

RULE MAKING ACTIVITIES

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

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

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

Office of Alcoholism and Substance Abuse Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Credentialing of Counselors and Professionals

I.D. No. ASA-52-07-00010-P

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

Proposed action: Amendment of Parts 853 and 855 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(a), 19.09(b), (d), 19.21(d), 32.01 and 32.07(a)

Subject: Amendment to credentialing of alcoholism and substance abuse counselors and alcohol and substance abuse prevention professionals.

Purpose: To amend the process to eliminate the oral examination and change the renewal cycle from two years to three years.

Text of proposed rule: Section 853.6 Qualifications.

Section 853.6 (a) is amended to read as follows:

(a) Knowledge and skills required. The Office shall issue an alcoholism and substance abuse counselor credential to any person who has demonstrated an acceptable level of safe practice by successfully completing education and training, supervised practical training, work experience [and written and oral examinations] *and a written examination*, all of which address a body of knowledge, work behavior and skills related to chemical dependence counseling.

Section 853.7 Examination eligibility requirements

Section 853.7 is amended to read as follows:

In order to sit for the [oral and written examination] *examination* required pursuant to section 853.10 of this Part, an applicant for an alcoholism and substance abuse counselor credential shall satisfy the following requirements:

Section 853.8 Application to sit for the [oral and] written examination.

Section 853.8 (a) is amended to read as follows:

Forms. Application to sit for the [oral and] written examination shall be made on forms provided by the Office.

Section 853.10 Examinations

Section 853.10 (a) is amended to read as follows:

(a) Successful completion required. Each applicant who has submitted a complete application in accordance with Sections 853.7 and 853.8 of this Part and is deemed eligible, shall be required to successfully complete and pass [both written and oral examinations] *a written examination* administered under the direction of the Office. [Only applicants who successfully complete the written examination will be admitted to the oral examination.]

Subdivision (b) (3) of Section 853.10 is repealed.

Subdivision (b)(4) of Section 853.10 is repealed and a new Section 853.10 (3) is adopted to read as follows:

The schedule of dates for the written examination will be established at least 120 days prior to the examination.

Section 853.10 (c) (2) is repealed.

Section 853.10 (c) (3) is repealed and a new Section 853.10 (c) (2) is adopted to read as follows:

This examination shall meet all generally accepted psychometric and testing standards applicable to professional certification.

Section 853.10 (d) is amended to read as follows:

Each applicant shall be required to demonstrate, through his or her performance on the written [and oral] examination[s] the knowledge, skills and professional expertise as specified in Section 853.6 of this Part.

Section 853.11 Examination review, notification and administrative review.

Section 853.11 (b)(1) is amended to read as follows:

An applicant shall be notified in writing of the results of the written examination [and the oral examination eligibility determination].

Section 853.11 (b)(2) is repealed and Section 853.11 (b)(3) is renumbered (2).

Section 853.12 Notice of credential and expiration of credential.

Section 853.12 (b) is amended to read as follows:

Expiration of credential. Each credential shall be valid for a period of [two] *three* years and shall expire on the counselor's birth date following the [second] *third* year from the issue date, unless revoked by the office prior to the expiration date.

Section 853.14 Credential Renewal.

Section 853.14 (b)(5)(i) is amended to read as follows:

(5) Except as provided in Paragraph (1) of this Subdivision, a Credentialed Alcoholism and Substance Abuse Counselor shall submit to the Office satisfactory evidence of continued competence and skill maintenance, which are subject to verification and approval by the Office and which shall include the following:

(i) documentation of attendance at a minimum of [40] *60* clock hours of continuing professional education related to alcoholism and substance abuse counseling and completed within the previous [two] *three* years, or other relevant education as may be approved at the discretion of the Office; and

Section 853.16 Credentialing based upon reciprocity.

Section 853.16 (a) is amended to read as follows: (a) The Credentials Board will recommend issuance by the Office, without requiring written [or oral] examination, of a credential to any applicant who is determined to be eligible for reciprocity based on the following:

Section 855.13 is amended to read as follows:

855.13 Credential renewal requirements

(a) All persons issued a credential under this Part shall provide satisfactory and appropriate documentation within [two] *three* years of receipt of such credential in accordance with the provisions of this Section.

(b) Satisfactory evidence of continued competence and skill maintenance shall be provided, subject to verification and approval by the Office, which shall include the following:

(1) documentation of attendance at a minimum of [40] *60* clock hours of continuing professional education related to alcohol and substance abuse prevention and/or other relevant education as may be approved at the discretion of the Office, completed within the [2] *3* year effective period of the credential; and

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

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

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

Regulatory Impact Statement

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

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.09(d) of the Mental Hygiene Law directs the Commissioner to establish minimum qualifications for credentialed alcoholism and substance abuse counselors; to issue credentials to persons who meet those qualifications; and to suspend or revoke such credentials for good cause.

Section 19.21 (b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to assess alcoholism, substance abuse, and chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

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

The relevant sections of the Mental Hygiene Law cited above, allow the Commissioner to regulate how chemical dependency services are delivered, establish minimum qualifications for credentialed alcoholism and substance abuse counselors and to issue credentials to persons who meet those qualifications. Therefore the repeal of a requirement originally imposed by the Office is within the discretion of the Commissioner. Good cause being shown that the testing requirements of the Office will be administered through a written examination only, is evident by the fact that recent studies have shown that the subjectivity of the examiners administering the oral examination effect the outcome in a manner that cannot be accurately measured.

2. Legislative Objectives: Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The proposed amendment to Part 853 and 855, Credentialing requirements, will assure that patients receive the best care and treatment. Part 853 and 855 establish the requirements for credentialing alcoholism and substance abuse counselors, prevention professionals and prevention specialists. These requirements ensure that patients are receiving care from qualified counselors. Eliminating the requirement of the oral examination does not undermine

the testing process, it merely transfers the burden of that examination into the written examination in that the written examination will have to test for the knowledge and abilities that were once tested through the oral examination. The educational, training and work experience requirements will remain the same. The renewal cycle will be changed from two years to three years, and therefore the educational requirements will also increase from 40 to 60 hours to reflect the new renewal cycle. The legislature enacted section 19 enabling the Commissioner to establish best practices for treating chemical dependency.

3. Needs and Benefits: The need for the elimination of the oral examination is so that potential candidates who are seeking a credential in order to perform as a credentialed alcoholism and substance abuse counselor will be tested on their knowledge of relevant chemical dependency treatment practices through one integrated examination that will test all core principles of chemical dependency counseling. The benefit of integrating the examination into one written exam and eliminating the need for an oral examination is that all candidates will be tested on an objective written examination that can be relied upon as an accurate reflection of their knowledge and competence.

As a member of the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Inc. (IC&RC), the Office uses the national counselor examination (both written and oral) developed by the IC&RC as a basis for credentialing counselors in New York State. In response to a variety of concerns expressed by the membership of the IC&RC (i.e., state certification boards), the organization has been examining the appropriateness of continuing to use the oral examination as part of the national counselor certification process. The IC&RC designated a committee to examine the feasibility of the Case Presentation Method (CPM) oral examination. As a result of this examination, a number of significant weaknesses were revealed. Most notably was a lack of demonstrable psychometric parameters. For example, the absence of a consistent policy on how to address scoring when the reliability of the three evaluators who conduct the oral exam is less than 80 percent, as well as the fact that inter-rater reliability data is not typically gathered by IC&RC member boards and therefore cannot be used to defend the objectivity of the exam. In addition, a general lack of standardization in the administration of the oral examination (e.g., inconsistencies in requiring the advance submission of a case presentation, as well as "live" case presentations and scoring vs. video/audio taped-case presentations for subsequent scoring) was also found to be problematic.

Based on the above, at the IC&RC's Spring 2007 Board of Directors meeting, a motion was approved to transition away from the CPM oral examination, with the goal of incorporating the oral examination competencies into the written examination. A CPM Task Force was charged with developing a timeline for elimination of the oral examination.

The need for changing the renewal cycle of Part 853 and 855 is that the professionals seeking re-credentialing will have more time to gain their continuing education credits.

4. Costs: There are no increases to costs anticipated from this proposed amendment.

a. Costs to regulated parties: There will be no additional costs to applicants.

b. Costs to the agency, state and local governments: There will be no additional costs to counties, cities, towns or local districts. The Office should realize savings from implementation of the proposed rule as the cost of administering the oral examination will be eliminated.

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

6. Paperwork: Part 853 and 855 will not require any additional paperwork. Part 853 and 855 will result in a reduction in paperwork for both the Office agency and test applicants.

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

8. Alternatives: The administration of the exam was looked at as a factor in the unreliability of the outcome in the examination process, however no reasonable alternative to the "human factor" in administering the examination could be devised, therefore the current changes are being proposed.

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

10. Compliance Schedule: It is expected that full implementation of Part 853 and 855 will be completed by January 1, 2008.

Regulatory Flexibility Analysis

Effect of Rule: The proposed amendments to Part 853 and 855 will impact applicants who wish to take the credentialed alcoholism and sub-

stance abuse counselor (CASAC) examination. It is expected that the amendments will result in a more efficient testing of the core principles tested in order to best assess who is qualified to hold the CASAC credential. Small businesses may be positively affected by an increase in qualified professionals credentialed to practice within their organization. Local governments and districts will be affected because the pool of applicants taking the examination may increase since the test will be streamlined and more reliable. Many localities currently have a workforce problem in that there are too few CASACS available and employers cannot fill these positions. Increasing the pool of applicants will allow providers to hire CASACS thereby enabling them to provide increased services (ie: additional groups, and individual counseling sessions to more people).

Compliance Requirements: It is not expected that there will be significant changes in compliance requirements.

Professional Services: It is not expected that programs will need to utilize additional professional services.

Compliance Costs: It is not expected that providers will have any significant change in compliance costs.

Economic and Technological Feasibility: Compliance with the record-keeping and reporting requirements of the Part 853 and 855 is not expected to have an economic impact or require any changes to technology for small businesses and government.

Minimizing Adverse Impact: Part 853 and 855 have been carefully reviewed to ensure minimum adverse impact to providers, patients or candidates.

Any impact this rule may have on small businesses and the administration of State or local governments and agencies, will either be a positive impact or the minimal costs for materials and compliance are so small that they will be absorbed into the already existing economic structure.

Small Business and Local Government Participation: These amendments were shared with New York’s treatment provider community through their professional organization ASAP, the Greater New York Hospital Association, the Legal Action Center, COMPA, and the Council of Local Mental Hygiene Directors. The existing members of the Advisory Council on Alcoholism and Substance Abuse Services were given a copy of the proposal and an opportunity to comment.

Rural Area Flexibility Analysis

A rural flexibility analysis is not provided since these proposed regulations would have no adverse impact on public or private entities in rural areas. The increased renewal cycle and the discontinuation of the oral examination may have a positive impact on all providers but specifically in rural areas where there may be a workforce shortage. These amendments place less of a burden on applicants and grant another year in which to complete the renewal requirements.

Job Impact Statement

The implementation of the Amendment to Part 853 and Part 855 will have an impact on jobs in that it will increase the renewal cycle allowing more time for completing re-credentialing requirements thereby increasing the retention of workforce. Additionally it will allow a larger pool of candidates to pass the examination by eliminating a portion of the exam that is no longer validated. This regulation will not adversely impact jobs outside of the provider community. This amendment to Part 853 and Part 855 will not result in the loss of any jobs within New York State.

CB 105, CB 107, CB 109, CB 111, CB 113, CB 116, CB 117, SB 101, SB 110, SL 101, SL 110, SL 111, SL 112, FB 101, FB 102, MB 101, MB 102, MB 103, MB 104, MB 105 and MB 106; repeal Supervisory Policy G 107 and add Part 500 to Title 3 NYCRR.

Statutory authority: Banking Law, sections 12, 14(1), 18 and 18-a

Subject: References in the Banking Department’s regulations to fees charged by the department, addresses and contact information for the department, and Federal publications.

Purpose: To update, conform, and centralize the subject references.

Substance of proposed rule: Although the proposed rule making entails numerous amendments to 3 NYCRR, the primary amendments are contained in Supervisory Policy G 1. Section 1.2 of such Policy contains a chart which lists all the fees prescribed by the Banking Law and the statutory authorizations for such fee amounts. The amendments update that section to reflect the new fee amounts prescribed by section 18-a of the Banking Law. Section 1.2 also sets forth the records access fees (copying and certification fees) authorized by section 18 of the Banking Law. Section 1.1 of Supervisory Policy G 1 sets forth the contact information for the Banking Department, the publication sources for federal laws, regulations and supervisory materials cited elsewhere in 3 NYCRR, and the contact information to review or obtain copies of such laws, regulations and materials.

The rule making also adds a new Sub-chapter C to the Superintendent’s Regulations and a new Part 500 within such sub-chapter. Sub-chapter C is designated as “general regulations” having application to both banking and non-banking organizations. The purpose of the new Part 500 is to establish the regulatory basis within the Superintendent’s Regulations for the placement of both the investigation and records access fees within Supervisory Policy G 1. With respect to the records access fees, section 18 of the Banking Law authorizes the Superintendent to set such fees by regulation. Section 18-a, which sets the fee amounts for applications, authorizes the Superintendent to reduce or waive fees under certain conditions pursuant to regulations.

The other amendments to 3 NYCRR generally delete references to specific fee amounts, federal publication sources related to federal document citations, and/or contact information for the Banking Department or federal document access and substitute references to sections 1.1 and/or 1.2 of Supervisory Policy G 1, as appropriate, to enable a reader to locate the pertinent information. Any other amendments are technical or the deletion of regulatory provisions that are dated or have been superseded as the result of other statutory or regulatory amendments. The revisions to 3 NYCRR in this regard are as follows:

- Sections 6.3(b) and 6.5(b) of Part 6 of the General Regulations of the Banking Board are amended;
- Section 11.6 of Part 11 of the General Regulations of the Banking Board is amended;
- Section 14.3(c) and (d)(11) of Part 14 of the General Regulations of the Banking Board is amended;
- Section 16.4 of Part 16 of the General Regulations of the Banking Board are amended;
- Section 30.4 of Part 30 of the General Regulations of the Banking Board is amended;
- Section 34.2(b) of Part 34 of the General regulations of the Banking Board is amended;
- Section 36.1 of Part 36 of the General Regulations of the Banking Board are amended;
- Section 39.3(b) of Part 39 of the General Regulations of the Banking Board is amended;
- Section 41.1(b), (c),(h) and (j) of Part 41 of the General Regulations of the Banking Board is amended;
- Section 51.4(c) of Part 51 of the General Regulations of the Banking Board is amended;
- Sections 66.2(b), 66.3(a) and 66.4(b) of Part 66 of the General Regulations of the Banking Board are amended;
- Sections 76.2(v) and (w) and 76.8(a)(1), (c)(1) and (d)(1) of Part 76 of the General Regulations of the Banking Board are amended;
- Section 79.11(a) of Part 79 of the General Regulations of the Banking Board is amended;
- Footnote 1 of item 14 of section 86.14 of Part 86 of the General Regulations of the Banking Board is repealed and section 86.4(b) and note 2(d) of section 86.14 of such Part are amended;
- Section 87.1(b) of Part 87 of the General Regulations of the Banking Board is amended;
- Section 301.8 of Part 301 of the Superintendent’s Regulations is amended;

Banking Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Fees Charged, Addresses and Contact Information, Federal Publications

I.D. No. BNK-52-07-00001-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 Parts 6, 11, 14, 16, 30, 34, 39, 41, 51, 66, 76, 86, 87, 301, 303, 306, 307, 400, 401, 402, 406, 407 and 410, Supervisory Policy G 1 and Supervisory Procedures G 100, G 101, G 104, G 105, G 106, G 109, G 110, G 114, CB 101, CB 103,

- Section 303.3 (d) of Part 303 of the Superintendent's Regulations is amended;
- Subdivision b of Section 306.1, Explanatory Note, of Part 306 of the Superintendent's Regulations is repealed and Section 306.2 is amended;
- Subdivision b of Section 307.1, Explanatory Note, of Part 307 of the Superintendent's Regulations is repealed and Section 307.2 is amended;
- Section 400.2 of Part 400 the Superintendent's Regulations is repealed; sections 400.3 through 400.15 are renumbered, respectively, sections 400.2 through 400.14; and sections 400.1(b) and 400.5(d)(2) of such part are amended;
- Sections 401.1(a), 401.2(a) and 401.4 of the Superintendent's Regulations are amended;
- The opening paragraph of section 402.2(b) and sections 402.9(b), 402.16 and 402.17(a)(3) of Part 402 of the Superintendent's Regulations are amended;
- Sections 406.3(a)(2), 406.4(d)(1)(iii), and 406.16 of Part 406 of the Superintendent's Regulations are amended;
- Subdivision (a) and the opening paragraph of subdivision (b) of Section 407.1 of Part 407 of the Superintendent's Regulations are amended;
- Sections 410.6(c) and 410.5 of Part 410 of the Superintendent's Regulations are repealed; sections 410.6 through 410.19 are renumbered, respectively, sections 410.5 through 410.18, and sections 410.2, 410.4 410.5(a), 410.7(q) and 410.14(a) of such part are amended;
- Section 100.1 of Supervisory Procedure G 100 is amended;
- Section 101.1 of Supervisory Procedure G 101 is amended;
- Section 104.1 of Supervisory Procedure G 104 is amended;
- Section 105.1 of Supervisory Procedure G 105 is amended;
- The opening paragraph of section 106.4 and section 106.5(b) of Supervisory Procedure G 106 are amended;
- Supervisory Procedure G 107 is repealed;
- Section 109.2 of Supervisory Procedure G 109 is amended;
- Section 110.2 of Supervisory Procedure G 110 is amended;
- Sections 114.2 and 114.11(a) of Supervisory Procedure G 114 are amended;
- Section 101.3(a) of Supervisory Procedure CB 101 is amended;
- Section 103.1(a) of Supervisory Procedure CB 103 is amended;
- Section 105.1(a) of Supervisory Procedure CB 105 is amended;
- Section 107.1 of Supervisory Procedure CB 107 is amended;
- Section 109.1 of Supervisory Procedure CB 109 is amended;
- Section 111.1 of Supervisory Procedure CB 111 is amended;
- Section 113.1 of Supervisory Procedure CB 113 is amended;
- Section 116.1 of Supervisory Procedure CB 116 is amended;
- Section 117.1(b) of Supervisory Procedure CB 117 is amended;
- Section 101.1(a) of Supervisory Procedure SB 104 is amended;
- Section 110.1(b) of Supervisory Procedure SB 110 is amended;
- Section 101.1(a) of Supervisory Procedure SL 101 is amended;
- Section 110.1(b) of Supervisory Procedure SL 110 is amended;
- Section 111.1(b) of Supervisory Procedure SL 111 is amended;
- Section 112.1(b) of Supervisory Procedure SL 112 is amended;
- Sections 101.1 and 101.2 of Supervisory Procedure FB 101 is amended;
- Sections 102.1 and 102.2 of Supervisory Procedure FB 102 is amended;
- Sections 101.1(a) and 101.2 of Supervisory Procedure MB 101 are amended;
- Sections 102.1(a) and 102.2 of Supervisory Procedure MB 102 are amended;
- Sections 103.1(a) and 103.2 of Supervisory Procedure MB 103 are amended;
- Sections 104.1(a) and 104.2 of Supervisory Procedure MB 104 are amended;
- Sections 105.3 and 105.4(a) and (a)(1) of Supervisory Procedure MB 105 are amended; and
- Section 106.1 of Supervisory Procedure MB 106 is amended.

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

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

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

Consensus Rule Making Determination

The proposed rule making comprises primarily technical amendments to many sections of the General Regulations of the Banking Board, the Superintendent's Regulations and the Supervisory Policies and Procedures set forth in 3 NYCRR. The proposed amendments will have no effect upon regulated parties, small businesses or local units of government throughout New York.

Chapter 59, part O, of the laws of 2006 amended Section 18 of the Banking Law and Chapter 109, part D-1, of the laws of 2006 added Section 18-a to the Banking Law. These changes in the law necessitated a revision of Supervisory Policy G 1 to make references to certain fees therein consistent with the amendments to sections 18 and 18-a. In addition to making revisions to Supervisory G 1 necessary to conform to the changes in the law, the rulemaking also revises Supervisory Policy G 1 to centralize references within 3 NYCRR to investigation and records access fees, addresses and other contact information for the Department and access information for the United States Code, the Code of Federal Regulations and the Federal Register. Further, the proposed rule amends numerous other sections of 3 NYCRR to cross reference the amended Supervisory Policy G 1. Such amendments will ensure 3 NYCRR will remain internally consistent with respect to such references. Following adoption of the proposed rule, it will only be necessary to update Supervisory Policy G 1 in order to keep such references current.

Job Impact Statement

The purpose of the proposed amendments is to update, conform and centralize references in the regulations to fees charged by the Banking Department, addresses and contact information for the Department, and federal publications so that such references reflect accurate and current information and can be maintained in the future with minimal amendment to the Banking Department's regulations.

A job impact statement is not submitted because it is apparent from the nature and purposes of the proposed amendments that they will not have a substantial adverse impact on jobs and employment opportunities.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Identifying Badges for Health Care Professionals

I.D. No. EDU-52-07-00008-P

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

Proposed action: Amendment of section 29.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 6504 (not subdivided); 6506(1); and 6509(9)

Subject: Requirement that health care professionals wear identifying badges.

Purpose: To extend to all practice settings the requirement that health care professionals, other than physicians, physician assistants, and specialist assistants, wear an identifying badge which shall be conspicuously displayed and indicate the professional's name and professional title.

Text of proposed rule: Paragraph (9) of subdivision (a) of Section 29.2 of the Rules of the Board of Regents is amended, effective April 10, 2008, as follows:

(9) failing to wear an identifying badge, which shall be conspicuously displayed and legible, indicating the practitioner's name and professional title authorized pursuant to the Education Law, while practicing *such profession* [as an employee or operator of a hospital, clinic, group practice or multiprofessional facility, registered pharmacy, or at a commercial establishment offering health services to the public];

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

Data, views or arguments may be submitted to: Frank Munoz, Associate Commissioner, Office of the Professions, State Education Department,

2nd Fl., West Wing Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 486-1765, e-mail: opopr@mail.nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State and the functions conferred upon the Education Department.

Section 6504 of the Education Law provides that admission to the practice of the professions and regulation of such practice shall be supervised by the Board of Regents and administered by the Education Department.

Subdivision (1) of section 6506 of the Education Law authorizes the Regents to promulgate rules in its supervision of the practice of the professions.

Subdivision (9) of section 6509 of the Education Law authorizes the Board of Regents to define unprofessional conduct.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative intent of the aforementioned statutes by making it unprofessional conduct for certain health professionals to fail to wear an identifying badge in all practice settings, thus enabling patients to clearly know who is rendering professional services to them.

3. NEEDS AND BENEFITS:

Currently, it is unprofessional conduct for those practicing in most of the health professions to fail to wear an identifying badge while practicing as an employee or operator of a hospital, clinic, group practice or multiprofessional facility, registered pharmacy, or at a commercial establishment offering health services to the public. The proposed amendment will provide additional public protection by expanding to all practice settings the identifying badge requirement, thereby providing patients in all settings with the name and professional licensure designation of health professionals licensed pursuant to Title VIII of the Education Law, other than physicians, physician assistants, and specialist assistants.

4. COSTS:

a. Costs to State: The proposed amendment will not impose any additional cost on State government, including the State Education Department.

b. Costs to local government: None.

c. Costs to private regulated parties: There will be minimal costs to private regulated parties. The Department estimates that it will cost health professionals \$2 to \$3 for an identifying badge.

d. Costs to the regulating agency: As stated above, the proposed amendment does not impose any additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon local government.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirement.

7. DUPLICATION:

The proposed amendment does not duplicate other State or Federal requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment, and none were considered.

9. FEDERAL STANDARDS:

There are no applicable standards of the Federal government for the subject of the proposed amendment.

10. COMPLIANCE STANDARDS:

The proposed amendment will be effective on its stated effective date. No period of time is necessary to enable regulated parties to meet the amendment's requirements.

Regulatory Flexibility Analysis

The proposed amendment expands the definition of unprofessional conduct to include all health professionals, other than physicians, physician assistants, and specialist assistants, who fail to wear an identifying badge, indicating the professional's name and professional title. It does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on small businesses or local governments, other than the minimal requirement that each practicing professional have a

name badge. Because it is evident from the nature of the rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment will apply to all persons practicing a licensed profession or utilizing a professional title without being authorized to do so, including those who live in the 44 rural counties of New York State with less than 200,000 inhabitants and the 71 towns in urban counties of New York State with a population density of 150 per square mile or less.

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

The current rule requires certain licensed health care professionals practicing in institutions and group practice settings to wear an identifying badge, indicating the practitioner's name and profession. The proposed amendment expands the requirement for certain health care professionals to wear an identifying badge to all practice settings, including private offices.

3. COSTS:

The proposed regulation does not impose any additional costs on public entities. The proposed amendment will impose minimal costs on private regulated parties. The Department estimates that the cost to create a name identifying badge will be approximately \$2 to \$3 per health professional.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment makes no exception for individuals who live or work in rural areas. The Department has determined that the requirements should apply to all health professionals, in order to protect patients. Because of the nature of the proposed amendment, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Feedback concerning rules to implement section 6516 of the Education Law was sought from statewide organizations representing parties having an interest in professional licensure. These entities have members who live or work in rural areas.

Job Impact Statement

The proposed amendment extends to all practice settings the requirement that health care professionals, other than physicians, physician assistants, and specialist assistants, wear an identifying badge which shall be conspicuously displayed and indicate the professional's name and professional title. This amendment would not have a substantial adverse impact on jobs and employment opportunities because it relates to the proper identification of licensed professionals to their patients. Because it is evident from the nature of the proposed amendment that it would have no adverse impact on jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Setting of Body Gripping Traps on Land

I.D. No. ENV-22-07-00010-E

Filing No. 1366

Filing date: Dec. 11, 2007

Effective date: Dec. 11, 2007

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

Action taken: Amendment of section 6.30 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

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

Specific reasons underlying the finding of necessity: These amendments to the Department's trapping regulations are intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons. The regulations will immediately enhance the general welfare by improving the selectivity of trapping when body gripping traps are used. Specifically, the potential for dogs to be captured, injured or killed in these traps will be reduced.

The Department of Environmental Conservation originally filed a Notice of Emergency Adoption with the Department of State on September 13, 2007. The emergency rule is scheduled to expire on or about December 11, 2007, unless it is re-adopted. Therefore, the immediate re-adoption of this rule is necessary for the preservation of the general welfare, and compliance with section 202, subdivision (1) of SAPA would be contrary to the public interest.

These amendments are necessary to protect dogs that may come in contact with a trap while the dogs are being walked by their owners or are being used for hunting. At the same time, the regulation should not diminish the effectiveness of traps used for catching the intended furbearers, primarily fisher and raccoon.

Subject: Setting of body gripping traps on land.

Purpose: To prevent the capture of dogs in body gripping traps on land.

Text of emergency rule: See Appendix in the back of this issue of the Register.

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. ENV-22-07-00010-P, Issue of May 30, 2007. The emergency rule will expire February 8, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, e-mail: grbatche@gw.dec.state.ny.us

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

Regulatory Impact Statement

1. Statutory Authority

Section 11-0303 Environmental Conservation Law (ECL) addresses the general purposes and policies of the Department of Environmental Conservation (Department) in managing fish and wildlife resources. Sections 11-1101 and 11-1103 of the ECL authorize the Department to regulate the taking, possession and disposition of beaver, fisher, otter, bobcat, coyote, fox, raccoon, opossum, weasel, skunk, muskrat, pine marten and mink ("furbearers"). This regulation addresses restrictions on the use of certain sizes of body gripping traps, traps which are used primarily to take fisher and raccoon.

2. Legislative Objectives

The legislative objective behind the statutory provisions listed above is to authorize the Department to establish the methods by which furbearers may be taken by trapping.

3. Needs and Benefits

These amendments to the Department's trapping regulations are intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons. The regulations will immediately enhance the general welfare by improving the selectivity of trapping when body gripping traps are used. Specifically, the potential for dogs to be captured, injured or killed in these traps will be reduced.

The Department first proposed a regulation to address this issue on May 30, 2007 (ENV 22-07-00010-P) and received a large number of comments during the 45-day public comment period. Consequently, the Department is making significant revisions to the original proposed rule, and will be filing a Notice of Revised Rulemaking with the Department of State for publication in the *State Register*. The Revised Rulemaking will provide for an additional 30 day comment period. However, the Department has determined that, in order to protect the general welfare, it is necessary to adopt this regulation on an emergency basis so that it will be in effect for the 2007-2008 trapping season, which begins on October 25, 2007.

The regulation would address the manner in which body gripping traps, measuring five and one-half inches or more in the open position, are set on land with the aid of baits, lures, or other attractants. Body-gripping traps are to be measured in accordance with paragraph 11-1101(6)(b) of the Environmental Conservation Law (ECL), which reads in part as follows:

The dimension of the body gripping trap shall be ascertained when the trap is set in the extreme cocked position and shall be the maximum

distance between pairs of contacting body gripping surfaces except for rectangular devices which shall be the maximum perpendicular distance between pairs of contacting body gripping surfaces.

The Department has included diagrams in the regulation to clearly demonstrate how body-gripping traps are measured. For further clarity, the Department has also included diagrams in the regulations that illustrate leg-gripping traps ("foothold traps") and how they are measured pursuant to ECL 11-1101 (6)(a).

For traps of this size set on land, the regulations require that certain precautions be taken to avoid capturing a dog in body-gripping traps. These traps must be set in compliance with one of three options: (1) set four feet above the ground; or (2) set within one of three different types of enclosures which have restricted openings and other features designed to prevent a dog from entering and triggering the trap; or (3) set within an enclosure which is fastened to a tree or post in a vertical position, has only one opening which faces the ground, and is set so that the opening is no more than six inches from the ground.

The regulations also restrict the setting of body-gripping traps that are set without the use of baits, lures, or other attractants in so called "blind run sets." In these cases, trappers will not be allowed to use body-gripping traps more than six inches in size, and when using smaller traps (six inches or less), they must be set close to the ground, below the typical level of a domestic dog.

The also prohibit the setting of body-gripping traps on public lands within one hundred feet of "trails," which are defined as designated, marked, and maintained paths or ways designed for recreational, non-motorized traffic. The Department selected the one-hundred foot distance because there is an existing restriction in the Environmental Conservation Law that prohibits the setting of traps within one-hundred feet of homes, and a person walking a dog could reasonably be expected to be capable of controlling a dog with voice and visual commands within a distance of about one-hundred feet. The purpose of this restriction is to provide further protection to dogs being walked along trails. These restrictions do not effect traps set in water on public lands along trails, and do not effect the setting of leg-gripping traps because the purpose of this rulemaking is to reduce or eliminate the killing of dogs captured in body-gripping traps. However, while monitoring the implementation of the regulation, the Department will also closely monitor and evaluate any incidents involving the capture of dogs in leg-gripping traps within one hundred feet of trails on public lands.

The traps that will be impacted by this rule are mainly used to target raccoons and fisher. Raccoons and fisher are smaller than most dogs and are well adapted for crawling into small holes to find food or shelter or both. These species are natural cavity dwellers. Dogs, on the other hand, are generally not well adapted for climbing into small holes.

The regulations require that body-gripping traps used in conjunction with baits, lures, or other attractants be set within a container designed to exclude dogs. The regulations require that traps be set at least four inches from the opening of an enclosure with a six inch or smaller opening; and that traps be set at least eighteen inches from the opening of an enclosure with ten inch or smaller openings. Traps placed in enclosures made of natural materials are allowed if they are set at least eight inches from an entrance hole, and the entrance hole does not exceed six inches measured vertically. A trap that is set in an enclosure affixed to a tree or post must have its only opening positioned no more than 6 inches from the ground.

Collectively, these choices of design options provide flexibility for trappers while greatly reducing the chance that a dog may be captured, injured, or killed in body-gripping traps. Department staff believe that such requirements will make these traps very selective to catching raccoons and fisher, and relatively inaccessible to dogs. Similar techniques have been used in other states with effectiveness.

Traps adapted pursuant to the requirements should remain effective for capturing raccoons and fisher because these species readily enter small holes to seek shelter or food or both. For this reason, the modified trap sets are not expected to significantly reduce the ability of trappers to catch these species. However, the rule will increase the selectivity of trapping and reduce or eliminate the capture of most dogs. A very small dog, however, may still be vulnerable to capture, injury, or death.

If a trapper opts to comply with the regulation by placing the trap at least four feet above the ground, dogs will be at very low risk of capture because the traps will be out of reach of most dogs. Raccoons and fisher, however, are well adapted to climbing, and traps will remain effective in catching these species if they are placed four feet or more above ground. The Environmental Conservation law prohibits the suspension of animals caught in traps, and trappers will need to use techniques that will prevent

the suspension in the air of any animal caught above the ground in a body-gripping trap.

The regulation is needed to protect dogs that may come in contact with a trap while the dogs are being walked by their owners or are being used for hunting. At the same time, the regulation should not negatively affect the effectiveness of traps used for catching the intended furbearers, primarily fisher and raccoon.

4. Costs

Trappers will be required to purchase or construct an enclosure made of wood, metal, plastic, or wire that will be used in the setting of certain body gripping traps. Alternatively, they may fashion an enclosure from natural materials, such as rocks or logs. Additionally, they may choose to set their traps at least four feet above the ground. For trappers who decide to use an enclosure, the Department estimates that trappers will need to spend approximately five (5) dollars in materials to comply with the regulation. In some cases, the expense will be lower because suitable buckets, wire, and lumber may be used to construct the container and are available at very low expense or salvageable as scrap.

5. Local Government Mandates

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

6. Paperwork

The rules do not impose additional reporting requirements upon the regulated public (trappers).

7. Duplication

There are no other local, state or federal regulations concerning the taking of fisher and raccoons.

8. Alternatives An alternative to making the changes is to leave the trapping regulations unchanged. However, this would mean that dogs would continue to be vulnerable to capture, injury, or death in traps set for the capture of furbearers.

9. Federal Standards

There are no federal government standards for the taking of fisher and raccoons.

10. Compliance Schedule

Trappers will be required to comply with the new rule as soon as it takes effect.

Regulatory Flexibility Analysis

The purpose of this rulemaking is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. Trappers will not be allowed to set body-gripping traps on public lands within one hundred feet of designated and marked trails. The regulations apply statewide.

The regulations do not apply directly to local governments or small businesses. Therefore, the Department has determined that this rulemaking will not impose an adverse economic impact on small businesses or local governments since it will not affect these entities.

Fisher trappers must report their take to the Department to lawfully possess a trapped fisher. The rulemaking does not affect this requirement. All other reporting or recordkeeping requirements associated with trapping are administered by the Department. Therefore, the Department has determined that this rulemaking will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

Based on the above, the Department has concluded that a regulatory flexibility analysis is not required.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulation will apply statewide, and would affect trapping in all rural areas of New York.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The purpose of this rulemaking is to amend the trapping regulations for body gripping traps. It will apply to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will

be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. They will also be prohibited from setting body-gripping traps on public lands within one hundred feet of designated and marked trails.

No professional services are needed for trappers to comply with the new regulations. Fisher trappers are currently required to report the harvest of fisher to the Department. The rulemaking does not affect this requirement. All other reporting or recordkeeping requirements associated with fisher trapping are administered by the Department. There are no reporting requirements for raccoon trappers.

3. Costs:

The cost of equipping a single trap with a dog resistant container is estimated to be \$5 or less in material expenditures. Trappers will be required to purchase or construct suitable boxes, buckets, or wire cages for setting body gripping traps. Alternatively, they may choose to set their traps at least five feet above the ground. For trappers who decide to enclose their traps in a container, the Department estimates that the average trapper will need to spend a total of \$85 (\$5 per trap X an average of 17 traps of the type affected by the regulation) in materials to comply with the regulation. The Department estimates that trappers will spend an additional \$15 on annual maintenance costs. In some cases, the expense will be nearly zero because suitable buckets, wire, and lumber are available at very low expense or salvageable as scrap.

4. Minimizing adverse impact:

The regulations will primarily affect the trapping of fisher and raccoons. They are intended to prevent the capture, injury, or killing of dogs in body-gripping traps. Under the terms of the regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog-resistant container, as specified in the regulations.

The regulations should protect dogs without reducing trapper effectiveness in trapping raccoon and fisher. These requirements are not expected to significantly change the number of trappers or the frequency of trapping in rural areas.

5. Rural area participation:

Prior to proposing this regulation, the Department conducted seminars in all areas of the State to teach trappers about techniques to avoid catching dogs, and incorporated these techniques in the Department's mandatory trapper education curricula. The Department also published information on methods to avoid catching dogs. This publication was sent to all licensed trappers in the State of New York on two separate occasions. The Department has adopted this regulation because it is essential that all trappers use techniques to avoid the capture and killing of dogs in body-gripping traps.

Job Impact Statement

The purpose of this rulemaking is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies statewide to traps set on land which have an opening that measures five and one-half inches or larger.

Due to the size of the trap involved, this regulation will primarily affect the trapping of fisher and raccoons. Under the terms of the regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog resistant container, as specified in the regulations. The proposal also prohibits the setting of body-gripping traps on lands within one hundred feet of designated and marked trails.

Trappers derive only a small portion of their annual income from the sale of animals taken by trapping. Moreover, the rulemaking is not expected to significantly change the number of participants (trappers), the frequency of participation in the regulated activities, or trapping success by each trapper. The regulations do not prohibit trapping activity, so long as each trap complies with the measures designed to protect dogs. Effective methods for capturing fisher and raccoons will remain available to trappers under the regulations, while the likelihood of injuring or killing a dog will be reduced, if not eliminated. For these reasons, the Department anticipates that this rulemaking will have no negative impacts on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

Department of Health

EMERGENCY RULE MAKING

Payment for FQHC Psychotherapy and Offsite Services

I.D. No. HLT-52-07-00006-E

Filing No. 1358

Filing date: Dec. 7, 2007

Effective date: Dec. 7, 2007

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

Action taken: Amendment of section 86-4.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 201.1(v)

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

Specific reasons underlying the finding of necessity: The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

Subject: Payment for FQHC psychotherapy and offsite services.

Purpose: To permit psychotherapy by certified social workers as a billable service under certain circumstances.

Text of emergency rule: Section 86-4.9 is amended to read as follows:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in subdivision (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services with the exception of clinical social services in FQHC clinics as defined in subdivision (g) of this section, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the

facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g) For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(h) Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in subdivision (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.

(i) Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.

(1) FQHC offsite services must:

(i) consist of services normally rendered at the FQHC site.

(ii) be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.

(iii) be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.

(iv) be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.

(v) not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.

(vi) not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.

(2) Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.

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 5, 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:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of

the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act (42 USC 1396a(a)(10)) and 1905(a)(2) of the Social Security Act (42 USC 1396d(a)(2)) require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act (42 USC 1395x(aa)) defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

- Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.
- Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.
- Payment will be made on the basis of a FQHC group rate.
- Payment will only be made for services that occur in FQHCs.

Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.
- Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.
- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

COSTS:

Costs for the Implementation of, and Continuing Compliance with this Regulation to Regulated Entity:

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services. These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Downstate			Statewide Average	Cost Estimates
	Upstate	Upstate	Upstate		
Offsite Visits					Offsite Visits
Subsequent Hospital Care	\$62.73	\$55.19	\$58.96		\$1,117,212
Psychotherapy Services					Group Therapy
Group Psychotherapy	\$34.86	\$30.81	\$32.84		\$6,222,733
2004 FQHC Visit Volume	1,894,864				
					Total
Volume Increase Assumptions					\$7,339,945

Group Therapy Increase = 10% Increase

2004 FQHC Volume.

Off-site Visit Increase = 1%

Increase

Over 2004 FQHC Volume

Cost to the Department of Health:

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

No impact on small businesses or local governments is expected.

Compliance Requirements:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Professional Services:

No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department's (SED) new standards for social worker licensure.

Compliance Costs:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Economic and Technological Feasibility:

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Small Business Participation:

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

Compliance Costs:

There are no direct costs associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and associations represent social workers and clinic providers from across the State, including rural areas.

Job Impact Statement

Nature of Impact:

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

Categories and Numbers Affected:

There are almost 1000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

Regions of Adverse Impact:

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

Minimizing Adverse Impact:

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

Self-Employment Opportunities:

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Assisted Living Residence

I.D. No. HLT-13-07-00002-RP

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

Revised action: Addition of Part 1001 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 4662, subd. 1

Subject: Regulations for assisted living residences in New York State.

Purpose: To further the goals of PHL article 46-B (Assisted Living Reform Act), pursuant to PHL section 4662(1), by creating the regulatory framework necessary for implementation of the provisions therein.

Substance of revised rule: The Assisted Living Reform Act creates several new licensure and certification categories: Assisted Living Residence (ALR), Enhanced ALR and Special Needs ALR. The Act defines "assisted living" and "assisted living residence" as "an entity" which provides or arranges for housing, on-site monitoring and personal care services and/or home care services (either directly or indirectly) in a home-like setting to five or more adult residents unrelated to the assisted living provider. An ALR must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an individualized service plan for each resident. In order to operate as an ALR, an operator must also be certified as an adult home or enriched housing program.

The ALR licensure category is viewed as a basic level of assisted living, but one that differs from the level of care provided by adult homes or enriched housing programs in several significant ways. An additional requirement for ALRs is an individualized service plan (ISP) for each resident. The ISP describes what services will be provided and the identified provider or staff responsible. The ISP must be reviewed and updated every six months as well as whenever a resident has a significant change in needs. In addition, prospective residents, resident and their representatives are entitled to significant residency agreement and disclosure information. Case management and other services and related staff qualification and training requirements will differ as well.

Certification as an Enhanced ALR will allow residents to age in place. This is a major new feature of the Assisted Living Reform Act. Assisted living residences with Enhanced ALR certification may retain residents who exceed the retention standards of adult homes, enriched housing programs or assisted living residences. Enhanced ALRs cannot admit residents in need of 24-hour skilled nursing care or medical care. A written evaluation from the resident's physician that the resident does not require 24-hour skilled nursing care or medical care is required prior to admission. However, Enhanced ALRs may retain residents in need of 24-hour skilled nursing care or medical care if certain conditions are met as described in this section.

The second certification category for which ALRs may apply is the Special Needs ALR. The Special Needs ALR certification requires that ALRs that advertise or market themselves as serving individuals with special needs, including but not limited to dementia or cognitive impairments, must apply to the New York State Department of Health (the Department) for Special Needs ALR certification. All facilities currently licensed under Article 7 of the Social Services Law that operate dedicated dementia facilities and/or units will be required to apply for this designation. The Department has revised its current policy and procedures for such dementia units.

No adult home, enriched housing program or ALR may advertise or market itself as providing specialized services to individuals with special needs unless and until the residence has been licensed as an ALR and issued a Special Needs assisted living certificate. This approval will be based in part on the submission of a special needs plan which sets forth how the special needs of such residents will be safely and appropriately met at the residence. The plan must include, but need not be limited to, a written description of specialized services, staffing levels, staff education and training, work experience, professional affiliations or special considerations relevant to serving persons with special needs, as well as any environmental modifications that have been made or will be made to protect the health, safety, and welfare of such persons in residence. The approval of any special needs program will also be based on adherence to any standards developed by the Department to ensure adequate staffing and training necessary to safely meet the needs of the specialized population proposed to be served.

The Department proposes the following rule making for the purpose of providing a regulatory framework for implementation of the Assisted Living Reform Act of 2004.

Section 1001.1 sets out the types of residences to which this regulation applies, as well as what other regulations will apply to assisted living residences.

Section 1001.2 lists the applicable definitions.

Section 1001.3 provides the requirements pertaining to certificates of incorporation and/or articles of organization. Specifically, this section sets forth the requirements for a not-for-profit corporation or business corporation to file or amend certificates of incorporation or for a limited liability company to file or amend articles of organization for the purpose of establishing and operating or fundraising on behalf of any ALR, Enhanced ALR or Special Needs ALR.

Section 1001.4 describes who may be issued operating certificates to operate an ALR, Enhanced ALR or a Special Needs ALR. In addition, this section discusses what must be contained in the respective operating certificates. This section also prohibits the operator from taking certain actions with respect to the operating certificate. Also detailed is what actions must be taken by the operator in the event that the residence ceases operations. Finally, this section provides what authority the operator and the fact that such authority is limited to the operator.

Section 1001.5 enumerates the procedure for and what information must be included in an application for licensure as an ALR and for certification as an Enhanced ALR or a Special Needs ALR. This section also describes the process that will be followed by the Department when considering applications.

Section 1001.6 provides the general provisions to which all assisted living residences must adhere.

Section 1001.7 discusses the admission and retention standards applicable to assisted living residences. Specifically, this section provides the standards that need to be met at the differing levels of care. This section also lists the differing levels of resident infirmity that would preclude a residence (depending on the type of certificate that the facility is operating under) from admitting and/or retaining such a resident.

Section 1001.8 provides the consumer and resident protections. These specific protections require each residence to provide the residents with a living environment that promotes dignity, autonomy, independence and privacy in the least restrictive and most home like setting. This section provides individual residents' right as well as providing for the support of resident and family organizations. Also enumerated in this section are standards that must be followed when creating and implementing residency agreements.

Section 1001.9 sets forth the requirements of how residents' funds and valuables are to be maintained and protected.

Section 1001.10 lists the services that must be provided by assisted living residences. These services include, but are not limited to the following: monitoring, daily food service, case management service, personal care, health care, medication management. Depending on the operating

certificate of the individual residence, the residence may expand the scope of the basic services provided and/or provide additional services.

Section 1001.11 discusses personnel requirements. This section delineates staff training requirements, appropriate tasks for each specific training level and the staffing levels and classifications that must be present at the residence at any given time.

Section 1001.12 proscribes what records and reports must be generated and maintained by the operator.

Section 1001.13 lists the structural and environmental standards that must be met by both existing and newly constructed residences.

Section 1001.14 set forth the requirement that each residence must have disaster and emergency preparedness plans. This section also provides what should be included in such plans and how often such plans should be updated.

Section 1001.15 provides for the inspection and enforcement procedures to which each assisted living residence will be subject, and enumerates the schedule of penalties.

Section 1001.16 details the requirements and procedures to be followed should an operator of a residence contract with a separate entity for the provision of any of the residence's management or operations.

In addition to the sections set forth above, the residence will also be required to comply with any applicable adult care facility regulations found in Title 18 of the New York Code of Rules and Regulations Parts 485, 486, 487 and 488 and any other statutes and regulations required for maintaining a valid operating certificate issued pursuant to Title Two of Article Seven of the Social Services Law, unless superceded by a conflicting provision of the Assisted Living Reform Act, and shall obtain and maintain all other licenses, permits, registrations or other government approvals required in addition to the requirements under Article Seven.

Revised rule compared with proposed rule: Substantial revisions were made in sections 1001.2(a)(10), 1001.4(n)(1), (o), 1001.5(k), 1001.6(e)(6), 1001.7(l), 1001.8(c)(2)(iii)(c), (d), (f)(4), 1001.10(l), (n)(6), 1001.11(j), (n), 1001.12(c)(3), 1001.16(b)(2), (3), (4), (6), (9), (c) and (d).

Text of revised 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: Keith McCarthy, Department of Health, Division of Home and Community-Based Services, 161 Delaware Ave., Delmar, NY 12054, (518) 408-1600, e-mail: kjm@health.state.ny.us

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

Revised Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in Section 4662 of the Public Health Law (PHL), through Chapter 2 of the Laws of 2004 (known as the "Assisted Living Reform Act" or ALRA, PHL Article 46-B). PHL Section 4662 authorizes the Commissioner of Health to promulgate, in consultation with the Director of the State Office for the Aging, such rules and regulations as are necessary to implement the provisions of this article. Section 4662 further authorizes the Commissioner to receive and investigate complaints regarding the condition, operation and quality of care of any entities holding themselves out as "assisted living" or advertising themselves by a similar term, and to exercise all other powers and functions as are necessary to implement the provisions of Article 46-B.

In order to be licensed as an assisted living residence (ALR), Article 46-B requires all residences to be certified as an adult home or enriched housing program in accordance with Article 7 of the Social Services Law (SSL). Residences that are currently unlicensed desiring to be licensed as an ALR must simultaneously submit an application for licensure as an ALR and an SSL Article 7 application to seek approval as an adult home or enriched housing program. The residence must also be in compliance with all rules and regulations applicable to such facilities (18 NYCRR Parts 485, 486, and 487 (adult homes) or 488 (enriched housing programs)) unless a provision of the ALRA supercedes the Article 7 statutory or regulatory provision. Section 122(c) of Chapter 436 of the Laws of 1997 provides that effective April 1, 1997, the functions, powers, duties and obligations of the former Department of Social Services concerning adult homes, enriched housing programs, residences for adults and assisted living programs (*i.e.*, "adult care facilities") are transferred to the New York State Department of Health.

Legislative Objectives:

In enacting Chapter 2 of the Laws of 2004, the Legislature found and declared that congregate residential housing with supportive services in a home-like setting, commonly known as "assisted living", is an integral part of the continuum of long term care. Further, the philosophy of assisted living emphasizes aging-in-place, personal dignity, autonomy, independence, privacy and freedom of choice. The legislative objective of PHL Article 46-B is to create a clear and flexible statutory structure for assisted living that provides a definition of "assisted living residence"; that requires licensure of the residence; that requires a written residency agreement that contains consumer protections; that enunciates and protects resident rights; and that provides adequate and accurate information for consumers, which is essential to the continued development of a viable market for assisted living.

"Assisted living" and "assisted living residence" means an entity which provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider. An applicant for licensure as assisted living that has been approved in accordance with the provisions of this article must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an Individualized Service Plan for each resident. An operator of assisted living shall provide each resident with considerate and respectful care and promote the resident's dignity, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident's preferences and physical and mental status.

Needs and Benefits:

For many years, it has been very difficult for consumers to compare one assisted living residence to another because, in New York State, there had been no standard definition. This opinion was echoed in a 1999 report by the federal General Accounting Office (GAO), which outlined the results of a two-year study of assisted living in four states. A major finding of the report was that consumers need clear and complete information regarding facility services, costs and policies in order to make an informed decision and that, in the states studied, seniors were not routinely provided with sufficient information to allow them to select the most appropriate setting.

To help seniors make such informed decisions before agreeing to live in an assisted living residence, the ALRA requires every residence to provide clear and complete information to prospective residents before they sign a contract. Under this new law, ALRs must use a standard "plain language" contract - with no small print - that fully discloses what services are provided, by whom, and the cost. The law also requires ALRs to disclose to seniors the conditions under which an operator can terminate a residency agreement and what the resident can expect to happen if they can no longer pay the fees.

The ALRA also fills the gaps in adult residential services law that in some instances allowed facilities to operate without any licensure or State surveillance. For instance, it requires certain adult residences that had operated without license (known as "look alike" facilities) to become certified as adult care facilities and therefore subject to State regulation and oversight. Any residence that then wishes to market itself as assisted living must seek an additional licensure as an Assisted Living Residence.

In other instances, facilities had long been prevented from appropriately expanding the range of services provided to their residents as their needs changed over time. The ALRA provides a mechanism to allow those operators who wish to provide a broader range of services, known as "aging in place", to do so by becoming licensed as an Assisted Living Residence and obtaining additional certification for Enhanced Assisted Living from the Department. Those operators seeking to provide specialized services to special needs residents, such as those with Alzheimer's or dementia, will likewise have to be licensed as an Assisted Living Residence and also obtain a Special Needs Assisted Living Certificate.

To obtain either the Enhanced Assisted Living or Special Needs Assisted Living certifications, operators must submit a plan to the Department demonstrating how they will safely and appropriately meet all of their residents' needs, and have policies in place to continually meet those needs as they change over time. The plan must include, but not be limited to, a written description of services, staffing levels, staff education and training, work experience, and any environmental modifications that have been or will be made to protect the health, safety and welfare of such residents.

The ALRA provides several important opportunities for consumers and providers: greater clarity as to the definition of "assisted living"; greater assurance that the combinations of housing and services referred to as

assisted living will be subject to State oversight; significant protection of consumer/resident rights; the opportunity to age in place with dignity and choice in a more home-like setting; as well as the opportunity for persons with special needs to obtain specialized care by persons with appropriate qualifications and experience. These regulations further the goals of PHL Article 46-B by creating the regulatory framework necessary for implementation of the provisions therein, including but not limited to criteria by which applications for licensure and certification can be reviewed, defining "independent senior housing", establishing standards for the hiring of direct care staff by residences, and generally clarifying and carrying out the intent of the law.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

PHL Section 4656(6) prescribes the fees associated with licensure and certification for assisted living. The basic biennial assisted living residence fee is \$500 per facility plus an additional \$50 for each ALR resident whose income exceeds 400% of the Federal Poverty Level (FPL). The maximum ALR fee required for an individual facility is \$5,000. In 2006, 400% of the Federal Poverty Level represents an income level of \$39,200 per individual. Financial information on residents who are below the 400% FPL threshold and are not Medicaid or SSI eligible must be maintained to verify their eligibility for an exemption to the \$50 fee for residences.

The biennial fee for Enhanced Assisted Living certification is \$2,000. The biennial fee for Special Needs Assisted Living is also \$2,000. Facilities applying for Enhanced Assisted Living and Special Needs Assisted Living at the same time are entitled to a discount and are only required to remit a total of \$3,000 for both certifications. All applicable fees must be submitted with the initial application for licensure/certification.

Cost to State and Local Government:

None.

Cost to the Department of Health:

Passage of the ALRA has necessitated the Department hiring of staff to implement its licensure and certification provisions, specifically the review of initial applications submitted to the Department. Under this Act, through creation of a new State Finance Law Section 99-1, a special fund is created in the joint custody of the State Comptroller and the Commissioner of Health – the "Assisted Living Residence Quality Oversight Fund".

This fund shall consist of all money collected by the Department pursuant to PHL Article 46-B, including licensure fees, certification fees and civil penalties collected. Any interest earned on investment of monies by such fund becomes part of the fund. The fund shall be available to the Department for the purpose of implementation of PHL Article 46-B.

Through passage of the SFY 2007-08 Budget, the Department has been authorized up to \$2 million from this special revenue account for the implementation and oversight activities related to this Act. In addition, the Act provides that \$500,000 is to be available from this fund to the State Office for Aging's Long-Term Care Ombudsman Program for the purposes of carrying out the provisions of Article 46-B.

Local Government Mandates:

None.

Paperwork:

In many regards, the application process for ALRs is very similar to the process that operators currently utilize to obtain certification for an adult home or enriched housing program. Likewise, with regards to obtaining an Enhanced Assisted Living or Special Needs Assisted Living Certificate, operators will have to submit an application to the Department providing a plan which sets forth how the additional needs of such residents will be safely and appropriately met, including but not limited to, a written description of services, staffing levels, staff education and training, work experience, and any environmental modifications.

In addition to these application processes to obtain licensure as an ALR and/or certification for Enhanced and/or Special Needs Assisted Living, the Assisted Living Reform Act contains numerous provisions to ensure resident rights are protected and adequate and accurate information is available for consumers. For instance, the Act requires a written residency agreement that contains consumer protections, and enunciates and protects resident rights.

A key provision of the Act is development of an Individualized Service Plan (ISP). A written ISP must be developed for each resident upon admission. The ISP is to be developed with the resident, resident's representative and resident's legal representative, if any; the operator; and, if necessary, a home care services agency. The initial ISP will be developed in consultation with the resident's physician. If the physician determines that the resident is not in need of home care services, a home care services agency need not participate in the development of the ISP.

The ISP will take into account the medical, nutritional, rehabilitation, functional, cognitive and other needs of the resident. The ISP will include the services to be provided, and how and by whom services will be provided and accessed. The ISP is to be reviewed and revised as frequently as necessary to reflect the changing care needs of the resident, but no less frequently than every six months. To the extent necessary, such review and revision will be undertaken in consultation with the resident's physician.

The ALRA requires that certain important information be disclosed to prospective residents and their representatives, pursuant to PHL Section 4658(3). Among the items to be disclosed are: a consumer guide to inform and assist the consumer in the selection of an ALR (prepared by DOH in consultation with the State Office for the Aging, consumers, operators of ALRs, and home care services providers); a statement listing the residence's licensure status and whether it has an Enhanced Assisted Living or Special Needs Assisted Living certificate; a statement that the resident shall have the right to receive services from service providers with whom the operator does not have an arrangement; a statement that the resident shall have the right to choose their health care providers, notwithstanding any agreements to the contrary; and a statement regarding the availability of Long-Term Care Ombudsman Services and the telephone number of the local and State ombudsman.

Duplication:

This regulation does not duplicate any other state or federal law or regulation. PHL Section 4656(1) requires that, in order to operate as an assisted living residence, an operator shall be certified as an adult home or enriched housing program pursuant to Title 2 of Article 7 of the Social Services Law. PHL Section 4656(2) goes on to require the assisted living operator to comply with all applicable statutes, rules and regulations required for maintaining a valid operating certificate for an adult home/enriched housing program.

In PHL Section 4656(7), this lack of duplication is emphasized, stating that the requirements of PHL Article 46-B "shall be in addition to those required of an adult care facility. In the event of a conflict between any provision of this article and a provision of Article 7 of the Social Services Law or a regulation adopted thereunder, the applicable provision of [PHL Article 46-B] or the applicable regulation shall supersede Article 7 of the Social Services Law or the applicable regulation thereunder to the extent of such conflict." In addition, the application process provides for a streamlined procedure for review of character and competence for those existing operators of adult homes and enriched housing programs who are in "good standing" with the Department in terms of compliance. Operators are being requested to submit only those application materials that are updated information or that is different from what they may have submitted to the Department in previous applications.

Alternative Approaches:

No alternative approaches were considered. Section 7 of Chapter 2 of the Laws of 2004 prohibits the Department from issuing emergency regulations in regard to PHL Article 46-B.

Federal Requirements:

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

Compliance Schedule:

As Section 7 of the Laws of Chapter 2 of the Laws of 2004 prohibits the Department from issuing emergency regulations in regard to PHL Article 46-B, this regulation will take effect upon publication of a notice of adoption in the *New York State Register*.

In terms of compliance schedule, the "Assisted Living Reform Act" became effective 120 days after being signed into law. Since the Governor signed the bill on October 26, 2004, the Act was effective as of February 23, 2005.

The Act states that any entity which qualifies as an ALR pursuant to PHL Article 46-B and operating as an ALR on or before the effective date shall, within 60 days of such effective date (that is, by April 25, 2005) apply to be licensed or certified with the Commissioner of Health in accordance with the provisions of Article 46-B upon approval of all licenses and certification for which the entity has applied.

Given the very short timeframe for implementation provided under the Act, the ALR application was not available to applicants until June 3, 2005. Therefore, the Department extended the deadline for submission of the application to August 3, 2005. This regulation will enable the Department to act upon those applications, and perform the oversight functions necessary for implementing the provisions of the Act.

Revised Regulatory Flexibility Analysis

Effect of Rule:

There are 500 existing adult homes and enriched housing programs in New York State. Of those, 371 have been identified as being certified for 100 or fewer beds and considered a small business (74%).

To date, 226 existing adult homes and enriched housing programs have applied for licensure as Assisted Living Residences (ALRs). An additional 46 applications have been received by the Department by facilities proposing to be certified as an adult home/enriched housing program and subsequently licensed as an ALR.

The Department has advised prospective applicants that, in order to be licensed as an ALR, the facility's entire capacity will have to be subject to such licensure. Currently with regards to adult care facilities, for example, a 100-bed facility could be comprised of 80 adult home beds and 20 enriched housing program beds. If this same facility desired licensure as an ALR, all 100 beds would have to be licensed as such. It is expected the majority of facilities applying for ALR licensure will be for 100 or fewer beds and, thereby, considered a small business.

Local governments are not affected by this rule, unless they intend to apply to the Department to operate an ALR.

Compliance Requirements:

In order to comply with these requirements, any entity wishing to establish, operate, provide, conduct, or offer "assisted living" in New York state, or hold itself out as an entity which otherwise meets the definition of "assisted living" or by a similar term, must apply and obtain approval of the Department to operate as an adult care facility (either an adult home or an enriched housing program) and as an assisted living residence. This shall not apply to Assisted Living Programs (ALPs) approved by the Department pursuant to SSL Section 461-1.

Professional Services:

All facilities required to obtain licensure as an ALR must have staff trained and qualified to provide the care and services the residence has been approved by the Department to provide.

Compliance Costs:

PHL Section 4656(6) prescribes the fees associated with licensure and certification for assisted living. The basic biennial assisted living residence fee is \$500 per facility plus an additional \$50 for each ALR resident whose income exceeds 400% of the Federal Poverty Level (FPL). The maximum ALR fee required for an individual facility is \$5,000. In 2006, 400% of the Federal Poverty Level represents an income level of \$39,200 per individual. Financial information on residents who are below the 400% FPL threshold and are not Medicaid or SSI eligible must be maintained to verify their eligibility for an exemption to the \$50 fee.

The biennial fee for Enhanced Assisted Living certification is \$2,000. The biennial fee for Special Needs Assisted Living is also \$2,000. Facilities applying for Enhanced Assisted Living and Special Needs Assisted Living at the same time are entitled to a discount and are only required to remit a total of \$3,000 for both certifications. All applicable fees must be submitted with the initial application for licensure/certification.

Economic and Technological Feasibility:

As the majority of such existing facilities are small businesses, it should be economically and technologically feasible for small businesses to comply with the regulations.

Minimizing Adverse Impact:

The "Assisted Living Reform Act" created a Task Force on Adult Care Facilities and Assisted Living Residences, "to update and revise the requirements and regulations applicable to [ACFs and ALRs] to better promote resident choice, autonomy and independence. The Task Force consists of ten appointed members (six appointed by the Governor, two by the Senate, and two by the Assembly), as well as four ex-officio members (the Commissioner of Health, the Director of the State Office for the Aging, the Commissioner of the Office of Mental Health, and the Chair for the Commission on Quality of Care and Advocacy for Persons with Disabilities). Beginning with their first meeting in April 2005, the Task Force also makes recommendations with respect to "minimizing duplicative or unnecessary regulatory oversight." In order to minimize adverse impact, the Department has consulted with the Task Force on the principles contained within this regulatory package.

Small Business and Local Government Participation:

As stated above, the Task Force on Adult Care Facilities and Assisted Living Residences first convened in April 2005, and has met a total of thirteen times through October 2007. In addition to ex-officio members of four State agencies, the Task Force includes representatives of the ACF and assisted living industry, home care representatives, and consumer advocates.

Rural Area Flexibility Analysis

Pursuant to section 202-bb of the State Administrative Procedure Act, a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural adult care facilities or assisted living residences.

Job Impact Statement

A Job Impact Statement is not included because it is apparent from the nature and purpose of this regulation that it will not have a substantial adverse impact on jobs and employment activities.

Assessment of Public Comment

The proposed assisted living residences regulation is intended to create the regulatory framework necessary for implementation of the provisions of the Assisted Living Reform Act of 2004 (ALRA), including but not limited to, the following elements: establishing the criteria by which applications for licensure and certification will be reviewed; establishing standards for admission and retention, consumer and resident protections, resident services, personnel, records and reports, structural and environmental standards, management contracts; defining "independent senior housing"; establishing standards for the hiring of direct care staff by residences; and generally clarifying and carrying out the intent of the law. Overall, the comments on the proposed regulation addressed many varied interests and issues. A total of 946 written comments were received from individuals and organizations during the 45-day public comment period which expired on May 14, 2007.

A majority of the comments were submitted by residents of facilities which will need to become licensed as assisted living residences. Most of these individuals expressed views strongly in favor of this regulation, stating the proposed regulations provides the protections and oversight needed when residing in an assisted living residence. In particular, these comments support the proposed rules regarding nurse staffing for enhanced assisted living and special needs assisted living, the development of individualized service plans and disclosures that the facilities are required to make to residents.

Some individuals and organizations commented on issues associated with whether the proposed regulations properly address or exceed the legislative intent of the Assisted Living Reform Act, or are duplicative of current requirements for adult care facilities. Commentors also noted open issues relating to the affordability of the assisted living residence model resulting from the regulation proposed. The Department is confident that the proposed regulations are consistent with both the legislative intent and the letter of the ALRA. The ALRA established the Task Force on Adult Care Facilities and Assisted Living Residences to "gather information regarding the various ways in which existing requirements and guidelines unduly infringe on affordability of care and services, individual resident choice, autonomy and independence, examine and evaluate such requirements and guidelines, and make recommendations" with regard to, among other things, minimizing duplicative or unnecessary regulatory oversight; ensuring that the indigent have adequate access to, and that there are a sufficient number of, enhanced assisted living residences; and developing affordable assisted living.

Since the inaugural meeting on April 14, 2005, the Task Force has met thirteen times and provided invaluable input on all objectives accomplished for implementing the Act, including consultation on the principles contained within the proposed regulatory package. The Task Force – which, in addition to ex-officio members of four State agencies, includes representatives of the adult care facility (ACF)/assisted living industry, home care representatives, and consumer advocates – will continue to meet to address those issues not yet resolved within this regulatory package.

Due to the volume of comments submitted, the issues and responses to those issues which follow will focus on those potentially necessitating a substantive change to the regulatory package.

Issue:

Some providers commented that the proposed minimum nurse staffing standards for Enhanced and Special Needs Assisted Living Residences fail to take into account the actual needs of the resident population, and conflict with both the letter and spirit of the law which is to ensure access to care and services tailored specifically to the individual needs of the resident as determined by the resident, his/her family and representatives, health care provider and the operator, through development of the individualized service plan (ISP). They express the view that most ACF-level residents discharged to a higher level of care require an increased need for personal care services and/or supervision, rather than skilled nursing care, and that the burden for obtaining the necessary health care services to remain in an

EALR is upon the resident and not the facility. Therefore, they argue, the requirements as proposed are unnecessary and excessive.

Response:

The proposed minimum nurse staffing requirement for enhanced assisted living residences (EALRs) and special needs assisted living residences (SNARLs) has been revised to significantly reduce the number of hours of coverage required. A registered professional nurse (RN) will need to be on duty and onsite at the residence, for eight hours per day, seven days a week. (By contrast, the original proposed regulation would have required on site coverage by an RN or LPN at least sixteen hours per day, seven days a week, as well as on site coverage by a RN eight hours a day, five days a week.) In addition, an RN must be on call and available for consultation 24 hours a day, seven days a week. RNs would be responsible in an EALR for such necessary nursing services as resident assessments, supervision of aides, and treatments as identified on the ISP. It is important to note that the regulations will require that the operator arrange for additional nursing coverage where determined to be necessary by the resident's physician and/or the ISP process.

Issue:

A segment of the industry commented that the provisions pertaining to management contracts should be deleted in their entirety, arguing there exists no statutory reference to the matter and they fail to take into consideration the assisted living business model that exists today in other states, where professionally managed assisted living companies operate through contracts with management companies. Commentors suggested that, at most, the Department of Health review of management contracts should be limited to whether the text of the contract is in compliance with regulation and whether the facility is being operated in compliance with all applicable statutes and regulations. Commentors also indicated that these provisions will negatively impact economic development in New York state, by impeding development of new projects and continued operation of existing communities by experienced, professionally managed organizations.

Response:

The Department of Health believes in the need to regulate management agreements for ACFs/ALRs to assure that only duly approved operators are given independent authority for the operation of the facility, as well as the need to conduct character and competency reviews on proposed managers. The provisions within the proposed regulatory package for management contracts have been revised to address specific recommendations made by industry representatives. In particular, the regulations would be modified to: (1) add a provision that the Department must provide a written response within 90 days after the submission by an applicant or operator of a proposed management agreement, provided that the Department has received all information necessary for its review; (2) increase the duration for approved management contracts from 3 years to 5 years; (3) eliminate the requirement that the operator demonstrate that "goals and objectives" of the management contract have been met; (4) clarify that for an already approved contract, only revisions related to a substantive change in terms of power delegated, management fees, the term of the agreement, and changes to the management entity itself or its principals, must receive the prior written approval of the Department; and (5) develop in consultation with the industry a model Management Agreement. Further, while the provision pertaining to contractor's fees has been deleted in its entirety, language has been added to require that management contracts contain the method and amount of payment for management services provided to the ALR. In addition, the regulation has been amended to add a provision authorizing the Department to terminate a management agreement should the residence provide a severe and persistent substandard level of care.

Issue:

A segment of the industry submitted comments about the proposed definition of "Independent Senior Housing" (ISH). Some commentators requested additional clarification with regard to such terms and phrases as: "arranged for or coordinates", "personal care", "directly or indirectly", "supervision", and "monitoring". One commentator suggested additional criteria which could be incorporated into the standards relating to ISH with regard to actions which would be indicators of the provisions or arrangement of personal care and/or homecare services.

Response:

The terms "personal care" and "supervision" are defined in ACF regulations. The term "monitoring" is defined both in the ALRA and these proposed regulations. The Department has revised the proposed standards relating to ISH to incorporate the above-noted comment regarding indicators that personal care and/or home care is being provided to the extent that licensure as an ACF or ALR may be necessary. The Department believes the proposed regulation clearly identifies when an entity is subject to ACF

certification and when it is subject to ALR licensure, as required under the ALRA.

Issue:

Comments were made that the ALR Medical Evaluation (DOH 3122) is quite lengthy and detailed, potentially exceeding the information required of nursing homes. ACFs have traditionally had difficulty getting the current 2-page form completed by physicians in its entirety or accurately. Therefore, DOH is urged to consider: (1) revising the Medical Evaluation form from its proposed 5-page length, and (2) outreach and education to physicians regarding the form and the ALR. In addition, the industry requested the Department allow flexibility regarding who can complete the form to include Physician Assistants.

Response:

For the most part, the question does not seem to be related to the value of the data being gathered via the Medical Evaluation, but rather the cooperation of the resident's physician in completing the evaluation. Therefore, the Department has conducted an examination of those items which can be completed by someone other than the physician, and have explored ways to achieve compliance/cooperation from physicians on the remainder. The Department has also re-evaluated the various forms to be completed upon a resident's admission to an ALR (and annually), and have identified efficiencies and eliminated duplication. The regulatory proposal has been amended in certain instances to, where not previously noted, specify the form to be used for the activity undertaken. This will help to eliminate the appearance of duplication.

Issue:

Some commentators have stated that the provision prohibiting the requirement of a guarantor of payment as a condition of admission has no basis in law. They believe the language, as proposed, is difficult to interpret. They state that the ability to require a guarantor is central to the financial viability of ALRs, with far-reaching consequences to the potential expansion of assisted living in New York State.

Response:

The proposed regulations do not attempt to bar "guarantors of payment", but to clarify that the operator cannot mandate that a prospective resident or other person agree to a guarantor of payment as a condition of admission unless the operator has reasonably determined, on a case by case basis, that the prospective resident would lack either the current capacity to manage financial affairs and/or the financial means to assure payment due under the residency agreement. The proposed regulations have been revised to set this forth in a clearer manner.

Issue:

Some comments were received from industry representatives stating that it is not appropriate to require operators to submit information responsive to any Department of Health request within 30 days or suffer an administrative withdrawal and forfeiture of fees, especially in light of the absence of a specified time for the Department to respond to applicants during the review process. Further, for multi-state operators, gathering information from all states in which they operate can often take more than 30 days.

Response:

Applicants for licensure/certification of ACFs historically submit incomplete applications, requiring Department of Health staff to continually follow up with requests for the additional missing documentation. Prolonged response delays from applicants have subsequently resulted in initial, "complete" information becoming outdated or no longer pertinent, thereby resulting in the need for a "current" re-submission and the wasting of initial staff time spent reviewing material. More recently, as applicants have increasingly become more "corporate" in nature, there has been a tendency for changes in major aspects of submitted applications (*i.e.*, individuals in entity, name of entity, landlord, parent company, lease provisions) while review of the initial application materials is still underway. While the regulation, as proposed, attempts to direct applicants to submit required materials while the information contained within is still pertinent, the regulation has been amended to extend this timeframe from 30 to 60 days. In addition, with regard to Department review of waiver requests and management agreements, the regulations have also been amended to provide for a response to an operator within 90 days of receipt of all information necessary for the Department to make a determination.

Issue:

Some comments were received from industry representatives expressing concern that the proposed environmental and structural standards exceed what is currently required under regulation for ACFs. They believed the intent of the new law equated basic ALR with the ACF and, as such, their buildings would not require changes. Such commentators con-

tend there is no rational basis for applying different or more stringent standards to ALRs when they serve the very same residents with the very same needs as those now served by many ACFs. They express concern that the proposed environmental and structural standards will discourage participation by existing operators.

Response:

The regulations proposed are necessary to modernize the building standards for ACFs/ALRs, which have not been updated in years, to reflect the change in resident populations over that time. The Department recognizes the impact this will have on older existing facilities, yet believes the State must balance that with the need to protect a frailer resident population, in the enhanced ALR where individuals can age in place and in special needs ALRs where individuals with dementia or other special needs will reside, as well as in the general ALR. Further, it must be remembered that the proposed regulation provides for a process by which an applicant can request a waiver of a non-statutory requirement in regulation, which must include a description of what will be done to achieve or maintain the purpose of the regulation to be waived and to protect the health, safety and well-being of the residents.

Issue:

Some commentators representing segments of the industry have expressed concern regarding the creation of "Family Organizations", citing the lack of reference to such in statute. Such commentators argue that, as in the ACF setting, ALR residents may or may not choose to be actively involved in their resident councils. As such, it should be the residents' choice and ultimate decision as to whether they want their family members to be involved in the facility and, if so, whether it should be in the forum of a formal organization.

Response:

The proposed revisions emphasize that this provision is to be no different than the current "food committee" requirement for ACFs, established by Chapter 58 of the Laws of 2007. Residents, or families and resident representatives in this case, are not required to form a committee/organization. Yet, if they decide to do so, the operator must assist and facilitate such meetings. Comments received from residents and their advocates are very supportive of this provision.

Insurance Department

NOTICE OF ADOPTION

Rules Governing Valuation of Life Insurance Reserves

I.D. No. INS-42-07-00004-A

Filing No. 1362

Filing date: Dec. 10, 2007

Effective date: Dec. 26, 2007

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

Action taken: Amendment of Part 98 (Regulation No. 147) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

Subject: Rules governing valuation of life insurance reserves.

Purpose: To include the provisions of the adopted new version of Actuarial Guideline 38 to be in effect for policies issued on or after Jan. 1, 2007 and prior to Jan. 1, 2011.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-42-07-00004-P, Issue of October 17, 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.

NOTICE OF ADOPTION

2001 CSO Preferred Class Structure Mortality Table

I.D. No. INS-42-07-00005-A

Filing No. 1361

Filing date: Dec. 10, 2007

Effective date: Dec. 26, 2007

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

Action taken: Amendment of Part 100 (Regulation No. 179) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, and 4517, and articles 24 and 26

Subject: Recognition of the 2001 CSO mortality table for use in determining minimum reserve liabilities and nonforfeiture benefits and recognition and guidance for use of the 2001 CSO preferred class structure mortality table for use in determining minimum reserve liabilities.

Purpose: To recognize and permit the use of the 2001 CSO preferred class structure mortality table for preferred lives for individual life insurance and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years in accordance with sections 4217 and 4517 of the Insurance Law.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-42-07-00005-P, Issue of October 17, 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.

Department of Law

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

Investigations, Civil Enforcement Actions, and Qui Tam Actions Related to Fraud Perpetrated Against the State and Local Governments

I.D. No. LAW-39-07-00008-ERP

Filing No. 1360

Filing date: Dec. 7, 2007

Effective date: Dec. 7, 2007

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

Emergency action taken: Addition of Part 400 to Title 13 NYCRR.

Statutory authority: State Finance Law, section 194

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

Specific reasons underlying the finding of necessity: Frauds perpetrated against the government harm the public by depriving the state and local governments of much-needed funds. Certain frauds, such as those involving complicit or participating government officials, threaten the very integrity of the administration of the state and local governments, and are likely to be repeated unless discovered. Many frauds also directly threaten the health, public safety, and welfare of members of the public who rely on government-funded service providers for housing, health care and other essential services.

On April 9, 2007, New York enacted Article XIII of the State Finance Law. See N.Y. State Finance Law, sections 187-194 (hereinafter referred to as "the False Claims Act"). The purposes of the False Claims Act include the prevention and deterrence of frauds against the state and local governments, and the recovery of funds or property fraudulently obtained.

The False Claims Act empowers the Attorney General of the State of New York to investigate and initiate civil enforcement actions against parties who, among other things, knowingly present false or fraudulent demands for payments or property to the state or a local government. Additionally, the False Claims Act empowers local governments to investigate and initiate civil enforcement actions on their own behalf. It also allows private individuals to file qui tam enforcement actions on behalf of the state or a local government, and then prosecute these actions on their own if the state or local government declines to intervene in the action.

The Attorney General adopts the emergency rule to enforce the newly enacted False Claims Act, as a matter of necessity, because time is of the essence for the Office of the Attorney General to begin and continue investigations to prevent and deter frauds against the state and local governments and to recover funds and property fraudulently obtained. The rule allows qui tam enforcement actions that have been and that may be filed pursuant to the False Claims Act to be handled in an orderly fashion. The need for the emergency rule will exist until such rule is adopted on a permanent basis.

Indeed, in the absence of the rule, a procedural vacuum exists that is contrary to the public interest. Guidelines or procedures currently do not exist that specify the manner in which the Office of the Attorney General can investigate violations of the False Claims Act. Additionally, government plaintiffs and qui tam plaintiffs currently empowered to investigate and prosecute violations of the False Claims Act cannot effectively and efficiently exercise that power without the attached rule. This vacuum jeopardizes the public interest in the immediate prevention and deterrence of frauds against the state and local governments and in connection with the administration of governmental programs and the recovery of funds or property fraudulently obtained.

Furthermore, in the absence of the rule, no procedures exist to ensure that the Office of the Attorney General is made aware of civil enforcement actions filed by local governments, even though such actions may affect an interest of the state or interfere with or duplicate ongoing investigations or enforcement actions being undertaken by the Attorney General or other state agencies. Without such notification or consultation these actions may likewise interfere with or duplicate ongoing investigations being conducted by the Office of the Attorney General or other state agencies.

Finally, in the absence of the attached rule, insufficient procedures exist for processing qui tam actions, including, but not limited to, critical procedures regarding how qui tam plaintiffs shall proceed when the government declines to intervene or supersede in a qui tam action. Thus, compliance with the normal procedural requirements for notice and public comment would be contrary to the public interest.

Subject: Investigations, civil enforcement actions, and qui tam actions related to fraud perpetrated against the State and local governments.

Purpose: To establish procedures for investigating persons who defrauded the State or a local government; and the handling and processing of civil enforcement actions and qui tam actions under article XIII of the State Finance Law.

Text of emergency/revised rule: CHAPTER IX. FALSE OR FRAUDULENT CLAIMS INVOLVING GOVERNMENT FUNDS OR PROPERTY PART 400. PROCEDURAL REGULATIONS OF THE FALSE CLAIMS ACT

Section 400.1 General Provisions

(a) *The State Finance Law, sections 187-194, shall be referred to herein as the "False Claims Act".*

(b) *Definition of Person: The term "person" as used herein shall mean any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.*

(c) *Definition of Attorney General: The term "Attorney General" as used herein shall mean the Attorney General or his or her deputies, designees, assistants or special assistants.*

(d) *Severability: If any provision herein or the application of such provision to any persons or circumstances shall be held invalid, the validity of the remainder of the provisions and/or the applicability of such provisions to other persons or circumstances shall not be affected thereby.*

Section 400.2 Civil Enforcement by the Attorney General

(a) *Whenever it shall appear to the Attorney General that any person has engaged or is engaging in conduct that might amount to a violation of the False Claims Act, the Attorney General is authorized to investigate such violations by taking proof and making a determination of the relevant facts and issuing subpoenas in accordance with the Civil Practice Law and Rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought under the False Claims Act by the Attorney General, a local government, or any person, including a qui tam plaintiff.*

(b) *If a person subpoenaed to attend an inquiry related to a violation of the False Claims Act fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper or data when ordered so to do by the officer conducting such inquiry, or if a person fails to perform any act required to be performed, the Attorney General may institute civil contempt proceedings under section 2308(b) of the Civil Practice Law and Rules or make a motion to compel pursuant to that section or take any other action authorized by law.*

Section 400.3 Civil Enforcement by Local Governments

(a) *A local government shall consult with the Attorney General prior to filing any action under section 190(1) of the False Claims Act related to the Medicaid program.*

(b) *A local government filing an action under section 190(1) of the False Claims Act shall provide the Attorney General with a copy of the complaint on or about the date such complaint is filed.*

(c) *Under no circumstances shall the state be bound by the act of a local government that files an action involving damages to the state.*

Section 400.4 Qui Tam Actions

(a) *All qui tam actions shall be served on the Attorney General by the personal delivery of the qui tam complaint and accompanying evidence to a person designated to receive service at the Managing Clerk's Office on the 24th Floor at the Office of the Attorney General at 120 Broadway, New York, New York 10271, unless otherwise authorized by the Attorney General.*

(b) *A local government, having been authorized by the Attorney General to supersede or intervene in a qui tam action on its own behalf pursuant to section 190(2) of the False Claims Act, shall cooperate with the Attorney General in any subsequent investigation related to the action.*

(c) *If the state or a local government does not intervene or supersede after the 60 day time period or any extensions obtained under section 190(2)(b) of the False Claims Act, then the qui tam plaintiff has 30 days after such time period or extensions expire to decide whether to proceed with the action.*

(1) *If the qui tam plaintiff elects to proceed with the action, the qui tam plaintiff shall so advise the court, the state, and applicable local governments, and cause the complaint to be unsealed. After the complaint is unsealed, the qui tam plaintiff shall serve the complaint on any defendant pursuant to the provisions of the Civil Practice Law and Rules and other applicable law.*

(2) *If the qui tam plaintiff elects not to proceed with the action, the qui tam plaintiff shall either: (i) voluntarily discontinue the action, without an order and without unsealing the action, by filing with the court a notice of discontinuance and serving a copy of this notice on the Attorney General, who may in the Attorney General's discretion make an in camera motion to unseal the complaint; or (ii) seek to voluntarily discontinue the action by order of court by making an in camera motion to unseal the complaint and dismiss the action.*

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of emergency/proposed rule making was published in the *State Register* on September 26, 2007, I.D. No. LAW-39-07-00008-EP. The emergency rule will expire March 5, 2008.

Emergency rule compared with proposed rule: Substantial revisions were made in section 400.2.

Text of rule and any required statements and analyses may be obtained from: Henry M. Greenberg, Department of Law, The Capitol, Albany, NY 12224, (518) 574-7330, e-mail: henry.greenberg@oag.state.ny.us

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

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

Revised Regulatory Impact Statement

1. Statutory authority: Section 194 of the State Finance Law gives the Attorney General of the State of New York power to adopt such rules and regulations as is necessary to effectuate the purposes of the Article XIII of the State Finance Law. See N.Y. State Finance Law, sections 187-194 (hereinafter referred to as the "False Claims Act").

2. Legislative objectives: These rules and regulations are in accordance with the public policy objectives the Legislature sought to advance by passing the False Claims Act, which include the prevention and deterrence of fraud against the state and local governments, and the recovery of funds or property fraudulently obtained. The investigative procedures authorized by the rules and regulations (hereinafter referred to as "the rule") empower

the Attorney General to investigate frauds that constitute a violation of the False Claims Act, and thereby facilitate his or her ability to bring civil enforcement actions and other actions against parties that commit such violations. Also, the rule ensures that civil enforcement actions and qui tam actions will be handled in an orderly fashion.

3. Needs and benefits: The rule is needed to effect the purposes of the False Claims Act: the prevention and deterrence of frauds against the state and local governments, and the recovery of funds or property obtained through false or fraudulent conduct. It establishes how the Attorney General can begin and continue investigations of potential violations of the False Claims Act. It ensures that civil enforcement actions and qui tam enforcement actions that have been and that may be filed will be handled in an orderly fashion.

Indeed, in the absence of the rule, a procedural vacuum exists that is contrary to the public interest. Guidelines or procedures currently do not exist that specify the manner in which the Office of the Attorney General can investigate violations of the False Claims Act. Additionally, government plaintiffs and qui tam plaintiffs currently empowered to investigate and prosecute violations of the False Claims Act cannot effectively and efficiently exercise that power without the attached rule. This vacuum jeopardizes the public interest in the immediate prevention and deterrence of frauds against the state and local governments and in connection with the administration of governmental programs and the recovery of funds or property fraudulently obtained.

Furthermore, in the absence of the rule, no procedures exist to ensure that the Office of the Attorney General is made aware of civil enforcement actions filed by local governments, even though such actions may affect an interest of the state or interfere with or duplicate ongoing investigations or enforcement actions being undertaken by the Attorney General or other state agencies. Without such notification or consultation, these actions may likewise interfere with or duplicate ongoing investigations being conducted by the Office of the Attorney General or other state agencies.

Finally, in the absence of the rule, insufficient procedures exist for processing qui tam actions, including, but not limited to, critical procedures regarding how qui tam plaintiffs shall proceed when the government declines to intervene or supersede in a qui tam action.

The benefits derived from the rule are that:

(A) The Attorney General can investigate any violation of the False Claims Act with the power to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the Civil Practice Law and Rules. The rule specifies that the Attorney General may use section 2308(b) of the Civil Practice Law and Rules, or other applicable law, to compel compliance with an investigation. Furthermore, the rule ensures that the Attorney General's powers to investigate granted therein do not terminate by reason of a local government, or any person, including a qui tam plaintiff, filing a complaint. The rule thus enhances the Attorney General's ability to investigate and bring enforcement actions under the False Claims Act.

(B) The Attorney General will be notified of local government enforcement actions, and consulted with prior to a local government filing an action related to the Medicaid program, so that he or she can protect the state's interest in local enforcement actions and notify other state agencies if necessary. This notification protects the state's interest in litigation initiated by local governments, avoids duplicative actions and investigations, and allows for the cooperation and the sharing of resources by the state and local governments.

(C) Qui tam actions will be handled and processed in an orderly fashion. If the government decides not to intervene in a qui tam action, the rule establishes a time period and procedures for the qui tam plaintiff to either proceed or discontinue the action.

Together, these benefits enhance the ability of the state and local governments and qui tam plaintiffs to bring enforcement actions, recover funds and property fraudulently obtained, and prevent and deter other frauds.

4. Costs: There are de minimis costs to the rule.

5. Local government mandates: A local government filing an action under section 190(1) of the State Finance Law shall provide the Attorney General with a copy of the complaint on or about the date such complaint is filed. A local government shall consult with the Attorney General prior to filing any action related to the Medicaid program.

6. Paperwork: There are no additional reporting requirements or paperwork requirements as a result of this rule.

7. Duplication: The rule will not duplicate any existing state or federal law.

8. Alternatives: The rule as originally proposed granted the Attorney General the power to investigate violations of the False Claims Act with the same powers, procedures and devices that he possesses to investigate violations of Section 352 of the General Business Law. In response to objections raised by the New York Association of Homes and Services for the Aging and the New York State Health Facilities Association, the reference to the General Business Law has been replaced with specific authorization to investigate violations of the False Claims Act by taking proof and making a determination of the relevant facts and issuing subpoenas.

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

10. Compliance schedule: Compliance with this rule could be achieved immediately upon effect of the adoption of this rule.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

The revisions made to the proposed 13 N.Y.C.R.R. Part 400 do not necessitate revisions to the previously published Regulatory Flexibility Analysis or previously published Rural Area Flexibility Analysis.

Assessment of Public Comment

On September 10, 2007, the Attorney General adopted Part 400 to Title 13 of the New York Code of Rules & Regulations ("N.Y.C.R.R.") on an emergency basis and proposed the rule for permanent adoption by filing the required documents with the Department of State in accordance with the State Administrative Procedure Act.

The rule was published for comment in the State Register on September 26, 2007. The rule, adopted pursuant to the authority granted to the Attorney General under section 194 of the State Finance Law, establishes procedures by which the Attorney General may begin and continue investigations of potential violations of Article XIII of the State Finance Law. See N.Y. State Finance Law, sections 187-194 (hereinafter referred to as the "False Claims Act"). It also ensures that civil enforcement actions and qui tam enforcement actions filed by local governments and qui tam plaintiffs will be processed and handled in an orderly fashion.

In response to the publication of the Notice of Emergency Adoption and Proposed Rule Making for 13 N.Y.C.R.R. Part 400, the Department of Law received two comments objecting to the addition of 13 N.Y.C.R.R. section 400.2 (hereinafter referred to as "section 400.2"). One comment was submitted by the New York Association of Homes and Services for the Aging ("NYAHSa"), a not-for-profit association that represents over 600 not-for-profit and public long-term care providers. The other comment was submitted by the New York State Health Facilities Association ("NYSHFA"), a not-for-profit association representing approximately 260 long-term care providers statewide.

NYASHA and NYSHFA object to the fact that section 402 grants the Attorney General the investigatory powers, procedures and devices of section 352 of the General Business Law to investigate violations of the False Claims Act. They express concern that section 402 improperly creates the potential for criminal liability, and goes beyond the scope of the False Claims Act by granting the Attorney General the power to issue subpoenas and interrogatories.

Additionally, NYAHSa argues that: the additional investigative and subpoena powers raise potential substantive and constitutional due process concerns; it is unclear whether and how the Department of Law plans to employ the investigatory powers established by section 400.2; and that the Department of Law should have provided an opportunity for the public to comment on the rule prior to promulgating it.

In light of the comments, the Department of Law is filing a Notice of Emergency Adoption and Revised Rule Making to revise section 400.2. Additionally, the Department of Law hereby responds to the central points of the comments as follows:

1. The Potential for Criminal Penalties

NYASHA and NYSHFA contend that section 400.2 is improper because the grant of the "powers, procedures and devices" of section 352 of the General Business Law to investigate violations of the False Claims Act could result in the imposition of criminal penalties.

There is no merit to this objection. Section 400.2 does not, and was never intended to, create potential criminal liability related to investigations or prosecutions of a violation of the False Claims Act. Nevertheless, to avoid any future misunderstanding, section 400.2 has been revised to eliminate all references to the "powers, procedures and devices" of section 352 of the General Business Law and replace them with specific authority to take proof and make a determination of the relevant facts and issue subpoenas in accordance with the Civil Practice Law and Rules. Also, the revised rule makes clear that the Attorney General may only enforce an investigative demand by civil contempt proceedings under section 2308(b)

of the Civil Practice Law and Rules, or by making a motion to compel pursuant to that section, or by taking any other action already authorized by law.

2. The Scope of the False Claims Act

NYASHA and NYSHFA contend that the grant of investigatory powers to issue subpoenas and take proof contained in section 400.2 goes beyond the letter and intent of the False Claims Act.

This contention is without merit. Section 400.2 as originally proposed, and as hereby revised, is both proper and necessary to effect the purposes of the False Claims Act. Section 189 of the False Claims Act makes any person liable to the state for committing certain acts that result or that could result in defrauding the state or local government of money or property. Section 190(1) of the False Claims Act specifically grants the Attorney General the power to investigate any violations under section 189. The False Claims Act, however, does not define the contours of this statutory grant of investigative authority. Instead, section 194 of the False Claims Act delegates to the Attorney General broad power to promulgate rules and regulations specifying the investigative authority "necessary to effectuate the purposes of the statute."

Authority to issue subpoenas prior to filing a complaint is an investigative technique necessary to effectuate the purposes of the statute. The text and statutory scheme of the False Claims Act require the Attorney General to investigate a violation of the False Claims Act prior to filing a civil enforcement action and prior to the unsealing and service on the defendant of a qui tam complaint. Indeed, the act mandates that all qui tam cases are kept under seal and not disclosed to the defendant for at least 60 days for the sole purpose of giving the Attorney General the time to investigate the allegations while the defendant remains unaware of the pending complaint. This requires the Attorney General, in appropriate cases, to take proof and issue subpoenas prior to the service of a complaint on the defendant.

Both NYASHA and NYSHFA point to the legislature's rejection of the so-called "Martin Act for Health Care Fraud" as evidence that the legislature intended to withhold authority for pre-complaint subpoenas, but they are mistaken. The Martin Act for Health Care Fraud would have, among other things, created several new criminal offenses relating to private and public sector health care fraud, and allowed the Attorney General to investigate and criminally prosecute offenders. The legislative rejection of that statute cannot be construed to indicate any legislative intent to limit the investigative techniques by which the Attorney General may investigate and enforce the False Claims Act, which authorizes only civil remedies for fraud that deprives, or that attempts to deprive, the state or a local government of money or property. Indeed, one of the signature features of the False Claims Act is the establishment of a procedure for qui tam actions specifically designed to allow the Attorney General to investigate violations prior to a complaint being filed or served on the defendant. Thus, the legislature's rejection of a sweeping criminal health care fraud statute is not evidence of the invalidity of section 400.2.

3. The Use of Investigatory Powers Granted Under Section 400.2

NYASHA expresses concern that it is unclear whether and how the Department of Law plans to employ the investigatory powers established by section 400.2.

The revised rule makes it clear that the Attorney General may use the investigatory powers granted therein prior to a complaint being filed or served on a defendant. To the extent NYASHA is concerned about the Attorney General's use of broad new investigatory powers in investigations of its member health care organizations, that concern is misplaced. Revised section 400.2 does not expand the Attorney General's power to investigate health care providers or businesses suspected of violating the False Claims Act. Section 63(12) of the Executive Law currently allows the Attorney General to take proof and issue subpoenas upon suspicion that any person has engaged in repeated fraudulent or illegal acts in the conducting of business. A suspicion that a health care provider or some other business has presented a false or fraudulent claim to a state or a local government in violation of the False Claims Act currently provides the necessary predicate for the Attorney General to take proof and issue subpoenas under section 63(12) of the Executive Law. Additionally, the Attorney General has other powers to investigate Medicaid providers, including but not limited to those granted under 18 N.Y.C.R.R. sections 504.3(a) and 504.3(g).

4. Due Process Concerns

NYASHA asserts that there are due process and constitutional concerns with regard to the powers granted by section 400.2.

The use of investigatory devices contained in the original and revised rule have been repeatedly held constitutional as they relate to civil fraud investigations.

5. Adoption of the Rule on an Emergency Basis

NYASHA asserts that the Department of Law should have published Part 400 under the proposed rulemaking process, with an opportunity for public comment and a dialogue with affected stakeholders, prior to promulgation.

The Attorney General has complied with the requirements of the State Administrative Procedure Act ("SAPA") for adopting Part 400 on an emergency basis and proposing the rule for permanent adoption. The Attorney General has and will continue to accept comments from the public concerning the revised rule in accordance with SAPA. Indeed, the Attorney General is hereby revising the proposed rule, and will allow the prior emergency rule to expire in favor of the revised rule, specifically to address points raised by NYASHA and NYSHFA.

Long Island Power Authority

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Tariff for Electric Services

I.D. No. LPA-52-07-00004-P

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

Proposed action: The authority is considering a proposal to adopt revisions to its tariff for electric services to amend and repeal certain parts and sections of the tariff.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Tariff for electric services.

Purpose: To adopt miscellaneous revisions to the authority's tariff for electric services.

Public hearing(s) will be held at: 10:00 a.m., Feb. 11, 2008 at Huntington Town Hall, 100 Main St., Huntington, NY; and 2:00 p.m., Feb. 11, 2008 at Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY.

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

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

Substance of proposed rule: The Long Island Power Authority ("Authority") is considering a proposal to adopt certain revisions to its Tariff for Electric Services, including the designation of certain authority to the President and Chief Executive Officer, or his/her designee, with regard to certain service matters concerning the resale, redistribution and sub-metering of electricity, the Authority's customer complaint procedures and certain energy service company and direct retail customer licensing matters. In addition, the proposal provides that Rate Code 277 will be reclassified as Rate Code 273, and that tariff leaf no. 29A, which pertains to the Authority's expired Charitable Contributions program, will be repealed. The Authority may approve, modify, or reject, in whole or part, the proposal.

Text of proposed rule and any required statements and analyses may be obtained from: Kevin S. Law, President and Chief Executive Officer, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700

Data, views or arguments may be submitted to: Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, e-mail: amccabe@lipower.org

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

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

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

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Habilitation Services

I.D. No. MRD-36-07-00005-A
Filing No. 1365
Filing date: Dec. 11, 2007
Effective date: Jan. 1, 2008

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

Action taken: Amendment of sections 635-10.4 and 635-10.5 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Habilitation services.

Purpose: To update the definitions of residential habilitation and day habilitation to parallel the wording in the Federal HCBS waiver agreement; and include the billing requirement of a face-to-face contact for at-home residential habilitation and for family care residential habilitation.

Text of final rule: Subparagraph 635-10.4(b)(1)(xi) is amended as follows:

(xi) Providing [on-site] professional services *for the individual* by qualified members of a clinical discipline which are part of the development or implementation of an individualized service plan and which are intended to enable the person [or] *and, as appropriate*, his or her family to cope with health care, emotional, psychological, behavioral or programmatic [problems] *issues*. [in order] *The purpose of the professional service is to maintain or improve the person's health, safety or level of functioning.*

New subparagraphs (xii), (xiii) and (xiv) are added to paragraph 635-10.4(b)(1) as follows:

- (xii) *Training, support and assistance in pursuing personal valued outcomes as stated in the person's individualized service plan (ISP).*
- (xiii) *Training, support and assistance in self-advocacy and making informed choices.*
- (xiv) *Training, support and assistance with community inclusion and relationship building.*

Note: Rest of section is renumbered accordingly.

New subparagraphs (xi), (xii), (xiii) and (xiv) are added to paragraph 635-10.4(b)(2) as follows:

- (xi) *Professional services provided for the individual by qualified members of a clinical discipline which are part of the development or implementation of an individualized service plan and which are intended to enable the person and, as appropriate, his or her family to cope with health care, emotional, psychological, behavioral or programmatic issues. The purpose of the professional service is to maintain or improve the person's health, safety or level of functioning.*
- (xii) *Training, support and assistance in pursuing personal valued outcomes as stated in the person's individualized service plan (ISP).*
- (xiii) *Training, support and assistance in self-advocacy and making informed choices.*
- (xiv) *Training, support and assistance with community inclusion and relationship building.*

Note: Rest of section is renumbered accordingly

A new paragraph (14) is added to subdivision 635-10.5(b) as follows:

(14) To bill for each day that residential habilitation services are provided in the individual's home (At-Home Residential Habilitation), staff shall deliver and daily document at least one face-to-face individualized residential habilitation service for each continuous time period that residential habilitation is provided to the individual. To bill for each day that family care residential habilitation services are provided, the family care provider shall deliver and daily document at least one face-to-face individualized residential habilitation service to the individual.

Note: Rest of section is renumbered accordingly.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 635-10.5(b)(14) and 635-10.4(b)(2).

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

A Revised Regulatory Impact Statement is not being submitted because the non-substantive changes to the originally proposed text do not necessitate revisions to the information provided in the original Regulatory Impact Statement. The minor non-substantive changes were to substitute a word used in the text with preferred terminology and to change the numeration from the proposed text.

Regulatory Flexibility Analysis

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted because the non-substantive changes to the originally proposed text do not necessitate revisions to the information provided in the original Regulatory Flexibility Analysis for Small Businesses and Local Governments. The minor non-substantive changes were to substitute a word used in the text with preferred terminology and to change the numeration from the proposed text.

Rural Area Flexibility Analysis

A Revised Rural Area Flexibility Analysis is not being submitted because the non-substantive changes to the originally proposed text do not necessitate revisions to the information provided in the original Rural Area Flexibility Analysis. The minor non-substantive changes were to substitute a word used in the text with preferred terminology and to change the numeration from the proposed text.

Job Impact Statement

A Revised Job Impact Statement is not being submitted because the non-substantive changes to the originally proposed text do not necessitate revisions to the information provided in the original Job Impact Statement. The minor non-substantive changes were to substitute a word used in the text with preferred terminology and to change the numeration from the proposed text.

Assessment of Public Comment

OMRDD received one comment regarding this proposed rule making. The comment was received from an individual.

1. Comment: The individual found it unclear as to what distinguishes a "face-to-face" individualized residential habilitation service from any other individualized residential habilitation service and thought some definition is needed to supplement the new requirement.

Response: There is no need for further clarification in the regulation. There is no change in the service delivery and documentation requirements because of this regulatory amendment as the requirements in the amendment were part of an Administrative Memorandum issued by OMRDD in March, 2004 and they have already been implemented by the provider community. This amendment simply formalizes the requirement in regulation and also clarifies that billable service time can only be counted when the service is provided and the person is present. That being said, indirect services, such as attending ISP reviews, telephone contacts, and paperwork, for example, are considered a cost factor and are included in the residential habilitation rate.

NOTICE OF ADOPTION

Reimbursement Methodologies for Various Facilities and Services

I.D. No. MRD-41-07-00019-A
Filing No. 1364
Filing date: Dec. 11, 2007
Effective date: Jan. 1, 2008

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

Action taken: Amendment of sections 635-10.5, 671.7, 679.6, 680.12, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

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

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

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

Text or summary was published in the notice of proposed rule making, I.D. No. MRD-41-07-00019-P, Issue of October 10, 2007.

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Assessment of Public Comment

OMRDD received one letter of comment from a service provider agency. The comments and OMRDD's response thereto are as follows.

Comment: The OMRDD provider submitted comments primarily addressing the methodology used to determine those agencies entitled to Health Care Enhancement III (HCE III) funding at the benchmark level. This provider asked for an explanation of why the benchmark was raised for HCE III. This provider also stated that the revised threshold is unreasonable because the provider's current health care benefits are more generous than those of providers above the benchmark.

Response: After working with Provider Associations and reviewing their comments as well as the terms of the previous Health Care Enhancements, OMRDD made the decision to raise the benchmark for HCE III. This decision has the effect of allowing more monies to be distributed to those agencies which are not currently offering optimal health care benefits. In so doing, OMRDD is enabling those agencies to afford more improvements in their health care plans than would have been possible without the benchmark threshold revision. OMRDD believes this strategy is in keeping with the intent of the initiative.

In opting not to resurvey providers, OMRDD was influenced by its experiences with the earlier survey and previous enhancement implementation. With an aim to streamline the process for providers as well as for central office, OMRDD modified a number of components. For example, the application was simplified for providers' ease of completion. In HCE III, specific dollar entitlements are predicated on operating budgets, thus eliminating the need for providers to identify eligible employees and produce counts, by program for OMRDD, as in the earlier enhancements. This change also facilitates data management for OMRDD. Because the survey was complex, demanding resources of time and labor on the part of providers and OMRDD, practicality dictated the decision to use the existing survey. The objective of these measures was to better manage the process and to minimize the time span between delivering the news of HCE III to providers and delivering the actual funds to them.

NOTICE OF ADOPTION

Health Care Decisions Act

I.D. No. MRD-42-07-00007-A

Filing No. 1363

Filing date: Dec. 11, 2007

Effective date: Dec. 30, 2007

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

Action taken: Amendment of section 633.10 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b); Surrogate's Court Procedure Act, section 1750-b; and L. 2007, ch. 105

Subject: Amendment of certain regulatory provisions implementing the Health Care Decisions Act consistent with chapter 105 of the Laws of 2007.

Purpose: To include, in regulation, a prioritized list of family members who may be qualified to make a decision to withhold or withdraw life-sustaining treatment in certain circumstances.

Text or summary was published in the notice of proposed rule making, I.D. No. MRD-42-07-00007-P, Issue of October 17, 2007.

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Assessment of Public Comment

OMRDD received two letters containing comments on the proposed regulations, one from the Mental Hygiene Legal Service (MHLS) and one from a service provider agency. The specific comments and OMRDD's response are as follows.

Comment: The MHLS suggested the addition of the phrase "who has also complied with the other provisions of SCPA 1750-b" following the term "qualified family member."

Response: This issue is addressed in clause (c) of the proposed regulation which states: "A decision to withhold or withdraw life-sustaining treatment may be made in accordance with SCPA section 1750-b by the following qualified family members..." (emphasis added).

Comment: The MHLS wondered how a hospital or other health care facility would determine the appropriate priority if there were several involved family members, and how such facilities would determine the level of active involvement among members of the same category.

Response: OMRDD declined to specifically address this issue in the regulations for three reasons: (1) OMRDD lacks the authority to regulate hospitals or other health care facilities; (2) OMRDD intends to administratively advise residential providers under its auspices to provide information regarding the individual's family members to the hospital or health care facility; and (3) It is OMRDD's position that the notification/objection processes contained in the Health Care Decisions Act (HCDA) should prevent such a decision being made by an inappropriate or unqualified family member.

Comment: The MHLS suggested the addition of language requiring notification of other qualified family members when a decision is made.

Response: Chapter 105 did not amend the notification or objection provisions of the HCDA. It merely expanded usage of the term "guardian" to include certain actively involved family members when no guardian had been appointed. It would be beyond the scope of OMRDD's statutory authority for this regulation to amend the notification or objection provisions of the HCDA.

Comment: The responding service provider noted that the prioritized list of surrogates set forth in the regulation differs slightly from the surrogate list for consent to Do not Resuscitate (DNR) orders found in OMRDD's regulations at section 633.18.

Response: OMRDD is aware of the difference in the two prioritized lists of surrogates. The DNR surrogate list set forth in section 633.18 mirrors the list contained in Public Health Law (PHL) section 2965. However, the sponsor's memorandum accompanying Chapter 105, which amends the HCDA, specifically suggested that the surrogate list in the present required regulations should be based upon the prioritized surrogate list set forth in section 633.11 for consent to professional medical treatment.

Department of Motor Vehicles

NOTICE OF ADOPTION

Evidentiary Rules for Traffic Violations Bureau Hearings

I.D. No. MTV-43-07-00009-A

Filing No. 1367

Filing date: Dec. 11, 2007

Effective date: Dec. 26, 2007

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

Action taken: Amendment of Part 124 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 225(1), (3) and 227(1)

Subject: Evidentiary rules for Traffic Violations Bureau hearings.

Purpose: To preclude the need for testimony upon the introduction of certain business records in Traffic Violations Bureau hearings.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-43-07-00009-P, Issue of October 24, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Carrie L. Stone, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: carrie.stone@dmv.state.ny.us

Assessment of Public Comment

The agency received no public comment.

250 High Pressure Sodium	\$10.23
400 High Pressure Sodium	\$ 9.37
1000 High Pressure Sodium	\$21.15
100 Mercury Vapor	\$ 4.95
175 Mercury Vapor	\$ 3.82
200 Mercury Vapor	\$16.19
1000 Mercury Vapor	\$13.51
400 Mercury Halogen	\$12.41
1000 Mercury Halogen	\$13.51
Industrial S.C. 5	
Demand Charge, per kW	\$ 3.75
Energy Charge, per kWh	\$.0271

¹ Purchased Power Adjustment reflected in proposed rates.

Text of proposed rule and any required statements and analyses may be obtained from: Anne B. Cahill, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 390-8036, E-mail: secretarys.office@nypa.gov

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

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

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

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

Power Authority of the State of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates for the Sale of Power and Energy

I.D. No. PAS-52-07-00011-P

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

Proposed action: Revision in rates for City of Sherrill.

Statutory authority: Public Authorities Law, section 1005(5)

Subject: Rates for the sale of power and energy.

Purpose: To maintain the system's fiscal integrity; this increase in rates is not the result of a Power Authority rate increase to the city.

Substance of proposed rule:

CITY OF SHERRILL
Proposed Monthly Rates

	Proposed Rates ¹
Residential S.C. 1	
Customer Charge	\$ 5.05
Energy Charge, per kWh	
First 1,750 kWh	\$.0408
Over 1,750 kWh only	\$.0501
S. Commercial S.C. 2	
Customer Charge	\$ 6.50
Energy Charge, per kWh	\$.0425
L. Commercial S.C. 3	
Demand Charge, per kW	\$ 3.75
Energy Charge, per kWh	\$.0301
Outdoor Lighting S.C. 4	
(Charge per Lamp, per month)	
100 High Pressure Sodium	\$ 4.95
150 High Pressure Sodium	\$ 7.09

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Waiver by the Town of Milan (Dutchess County)

I.D. No. PSC-52-07-00002-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition from the Town of Milan (Dutchess County) for a waiver of sections 894.1 through 894.4(b)(2) of the commission's rules to expedite the franchising process between the Town of Milan and Cablevision of Wappingers Falls, Inc.

Statutory authority: Public Service Law, section 222

Subject: Waiver by the Town of Milan (Dutchess County).

Purpose: To allow the Town of Milan (Dutchess County) to expedite the franchising process with Cablevision of Wappingers Falls, Inc.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Milan (Dutchess County) for a waiver of Sections 894.1 through 894.4(b)(2) of the Commission's rules to expedite the franchising process between the Town of Milan and Cablevision of Wappingers Falls, 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-V-1391SA1)

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

Complaint Regarding Alleged Misuse of Proprietary Information by Cable Telecommunications Association of New York, et al.

I.D. No. PSC-52-07-00003-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 grant or deny, in whole or part, the Oct. 30, 2007 complaint filed by Cable Telecommunications Association of New York and Cablevision Lightpath, Inc. against Verizon New York Inc. (Verizon) for alleged misuse of proprietary information in processing carrier change orders.

Statutory authority: Public Service Law, sections 24, 25, 91(3), 94(2), 96 and 97(2)

Subject: Complaint regarding alleged misuse of proprietary information by Verizon in processing carrier change orders.

Purpose: To consider complaint regarding alleged misuses of proprietary information by Verizon in processing carrier change orders.

Substance of proposed rule: The Commission is considering whether to grant or deny, in whole or part, the Oct. 30, 2007 complaint filed by Cable Telecommunications Association of New York and Cablevision Lightpath, Inc. against Verizon New York Inc. (Verizon) for alleged misuse of proprietary information in processing carrier change orders.

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. Brillong, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(07-C-1288SA1)

merchandise awarded at the wheel or, if donated, its current retail price. When a total of [\$1,000] \$10,000 in prizes has been awarded at a merchandise wheel, the merchandise wheel must be closed (see section 5622.12 of this Subchapter). It will not be necessary to file the inventory control sheet with form GC-7B.

Text of proposed rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, e-mail: info@racing.state.ny.us

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

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

Consensus Rule Making Determination

Board staff has determined that no person is likely to object to the rule as written because it merely implements or conforms to non-discretionary statutory provisions of the General Municipal Law.

The rulemaking will amend section 5620.10 of subtitle T of 9E NYCRR to conform with amendments to the General Municipal Law that were enacted under Chapter 177 of the Laws of 1994. These non-discretionary statutory provisions are found in General Municipal Law Sec. 189(6).

The non-discretionary statutory provision increases the maximum dollar amount of prizes that can be awarded during the play of a merchandise wheel, before the wheel must be closed, from \$1,000 to \$10,000.

Job Impact Statement

The New York State Racing and Wagering Board has determined that the rule will have no substantial adverse impact on jobs and employment opportunities, as is apparent from the nature and purpose of the rule. Merchandise wheels will now have a higher limit on the amount of merchandise which can be given away in prizes before the wheel must be closed. The maximum prize limit is being raised from \$1,000 to \$10,000. This change may slightly increase the amount of money raised by charitable organizations in fundraising and may benefit the charitable organizations, however, this rule will neither add jobs nor have a substantial adverse impact on jobs. Merchandise wheels may only be conducted by volunteers and General Municipal Law 189(11) prohibits any person from receiving remuneration for participating in the management or operations of any game of chance, including merchandise wheels, therefore, there will be no significant impact on jobs.

Department of State

**EMERGENCY
RULE MAKING**

Administration and Enforcement of the Uniform Fire Prevention and Building Code (UFPBC) with Respect to Facilities to be Included in the Statewide Wireless Network

I.D. No. DOS-39-07-00010-E

Filing No. 1359

Filing date: Dec. 6, 2007

Effective date: Dec. 6, 2007

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

Action taken: Amendment of sections 1201.2(d) and 1204.1; addition of section 1204.3(f)(4) and (h)(3); renumbering of section 1204.3(i) to section 1204.3(l); and addition of section 1204.3(i), (j) and (k) to Title 19 NYCRR.

Statutory authority: Executive Law, section 381

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

Specific reasons underlying the finding of necessity: This rule is adopted as an emergency measure to preserve the public safety and general welfare and because time is of the essence. This rule clarifies an existing rule, which provides that the State is accountable for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to buildings, premises and equip-

Racing and Wagering Board

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

Merchandise Wheels

I.D. No. RWB-52-07-00007-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 5620.10(d) of Title 9 NYCRR.

Statutory authority: General Municipal Law, sections 188-a and 189(6)

Subject: Merchandise wheels and the maximum dollar amount of prizes that can be awarded before the wheel must be closed.

Purpose: To amend the board's games of chance rules and regulations to conform with an amendment to the General Municipal Law that was enacted under chapter 177 of the Laws of 1994. This statutory amendment increased the maximum dollar amount of prizes that can be awarded during the play of merchandise wheels, before the wheel must be closed, from \$1,000 to \$10,000.

Text of proposed rule: Subdivision (d) of Section 5620.10 of 9 NYCRR is amended to read as follows:

(d) Control sheet. Each merchandise wheel shall have an inventory control sheet which shall indicate the cost to the licensee of each item of

ment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority, by expressly providing that the State will be responsible for administration and enforcement of the Uniform Code with respect to facilities to be included in the Statewide Wireless Network to be established and implemented by the Office for Technology. Adoption of this rule on an emergency basis preserves the public safety and general welfare by clarifying the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network, and thereby permitting the immediate commencement of the review and permitting process incidental to the construction and implementation of the Statewide Wireless Network.

Subject: Accountability for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Purpose: To clarify that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Text of emergency rule: Subdivision (d) of section 1201.2 of Title 19 NYCRR is amended to read as follows:

(d) (1) The State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority.

(2) Without limiting the generality of the provisions of paragraph (1) of this subdivision, the State shall be accountable for administration and enforcement of the Uniform Code with respect to all statewide wireless network facilities (as that term is defined in subdivision (j) of section 1204.3 of Part 1204 of this Title) and all activities related thereto undertaken by the Office for Technology; provided, however, that nothing in this paragraph shall be construed as subjecting to the provisions of the Uniform Code any statewide wireless network facility that would not otherwise be subject to the provisions of the Uniform Code.

(3) In the case of a statewide wireless network facility (as that term is defined in subdivision (j) of section 1204.3 of Part 1204 of this Title) which is constructed or installed on or in a statewide wireless network supporting building (as that term is defined in subdivision (k) of section 1204.3 of Part 1204 of this Title):

(i) the State shall be accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network facility and all activities related thereto undertaken by the Office for Technology, but the State shall not be accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building;

(ii) the governmental entity that would have been accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building if such statewide wireless network facility had not been constructed or installed thereon or therein shall remain accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building, but such governmental entity shall not be responsible for administration and enforcement of the Uniform Code with respect to such statewide wireless network facility; and

(iii) the State and such governmental entity shall consult with each other and fully cooperate with each other in connection with the performance of their respective administrative and enforcement obligations, and in particular, but not by way of limitation, the State shall make all records in its possession pertaining to such statewide wireless network facility available to such governmental entity upon request by such governmental entity, and such governmental entity shall make all records in its possession pertaining to such statewide wireless network supporting building available to the State upon request by the State. Nothing in this paragraph shall require the State to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency (as that term is defined in subdivision (h) of section 1204.3 of Part 1204 of this Part) to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.

Section 1204.1 Title 19 NYCRR is amended to read as follows:

Section 1204.1 Introduction. Section 381 of the Executive Law directs the Secretary of State to promulgate rules and regulations prescribing minimum standards for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (Uniform Code). Sec-

tion 1201.2(d) of this Title provides that the State shall be accountable for administration and enforcement of the Uniform Code with respect to:

(a) buildings, premises, and equipment in the custody of, or activities related thereto undertaken by, a State agency, and

(b) all statewide wireless network facilities and all activities related thereto undertaken by the Office for Technology.

This Part establishes procedures for the administration and enforcement of the Uniform Code by state agencies. Buildings and structures exempted from the Uniform Code by other preclusive statutes or regulations are not subject to the requirements of this Part.

New paragraph (4) of subdivision (f) of section 1204.3 of Title 19 NYCRR is added to read as follows:

(4) Notwithstanding any other provision of this subdivision to the contrary and without regard to the criteria mentioned in paragraph (3) of this subdivision, for the purposes of this Part the Office for Technology shall be considered to have custody and effective control of all statewide wireless network facilities; provided, however, that nothing in this subdivision shall be construed as subjecting to the provisions of the Code any statewide wireless network facility that would not otherwise be subject to the provisions of the Code; and provided further that for the purposes of this Part, the Office for Technology shall not be considered to have custody or effective control of any statewide wireless network supporting building merely by reason of the construction or installation of any statewide wireless network facility thereon or therein.

New paragraph (3) of subdivision (h) of section 1204.3 of Title 19 of the NYCRR is added to read as follows:

(3) Without limiting the generality of paragraphs (1) and (2) of this subdivision, for the purposes of this Part and for the purposes of Part 1201 of this Title, the term "State agency" shall include the Office for Technology.

Subdivision (i) of section 1204.3 of Title 19 NYCRR is renumbered subdivision (l) and new subdivisions (i), (j), and (k) are added to read as follows:

(i) Statewide wireless network. An integrated statewide communications system intended to link state and local first responders to each other and to allow state and local first responders to communicate reliably during emergency situations, as contemplated by section 402(1)(a) of the State Technology Law. The term statewide wireless network shall include such communications system as originally developed and constructed and as thereafter extended, improved, upgraded, or otherwise modified from time to time.

(j) Statewide wireless network facility. Any tower, antenna, or equipment which is used or intended to be used in the operation of the statewide wireless network, and any building or structure which is constructed specifically for the purpose of supporting or containing any such tower, antenna, or equipment.

(k) Statewide wireless network supporting building. A building or structure which is not a statewide wireless network facility (i.e., which was not constructed specifically for the purpose of supporting or containing a tower, antenna, or equipment which is used or intended to be used in the operation of the statewide wireless network), but which has a statewide wireless network facility constructed or installed thereon or therein. For example, if a tower, antenna, and equipment used or intended to be used in the operation of the statewide wireless network, and a building or structure which will contain such equipment or support such tower, are constructed on the top of an existing office building, then:

(1) such office building would be a statewide wireless network supporting building;

(2) such office building would not be a statewide wireless network facility; and

(3) the tower, antenna, equipment, and building or structure constructed on the top of such office building would be a statewide wireless network facility.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. DOS-39-07-00010-EP, Issue of September 26, 2007. The emergency rule will expire February 3, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: joseph.ball@dos.state.ny.us

Regulatory Impact Statement

1. STATUTORY AUTHORITY.

The statutory authority for this rule is section Executive Law section 381(1), which provides that the Secretary of State shall promulgate rules

and regulations prescribing minimum standards for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code"), and Executive Law section 381(2), which provides that every local government shall administer and enforce the Uniform Code "(e) except as may be provided in regulations of the secretary"

2. LEGISLATIVE OBJECTIVES.

"In general, section 381 of the Executive Law directs that the State's cities, towns and villages administer and enforce the New York State Uniform Fire Prevention and Building Code (Uniform Code). However, the statute contemplates the need for alternative procedures for certain classes of buildings based upon their design, construction, ownership, occupancy or use, and authorizes the Secretary of State to establish those procedures. . . ." 19 NYCRR section 1201.1.

Rules and regulations previously adopted by the Secretary of State pursuant to Executive Law section 381(2) provide that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority.

This rule will clarify that the State is accountable for administration and enforcement of the Uniform Code with respect to facilities in the Statewide Wireless Network to be constructed and implemented by the Office for Technology.

3. NEEDS AND BENEFITS.

The existing policy of this State, as reflected in the existing rules and regulations, is that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority. This rule will clarify that this policy shall apply to facilities in the Statewide Wireless Network to be constructed and implemented by the Office for Technology.

This rule will also address the situation that will arise when a governmental agency other than the State (a local government, in most cases) is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure, and a Statewide Wireless Network facility is to be constructed or installed in or on such building or structure. This rule will provide that in such a case: (1) the local government will continue to have responsibility for administration and enforcement of the Uniform Code with respect to the building or structure; (2) the State will be responsible for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facility to be constructed on installed in or on the building or structure; and (3) the local government and the State must consult and cooperate with each other with respect to their respective administrative and enforcement responsibilities, and must make their records available to each other on request. The rule would provide that the State would not be required to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.

It is appropriate that the State have the responsibility for administration and enforcement of the Uniform Code with respect to the facilities that will be part of the Statewide Wireless Network. This will simplify and streamline the permitting process for all Statewide Wireless Network facilities to be constructed throughout the State. However, it may not be clear that the Office for Technology is a "department, bureau, commission, board or authority," as that phrase is currently used in 19 NYCRR section 1201.2(d), and it may not be clear that all facilities in the Statewide Wireless Network will be in the "custody" of the Office for Technology, as that term is currently used in 19 NYCRR section 1201.2(d). Since Statewide Wireless Network facilities will be constructed in numerous communities throughout the State, it is appropriate to provide those communities, as well as the Office for Technology, with a clear indication of the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facilities.

4. COSTS.

a. Cost to regulated parties for the implementation of and continuing compliance with this rule: This rule imposes no obligation on any private party.

b. Costs to the Department of State: The Department of State anticipates that it will incur no costs as a result of this rule.

c. Costs to other State agencies: This rule will clarify that the State will be responsible for administration and enforcement of the Uniform Code

with respect to Statewide Wireless Network facilities. The Department of State anticipates that the Office of General Services ("OGS") will be the construction-permitting agency for Statewide Wireless Network facilities. The Department of State views this aspect of this rule more as a clarification of existing rules and regulations, rather than the creation of a new obligation that OGS would not otherwise have.

The Office for Technology will be required to comply with the Uniform Code in constructing any Statewide Wireless Network facility that is subject to the Uniform Code. However, this obligation exists under existing law and regulation, and not by reason of this rule.

d. Cost to local governments: This rule will require local governments having the responsibility for administration and enforcement of the Uniform Code with respect to buildings and structures to consult and cooperate with the State, and to make their records available to the State, when a Statewide Wireless Network facility is constructed or installed in or on any such building or structure. However, the Department of State anticipates that existing staff in the code enforcement offices of the affected local governments will be able to provide the required consultation and cooperation, and the Department of State anticipates that this part of this rule will impose little or no new costs on local governments.

5. PAPERWORK.

This rule will clarify that the State, rather than local governments, will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State anticipates that the amount of paperwork that will be required if the State is responsible for administration and enforcement of the Uniform Code will be no greater than the paperwork that would be required if local governments were given that responsibility.

6. LOCAL GOVERNMENT MANDATES.

As stated in subparagraph 4 (d) (Costs to local governments) of this Regulatory Impact Statement, this rule will require local governments having the responsibility for administration and enforcement of the Uniform Code with respect to buildings and structures to consult and cooperate with the State, and to make their records available to the State, when a Statewide Wireless Network facility is constructed or installed in or on any such building or structure. However, the Department of State anticipates that existing staff in the code enforcement offices of the affected local governments will be able to provide the required consultation and cooperation.

7. DUPLICATION.

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

8. ALTERNATIVES.

Making local governments, and not the State, responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities was considered but rejected for the reasons set forth in the Regulatory Impact Statement. The Department of State has not considered any other alternative to this rule.

9. FEDERAL STANDARDS.

The Department of State is not aware of any instance in which this rule exceeds any minimum standards of the federal government for the same or similar subject areas.

10. COMPLIANCE SCHEDULE.

This rule can be complied with immediately. The Office of General Services has the ability to act as the construction-permitting agency, and should be able to begin the required permitting process with little or no delay.

Regulatory Flexibility Analysis

1. EFFECT OF RULE.

This rule does not apply directly to any business. However, to the extent that any business becomes involved in the Uniform Code permitting process incidental to construction of any Statewide Wireless Network facility, such business will be indirectly affected by this rule, since this rule will provide that the State will be responsible for such permitting.

This rule will affect local governments in municipalities in which Statewide Wireless Network facilities are to be constructed, since this rule will clarify that the State, and not the local government, will be responsible for administration and enforcement of the Uniform Code with respect to such Statewide Wireless Network facilities.

This rule will provide that when a local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and a Statewide Wireless Network facility is constructed or installed in or on such building or structure, (1) the local government will retain the responsibility for administration and enforce-

ment of the Uniform Code with respect to the building or structure, (2) the State will have responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facility constructed on installed in or on such building or structure, and (3) the local government and the State will be required to consult and cooperate with each other in connection with the performance of their respective administrative and enforcement obligations, and to make records available to each other upon request. (The rule will provide that the State would not be required to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.)

2. COMPLIANCE REQUIREMENTS.

Any business involved in the construction of any Statewide Wireless Network facility will be required to comply with the Uniform Code (to the extent that the Uniform Code applies to such facility). However, that requirement exists under current law, not by reason of this rule. This rule will clarify that the State will be responsible for administration and enforcement of the Uniform Code with respect to such facility; this rule will not impose any new compliance requirement on any business.

This rule will clarify that the State, and not local governments, will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. This part of the rule imposes no compliance requirements on local governments. This rule will provide that a local government that is responsible for administration and enforcement of the Uniform Code with respect to a building or structure shall retain such responsibility even if a Statewide Wireless Network facility is constructed or installed in or on such building or structure. This part of the rule imposes no new compliance requirements on local governments.

This rule will require a local government to consult and cooperate with the State, and to make its records available to the State, when the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and a Statewide Wireless Network facility is constructed or installed in or on such building or structure.

3. PROFESSIONAL SERVICES.

This rule imposes no new compliance requirements on businesses. Therefore this rule creates no new reporting, recordkeeping, or other requirements for business which would require professional services.

A local government will be required to consult and cooperate with the State, and to make its records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that existing staff in the code enforcement office of the local government will be able to provide the necessary consultation and cooperation. Therefore, except for such professional services as may be provided by existing staff, the Department of State anticipates that local governments will not require professional services to comply with this rule.

4. COMPLIANCE COSTS.

This rule imposes no new compliance requirements on businesses. Therefore this rule creates no new compliance costs for businesses.

This rule requires a local government to consult and cooperate with the State, and to make records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that existing staff in the code enforcement office of the local government will be able to provide the necessary consultation and cooperation. Therefore, the Department of State anticipates that local governments will incur little or no additional costs in complying with this consultation and cooperation requirement.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

The Department of State anticipates that the Office of General Services will serve as the construction-permitting agency in connection with the State's obligation to administer and enforce the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State believes that the permitting process incidental to the construction of a Statewide Wireless Network will be facilitated and simplified if that process is centralized in a single State agency. Therefore, to the extent that any small

business becomes involved in the permitting process, this rule should enhance the economic and technological feasibility of compliance with the permitting requirements by such business.

The Department of State anticipates that existing staff in the code enforcement offices of local governments will be able to provide the consultation and cooperation that this rule will require when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that it will be economically and technologically feasible for local governments to comply with this rule.

6. MINIMIZING ADVERSE IMPACT.

This rule imposes no new obligation on businesses of any size. Accordingly, this rule makes no special provisions for small businesses.

This rule requires a local government to consult and cooperate with the State, and to make records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. Since such consultation and cooperation is essential to proper administration and enforcement of the Uniform Code and, accordingly, essential to public safety, it is not feasible to exempt local governments from this rule. However, the Department of State anticipates that existing staff in the code enforcement offices of local governments will be able to provide the necessary consultation and cooperation, and the Department of State anticipates that local governments will incur little or no additional costs in complying with this consultation and cooperation requirement.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

The Department of State has solicited comments from the Office for Technology and the Office of General Services.

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices published in *Building New York*, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule clarifies that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to facilities to be included in the Statewide Wireless Network to be established by the Office for Technology. This rule will apply uniformly throughout the State, including all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

This rule creates no new reporting, record keeping, or compliance requirement for any business. In particular, this rule creates no new reporting, record keeping, or compliance requirement for businesses located in rural areas.

Local governments that are responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure will be required to consult and cooperate with the State, and to make its records available to the State, when a Statewide Wireless Network facility is constructed in or on such building or structure. This requirement will apply to all local governments, including local governments located in rural areas.

3. COSTS.

The Department of State anticipates that this rule will impose no new cost on any business. In particular, the Department of State anticipates that this rule will impose no new cost on businesses located in rural areas.

The Department of State anticipates that local governments, including local governments located in rural areas, will be able to use existing staff in their code enforcement offices to fulfill the consulting and cooperation requirements described in Section 2 (Reporting, recordkeeping and other compliance requirements) of this Rural Area Flexibility Analysis. Therefore, the Department of State anticipates that local governments, including local governments located in rural areas, will incur little or no additional costs in complying with this rule.

4. MINIMIZING ADVERSE IMPACT.

For the reasons discussed in Section 3 (Costs) of this Rural Area Flexibility Analysis, the Department of State anticipates that this rule will have little or no adverse impact on any business or local government. In particular, the Department of State anticipates that this rule will have little or no adverse impact on businesses or local governments located in rural areas. Accordingly, this rule makes no special provisions for regulated parties located in rural areas.

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices published in *Building New York*, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities.

This rule amends the existing regulation that provides that the State shall be accountable for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the Uniform Code) with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority, and adds definitions of new terms. The purpose of this rule is to clarify that the State shall have responsibility for administration and enforcement of the Uniform Code with respect to facilities to be included in the statewide wireless network to be established by the Office for Technology.

This rule will simply clarify the responsibility for administration and enforcement of the Uniform Code with respect to the statewide wireless network. It is anticipated that rule will have no adverse impact on jobs or employment opportunities related to the construction of the statewide wireless network. Rather, by providing that all review and permitting responsibilities will be vested in a single permitting agency, this rule should streamline the construction process, which may have a beneficial impact on jobs and employment opportunities related to the construction of the statewide wireless network.

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

Qualifying Experience and Education for Real Estate Appraisers

I.D. No. DOS-52-07-00005-E

Filing No. 1357

Filing date: Dec. 6, 2007

Effective date: Jan. 1, 2008

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

Action taken: Amendment of sections 1103.1, 1103.3(f), 1103.7, 1103.10, 1103.12(a), 1103.21, 1103.22(f), 1107.2, 1107.4(b)-(d), 1107.5 and 1107.9; repeal of sections 1103.8, 1103.9, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6, 1105.7 and 1105.8; and addition of new sections 1103.8, 1103.9, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6 and 1105.7 to Title 19 NYCRR.

Statutory authority: Executive Law, section 160-d

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

Specific reasons underlying the finding of necessity: The Federal Appraisal Qualifications Board (AQB), in accordance with the authority granted to said body pursuant to title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser Certification requirements that are no less stringent than those issued by the AQB.

In 2004, the AQB adopted significant revisions to the education requirements for real estate appraisers. States are required to adopt these requirements by January 1, 2008. A failure to do so could result in the State losing Federal recognition of the State program. Legislation was recently passed permitting the Department of State to adopt the required revisions

by rule making. If the rule making is not adopted by January 1, 2008, New York's appraiser program could lose Federal recognition.

If New York were to lose Federal recognition of its appraiser program, federal financial institutions and many state financial institutions would be prohibited from accepting appraisals from New York real estate appraisers. This would include virtually all mortgage and refinance transactions. Appraisers licensed or certified by the State of New York would be prohibited from preparing an appraisal for any such transaction and New York consumers would be forced to go out of state in order to obtain an appraisal. The hardship and disruption for the State's financial community, as well as for buyers and sellers of real estate within the State would be significant.

Subject: Qualifying experience and education for real estate appraisers.

Purpose: To amend current regulations in order to conform said regulations with recent statutory amendments to article 6-E of the Executive Law.

Substance of emergency rule: Section 1103.1 of Title 19 NYCRR is amended to specify the course work and education required for licensure as an appraiser assistant, licensed real estate appraiser and certified real estate appraiser.

Section 1103.3(f) of Title 19 NYCRR is amended to specify that course waivers may only be granted in 15 hour segments.

Section 1103.7 of Title 19 NYCRR is amended to permit the Department of State to approve courses of study for appraiser assistants.

Section 1103.8 of Title 19 NYCRR is repealed and a new section 1103.8 is added to specify the course content and hours of study required for licensure as an appraiser assistant, licensed and certified real estate appraiser.

Section 1103.9 of Title 19 NYCRR is repealed and a new section 1103.9 is added to specify the course content and hours of study required for general real estate appraiser certification.

Section 1103.10 of Title 19 NYCRR is amended to specify the educational requirements for the 15 hour National USPAP course.

Section 1103.12(a) of Title 19 NYCRR is amended to provide that students must physically attend 90 percent of each course offering in order to satisfactorily complete said course.

Sections 1103.21 and 1103.22(f) of Title 19 NYCRR is amended to set forth the registration fees for schools and instructors.

Section 1105.1 of Title 19 NYCRR is repealed and a new section 1105.1 is adopted to permit test providers who are approved by the Appraiser Qualifications Board to administer appraiser examinations in New York State.

Section 1105.2 of Title 19 NYCRR is repealed and a new section 1105.2 is adopted to set forth the procedure for test providers to obtain approval from the Department of State to administer appraiser examinations in New York State.

Section 1105.3 of Title 19 NYCRR is repealed and a new section 1103 is adopted to set forth the procedure and requirements for registering and scheduling exam candidates for appraiser examinations.

Section 1105.4 of Title 19 NYCRR is repealed and a new section 1105.4 is adopted to permit the Department to prescribe New York State specific examination questions.

Section 1105.5 of Title 19 NYCRR is repealed and a new section 1105.5 is adopted to require exam providers to report examination results to the Department of State in such form and manner as prescribed by the Department of State.

Section 1105.6 of Title 19 NYCRR is repealed and a new section 1105.6 is adopted to set forth the procedures associated with suspension and denials of approval to offer appraiser examinations.

Section 1105.7 of Title 19 NYCRR is repealed and a new section 1105.7 is adopted to require test providers to copy the Department of State on any reports sent to the Appraisal Qualifications Board.

Section 1105.8 of Title 19 NYCRR is repealed.

Section 1107.2 of Title 19 NYCRR is amended to specify that licensees must complete 28 hours of approved continuing education every two years, including the 7 hour National USPAP update course in order to renew their license or certification.

Section 1107.4(b)-(d) of Title 19 NYCRR is amended to specify that no more than 14 hours of continuing education credit may be offered for authorship of an appraisal course of study or publication.

Section 1107.5 of Title 19 NYCRR is amended to specify that licensees must complete 28 hours of approved continuing education every two years, including the 7 hour National USPAP update course in order to renew their license or certification.

Section 1107.9 Title 19 NYCRR is amended to remove a dated provision that, for all licenses and certifications expiring on or before December 31, 2003, licensees were required to complete the 15 hour Ethics and Professional Practice Program or a course prescribed by subdivision b of section 1107.9.

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 4, 2008.

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

Regulatory Impact Statement

1. Statutory authority:

Executive Law section 160-d authorizes the New York State Board of Real Estate Appraisal to adopt regulations in aid or furtherance of the statute. One of the purposes of Article 6-E is to ensure that licensed and certified real estate appraisers meet certain minimum requirements for licensure. To meet this purpose, the Department of State, in conjunction with the New York State Board of Real Estate Appraisal, has issued rules and regulations which are found at Parts 1103, 1105 and 1107 of Title 19 NYCRR and is proposing this rule making.

2. Legislative objectives:

Executive Law, Article 6-E, requires the Department of State to license and regulate real estate appraisers. The statute requires prospective licensees to meet certain minimum requirements for licensure, including completion of approved qualifying education. These statutory requirements were changed during the 2007 Legislative Session in order to require the Department of State to implement such minimum requirements for licensure as are imposed on the State by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee will require States to enact such minimum standards for licensure and/or certification. The rule making advances the legislative objective by conforming the education regulations with the requirements of the Appraisal Subcommittee in accordance with the 2007 statutory amendment.

3. Needs and benefits:

The Federal Appraisal Qualifications Board (AQP), in accordance with the authority granted to said body pursuant to Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQP.

In 2004, the AQB adopted significant revisions to the education requirements for real estate appraisers. States are required to adopt these requirements by January 1, 2008. A failure to do so could result in the State losing Federal recognition of the State program.

During the 2007 legislative session, a bill was passed to require the Department to adopt education requirements that are no less stringent than those required by the AQB. If the Department fails to adopt these requirements, the New York appraisal program could lose Federal recognition. This would result in federal financial institutions and many State financial institutions being prohibited from accepting appraisals from New York real estate appraisers. This would include virtually all mortgage and refinance transactions. Appraisers licensed or certified by the State of New York would be prohibited from preparing an appraisal for any such transaction and New York consumers would be forced to go out of state in order to obtain an appraisal. The hardship and disruption for the State's financial community, as well as for buyers and sellers of real estate within the State would be significant.

To ensure that the AQB mandate is met, and to conform the existing education regulations with the statutory amendments, this rule making is necessary.

4. Costs:

a. Costs to regulated parties:

The rule making will not impose any new costs on real estate licensees. Insofar as prospective licensees are already required to complete education in order to qualify for a license, conforming the regulations with the statutory amendments will not result in any additional costs.

b. Costs to the Department of State: The rule does not impose any costs to the agency, the state or local government for the implementation and continuation of the rule.

5. Local government mandates:

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

6. Paperwork:

The rule does not impose any new paperwork requirements. Insofar as prospective licensees are already required to satisfactorily complete qualifying education, conforming the regulations with the recent statutory amendments will not result in additional paperwork requirements.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

No significant alternatives exist to be considered because the Department is required to propose this rule making by Federal mandate.

9. Federal standards:

Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 establishes the Appraisal Qualifications Board (AQP) which establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB. This rule making conforms the education regulations with the required federal standard.

10. Compliance schedule:

Prospective licensees will be required to comply with the rule on January 1, 2008. Insofar as the AQB has conducted outreach to the regulated public about the relevant changes effected by this rule making, licensees and prospective licensees have been notified about the changes and should be able to comply with the rule on its effective date.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to prospective real estate appraisers who are applying for licensure pursuant to Article 6-E of the Executive Law after January 1, 2008. During the 2007 legislative session, a bill was passed to amend Article 6-E of the Executive Law to require the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee will require States to enact certain minimum requirements for licensure and/or certification as a real estate appraiser. The rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate appraisers.

The rule does not apply to local governments.

2. Compliance requirements:

Insofar as the existing statute and regulations already require minimum education and experience requirements for licensure, the rule making will not add any new reporting, recordkeeping or other compliance requirements.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Licensees will not need to rely on any new professional services in order to comply with the rule. Licensees are already required to satisfy minimum education and experience qualifications pursuant to Article 6-E of the Executive Law. Insofar as licensees must already attend and complete approved education courses, conforming the regulations with the statute will not result in the need to rely on any new professional services. The Department expects existing education providers to begin offering new approved courses in accordance with the amended statute and the rule making.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The rule making will not result in any new compliance costs. Prospective licensees are already required to complete, and pay for, qualifying education pursuant to Article 6-E of the Executive Law. Insofar as licensees must already complete and pay for approved education courses, conforming the education regulations with the recent statutory amendments will not result in any new compliance costs.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the rule does not provide any new record keeping requirements on prospective licensees, it will be technologically feasible for these persons to comply with the rule.

6. Minimizing adverse impact:

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or record keeping requirements on licensees and does not require prospective licensees to take any affirmative acts to comply with the rule other than those acts that are already required pursuant to Executive Law, Article 6-E.

7. Small business participation:

Prior to proposing the rule, the Department discussed the proposal at numerous public meetings of the New York State Real Estate Appraisal Board, the minutes of which were posted on the Department's website. The public was given an opportunity to issue comments during the public comment period of these meetings. In addition, the Notice of Proposed Rule Making will be published by the Department of State in the State Register. The publication of the rule in the State Register will provide notice to local governments and additional notice to small businesses of the proposed rule making. Additional comments will be received and entertained.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Article 6-E of the Executive Law was amended during the 2007 legislative session, to, in relevant part, require the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee will require States to enact require certain minimum requirements for licensure and/or certification as a real estate appraiser. The rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. Insofar as the existing statute and regulations already require minimum education and experience requirements for licensure, the rule making will not add any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for licensed or certified real estate appraisers.

During the 2007 legislative session, a bill was passed to amend Article 6-E of the Executive Law. In pertinent part, the bill requires the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee will require State's to enact require certain minimum requirements for licensure and/or certification as a real estate appraiser. This rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate appraisers.

NOTICE OF ADOPTION**Administration and Enforcement of the Uniform Fire Prevention and Building Code**

I.D. No. DOS-39-07-00010-A

Filing No. 1356

Filing date: Dec. 6, 2007

Effective date: Dec. 27, 2007

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

Action taken: Amendment of sections 1201.2(d), 1204.1 and 1204.3 of Title 19 NYCRR.

Statutory authority: Executive Law, section 381

Subject: Accountability for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Purpose: To clarify that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. DOS-39-07-00010-EP, Issue of September 26, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231-0001, (518) 474-6740, e-mail: Joseph.Ball@dos.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Taxation and Finance

NOTICE OF ADOPTION**Annual Sales and Use Tax Returns**

I.D. No. TAF-40-07-00004-A

Filing No. 1369

Filing date: Dec. 11, 2007

Effective date: Dec. 26, 2007

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

Action taken: Amendment of section 533.3(d) and (g)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 1136, subds. (a), (b), (c), and (d); 1142, subds. (1) and (8); 1250 (not subdivided); and 1251, subds. (a), (b), (c) and (d)

Subject: Annual sales and use tax returns.

Purpose: To update the sales and use tax regulations concerning annual returns.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-40-07-00004-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: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax_regulations@tax.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION**Tobacco Products Wholesale Dealers' Informational Returns**

I.D. No. TAF-43-07-00003-A

Filing No. 1370

Filing date: Dec. 11, 2007

Effective date: Dec. 26, 2007

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

Action taken: Addition of Part 90 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 474, subdivision (4); 475, not subdivided.

Subject: Tobacco products wholesale dealers' informational returns.

Purpose: To require wholesale dealers that are not also distributors of tobacco products to file new monthly informational returns with the department detailing their purchases, sales, and prices of such products.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-43-07-00003-P, Issue of October 24, 2007.

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

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax_regulations@tax.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Repurchase Agreements and Securities Lending Agreements held by Registered Securities Brokers and Dealers**I.D. No.** TAF-43-07-00015-A**Filing No.** 1368**Filing date:** Dec. 11, 2007**Effective date:** Dec. 26, 2007 and shall apply to reports required to be filed, without regard to extensions of time to file, on or after Jan. 15, 2008.

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

Action taken: Amendment of sections 3-3.2, 4-4.3 and 6-2.7, renumbering of section 4-4.7 to section 4-4.8 and addition of new section 4-4.7 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; and 1096(a)

Subject: Repurchase agreements and securities lending agreements held by registered securities brokers and dealers.

Purpose: To provide that repurchase agreements and securities lending agreements held by registered securities brokers or dealers may not be considered investment capital so that the income and expenses from these agreements must be included in the computation of business income for such taxpayers.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-43-07-00015-P, Issue of October 24, 2007.

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

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax_regulations@tax.state.ny.us

Assessment of Public Comment

Written comments were received regarding proposal TAF-43-07-00015-P from the Securities Industry and Financial Markets Association (SIFMA). SIFMA states that it brings together the shared interests of more than 650 securities firms, banks and asset managers. The Department also received written comments regarding the proposal from Citigroup, Inc. and The Partnership for New York City.

SIFMA asserts that the proposed rule is inconsistent with the Tax Law and that it would result in a significant increase in tax liability for the securities industry. SIFMA notes that it has submitted an alternative proposal under which income from reverse repurchase agreements and securities borrow agreements (i.e., securities lending agreements from the perspective of the securities borrower) would be treated as investment income.

With respect to its assertion that the proposed rule is inconsistent with the Tax Law, SIFMA contends that "it is clear that under the existing statute a taxpayer's holding of a stock, bond or other security is investment capital as long as the property is not held for sale to customers in the regular course of business" and that "[t]he reverse [repurchase agreement] interest that is created when cash is paid by the buyer of the security in a [repurchase agreement] or the interest that is created when a security is borrowed is cash on hand and on deposit (or deemed cash if such interest is for no longer than six months and one day) in the taxpayer's hands and can be treated as either investment capital or business capital as the taxpayer elects." SIFMA contends, further, that there is no support in statute for addressing registered securities brokers and dealers differently from other taxpayers. The Department has examined repurchase agreements and securities lending agreements and the way they are used in the securities industry over the course of several years. As a result of this examination, the Department has determined that a better interpretation of the Tax Law is that reverse repurchase agreements and securities borrow agreements held by registered securities brokers and dealers do not constitute cash on hand or on deposit and are not investment capital. It is noted that, in interpreting the relevant statutory provisions, it has been a longstanding and well-established practice to examine the parties to the transaction (see, 20 NYCRR 3-3.2[d][1][iv] regarding taxpayers principally involved in the business of lending funds) and the nature of the transaction (see, 20 NYCRR 3-3.2 [d][1][iii] regarding instruments acquired for the sale of goods or services).

SIFMA also disagrees with proposed new section 4-4.7 regarding receipts of registered securities brokers or dealers for purposes of computing the receipts factor of the business allocation percentage under Tax Law section 210.3(a)(9). SIFMA asserts that the proposed rule includes income from repurchase agreements and securities lending agreements in gross

income from principal transactions for purposes of allocation without regard to whether the transaction involves the purchase or sale of such assets. SIFMA also maintains that interest expense should not be considered a cost of the securities in determining gross income and that there is no support for the position that interest expense from the transactions may not exceed interest income. As to the first point, SIFMA might be misreading the proposed rule. The proposed rule is not referring to the purchase or sale of repurchase agreements and securities lending agreements but to the purchase or sale of the underlying securities that are transferred pursuant to such agreements. Furthermore, the Department believes it to be a proper interpretation of the statute to include the interest expenses as a cost and to not allow gross income to be reduced below zero for purposes of calculating the receipts factor.

With respect to SIFMA's assertion that the proposed rule would result in a significant tax liability increase for the securities industry, it is noted that SIFMA did not submit any estimates or documentation in support of this position. It is further noted that the Regulatory Impact Statement (RIS) submitted with the proposed rule acknowledged that the change in interpretation may have a tax liability impact on particular taxpayers depending on their individual circumstances. It is also acknowledged that the liability of taxpayers under this proposal would be greater than the liability that would be calculated under a methodology that treats the income as investment income and does not properly match expenses to income. However, as stated in the RIS, "[t]he Department has determined that ultimately there is no measurable tax liability impact on an industry-wide basis between the interpretation of the current rule, with a proper matching of expenses to income, and this rule." The Department has not received information that would change this assessment. Moreover, the rule sets forth what the Department believes is a better interpretation of the statute.

Under SIFMA's alternative proposal, income from reverse repurchase agreements and securities borrow agreements would be treated as investment income to the extent of the lesser of 0.15% (15 basis points) of the average amount of these transactions or 35% of the taxpayer's entire net income. This alternative does not take into account a taxpayer's actual income and expenses from this activity. Furthermore, it treats the income from reverse repurchase agreements and securities borrow agreements as investment income. The Department does not believe this treatment is appropriate.

Citigroup urges the Department to withdraw the proposed rule and asserts that the provisions that the repurchase agreements and securities lending agreements held by registered securities brokers and dealers constitute business capital are contrary to law. As discussed, the Department believes that the rule represents a proper interpretation of the statutory provisions. Citigroup estimates that the industry-wide additional tax liability under the rule would be fifty million dollars when compared to a calculation using a proper matching of expenses to income. It appears that these estimates presume that income from securities lending agreements would have been previously treated as investment income. The Department does not agree with this position. Moreover, Citigroup does not provide sufficient information to confirm its estimates or to change the assessment in the RIS for the proposed rule. Citigroup also urges consideration of the industry proposal discussed above. Again, the Department does not believe the treatment in the alternative proposal is appropriate.

The Partnership for New York City urges the Department to withdraw the proposed rule and work with the financial services industry to develop an approach that would facilitate both administration and compliance using the alternative proposal developed by the financial services industry. The Department has worked with the industry and reviewed their alternative proposal. As discussed in the previous paragraphs, the Department does not believe the industry's alternative proposal is appropriate.

No changes were made to the rule as a result of these comments.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Out-of-State Resale Permits****I.D. No.** TAF-52-07-00009-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 sections 526.6(c)(2), 528.23(b); and repeal of section 532.6 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 1142, subds. (1) and (8); and 1250 (not subdivided)

Subject: Out-of-state resale permits.

Purpose: To repeal obsolete out-of-state resale permit provisions from the sales and compensating use tax regulations.

Text of proposed rule: Section 1. Paragraph (2) of subdivision (c) of section 526.6 of the regulations is amended to read as follows:

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See [sections] section 532.4 [and 532.6] of this Title.

Section 2. The cross-reference in subdivision (b) of section 528.23 of the regulations is REPEALED.

Section 3. Section 532.6 of the regulations is REPEALED.

Text of proposed rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax_regulations@tax.state.ny.us

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

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

Consensus Rule Making Determination

The Department of Taxation and Finance has determined that no person is likely to object to the adoption of this rule as written because these amendments merely repeal regulatory provisions that are no longer applicable to any person and make other technical changes that are not controversial in nature. That is, this rule simply repeals obsolete section 532.6, "Out-of-state resale permit," of the sales and compensating use tax regulations and two dated references to this section found in sections 526.6(c)(2) and 528.23(b). The Department discontinued issuing its out-of-state resale permits in 1998. At that time, holders of ST-128s (Out-of-State Resale Permits) were advised that the Department would continue to recognize such permits until their expiration dates. These permits were valid for a period of two years, the last of which expired in March or April of 2000.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter that the rule will have no impact on jobs or employment opportunities in this State. The rule simply deletes outdated information from the sales and compensating use tax regulations.