in Article 33 of the Mental Hygiene Law and this Part may be restricted within the resident's treatment plan by a written order signed by a physician stating the clinical justification for the restriction. The order imposing the restriction and a notation detailing the clinical justification therefor and the specific period of time in which the restriction shall be in effect must be entered into the resident's record. In no event may any right set forth in this section be restricted or limited as a punishment or for the convenience of staff.

(b) Any restriction on a right identified in this section shall be the least restrictive appropriate method for protecting the interest or interests involved.

(c) The treatment team or its designee shall discuss any restrictions of a right set forth in this section and the reason for such decision with the resident, and his or her family (if the resident does not object), and/or other authorized representative of the resident, and shall advise such persons of the resident's right to appeal this decision to the director of the facility. A notation that such persons were advised of the restriction, and the resident's right to appeal the decision, must be entered in the resident's record.

(d) In cases where a restriction is placed on incoming and/or outgoing mail in accordance with paragraph (2) of subdivision (c) of Section 527.11 of this Part, such mail may be withheld from the resident during the time the restriction is in place, or may be opened by a member of the treatment team in the presence of the resident. In no case may a staff member other than a member of the treatment team open such packages or letters, unless there exists an overriding compelling safety or security concern. In such cases, the reason why a treatment team member did not open a package or document, and a description of how the matter was handled (e.g., in consultation with the United States Postal Service, or other appropriate security intervention) must be appropriately documented in accordance with facility procedure.

(e) Appeals. Residents whose rights have been restricted in accordance with this Section shall be notified of their right to appeal such decision in accordance with Section 27.8 of this Title.

**Text of proposed 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

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

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

**Regulatory Impact Statement**

1. Statutory Authority: Section 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/her jurisdiction.

Section 33.02 of the Mental Hygiene Law establishes statutory rights of persons with mental disabilities and residents of programs licensed or operated by the Office of Mental Health. Section 33.05 of the Mental Hygiene Law requires the commissioner to establish guidelines to ensure that patients or residents at facilities have full opportunity for conducting correspondence, have reasonable access to telephones, and have frequent and convenient opportunities to meet with visitors.

2. Legislative Objectives: Article 7 of the Mental Hygiene Law reflects the Commissioner's authority to establish regulations regarding mental health programs. Furthermore, the Legislature intended, through passage of Mental Hygiene Law Section 33.05, the Commissioner of OMH, to establish guidelines to reflect the therapeutic nature that receiving visitors generally has for residents and to ensure that receiving visitors is part of the normalization process which permits residents to maintain ties with the rest of the community. In this same section, the Legislature also recognized that the right to communicate freely and privately, in a hospital setting, must be balanced with the necessity of ensuring the safety and welfare of residents and to avoid serious harassment to others.

3. Needs and Benefits: Regulations were enacted in the 1970's at 14 NYCRR Part 21 to establish standards for communications and visits, which were applicable to both the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities. Subsequently, the Department of Mental Hygiene was split into autonomous offices in 1978. Each office established its own statutory framework in the Mental Hygiene Law, and later legislation expanded upon the rights of residents and the communication needs of residents.

The Office of Mental Retardation and Developmental Disabilities updated its regulations in 14 NYCRR Part 633, which superseded Part 21 since applicable provisions regarding resident visiting rights and communication needs were moved into this section. Similarly, the Office of Mental Health promulgated regulations setting forth the right of patients to communicate freely with visitors, and establishing rules governing communication needs, in 14 NYCRR Part 527.

However, OMH did not clarify that the provisions of Part 527 partially superseded Part 21, which has resulted in some unnecessary duplication and confusion, particularly since a number of provisions in Part 21 are outdated. As one example, security is obviously a greater concern post 9/11/01 than it was in the 1970's, when Part 21 was initially enacted. OMH is attempting to address security issues while not infringing on resident rights by providing that in cases where security is an overriding concern, packages may be opened by someone other than a treatment team member, with appropriate documentation. These amendments are therefore designed to specifically repeal Part 21, and to incorporate and update standards governing visiting and communication rights of residents in facilities under the jurisdiction of OMH, so that they are fully contained in 14 NYCRR Part 527.

It must be noted that substantially identical amendments were filed and adopted on June 20, 2006, and were in effect from July 5, 2006 until May 17, 2007. On that date, the amendments were deemed null and void in Orange County Court as a result of a lawsuit filed by the Mental Hygiene Legal Service, alleging that the final rule contained a "substantial" change as compared to the proposed rule, and a Revised Rulemaking should have been filed prior to final adoption (*Hirschfeld v. Carpinello*, Index No. 9034/2006). These amendments are thus intended to restore those regulations, which, prior to the decision overruling them on technical grounds, had been effective for almost one year.

#### 4. Costs:

(a) cost to State government: These regulatory amendments will not result in any additional costs to State government.

(b) cost to local government: These regulatory amendments will not result in any additional costs to local government.

(c) cost to regulated parties: These regulatory amendments will not result in any additional costs to regulated parties.

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

6. Paperwork: This rule will have no impact on any paperwork requirements of affected entities.

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

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. Inasmuch as the provisions of 14 NYCRR Part 21 are either outdated or duplicative of provisions found in Part 527, and that almost identical regulations have been in effect for almost one year, this alternative was necessarily rejected.

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 regulatory amendments are effective immediately.

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

A Regulatory Flexibility Analysis for Small Businesses and Local Governments, and Rural Area Flexibility Analysis are not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses or rural areas, nor will they impose any new reporting, record keeping or other compliance requirements on small businesses or local governments, or on public or private entities in rural areas. The amendments to the rule are designed to simply move and update existing requirements from 14 NYCRR Part 21, which is being repealed, to 14 NYCRR part 527. No new or additional requirements are being imposed on small businesses, local governments, or other public or private entities.

A Job Impact statement is not being submitted with this notice because it is evident from the subject matter of the amendments that they will have no impact on jobs and employment opportunities. This amendment essentially consists of a relocation, and updating, of existing regulatory requirements and, as such, has no impact on jobs and employment opportunities within the OMH system.

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## Public Service Commission

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

#### Submetering of Electricity by Herbert E. Hirschfeld

I.D. No. PSC-51-07-00005-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of BLDG Management Company, Inc., to submeter electricity at 95 Christopher St., New York, NY.

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

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

**Purpose:** To consider the request of Herbert E. Hirschfeld, P.E., on behalf of BLDG Management Company, Inc., to submeter electricity at 96 Christopher St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of BLDG Management Company, Inc., to submeter electricity at 95 Christopher Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

**Data, views or arguments may be submitted to:** Jaelyn 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-1374SA1)

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

**Approval of Credit Facilities and Light Regulations by Empire Generating Co. LLC**

**I.D. No.** PSC-51-07-00006-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 a petition from Empire Generating Co. LLC requesting approval of credit facilities in an amount not to exceed \$535 million for the construction of an approximately 635 MW natural gas fired electric generation facility to be located in Rensselaer, NY, and that the generation facility and its owner be lightly regulated.

**Statutory authority:** Public Service Law, sections 2(13), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

**Subject:** Approval of credit facilities and light regulation of an approximately 635 MW gas fired electric generation facility.

**Purpose:** To consider approval of credit facilities and light regulation of an approximately 635 MW gas fired electric generation facility.

**Substance of proposed rule:** The Public Service Commission is considering a petition from Empire Generating Co. LLC requesting approval of credit facilities in an amount not to exceed \$535 million for the construction of an approximately 635 MW natural gas fired electric generation facility to be located in Rensselaer, New York, and that the generation facility and its owner be lightly regulated. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**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. Brillig, 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-1390SA1)

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

**Merger by GAZ de France SA (GdF) and Suez SA (Suez)**

**I.D. No.** PSC-51-07-00007-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, the amended joint petition of United Water Inc. (UW), United Water Resources Inc. (UWR), United Waterworks Inc. (UWW), United Water New York Inc. (UWNY), United Water New Rochelle Inc. (UWNR), United Water South County Inc. (UWSC), United Water Owego Inc. (UWO), United Water Nichols Inc. (UWN), and United Water Westchester Inc. (UWWI) (the companies) for a declaratory ruling disclaiming jurisdiction or, in the alternative, for approval of the merger of GAZ de France SA (GdF) and Suez SA (Suez), and the simultaneous initial public offering of shares of Suez Environment (SE).

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Merger by GAZ de France SA (GdF) and Suez SA (Suez).

**Purpose:** To issue a declaratory ruling disclaiming jurisdiction or to approve a transaction by which Suez would be merged into GdF, along with the simultaneous initial public offering of shares of SE. As a result there

would be a transfer of an indirect controlling interest in UW, UWR, UWW, UWN, UWN, UWO, UWN, UWSC, and UWWI.

**Substance of proposed rule:** GAZ de France and Suez SA are petitioning to merge as GDF Suez. Currently Suez SA is the parent of Suez Environment, which is a parent company of United Water Inc. (UW), United Water Resources Inc. (UWR), United Waterworks Inc. (UWW), United Water New York Inc. (UWNY), United Water New Rochelle Inc. (UWNR), United Water South County Inc. (UWSC), United Water Owego Inc. (UWO), United Water Nichols Inc. (UWN), and United Water Westchester Inc. (UWWI), (the companies) which are New York State regulated water companies. If approved, Suez Environment ownership will consist of publicly traded shares, GDF Suez, and a variety of major shareholders. The Commission may adopt, reject, or modify in any way the Companies' proposal.

**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. Brillig, 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-W-1367SA2)

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**Office of Real Property  
Services**

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**NOTICE OF ADOPTION**

**Certified Counties and School Districts**

**I.D. No.** RPS-28-07-00005-A

**Filing No.** 1314

**Filing date:** Dec. 4, 2007

**Effective date:** Dec. 19, 2007

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

**Action taken:** Repeal of Subpart 186-12 of Title 9 NYCRR.

**Statutory authority:** Real Property Tax Law, sections 202(1)(l) and 848

**Subject:** Certified counties and school districts.

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

**Text or summary was published** in the notice of proposed rule making, I.D. No. RPS-28-07-00005-P, Issue of July 11, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Hung Kay Lo, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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

**State Aid for Improved Assessment Administration**

**I.D. No.** RPS-51-07-00003-P

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

**Proposed action:** This is a consensus rule making to repeal Part 192 and Subpart 201-1 of Title 9 NYCRR.

**Statutory authority:** Real Property Tax Law, section 202(1)(1)

**Subject:** State aid for improved assessment administration.

**Purpose:** To repeal obsolete rules relating to the administration of programs of State aid for improved assessment administration that were in existence prior to 2001.

**Text of proposed rule:** Section one. Part 192 of 9 NYCRR is REPEALED.

§ 2. Subpart 201-1 of Part 201 of 9 NYCRR is REPEALED.

**Text of proposed rule and any required statements and analyses may be obtained from:** Joseph K. Gerberg, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210, (518)474-8821, e-mail: internet.legal@orps.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

This proposal is a consensus rule making in that it solely provides for the repeal of obsolete rules.

The first provision repeals Part 192 of 9 NYCRR, which implemented a State Aid program that was once authorized under section 1572 of the Real Property Tax Law. That program was closed in 1998 (see L. 1996, c. 309, § 3), and RPTL § 1572 itself was repealed three years later (L. 2001, c. 530), so these rules are no longer operative and should be removed from the books.

The section provision repeals Subpart 201-1 of 9 NYCRR, which initially implemented the replacement aid program authorized by RPTL § 1573, but only for assessment rolls filed in 1999 and 2000 by certain assessing units. Those provisions were of a temporary, transitional nature. All aid payable under that Subpart has long since been paid out and no purpose is served by leaving this inoperative language on the books.

The proposal does not repeal or amend Subpart 201-2 of 9 NYCRR, which implements the aid program authorized by RPTL § 1573 for assessment rolls filed in 2001 and thereafter. That aid program remains operative and that Subpart continues to set forth the currently applicable standards and criteria for the administration of this aid program. This rulemaking thus leaves Subpart 201-2 in effect and unchanged.

For the reasons stated above, the State Board of Real Property Services has determined that no person is likely to object to this proposed rule as written.

#### Job Impact Statement

A Job Impact Statement is not required for this rulemaking because this rulemaking will have no impact whatsoever on jobs and employment opportunities. As is apparent from the nature and purpose of the rulemaking, the rulemaking merely repeals obsolete rules relating to State Aid programs that are no longer operative and have not been operative for years. As such, the proposal will have no substantive effect and thus could not bear in any way upon jobs and employment opportunities.

**Purpose:** To revise existing regulation to provide for expanded forms of data transfer.

**Text of proposed rule:** Subdivision (d) of section 143-5.1 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(d) The central filing office shall collect a fee of three hundred dollars (\$300.00) for providing a copy on microfilm or by suitable electronic media of UCC documents filed with the central filing office during any calendar month. [Microfilm copies] Copies are offered for sale subject to availability. The central filing office [may limit the production of microfilm copies to such quantity as it determines from time to time to be appropriate, and the central filing office may discontinue the production of microfilm copies at any time] shall retain the authority to alter from time to time the medium by which copies of filed UCC documents will be made available for a fee.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Frament, Department of State, Division of Corporations, 41 State St., Albany, NY 12231, (518) 473-2278, e-mail: barbara.frament@dos.state.ny.us

**Data, views or arguments may be submitted to:** Richard DiGiovanna, Department of State, Division of Corporations, 41 State St., Albany, NY 12231, (518) 473-2278, e-mail: richard.digiovanna@dos.state.ny.us

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

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

#### Consensus Rule Making Determination

The Department of State has concluded that this rule making makes technical changes or is otherwise non-controversial and therefore no person is likely to object to its adoption. The proposed rule would amend subdivision (d) of section 143-5.1 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Currently, this regulation provides for the collection of a prescribed fee of \$300.00 for a microfilm copy of Uniform Commercial Code (UCC) documents filed with the Department of State during any calendar month. Subdivision (d) was adopted in response to the provisions of Uniform Commercial Code § 9-523(f) which directs the Secretary of State to offer to sell or license to the public on a nonexclusive basis copies of all UCC records filed with the Department of State. Such copies are to be available in every medium that from time to time is available to the Department.

The Department has recently begun imaging UCC documents filed with the Department in order to create a permanent record. Consequently, the Department is now able to offer for sale copies of filed UCC documents in a medium other than microfilm. Therefore, it is appropriate to amend the regulation that pertains to the sale to the public of copies of UCC documents filed by the Department of State. The Department now can provide copies by means of electronic media and is no longer limited to microfilm. Adoption of this proposed rule making will advise potential customers of the availability of this product in a new medium. The associated fee for obtaining the requested copies is not being changed at this time.

The nature of the regulation that is the subject of this rule making makes it highly unlikely that any one will object to its adoption. The rule making will not impose any requirement upon any regulated party. The underlying regulation is only applicable to parties as a result of their own choice. The associated fee is one that is already established for the product offered. The rule making merely provides parties with a new medium for a currently available product. Therefore, it is appropriate to characterize this rule making as a consensus rule. The definition of that term set out as subdivision 11 of State Administrative Procedure Act § 102 provides: "Consensus rule" means a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely . . . (c) makes technical changes or is otherwise non-controversial. As the proposed rule making merely implements technical changes, no one is likely to object to its adoption.

#### Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the proposed rule that it will not have an adverse impact on jobs and employment opportunities in New York. The proposed rule making would amend 19 NYCRR Part 143 to establish updated requirements for UCC documents filed in the central filing office. The proposed amendment would provide for future advancements in technology as the use of microfilm gradually diminishes and newer electronic media become more efficient. The proposed change would keep the regulation in line with current changes in the job market, and thus have a generally neutral impact on

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## Department of State

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

#### Medium or Format Copies of the Uniform Commercial Code Documents

I.D. No. DOS-51-07-00001-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 section 143-5.1 of Title 19 NYCRR.

**Statutory authority:** Executive Law, section 96-a; L. 2001, ch. 84; Uniform Commercial Code, section 9-526-(a)

**Subject:** Medium or format by which copies of the Uniform Commercial Code documents filed with the Department of State will be available to the public.

jobs. The fee of three hundred dollars for a copy of UCC documents filed during a thirty day period would not be changed.

The Department finds that it is evident from the subject matter of the rule that it could only have a positive impact or no impact on jobs and employment opportunities.

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## State University of New York

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### EMERGENCY RULE MAKING

#### State Basic Financial Assistance

**I.D. No.** SUN-42-07-00011-E

**Filing No.** 1315

**Filing date:** Dec. 4, 2007

**Effective date:** Dec. 4, 2007

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

**Action taken:** Amendment of section 602.8(c) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 355(1)(c) and 6304(1)(b); and L. 2007, ch. 53

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

**Specific reasons underlying the finding of necessity:** The State University of New York finds that immediate adoption of amendments to the Code of Standards and Procedures for the Administration and Operation of Community Colleges (the Code) is necessary for the preservation of the general welfare and that compliance with the requirements of subdivision 1 section 202 of the State Administrative Procedure Act would be contrary to the public interest. The 2007-2008 Education, Labor and Social Services Budget Bill (the Budget) requires amendments to the existing funding formula for State financial assistance for operating expenses of community colleges of the State and City Universities of New York. The funding formula is to be developed jointly with the City University of New York, subject to the approval of the Director of the Budget. Although negotiations between the State University, City University and the Division of the Budget were concluded in March 2007, the State University Trustees were unable to take action necessary to invoke the rule making process until May 31, 2007. Amendments to the Code on an emergency basis for the 2007-2008 operating assistance to public community colleges of the State and City Universities of New York:

1. provide timely State operating assistance to public community colleges of the State and City Universities of New York;
2. obtain the necessary revenue to maintain essential staffing levels, program quality, and accessibility.

Compliance with the provision of subdivision 1 of section 202(6) of the State Administrative Procedure Act would not be contrary to the public interest. The requirements of subdivision 1 of section 202(6) of SAPA would not allow implementation of the State fiscal assistance provided in the budget bill in time for the 2007-2008 community college fiscal year.

**Subject:** State basic financial assistance for operating expenses of community colleges under the program of the State University of New York and the City University of New York.

**Purpose:** To modify existing limitations formula for basic State financial assistance for operating expenses of community colleges of the State University and City University of New York in order to conform to the provisions of the Education Law and the 2007-2008 budget bill.

**Text of emergency rule:** c)Basic State financial assistance.

(1) Full opportunity colleges. The basic State financial assistance for community colleges, implementing approved full opportunity programs, shall be the lowest of the following:

- (i) two-fifths (40%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;
- (ii) two-fifths (40%) of the net operating costs of the college, or campus of a multiple campus college; or
- (iii) for the current college fiscal year the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$2,525] \$2,675; and

(b) up to one-half (50%) of rental costs for physical space.

(2) Non-full opportunity colleges. The basic State financial assistance for community colleges not implementing approved full opportunity programs shall be the lowest of the following:

(i) one-third (33%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) one-third (33%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the college fiscal year current, the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$2,105] \$2,230; and

(b) up to one-half (50%) of rental cost for physical space.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subdivision, a community college or a new campus of a multiple campus community college in the process of formation shall be eligible for basic State financial assistance in the amount of one-third of the net operating budget or one-third of the net operating costs, whichever is the lesser, for those colleges not implementing an approved full opportunity program plan, or two-fifths of the net operating budget or two-fifths of the net operating costs, whichever is the lesser, for those colleges implementing an approved full opportunity program, during the organization year and the first two fiscal years in which students are enrolled.

**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. SUN-42-07-00011-P, Issue of October 17, 2007. The emergency rule will expire February 1, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Dona S. Bulluck, Associate Counsel, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: Dona.Bulluck@suny.edu

#### **Regulatory Impact Statement**

This is a technical amendment to implement the provisions of the 2007-2008 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York.

#### **Regulatory Flexibility Analysis**

This is a technical amendment to implement the provisions of the 2007-2007 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York. It will have no impact on small businesses and local governments.

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

This is a technical amendment to implement the provisions of the 2007-2008 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York. This rule making will have no impact on rural areas or the recordkeeping or other compliance requirements on public or private entities in rural areas.

#### **Job Impact Statement**

No job impact statement is submitted with this notice because the adoption of this rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This rule making governs the financing of community colleges operating under the program of the State University and will not have any adverse impact on the number of jobs or employment opportunities in the state.