

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Asian Long Horned Beetle Quarantine

**I.D. No.** AAM-22-07-00004-E

**Filing No.** 486

**Filing date:** May 11, 2007

**Effective date:** May 11, 2007

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

**Action taken:** Amendment of Part 139 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 164 and 167

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

**Specific reasons underlying the finding of necessity:** The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, was first detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities detected infestations of this pest in other areas of Brooklyn as well as in and about Amityville, Queens and Manhattan. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are

described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to establish a quarantine area on Staten Island. This rule contains the needed modification.

The Asian Long Horned Beetle (ALB) is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they overwinter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); and Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash), Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 8,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 350,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the quarantine imposed by this rule has been determined to be the most effective means of preventing the spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

Based on the facts and circumstances set forth above the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately modify the quarantine area and restrict the movement of trees and materials from the areas of the State infested with

Asian Long Horned Beetle could result in the spread of the pest beyond those areas and damage to the natural resources of the State and could result in a federal quarantine and quarantines by other states and foreign countries affecting the entire State. This would cause economic hardship to the nursery and forest products industries of the State. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare. Given the potential for the spread of the Asian Long Horned Beetle beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule modifying the quarantine area should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

**Subject:** Firewood (all hardwood species), nursery stock, logs, green lumber, stumps, roots, branches and debris of a half inch or more in diameter of the following trees: maple, horse chestnut, silk tree or mimosa, birch, poplar, willow, elm, hackberry, ash, plane tree or sycamore, and mountain ash.

**Purpose:** To modify the Asian Long Horned Beetle quarantine to prevent the spread of the beetle to other areas.

**Text of emergency rule:** Section 139.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new subdivision (d) to read as follows:

*(d) That area in the Borough of Richmond in the City of New York bound by a line beginning at a point along the State of New York and the State of New Jersey border due north of the intersection of Richmond Terrace and South Avenue; then south to the intersection of South Avenue and Richmond Terrace; then south along South Avenue to its intersection with Fahy Avenue; then east along Fahy Avenue to Arlene Street; then south along Arlene Street until it becomes Park Drive North; then south on Park Drive North to its intersection with Rivington Avenue; then east along Rivington Avenue to the intersection of Mulberry Avenue; then south on Mulberry Avenue to its intersection with Travis Avenue; then northwest on Travis Avenue until it crosses Main Creek; then along the west shoreline of Main Creek to Fresh Kills Creek; then along the north shoreline of Fresh Kills Creek to Little Fresh Kills Creek; then along the north shoreline of Little Fresh Kills Creek to the Arthur Kill; then west to the border of the State of New York and the State of New Jersey in the Arthur Kill; then north along the borderline of the State of New York and the State of New Jersey to the point of beginning.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire August 8, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert J. Mungari, Director, Division of Plant Industry, Department of Agriculture and Markets, 10 B Airline Dr., Albany, NY 12235, (518) 457-2087

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Said Section also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

##### 2. Legislative objectives:

The quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Asian Long Horned Beetle.

##### 3. Needs and benefits:

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States was detected in the Greenpoint

section of Brooklyn, New York in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, Queens and Manhattan.

As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to establish a new quarantine area on Staten Island. The proposed rule contains the needed modifications.

The Asian Long Horned Beetle (ALB) is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they overwinter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); and Ulmus (Elm); Celtis (Hackberry); Fraxinus (Ash), Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 8,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 350,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the quarantine imposed by this rule has been determined to be the most effective means of preventing the spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

##### 4. Costs:

(a) Costs to the State government: none.

(b) Costs to local government: none.

(c) Costs to private regulated parties:

Nurseries exporting host material from the quarantine area, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.

Most shipments will be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the quarantine area may not move outside that area due to the fact that it is not practical at this time to

determine for certification purposes that the material is free from infestations.

The establishment of a quarantine area on Staten Island would affect 15 nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area.

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None.

(ii) It is anticipated that the Department will be able to administer the proposed quarantine with existing staff.

5. Local government mandate:

Yard waste, storm clean-up and normal tree maintenance activities involving twigs and/or branches of ½" or more in diameter of host species will require proper handling and disposal, *i.e.*, chipping and/or incineration if such materials are to leave the area under quarantine. An effort is underway to identify centralized disposal sites that would accept such waste from cities, villages and other municipalities at no additional cost.

6. Paperwork:

Regulated articles inspected and certified to be free of Asian Long Horned Beetle moving from quarantine area will have to be accompanied by a state or federal phytosanitary certificate and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The failure of the State to establish the quarantine on Staten Island where the Asian Long Horned Beetle has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Asian Long Horned Beetle that could result from the unrestricted movement of regulated articles from the areas covered by the modified quarantine. In light of these factors there does not appear to be any viable alternative to the modification of quarantine proposed in this rulemaking.

9. Federal standards:

The amendment does not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the rule immediately.

#### **Regulatory Flexibility Analysis**

1. Effect on small business:

The small businesses affected by the establishment of a quarantine area on Staten Island are the nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area. It is estimated that there are 15 such businesses within that area. The local governments involved in the proposed establishment of the quarantine area are the City of New York and the borough of Staten Island.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same quarantine requirements as other regulated parties.

2. Compliance requirements:

All regulated parties in the quarantine area on Staten Island established by this amendment will be required to obtain certificates and limited permits in order to ship regulated articles from that quarantine area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

3. Professional services:

In order to comply with the rule, small businesses and local governments shipping regulated articles from the quarantine area on Staten Island will require professional inspection services, which would be provided by the Department and the USDA.

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule:

Nurseries exporting host material from the quarantine area on Staten Island, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most such inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most

shipments would be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the quarantine area may not move outside that area due to the fact that it is not practical at this time to determine for certifications purposes that the material is free from infestation.

Local governments shipping regulated articles from the modified quarantine areas would incur similar costs.

5. Minimizing adverse impact:

The Department has designed the rule to minimize adverse economic impact on small businesses and local governments. This is done by limiting the quarantine area to only parts of Staten Island where the Asian Long Horned Beetle has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Asian Long Horned Beetle and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

6. Small business and local government participation:

The Department has contacted various representatives of nurseries, arborists, the forestry industry, and local government to discuss the quarantine. It has also had extensive consultation with the United States Department of Agriculture.

The Department is involved in a continuing outreach program involving all of the parties affected by the proposed amendment. The amendment has been discussed with the members of the Department's Plant Industry Advisory Committee, which includes representatives of the various types of regulated parties affected by the rule. In addition, a press release was issued at the time the original quarantine was imposed announcing the steps the State is taking to address the problem presented by the Asian Long Horned Beetle. Department representatives also attended a public meeting in Brooklyn, New York at which these issues were discussed and input was received. This outreach program will continue.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping host materials from the quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, will be made pursuant to compliance agreements for which there is no charge.

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

The rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the quarantine area established by this rule is situated on Staten Island, which does not fall within the definition of "rural areas" set forth in section 481(7) of the Executive Law.

#### **Job Impact Statement**

The rule will not have a substantial adverse impact on jobs and employment opportunities. The establishment of a quarantine area on Staten Island is designed to prevent the spread of the Asian Long Horned Beetle to other parts of the State. A spread of the infestation would have very adverse economic consequences to the nursery, forestry, fruit and maple product industries of the State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government, other states and foreign countries. By helping to prevent the spread of the Asian Long Horned Beetle, the rule will help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry, fruit and maple product industries.

Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated

with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

As set forth in the regulatory impact statement, the cost of the rule to regulated parties is relatively small. The responses received during the Department's outreach to regulated parties indicate that the rule will not have a substantial adverse impact on jobs and employment opportunities.

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## Department of Audit and Control

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### NOTICE OF ADOPTION

#### State-Administered Defined Contribution Service Award Programs for Volunteer Firefighters

**I.D. No.** AAC-12-07-00002-A

**Filing No.** 490

**Filing date:** May 15, 2007

**Effective date:** May 23, 2007

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

**Action taken:** Addition of Part 154 to Title 2 NYCRR.

**Statutory authority:** General Municipal Law, §§ 214, 215, 216, 216-a, 216-b, 216-c, 217, 217-a 218 and 219-a; and L. 2006, ch. 714, section 13

**Subject:** State-administered defined contribution service award programs for volunteer firefighters.

**Purpose:** To specify the procedures for the adoption and administration of State-administered defined contribution service award programs for volunteer firefighters and for the transfer to State administration of existing locally-administered defined contribution service award programs for volunteer firefighters.

**Substance of final rule:** Section 154.1 describes the scope of Part 154, covering State-administered defined contribution service award programs for volunteer firefighters. A political subdivision may adopt a new defined contribution volunteer firefighter service award program to be administered by the State or may transfer to the State the responsibility for administering an existing defined contribution volunteer firefighter service award program previously administered locally, subject to the requirements of Part 154.

Section 154.2 defines terms used in Part 154.

Section 154.3 sets forth the requirements for a local government Sponsor to notify the Comptroller of the adoption of a new State-administered defined contribution volunteer firefighter service award program or the transfer of an existing defined contribution volunteer firefighter service award program from local administration to State administration.

Section 154.4 provides for the execution of an Adoption or Transfer Agreement between a local government Sponsor and the State. The Adoption or Transfer Agreement will cover the obligations of each local government Sponsor and set forth the locally-determined features of the State-administered defined contribution volunteer firefighter service award program.

Section 154.5 authorizes the collection of personal identifying information necessary for the administration of the program and requires that such information be protected from unlawful disclosure.

Section 154.6 provides procedures for the determination of service credit and the payment of contributions therefor.

Section 154.7 provides procedures for the determination of optional prior service credit for up to five years prior to the commencement of a defined contribution service award program and permits prior service costs to be paid in a lump sum or in annual installments over five years.

Section 154.8 provides procedures for the distribution of State-administered defined contribution volunteer firefighter service awards when a participant becomes eligible for such an award.

Section 154.9 provides procedures for a local government Sponsor to notify the Administrator of an amendment to a State-administered defined contribution volunteer firefighter service award program consistent with the provisions of General Municipal Law Article 11-A or the termination

of State administration of a defined contribution volunteer firefighter service award program.

Section 154.10 provides for the Comptroller to serve as Administrator of State-administered service award programs or to retain an administrative service agency or a financial organization to administer all or any part of a defined contribution volunteer firefighter service award program, and specifies the duties of the Administrator.

Section 154.11 makes the Administrator responsible for the preparation of a program document setting forth the rights and obligations of Sponsors and participants and the procedures for administration of State-administered defined contribution volunteer firefighter service award programs.

Section 154.12 requires the Administrator to make reports to each Sponsor and to issue confidential account statements for each participant.

Section 154.13 provides for disclosure of a State-administered defined contribution volunteer firefighter service award program summary, and any modifications thereto, to each participant.

Section 154.14 sets forth the standards to be followed in the selection of administrative service agencies or financial organizations to act as service providers.

Section 154.15 requires a service provider to observe a fiduciary standard of care.

Section 154.16 prohibits service providers from using participant information to solicit or offer to participants in a State-administered defined contribution volunteer firefighter service award program any other product or service.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in sections 154.2(b)(6), 154.3(a) and 154.6(i)(3).

**Text of rule and any required statements and analyses may be obtained from:** William J. Murray, Associate Counsel, Office of the State Comptroller, 110 State St., 14th Fl., Albany, NY 12236-0001, (518) 474-9024, e-mail: bmurray@osc.state.ny.us

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

Only insubstantial changes were made to the rule. None of the changes had an effect on the substance of the rule. Therefore, it was unnecessary to prepare a Revised Regulatory Impact Statement, a Revised Regulatory Flexibility Analysis, or a Revised Rural Area Flexibility Analysis.

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

The Office of the State Comptroller (OSC) received comments from the New York State Conference of Mayors and Municipal Officials (NYCOM) and Penflex, Inc. a vendor providing service award program services throughout the State (Penflex).

NYCOM inquired about the requirement that a local Sponsor submit evidence to OSC showing that voters approved at a referendum the transfer to the State of administrative responsibility for a defined contribution volunteer firefighter service award program. OSC explained that the requirement is based on the provisions of General Municipal Law section 216(3), which require the amendment of a service award program to be approved in the same manner as the program was originally approved. No change in the regulation was made in response to the NYCOM comment.

Penflex suggested that Part 154 would offer a participant the option of deferring payment of a service award and that such an option would trigger the application of the doctrine of constructive receipt and expose a participant to adverse tax consequences. However, OSC determined that since the regulation does not expressly provide such an option, it is unnecessary to resolve this issue at this time and no change was made in the regulation.

Penflex suggested that the regulation should provide for an annual audit of each service award program. General Municipal Law section 219-a(3) provides that an independent audit may be obtained by either the local Sponsor or the Administrator. Since OSC intends to procure the services of an administrative service agency to serve as program Administrator, but has not yet completed that procurement, OSC is not prepared to decide, at this time, whether it will be the obligation of the local Sponsor or the Administrator to obtain the required audit. Therefore, no change was made in the regulation to address the audit issue.

Penflex observed that the regulation requires a local Sponsor to pay to the State Administrator a sufficient amount to fully fund all the obligations of an existing service award program at the time the responsibility for program administration is transferred to the State, and Penflex suggested that part 154 does not provide sufficient detail as to how the sufficiency of such amount will be determined. However, since section 154.4(2) expressly provides that such amount shall be determined by the Administrator, OSC determined that it would not be advisable for the regulation to include additional details concerning such determinations at this time. Therefore, no change was made in the regulation.

Penflex observed that provisions of Part 154 covering termination of a defined contribution volunteer firefighter service award program are less detailed than provisions of Part 155 covering termination of a defined benefit volunteer firefighter service award program, and suggested that more detailed provisions be added to provide for distribution of service awards upon termination of a program. Parts 154 and 155 are patterned after the existing provisions of Parts 150 and 152, which govern defined contribution and defined benefit service award programs for volunteer ambulance workers, and Parts 150 and 152 contain differences in the levels of detail that are comparable to the differences between Parts 154 and 155. Therefore, no change was made in the regulation.

Penflex observed that Part 154 contains less detailed provisions than Part 155 covering the responsibilities of program trustees. Again, the differences were patterned on comparable differences between Parts 150 and 152 and OSC's determination that more flexibility should be allowed for defined contribution programs than for defined benefit programs. Therefore, no change was made in the regulation.

Penflex observed that Part 154 allows for a Sponsor to make no more than five years of contributions for a participant's service during the five years immediately preceding the adoption of a defined contribution program, and Penflex reported that many existing programs do not have a five-year limit for prior service contributions. Since the 5-year limitation was established by General Municipal Law section 216(1)(b)(viii), effective June 1, 2007, the definition of "prior service contribution" in section 154.2(b)(6) was changed to make clear that a program adopted prior to June 1, 2007 may provide for prior service contributions for a period longer than the five calendar years immediately preceding the adoption of the program.

Penflex pointed out that section 154.3(a) contained an erroneous reference to a defined benefit program, which should have referred to a defined contribution program. OSC corrected the error.

Penflex suggested that Part 154 could be revised to provide for actual, rather than estimated, amounts to be used in billing local Sponsors for annual contributions to service award programs. However, OSC determined that providing for estimated amounts would not preclude the Administrator from using actual amounts and that requiring only estimated amounts offers flexibility. Therefore, OSC made no change in the regulation.

Penflex observed that the law is unclear on the subject of granting service credit for a participant's military service and suggested that Part 154 be revised to offer guidance for such cases. However, OSC believes that this is a matter requiring legislative determination, and no change was made in the regulation.

Penflex suggested that Part 154 provide additional guidance for line-of-duty disability benefit administration. Again, OSC believes that this is a matter requiring legislative determination, and no change was made in the regulation.

Penflex suggested that Part 154 be revised to provide additional details covering the amortization of prior service credit contributions payable over a five-year term. However, OSC determined that flexibility is desirable and made no change in the regulation.

Penflex suggested that section 154.6 be revised to make clear that when a participant without a vested right to a service award forfeits not only his or her service credit but also his or her account balance when he or she ceases to serve as a volunteer firefighter. The regulation was revised accordingly.

Penflex suggested that Part 154 be revised to make the Trustee, rather than the Administrator, responsible for tax reporting. However, OSC intends the provisions of Part 154 to parallel the existing provisions of Part 150 covering defined contribution service award programs for volunteer ambulance workers. Since those provisions require the Administrator to handle tax reporting, no change was made in Part 154.

## NOTICE OF ADOPTION

### State-Administered Defined Benefit Service Award Programs for Volunteer Firefighters

**I.D. No.** AAC-12-07-00005-A

**Filing No.** 491

**Filing date:** May 15, 2007

**Effective date:** May 30, 2007

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

**Action taken:** Addition of Part 155 to Title 2 NYCRR.

**Statutory authority:** General Municipal Law, sections 214, 215, 216, 216-a, 216-b, 216-c, 217, 217-a, 219, 219-a; L. 2006, ch. 714, section 13

**Subject:** State-administered defined benefit service award programs for volunteer firefighters.

**Purpose:** To specify the procedures for the adoption and administration of State-administered defined benefit service award programs for volunteer firefighters and for the transfer to State administration of existing locally-administered defined benefit service award programs for volunteer firefighters.

**Substance of final rule:** Section 155.1 describes the scope of Part 155, covering State-administered defined benefit service award programs for volunteer firefighters. A political subdivision may adopt a new defined benefit volunteer firefighter service award program to be administered by the State or may transfer to the State the responsibility for administering an existing defined benefit volunteer firefighter service award program previously administered locally, subject to the requirements of Part 155.

Section 155.2 defines terms used in Part 155.

Section 155.3 details the procedure for local adoption of a State-administered defined benefit volunteer firefighter service award program.

Section 155.4 sets forth the requirements for a local government Sponsor to give notice to the Comptroller of the adoption of a new State-administered defined benefit volunteer firefighter service award program or the transfer of an existing defined benefit volunteer firefighter service award program from local administration to State administration.

Section 155.5 provides for the execution of an Adoption or Transfer Agreement between a local government Sponsor and the State. The Adoption or Transfer Agreement will cover the obligations of each local government Sponsor and set forth the locally-determined features of the State-administered defined benefit volunteer firefighter service award program.

Section 155.6 authorizes the collection of personal identifying information necessary of the administration of the program and requires that such information be protected from unlawful disclosure.

Section 155.7 requires local volunteer fire companies or volunteer fire departments and Sponsors of State-administered defined benefit service award programs to maintain records of firefighting service performed by volunteer members of such companies or departments and to report such service to the State.

Section 155.8 provides procedures for the determination of optional prior service credit for up to five years prior to the commencement of a defined benefit service award program and permits prior service costs to be paid in a lump sum or in annual installments over five years.

Section 155.9 provides procedures for the determination of service credit and the payment of contributions therefor.

Section 155.10 provides that a volunteer firefighter shall forfeit any service credit in a State-administered defined benefit volunteer firefighter service award program if the volunteer firefighter does not complete five years of service, except that such credit shall be restored if the volunteer firefighter resumes service in the same volunteer fire company or volunteer fire department within five calendar years after ceasing to serve as a volunteer firefighter in such company or department.

Section 155.11 provides procedures relating to the distribution of State-administered defined benefit volunteer firefighter service awards when a participant becomes eligible for such an award.

Section 155.12 provides for the amendment of a State-administered defined benefit volunteer firefighter service award program consistent with the provisions of General Municipal Law Article 11-A.

Section 155.13 provides the termination of State administration of a defined benefit volunteer firefighter service award program.

Section 155.14 provides procedure for a local government Sponsor to notify the Administrator of any amendment or termination of a State-administered defined benefit volunteer firefighter service program and specifies the information required to be included in such notice.

Section 155.15 provides for the Comptroller to serve as Administrator of State-administered service award programs or to retain an administrative service agency or a financial organization to administer all or any part of a service award program, and specifies the duties of the Administrator.

Section 155.16 provides for the Comptroller to appoint a Program Actuary to determine the amounts that each Sponsor must contribute to defray the costs of operating a State-administered defined benefit volunteer firefighter service award program, including the distribution of service award benefits and all administrative, actuarial, and investment service expenses.

Section 155.17 provides for the Comptroller to designate himself or herself as Program Trustee or to contract with an administrative service

agency or a financial services agency to serve as Program Trustee for the purpose of holding and investing program assets.

Section 155.18 makes the Administrator responsible for the preparation of a program document setting forth the rights and obligations of Sponsors and participants and the procedures for administration of State-administered defined benefit volunteer firefighter service award programs.

Section 155.19 requires the Administrator to make reports to each Sponsor and to issue confidential account statements for each participant.

Section 155.20 provides for disclosure of a State-administered defined benefit volunteer firefighter service award program summary, and any modifications thereto, to each participant.

Section 155.21 sets forth the standards to be followed in the selection of administrative service agencies or financial organizations to act as service providers.

Section 155.22 requires a service provider to observe a fiduciary standard of care.

Section 155.23 prohibits service providers from using participant information to solicit or offer to participants in a State-administered defined benefit volunteer firefighter service award program any other product or service.

Section 155.24 specifies optional forms of payment of defined benefit service awards.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in sections 155.2(b)(6), 155.7(h) and 155.24.

**Text of rule and any required statements and analyses may be obtained from:** William J. Murray, Associate Counsel, Office of the State Comptroller, 110 State St., 14th Fl., Albany, NY 12236-0001, (518) 474-9024, e-mail: bmurray@osc.state.ny.us

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

Only insubstantial changes were made to the rule. None of the changes had an effect on the substance of the rule. Therefore, it was unnecessary to prepare a Revised Regulatory Impact Statement, a Revised Regulatory Flexibility Analysis, or a Revised Rural Area Flexibility Analysis.

**Assessment of Public Comment**

The Office of the State Comptroller (OSC) received comments from the New York State Conference of Mayors and Municipal Officials (NYCOM) and Penflex, Inc. a vendor providing service award program services throughout the State (Penflex).

NYCOM inquired about the requirement that a local Sponsor submit evidence to OSC showing that voters approved at a referendum the transfer to the State of administrative responsibility for a defined benefit volunteer firefighter service award program. OSC explained that the requirement is based on the provisions of General Municipal Law section 216(3), which require the amendment of a service award program to be approved in the same manner as the program was originally approved. No change in the regulation was made in response to the NYCOM comment.

Penflex suggested that Part 155 would offer a participant the option of deferring payment of a service award and that such an option would trigger the application of the doctrine of constructive receipt and expose a participant to adverse tax consequences. However, OSC determined that since the regulation does not expressly provide such an option, it is unnecessary to resolve this issue at this time and no change was made in the regulation.

Penflex suggested that the regulation should provide for an annual audit of each service award program. General Municipal Law section 219-a(3) provides that an independent audit may be obtained by either the local Sponsor or the Administrator. Since OSC intends to procure the services of an administrative service agency to serve as program Administrator, but has not yet completed that procurement, OSC is not prepared to decide, at this time, whether it will be the obligation of the local Sponsor or the Administrator to obtain the required audit. Therefore, no change was made in the regulation to address the audit issue.

Penflex observed that the regulation requires a local Sponsor to pay to the State Administrator a sufficient amount to fully fund all the obligations of an existing service award program at the time the responsibility for program administration is transferred to the State, and Penflex suggested that part 155 does not provide sufficient detail as to how the sufficiency of such amount will be determined. However, since section 155.5(2) expressly provides that such amount shall be determined by the Program Actuary, OSC determined that it would not be advisable for the regulation to include additional details concerning such determinations at this time. Therefore, no change was made in the regulation.

Penflex observed that Part 155 provides for payments to service award recipients of up to \$30 a month but that maximum amount could have adverse tax consequences if the Internal Revenue Service determines that

it is too high to comply with the requirements of Internal Revenue Code section 457 governing service award programs. However, since the \$30 maximum set forth in Part 155 is based on the provisions of General Municipal Law section 219(b), OSC determined that the potential consequences should only be resolved by legislation enacted by the United States Congress or the New York State Legislature or both. Therefore, no change was made in the regulation.

Penflex suggested that Part 155 be revised to make the Trustee, rather than the Administrator, responsible for tax reporting. However, OSC intends the provisions of Part 155 to parallel the existing provisions of Part 152 covering defined benefit service award programs for volunteer ambulance workers. Since those provisions require the Administrator to handle tax reporting, no change was made in Part 155.

Penflex interpreted section 155.11 ("Distributions") as defining the "normal form of payment" as "straight life," reported that most existing defined benefit service award programs define "the normal form to be 10C&C," and recommended that the regulation be revised to make clear that optional forms of payment are permitted. OSC determined that no revision was necessary, since section 155.11 does not, in fact, use the term "normal form of payment," and section 155.24 ("Optional forms of payment of service awards") clearly provides that "a five or ten year continuous and certain monthly payment life annuity," e.g., a 10C&C, is a permissible form of service award payment.

Penflex observed that Part 155 requires restoration of previously forfeited service credit to a volunteer firefighter who ceases to be a participant and then returns to service within 5 years. According to Penflex, not all existing defined benefit service award programs require the restoration of previous forfeitures, and Penflex suggested that OSC consider making the regulation more flexible. However, since it is OSC's intention that the regulations for volunteer firefighter service award programs and for volunteer ambulance worker service award programs have features that are as similar as practicable, and since the existing regulations in Part 152 (see section 152.10) provide for restoration of forfeitures, OSC determined that it was not advisable to revise part 155.

Penflex observed that Part 155 allows for a Sponsor to make available no more than five years of service credit for a participant's service during the five years immediately preceding the adoption of a defined benefit program, and Penflex reported that many existing programs do not have a five-year limit for prior service credit. Since the 5-year limitation was established by General Municipal Law section 216(1)(b)(viii), effective June 1, 2007, the definition of prior service credit in section 155.2(b)(6) was changed to make clear that a program adopted prior to June 1, 2007 may provide for prior service credit for a period longer than the five calendar years immediately preceding the adoption of the program.

Penflex reported that many existing service award programs provide more than one schedule for a participant to obtain a nonforfeitable right to a service award; for example, 5 years of service if a participant voluntarily terminates his or her service or 1 year of service if a participant dies. Penflex suggested the Part 155 be revised to make clear that such features are permissible. However, OSC determined that a revision was not necessary since Part 155 clearly does not prohibit such variations. To the contrary, section 155.5 expressly refers to the number of years required to obtain a nonforfeitable right to a service award as a "locally-determined feature of a the State-administered defined benefit volunteer firefighter service award program."

Penflex suggested that Part 155 could be revised to provide for actual, rather than estimated, amounts to be used in billing local Sponsors for annual contributions to service award programs. However, OSC determined that providing for actual amounts would not be possible because General Municipal Law section 216-c(1) requires the State to send annual billings to local Sponsors on November 15th of each year and, as of that date, it will be impossible to determine the actual amount of required contributions for most defined benefit programs. Therefore, OSC made no change in the regulation.

Penflex observed that the law is unclear on the subject of granting service credit for a participant's military service and suggested that Part 155 be revised to offer guidance for such cases. However, OSC believes that this is a matter requiring legislative determination, and no change was made in the regulation.

Penflex suggested that Part 155 provide additional guidance for line-of-duty disability benefit administration. Again, OSC believes that this is a matter requiring legislative determination, and no change was made in the regulation.

Penflex suggested that Part 155 be revised to provide for "uniform and consistent administrative and authoritative guidance" covering optional

death and disability benefits in cases in which a participant who has reached entitlement age defers the receipt of a service award until a later date. OSC is not prepared to address that suggestion at this time since it is unclear how many local Sponsors offer such optional death and disability benefits. Therefore, no change was made in the regulation.

Penflex noted that section 155.24 bases certain payment calculations on the date when a participant reaches the age of 65, despite the fact that entitlement ages may vary and in some cases may be as low as 55. Accordingly, the rule was changed to provide that calculations should be made as of the entitlement age.

Penflex pointed out two erroneous references in section 155.7(h) to defined contribution programs instead of defined benefit programs. Those errors have been corrected.

Penflex suggested that references to the "Administrator" in section 155.5(a)(2) be changed to "Trustee." Since OSC intends that the relevant duties be performed by the Administrator, no change was made in the regulation.

Penflex suggested deleting from section 155.19(a)(8) the requirement of including the total amount of forfeitures in the annual report provided by the Administrator to each local Sponsor. However, since OSC believes that the total amount of forfeitures may be of interest to Sponsors, no change was made in the regulation.

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## Crime Victims Board

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### NOTICE OF ADOPTION

#### Designation of a Crime Victims Board Claimant's Representative

**I.D. No.** CVS-12-07-00001-A

**Filing No.** 488

**Filing date:** May 14, 2007

**Effective date:** May 30, 2007

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

**Action taken:** Addition of section 525.1(l) and amendment of section 525.7(a) of Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 621(6) and 633; and Public Officers Law, section 96

**Subject:** Designation of a Crime Victims Board claimant's representative.

**Purpose:** To ensure the Crime Victims Board is in compliance with its confidentiality obligations under Executive Law, section 633 and Public Officers Law, section 96, while at the same time providing a Crime Victims Board claimant the opportunity to designate a representative.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CVB-12-07-00001-P, Issue of March 21, 2007.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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

#### Reimbursement of Crime-Related Counseling Expenses

**I.D. No.** CVB-22-07-00002-P

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

**Proposed action:** Amendment of section 525.12(g)(2) of Title 9 NYCRR.

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

**Subject:** Reimbursement of crime-related counseling expenses which are filed more than one year after counseling has begun.

**Purpose:** To specifically outline the process by which the board may approve counseling expenses filed more than one year after the counseling has begun in order for claimants or potential claimants to be aware of what services the board would consider reimbursable under its statutory authority.

**Text of proposed rule:** A new subpart (v) is added to subsection 2 of subdivision g of section 525.12 to read as follows:

(v) *The board may require proof from claimants for all claims of crime-related counseling expenses which are filed more than one year after counseling has begun. The claimants shall offer evidence to the board that the counseling is causally connected to the crime and the board may request an independent medical examination of any claimant before authorizing reimbursement for reasonable expenses of counseling services.*

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

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

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

**Regulatory Impact Statement**

1. **Statutory authority:** The New York State Executive Law, section 623 creates the Crime Victims Board (the Board) and grants the Board the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. New York State Executive Law, sections 626 and 631 provide that the Board may make awards to for out-of-pocket losses which include unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care, including counseling, or other services necessary as a result of the injury upon which the claim is based, including such expenses incurred as a result of the exacerbation of a pre-existing disability or condition directly resulting from the crime or causally related to the crime.

2. **Legislative objectives:** By enacting the New York State Executive Law, sections 626 and 631, the Legislature sought to ensure that the Board could reimburse out-of-pocket losses for medical care necessary as a result of the injury upon which a claim is based.

3. **Needs and benefits:** Currently, in New York State Executive Law, article 22, and 9 NYCRR 525, the process by which the Board approves counseling expenses filed more than one year after the counseling has begun is not explicitly defined. Prior to March of 2005, the Board had consistently limited counseling expenses resulting from a crime only for bills commencing one year prior to the date the claim was filed. After March of 2005, the Board expanded such reimbursements beyond that one year limitation. It was determined, however, that in these instances it was necessary to carefully scrutinize these claims closely for causal relationship, employing an independent medical examination (IME) if deemed necessary by the Board. These proposed regulations would specifically outline the process by which the Board may approve counseling expenses filed more than one year after the counseling has begun in order for claimants or potential claimants to be aware of what services the Board would consider reimbursable under its statutory authority.

4. **Costs:** a. Costs to regulated parties. For the most part, these proposed regulations would be codifying the Board's current interpretation of its statutory authority, therefore it is not expected that the proposed regulations would impose any additional costs to the agency or State.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

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

5. **Local government mandates:** These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. **Paperwork:** These proposed regulations do not require any additional paperwork requirements.

7. **Duplication:** These proposed regulations do not duplicate any other existing state or federal requirements.

8. **Alternatives:** Although the current Board has consistently applied its interpretation of Executive Law, sections 626 and 631, not implementing these proposed regulatory changes could result in inconsistent claimant award decisions in the future.

9. **Federal standards:** Permissible under 42 USC 10602(b)(1)(A).

10. Compliance schedule: The regulations will be effective on the date they are adopted.

#### **Regulatory Flexibility Analysis**

The New York State Crime Victims Board (the Board) projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of these proposed rule changes. These proposed rules changes simply outline the process by which the Board may approve counseling expenses filed more than one year after the counseling has begun. Since nothing in these proposed rule changes will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and one were taken. As apparent from the nature and purpose of these proposed rule changes, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

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

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of these proposed rule changes. These proposed rules changes simply outline the process by which the Board may approve counseling expenses filed more than one year after the counseling has begun. Since nothing in these proposed rule changes will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of these proposed rule changes, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

#### **Job Impact Statement**

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of these proposed rule changes. These proposed rules changes simply provide a definition of medical services or medical expenses for claimants or potential claimants of the Board. Since nothing in these proposed rule changes will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of these proposed rule changes, a full Job Impact Statement is not required and therefore one has not been prepared.

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

### **Definition of Medical Services or Medical Expenses**

**I.D. No.** CVB-22-07-00003-P

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

**Proposed action:** Amendment of section 525.1 of Title 9 NYCRR.

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

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

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

**Text of proposed rule:** A new subdivision (m) is added to section 525.1 to read as follows:

*(m) Medical services or medical expenses shall mean services provided or monitored by, or expenses incurred from those medical professionals licensed by the New York State Department of Education and within their licensed discipline. If the provider is out-of-state, payment for services within their licensed discipline shall only be made if such professional is licensed under one of the titles recognized by the New York State Department of Education's list of licensed professions. The Board may require an out-of-state provider to submit a copy of their license.*

*(1) Notwithstanding the provisions of subdivision (m) above, for all new claims received after the adoption of this rule, the Board may authorize the reimbursement of expenses associated with the provision of home-care services rendered by a non-licensed caregiver who is a family member when:*

*(i) the victim is under 18 years of age;*

*(ii) the claimant submits a physician's statement clearly stating that in the physician's opinion the victim will benefit from such home care by a non-licensed caregiver; and*

*(iii) the authorization is for no more than a three month period.*

*Family members who perform such services shall be reimbursed at a rate no greater than the current state minimum wage for up to 40 hours per week.*

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

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

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

#### **Regulatory Impact Statement**

1. Statutory authority: The New York State Executive Law, section 623 creates the Crime Victims Board (the Board) and grants the Board the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. New York State Executive Law, sections 626 and 631 provide that the Board may make awards to for out-of-pocket losses which include unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care, including counseling, or other services necessary as a result of the injury upon which the claim is based, including such expenses incurred as a result of the exacerbation of a pre-existing disability or condition directly resulting from the crime or causally related to the crime.

2. Legislative objectives: By enacting the New York State Executive Law, sections 626 and 631, the Legislature sought to ensure that the Board could reimburse out-of-pocket losses for medical care necessary as a result of the injury upon which a claim is based.

3. Needs and benefits: Currently, in New York State Executive Law, article 22, and 9 NYCRR 525, medical services or medical expenses are not explicitly defined. From recent history to date, the Board has consistently interpreted the statute to mean such services provided or monitored by medical professionals licensed by the New York State Department of Education within their licensed discipline. In instances where an out-of-state provider provides such services to a claimant of the Board, the Board only makes awards if the out-of-state provider is licensed under one of the recognized titles recognized by the New York State Department of Education's list of licensed professionals. These proposed regulations would specifically define medical services and medical expenses as the Board has interpreted the law in order for claimants or potential claimants to be aware of what services the Board would consider reimbursable under its statutory authority.

The Board further recognizes that homecare provided to minor victims by a family member should be considered for reimbursement as a medical expense under certain circumstances. These proposed regulations enumerate under which circumstances the Board would consider such homecare to be reimbursable and how to calculate the amount of reimbursement in order for claimants or potential claimants to be aware of what services the Board would consider reimbursable under its statutory authority.

4. Costs: a. Costs to regulated parties. For the most part, these proposed regulations would be codifying the Board's current interpretation of its statutory authority, therefore it is not expected that the proposed regulations would impose any additional costs to the agency or State. The proposed regulatory changes may, in fact, result in saving the agency and State money when the volume of otherwise ineligible claims filed with the Board decreases because claimants or potential claimants would be made aware of what services the Board would consider reimbursable under its statutory authority.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

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

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: These proposed regulations do not require any additional paperwork requirements.

7. Duplication: These proposed regulations do not duplicate any other existing state or federal requirements.

8. Alternatives: Although the current Board has consistently applied its interpretation of Executive Law, sections 626 and 631, not implementing these proposed regulatory changes could result in inconsistent claimant award decisions in the future. Another alternative to these proposed regulatory changes would be for the Board itself to develop a list of accepted medical providers for which awards may be based. The Board however, has determined that the New York State Education Department is the most appropriate body to determine the list of accepted medical providers, as the licensing agency for medical providers in New York State.

9. Federal standards: Permissible under 42 USC 10602(d)(2).

10. Compliance schedule: The regulations will be effective on the date they are adopted.

**Regulatory Flexibility Analysis**

The New York State Crime Victims Board (the Board) projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of these proposed rule changes. These proposed rules changes simply provide a definition of medical services or medical expenses for claimants or potential claimants of the Board. Since nothing in these proposed rule changes will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and one were taken. As apparent from the nature and purpose of these proposed rule changes, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

**Rural Area Flexibility Analysis**

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of these proposed rule changes. These proposed rules changes simply provide a definition of medical services or medical expenses for claimants or potential claimants of the Board. Since nothing in these proposed rule changes will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of these proposed rule changes, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

**Job Impact Statement**

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of these proposed rule changes. These proposed rules changes simply provide a definition of medical services or medical expenses for claimants or potential claimants of the Board. Since nothing in these proposed rule changes will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of these proposed rule changes, a full Job Impact Statement is not required and therefore one has not been prepared.

**Statutory authority:** Election Law, sections 3-100, 7-201, 7-203 and 7-204; and L. 2005, ch. 181

**Subject:** Contracts for voting systems.

**Purpose:** To repeal provisions which are overbearing and infringe unnecessarily on county boards of elections' discretion.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SBE-03-07-00004-P, Issue of January 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:** Todd D. Valentine, Board of Elections, 40 Steuben St., Albany, NY 12207-2109, (518) 474-6367, e-mail: tvalentine@elections.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Campaign Contribution Limits**

**I.D. No.** SBE-09-07-00001-A

**Filing No.** 484

**Filing date:** May 11, 2007

**Effective date:** May 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 6214.0 of Title 9 NYCRR.

**Statutory authority:** Election Law, sections 14-114 and 3-102

**Subject:** Campaign contribution limits.

**Purpose:** To set campaign contribution limits.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SBE-09-07-00001-P, Issue of February 28, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Todd D. Valentine, Board of Elections, 40 Steuben St., Albany, NY 12207-2109, (518) 474-6367, e-mail: tvalentine@elections.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Creation and Maintenance of Statewide Voter Registration List**

**I.D. No.** SBE-09-07-00003-A

**Filing No.** 483

**Filing date:** May 11, 2007

**Effective date:** May 30, 2007

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

**Action taken:** Amendment of Part 6217 of Title 9 NYCRR.

**Statutory authority:** Election Law, sections 5-614, 3-102; and L. 2005, ch. 24

**Subject:** Creation and maintenance of statewide voter registration list.

**Purpose:** To make more adjustments in adopted rules as the rules accurately reflect the technical and functional requirements of the system that will house the statewide list.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SBE-09-07-00003-P, Issue of February 28, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Todd D. Valentine, Board of Elections, 40 Steuben St., Albany, NY 12207-2109, (518) 474-6367, e-mail: tvalentine@elections.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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**State Board of Elections**

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**NOTICE OF ADOPTION**

**Contracts for Voting System**

**I.D. No.** SBE-03-07-00004-A

**Filing No.** 485

**Filing date:** May 11, 2007

**Effective date:** May 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 6209.9 of Title 9 NYCRR.

## Department of Environmental Conservation

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

#### Setting of Body Gripping Traps on Land

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

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

**Proposed action:** Amendment of section 6.3 of Title 6 NYCRR.

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

**Subject:** Setting of body gripping traps on land.

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

**Text of proposed rule:** A new paragraph 6.3(a)(13) is adopted to read as follows:

(13) *Requirements for setting body gripping traps on land. No person shall set on land a body-gripping trap that measures five inches or larger in the open position, measured in accordance with paragraph 11-1101(6)(b) of the Environmental Conservation Law, unless the trap is set in compliance with one of the following options:*

(a) *Set option 1: The trap is placed a minimum of five (5) feet above ground level; or*

(b) *Set option 2: The trap complies with all of the following design features and set requirements:*

(1) *The trap shall be placed within a container constructed of wood, plastic, metal, or wire; and*

(2) *No opening of the container shall measure more than six (6) inches in height at any point, except that if an opening is circular, the opening shall not measure more than six (6) inches in diameter; and*

(3) *One opening of the container shall be equipped with slots in which the trap springs rest. The slots shall begin at the container's opening, shall be perpendicular to the container's opening, and shall be a minimum of eight (8) inches deep in length, measured from the opening of the container; and*

(4) *The trap shall be recessed in the slots so that no part of the trap is less than four (4) inches from the opening of the container; and*

(5) *The container shall be securely fastened to the ground; or*

(c) *Set option 3: The trap complies with all of the following design features and set requirements:*

(1) *The trap shall be placed within a container constructed of wood, plastic, metal, or wire; and*

(2) *The container shall have no more than one opening; and*

(3) *The container shall be securely fastened in a vertical position to a tree or post;*

(4) *The container shall be positioned so that the opening of the container faces the ground and is no more than six (6) inches above the ground.*

**Text of proposed 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

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

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

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

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

#### 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 proposed 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

The Department proposes to establish a new trapping regulation that is intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons.

The proposed regulation would address the manner in which body gripping traps, measuring five inches or more in the open position, are set on land. Traps are to be measured in accordance with paragraph 11-1101(6)(b) of the Environmental Conservation Law, 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.

For traps of this size set on land, the Department is proposing that certain precautions must be taken in order to avoid capturing a dog with the trap. The Department proposes that these traps must be set in compliance with one of three options: (1) set five feet above the ground; or (2) set within a container which has restricted openings and other features designed to prevent a dog from entering and triggering the trap; or (3) set within a container 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 less than six inches from the ground.

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 proposed regulations require that the trap be set within a container designed to exclude dogs (unless the trap is set at least 5 feet in the air). In addition, the opening in the container for a trap set on the ground must be no more than six inches high, which is too small for medium to large dogs to enter, and the trap must be set back within the container so that no part of the trap is less than four (4) inches from the opening of the container. A trap that is set affixed to a tree or post, and which is less than five feet from the ground, must have its only opening positioned no more than 6 inches from the ground. This again provides a very small area through which to access the trap within the container. Department staff believe that such requirements will make these traps very selective to catching raccoons and fisher, and inaccessible to dogs. Similar techniques have been used in other states and have proven to be effective.

Traps adapted pursuant to the proposed 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 proposed 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 proposed regulation by placing the trap at least five feet above 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 five feet or more above ground.

The proposed 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 proposed 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 a container, made of wood, metal, plastic or wire, that will be used in the setting of certain body gripping traps. Alternatively, they may choose to set their traps at least five feet above the ground. For trappers who decide to use a container, 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 rule making does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork

The proposed 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 proposed 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 proposed rule making 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 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 five feet above ground. The proposed regulations apply statewide.

The proposed regulations do not apply directly to local governments or small governments. Therefore, the Department has determined that this rule making 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 proposed rule making 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 rule making 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 proposed regulation would 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 rule making is to amend the trapping regulations for body gripping traps. It will apply to traps set on land with an opening that measures five 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 five feet above ground.

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 proposed rule making 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 proposed 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 proposed 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 proposed regulations, trappers may comply with the new requirements by setting their traps at least five feet above ground level. Alternatively, they may choose to set their traps within a dog-resistant container, as specified in the proposed regulations.

The Department has proposed regulations that 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 proposed 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 proposed rule making 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 with an opening that measures five 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 proposed regulations, trappers may comply with the new requirements by setting their traps at least five feet above ground level. Alternatively, they may choose to set their traps within a dog resistant container, as specified in the proposed regulations.

Trappers derive a small portion of their annual income from the sale of animals taken by trapping. Moreover, the proposed rule making 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 proposed 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 proposed regulations, while the likelihood of injuring or killing a dog will be reduced, if not eliminated. For these reasons, the Department anticipates that this rule making will have no negative impacts on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

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## Insurance Department

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### EMERGENCY RULE MAKING

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

**I.D. No.** INS-22-07-00001-E

**Filing No.** 482

**Filing date:** May 10, 2007

**Effective date:** May 10, 2007

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

**Action taken:** Amendment of Part 52 (Regulation 62) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3103, 3201, 3217, 3221, 4235, 4303, 4305 and 4308

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

**Specific reasons underlying the finding of necessity:** Chapter 748 of the Laws of 2006, commonly referred to as "Timothy's Law", became effective on January 1, 2007. This law amends Sections 3221 and 4303 of the

Insurance Law to require health insurance coverage for inpatient and outpatient mental health services. Insurers, Article 43 corporations, and HMOs are required to amend policies and contracts and/or modify premium rates to comply with the requirements of Timothy's Law. Because the bill became effective two weeks after it was signed, affected insurers, Article 43 corporations and HMOs were not able to obtain prior approval of policy form and rate submissions that pertain to the mental health benefits. Nonetheless, policyholders, certificateholders and members must be made aware of the impact of Timothy's Law on their benefits as soon as possible.

To inform policyholders, certificateholders and members as soon as possible of the details of these new benefits, this amendment requires affected insurers, Article 43 corporations and HMOs to provide written notification explaining the key features of the mental health benefits required under Timothy's Law to affected policyholders, certificateholders, and members. The notice must state that a formal contract and/or certificate amendment will be sent that will explain the new benefits in greater detail. The notice must contain a toll-free customer telephone number that certificateholders and members may use to contact the company with questions concerning these benefits. The notice must be provided by February 15, 2007.

This amendment is necessary to require insurers, Article 43 corporations, and HMOs to provide notice to policyholders, certificateholders and members of the coverage. It is imperative that consumers be aware of the availability of this coverage. Inasmuch as the coverage is already mandated for the preservation of the public health and general welfare, the amendment must be continued on an emergency basis until such time as it can be adopted in final form.

**Subject:** Minimum standards for the form, content and sale of health insurance, including standards for full and fair disclosure.

**Purpose:** To require insurers, article 43 corporations and HMO's to send notices to their policyholders, certificateholders, and members describing chapter 748 of the Laws of 2006.

**Text of emergency rule:** Subdivision (d) of section 52.70 is amended by adding a new paragraph (9) to read as follows:

(9) *Every insurer issuing school blanket insurance policies pursuant to Insurance Law section 3221 shall send written notice of the enactment of Chapter 748 of the Laws of 2006 (commonly referred to as "Timothy's Law") to all affected policyholders, certificateholders and members. If permitted by the school blanket policy, insurers may provide notice to the group policyholder for distribution to individual certificateholders but shall be responsible for providing the notice. The notice shall be provided no later than February 15, 2007. The notice shall:*

(i) *describe the key features of the benefits required under Chapter 748 of the Laws of 2006;*

(ii) *state that a formal contract or certificate amendment shall be forthcoming that will explain the new benefits in greater detail;*

(iii) *provide a toll-free customer service telephone number that insureds may call to contact the insurer with questions concerning the new law; and*

(iv) *advise the policyholders that their premiums may be adjusted.*

Subdivision (e) of Section 52.70 is amended by adding a new paragraph (5) to read as follows:

(5) *Every insurer, Article 43 corporation and health maintenance organization ("HMO") shall send written notice of the enactment of Chapter 748 of the Laws of 2006 to all affected group policyholders, certificateholders, and members. If permitted by the group contract, an insurer, Article 43 corporation or HMO may provide notice to the group policyholder for distribution to individual certificateholders and members, but such insurer, Article 43 corporation or HMO ultimately shall be responsible for providing the notice. The notice shall be provided no later than February 15, 2007. The notice shall:*

(i) *describe the key features of the benefits required pursuant to Chapter 748 of the Laws of 2006;*

(ii) *state that a formal contract or certificate amendment will be forthcoming that will explain the new benefits in greater detail;*

(iii) *provide a toll-free customer service telephone number that insureds may call to contact the insurer, Article 43 corporation, or HMO with questions concerning the new law; and*

(iv) *advise the policyholders that their premiums may be adjusted.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire August 7, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Thomas Fusco, Insurance Department, 65 Court St. Rm. 7, Buffalo, NY 14202, (716) 847-7618, e-mail: tfusco@ins.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the 38th amendment to 11 NYCRR 52 derives from Sections 201, 301, 1109, 3103, 3201, 3217, 3221, 4235, 4303, 4305 and 4308 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law, and to effectuate any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization and its subscribers.

Section 3103 provides that any policy of insurance delivered or issued for delivery in this state in violation of any of the provisions of the Insurance Law shall be valid and binding upon the insurer issuing the same, but in all respects in which its provisions are in violation of the requirements or prohibitions of the Insurance Law it shall be enforceable as if it conformed with such requirements or prohibitions.

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

Section 3217 authorizes the Superintendent to issue regulations to establish minimum standards for the form, content and sale of health insurance.

Section 3221 sets forth standard health insurance policy provisions.

Section 4235 establishes requirements for group accident and health insurance.

Article 43 of the Insurance Law sets forth requirements for non-profit medical and dental indemnity corporations and non-profit health or hospital corporations, including requirements pertaining to minimum benefits of individual and small group contracts. Section 4303 and 4305 set forth required benefits and standard provisions for group contracts. Section 4308 authorizes the Superintendent to approve contracts, certificates, applications, riders and endorsements issued by Article 43 corporations and HMOs.

2. Legislative objectives: The statutory sections cited above establish a framework for the form, content and sale of health insurance. The proposed amendment to Regulation 62 is consistent with legislative objectives in that it would ensure that the policyholders, certificateholders, and members receive notice of the mental health benefits to which they are now entitled by operation of law as soon as possible prior to the formal revision of the insurance policy forms.

3. Needs and benefits: This emergency amendment requires insurers, Article 43 corporations, and HMOs to provide written notice to insureds by February 15, 2007 of the details of Chapter 748 of the Laws of 2006 (commonly referred to as "Timothy's Law"). The notice shall also provide a toll-free customer service telephone number that insureds may use to contact the company with questions concerning mental health coverage.

Chapter 748 of the Laws of 2006 became effective on January 1, 2007, less than two weeks after it was signed into law. The law requires insurance companies, Article 43 corporations and HMOs to provide coverage for inpatient and outpatient mental health services. To permit policyholders, certificateholders, and members to learn the details of the mental health coverage, insurers, Article 43 corporations and HMOs must provide a written notice that explains the benefits and provides a toll-free customer service telephone number from which policyholders, certificateholders and members may obtain information on the mental health coverage. The notice required by this regulation serves to educate consumers about the possible impact of Timothy's Law on their coverage until such time as their policy, certificate or contract is amended to address the benefit. It is important that the notice be provided to affected parties no later than February 15, 2007 because a significant number of policies and contracts were renewed or were issued on January 1, 2007, and thus are subject to Timothy's Law requirements.

The regulation therefore promotes the general welfare and public health.

4. Costs: This regulation imposes no compliance costs upon state or local governments.

There will be minimal additional costs of compliance to insurers, Article 43 corporations and HMOs that may need to delegate or reassign staffing responsibilities to prepare and distribute the notices. There are no costs to the Insurance Department. The notice requirement is one-time

only and not ongoing since insurers must conform their policies to explicitly provide for the coverage mandated by Timothy’s Law.

5. Local government mandates: The proposed regulation imposes no new programs, services, duties or responsibilities on local government.

6. Paperwork: The proposed regulation imposes no new reporting requirements. However, there is paperwork associated with preparing and distributing the notice.

7. Duplication: There are no known federal or other state requirements that duplicate, overlap or conflict with this regulation.

8. Alternatives: There are no significant alternatives to be considered at this time due to the short timeframe between the date of enactment and the effective date of the law.

9. Federal standards: There are no minimum standards of the federal government for the same of similar subject areas.

10. Compliance schedule: The provisions of this amendment will take effect immediately. Insurers, Article 43 corporations and HMOs shall have until February 15, 2007 to send written notice to their insureds.

**Regulatory Flexibility Analysis**

This amendment will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

This amendment will affect insurers, Article 43 corporations and HMOs licensed to do business in this state. Based upon information provided in the annual statements filed with the Insurance Department, insurers, Article 43 corporations and HMOs do not fall within the definition of “small business” found in Section 102(8) of the State Administrative Procedure Act because none of them are both independently owned and have under one hundred employees. This amendment does not apply to or affect local governments. As a result, there are no reporting, recordkeeping or other affirmative acts that a small business or local government will have to undertake to comply with this proposed regulation. The amendment will not impose any compliance costs on local governments or small businesses.

**Rural Area Flexibility Analysis**

The amendment will not impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Insurers, Article 43 corporations and HMOs to which the amendment applies do business in every county of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). Since the amendment applies to the health insurance market throughout New York, not only to rural areas, the same regulation will apply to regulated entities across the state. Therefore, there is no adverse impact on rural areas as a result of this amendment.

**Job Impact Statement**

The amendment to Regulation 62 will not adversely impact job or employment opportunities in New York. The proposed amendments are likely to have no measurable impact on jobs. The notice is a one-time only requirement. Insurers and health maintenance organizations may need to delegate or reassign staffing responsibilities to prepare and distribute the notices; however, it is anticipated that such responsibilities will be handled by existing personnel.

**Purpose:** To revise the standards for IOLA accounts.

**Text of proposed rule:** The existing Part 7000 of 21 NYCRR is repealed and a new Part 7000 is proposed as follows:

**PART 7000. TRUSTEES’ REGULATIONS AND PROCEDURES**

**Section 7000.1 Purpose of fund.**

*The purpose of the Interest on Lawyer Account Fund is to provide funding for providers of civil legal services in order to ensure effective access to the judicial system for all citizens of the State and to provide stable, economical and high quality delivery of civil legal services to the poor throughout the State. The fund is authorized to receive funds from any source for disbursement to nonprofit legal services providers for charitable purposes, including the delivery of legal services in civil matters to poor persons. The fund will receive interest earned by qualified client funds held by attorneys in unsegregated interest-bearing accounts and will utilize the interest so received for the above-stated purposes.*

**Section 7000.2 Definitions.**

(a) *Banking institutions are banks, trust companies, savings banks, savings and loan associations, credit unions or foreign banking corporations whether incorporated, chartered, organized or licensed under the laws of this State or the United States, provided that such banking institutions have a banking office in this State.*

(b) *Eligible bank or eligible banking institution means a banking institution that maintains IOLA accounts that comply with section 497 of the New York Judiciary Law, section 97-v of the New York State Finance Law and the criteria provided in these regulations, and has been approved by the Board of Trustees to maintain IOLA accounts.*

(c) *Funds received in a fiduciary capacity are funds received by an attorney or a law firm from a client or third person in the course of the practice of law, including but not limited to funds received in an escrow capacity, but not including funds received as trustee, executor, administrator, guardian or receiver in bankruptcy.*

(d) *Interest on Lawyer Account or IOLA account means an unsegregated interest bearing or dividend earning account, as approved by the Board of Trustees of the IOLA fund, maintained in an eligible bank for the deposit by an attorney or law firm as a fiduciary of qualified funds.*

(e) *Qualified funds are moneys received by an attorney or law firm in a fiduciary capacity from a client or a third person and which, in the sole discretion and judgment of the attorney or law firm, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient income to justify the expense of administering a segregated account for the benefit of the client or third person and cannot earn income for a client or third person in excess of the costs incurred to secure such income. Qualified funds do not include those moneys which are deposited for the particular client or client’s matter on which the interest will be paid to the client or an interest-bearing trust account at a banking institution with provision by the bank or by the depositing attorney or law firm for computation of interest earned by the client funds and the payment thereof to the client.*

(f) *New York Interest on Lawyer Account fund or IOLA fund means the fiduciary fund established by subdivision (1) of section 97-v of the New York State Finance Law and administered by the IOLA Board of Trustees.*

(g) *IOLA Board of Trustees, Board of Trustees or Board means the body of individuals appointed by the Governor pursuant to subdivision (2) of section 97-v of the New York State Finance Law that is authorized to administer the IOLA fund.*

**Section 7000.3 Organization.**

(a) *The IOLA fund shall be administered by a board of trustees appointed by the Governor.*

(b) *The board of trustees shall consist of 15 members, at least eight of whom shall be attorneys licensed to practice in New York. Two of the appointments, at least one of whom shall be an attorney, shall be appointed on the recommendation of the President of the Senate; two of the appointments, at least one of whom shall be an attorney, shall be appointed on the recommendation of the Speaker of the Assembly; one appointment shall be on the recommendation of the Minority Leader of the Senate and one on the recommendation of the Minority Leader of the Assembly. Two of the appointments, both of whom shall be attorneys, shall be appointed on the recommendation of the Court of Appeals. The Governor shall designate one member of the board as chair. No member of the Senate or Assembly shall be eligible to serve as a member of the board.*

(c) *The term of a trustee shall be three years. Of the trustees first appointed, five shall be appointed for terms expiring December 31, 1984; five shall be appointed for terms expiring December 31, 1985; and five shall be appointed for terms expiring December 31, 1986. As each term expires, each new appointment shall be for a term of three years. Vacan-*

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## Interest on Lawyer Account Fund

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

**Trustees’ Regulations and Procedures**

**I.D. No.** IOL-22-07-00020-P

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

**Proposed action:** Repeal of Part 7000 and addition of new Part 7000 to Title 21 NYCRR.

**Statutory authority:** State Finance Law, section 97-v and Judiciary Law, section 497

**Subject:** Standards for IOLA accounts.

cies shall be filled in the manner of the original appointment for the remainder of the term.

(d) The trustees shall employ an executive director to serve as the chief administrative officer of the fund.

(e) The trustees shall serve without compensation, but shall be entitled to receive their actual and necessary expenses incurred in the discharge of their duties.

#### Section 7000.4 Meetings.

(a) The trustees shall meet at least quarterly each year at such locations, and in such manner, as the chair shall designate. Special meetings may be called by the chair, and shall be called by the chair upon the request of at least four trustees. The chair shall provide reasonable notice of all meetings.

(b) Eight trustees shall constitute a quorum. A majority of the trustees present at any meeting of the board may exercise any powers held by the trustees, except as otherwise provided in this Part.

#### Section 7000.5 Powers and duties of trustees.

(a) In the exercise of the authority granted the trustees, the trustees have the power to:

(1) receive, hold and distribute the moneys remitted to the IOLA fund pursuant to the provisions of section 497 of the Judiciary Law and to receive such other moneys and property received from any source, including voluntary contributions, together with any interest accrued thereon. All such revenue not distributed shall be secured and invested as required by the provisions of sections 97-v and 98 of the State Finance Law;

(2) require eligible banking institutions to verify their current compliance with New York Judiciary law 497, New York State Finance Law 97-v and these regulations;

(3) make available to the public the names of eligible banking institutions;

(4) allocate no less than 75 percent of the net funds distributed after covering administrative expenses in any fiscal year as grants and contracts to not-for-profit tax-exempt "qualified legal services providers," as defined by section 7000.12(a)(1) of this Part, for the provision of civil legal services to the poor allocated according to the geographic distribution of poor persons throughout the State based on the latest available figures from the United States Department of Commerce, Bureau of Census;

(5) allocate the remaining funds to "administration of justice providers," as defined by section 7000.12(a)(2) of this Part, for purposes related to the improvement of the administration of justice, including but not limited to the provision of civil legal services to groups currently underserved by legal services, such as the elderly and the disabled, and the enhancement of civil legal services to the poor through innovative and cost-effective means, such as volunteer lawyer programs and support and training services;

(6) adopt and amend regulations for the administration of the fund and procedures for the distribution of grants and contracts;

(7) review applications for grants and contracts using staff and other available resources;

(8) determine, pursuant to the provisions of section 97-v of the State Finance Law, the award of grants and contracts, including the amount to be awarded and the terms under which the awards of grants and contracts shall be made;

(9) employ and remove, at their pleasure, employees, agents and consultants and fix their compensation within the amounts available therefor, but in no event shall more than 10 percent of the funds available in any fiscal year be spent on personnel and related services, including necessary nonpersonnel administrative costs of the program; provided, however, that pursuant to section 97-v of the State Finance Law as amended by the Laws of 1984, such limitation may be waived by the board of trustees by the adoption of a resolution, and such waiver shall remain in effect until the board determines by a subsequent resolution that the program is fully operational;

(10) furnish the Governor, the Court of Appeals, the Legislature and the State Comptroller with an annual report of the activities and operations of the fund; and

(11) perform all other acts necessary or proper for the fulfillment of the purpose of the fund and its effective administration, including but not limited to the creation of subcommittees of the board and the appointment of officers other than chair.

(b) Powers and duties of officers. The duties of the officers of the fund shall be as follows:

(1) the chair shall preside at all meetings of the trustees, generally supervise the administration of the fund and exercise such other functions

and duties that the trustees may assign or delegate, or that are customary to the office of the chair;

(2) the vice-chair shall assume the duties of the chair in the absence or disability of the chair;

(3) the treasurer shall maintain the financial records of the fund and, jointly with the chair, certify vouchers of the fund that authorize the State Comptroller to make payments of grants and contracts; and

(4) the executive director shall assist the trustees, supervise the implementation of regulations, coordinate the review of applications, supervise staff, serve as secretary at meetings and fulfill such other duties as may be assigned or delegated by the chair or the trustees.

#### Section 7000.6 Conflict of interest.

A trustee with a past or present affiliation with an applicant (including employee, officer, director, trustee, counsel or business relationship) for distribution of funds shall declare such affiliation to the trustee, and that trustee shall not participate in a vote on any matter relating directly to such applicant.

#### Section 7000.7 Reports.

(a) On or after the first day of April each year, the trustees shall prepare an annual report of the activities and operations of the fund during the preceding year. The report shall be transmitted to the Governor, the Legislature, the Court of Appeals and the State Comptroller.

(b) The trustees may issue periodic reports to the public concerning the activities and procedures of the fund.

Section 7000.8 Establishment of IOLA accounts by attorneys and law firms.

(a) Participation in IOLA is mandatory. Each attorney or law firm that receives qualified funds shall establish and maintain an IOLA account in an eligible banking institution of the attorney's or law firm's choosing. An attorney or law firm which receives qualified funds in the course of its practice of law and establishes and maintains an IOLA account shall (i) designate the account as "(name of attorney/law firm IOLA account)" with the approval of the banking institution and (ii) notify the IOLA fund within 30 days of establishing the IOLA account of the account number and the name and address of the eligible banking institution where the account is deposited. Such attorney or law firm:

(1) shall have discretion, in accordance with the code of professional responsibility, to determine whether moneys received by the attorney or law firm in a fiduciary capacity from a client or third person shall be deposited in a nonsegregated IOLA account;

(2) shall, if in the judgment of the attorney or law firm any moneys received are qualified funds, deposit such funds in an IOLA account;

(3) shall, ordinarily, in determining the type of account into which to deposit particular funds held for a client or third person, take into consideration the following factors:

(i) the amount of the funds received, the interest or dividends the funds would earn during the period they are expected to be deposited, the expected duration of the deposit, the rates of interest or yield and service charges or fees at a banking institution where the funds may be deposited;

(ii) the cost of establishing and administering non-IOLA accounts for clients or third persons, including the cost of the lawyer or law firm's services, and including the cost of obtaining tax identification information, the necessity or propriety of completing tax reports and forms, and remitting interest to a client;

(iii) the capability of the banking institution, or attorney or law firm, to calculate and pay interest earned by each client's fund, net of any service charges, fees or other applicable costs, to the particular clients, including through the use of subaccounting;

(iv) any other circumstances that affect the ability of the funds to earn income for a client or third person in excess of the costs incurred to secure such income while the funds are held.

(b) Notwithstanding the deposit requirements of this subdivision, no attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys into an IOLA account pursuant to the attorney's good faith judgment that such moneys were qualified funds.

(c) Attorneys with accounts in a financial institution which ceases for any reason to be an eligible banking institution for IOLA accounts shall move such accounts to an eligible banking institution.

(d) An attorney or law firm that establishes that compliance with the foregoing provisions of this section has resulted in any banking service charges or fees to such attorney or law firm shall be entitled to reimbursement of such charges or fees from the interest on the IOLA account of such attorney or law firm by filing a claim with supporting documentation with the IOLA fund within 90 days of the imposition of such charges or fees, as

approved by the Board. In no event, however, shall the attorney or law firm be entitled to reimbursement in excess of the interest earned by such IOLA account.

#### Section 7000.9 Interest.

(a) To be considered eligible, the banking institution shall pay an interest or dividend rate on IOLA accounts which is not less than the highest rate available among the following types of accounts, as paid by the banking institution to its best customers on similarly-sized accounts maintained at that institution in New York State:

- (1) A money market account with or tied to check writing capability;
- (2) A government (such as for municipal deposits) checking account;
- (3) An open-end money market fund investment offered through the banking institution that is (i) tied to a check writing capability at the institution, (ii) and which fund is solely invested in, or fully collateralized by, U.S. Government securities and (iii) has total assets of at least \$250,000,000; or

(4) Any other interest-paying checking account product.

(b) As alternatives to the foregoing, the institution may offer:

(1) 60% of the Federal Funds Target Rate paid on an interest-bearing checking account; or

(2) A yield specified by the IOLA fund, if it so chooses, which is agreed to by the financial institution and would be in effect for and remain unchanged during a period of twelve months from the inception of the agreement between the institution and the IOLA fund.

(c) The following additional provisions are applicable. As indicated by their terms, some apply only to one or some of the options set forth above.

(1) The Federal Funds Target Rate referenced in paragraph (1) of subdivision (b) shall be calculated as of the first day of each month.

(2) A bank may elect to offer the highest rates that it pays on government or high-yield money market accounts on another qualifying IOLA checking account, instead of actually offering such account.

(3) All account types will provide immediately available funds as otherwise required of attorney trust accounts.

(4) Institutions may elect to pay a higher interest or dividend rate than provided for in this section.

(5) All participating financial institutions shall report, in the form and manner prescribed by the IOLA fund, on the best rate paid to their best customers for each of the types of accounts they offer within the definitions specified in paragraphs (1) through (4) of subdivision (a) above. To enable attorneys and law firms to open and maintain an IOLA account, an eligible banking institution shall, within 30 days of the effective date of these regulations and as requested thereafter, provide to the IOLA Board information that demonstrates compliance with the provisions of this section.

(6) Where there is reasonable cause to believe a financial institution is willfully misrepresenting its best yield information, the IOLA fund may condition continued approval status on a finding by the institution's auditor that its certifications have been accurate.

(d) The IOLA Board shall periodically monitor the effectiveness of this standard.

#### 7000.10 Eligible Banking Institutions.

With respect to IOLA accounts, eligible banking institutions that choose to offer, establish, accept or maintain IOLA accounts:

(a) shall have no duty to inquire or determine whether deposits consist of qualified funds;

(b) shall charge only equitable service charges or fees against the interest earned on IOLA accounts which shall be limited to per check charges, per deposit charges, monthly maintenance fees, a fee in lieu of a minimum balance, federal deposit insurance fees, or a service charge for the preparation and issuance of reports required by this section, as approved by the trustees of the fund. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLA account;

(c) may elect to waive any charges or fees on IOLA accounts;

(d) shall remit at least quarterly any interest earned on IOLA accounts to the IOLA fund, after deduction of equitable service charges or fees, if any;

(e) shall not take any equitable service charges or fees in excess of the interest or dividends earned on an IOLA account for any month or quarter from interest or dividends earned on another IOLA account or from the principal of the account. Any charges or fees in excess of the interest or dividends earned on an IOLA account may be carried over to the next remitting periods and deducted from interest or dividends earned in such account.

(f) shall transmit to the IOLA fund with each remittance a report that shall identify each lawyer or law firm for whom the remittance is sent, the

amount of remittance attributable to each IOLA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average balance for each IOLA account for the period in which the report is made;

(g) shall transmit to each attorney or law firm who maintains an IOLA account a report in accordance with the normal procedures for reporting to its depositors;

(h) shall have no liability for any claims by any person or entity for payments from an IOLA account to or upon the order of the attorney or law firm maintaining the account;

(i) shall have no liability for any claims by any person or entity for any remittance of interest to the IOLA fund pursuant to the provisions of section 97-v of the State Finance Law; and

(j) shall not be subject to any action solely by reason of its opening, offering or maintaining an IOLA account, accepting any funds for deposit to any such accounts or remitting any interest to the IOLA fund. If in the sole discretion of the board of trustees of the IOLA fund, a banking institution has, because of a mistake of fact, error in calculation or erroneous interpretation of section 97-v of the State Finance Law, section 497 of the Judiciary Law or of this Part, remitted to the IOLA fund any moneys not required by such provision to be remitted, the board of trustees shall refund such moneys upon application of any aggrieved party. Any such refund shall be paid from the IOLA fund without interest and without the deduction of any service charge and shall constitute a full satisfaction and discharge of any claim for such refund.

#### Section 7000.11 Confidentiality.

(a) All records, documents or other information identifying an attorney or law firm, client or third person of an IOLA account shall be confidential and shall not be disclosed by a banking institution except with the consent of the attorney or law firm maintaining the account or as required by law, regulation, administrative requirement or compulsory legal process.

(b) The board of trustees shall maintain all papers, records, documents or other information identifying an attorney or law firm, client or third person of an IOLA account on a private and confidential basis, and shall not disclose such information unless such disclosure is (1) necessary to accomplish the purposes of section 497 of the Judiciary Law and section 97-v of the State Finance Law or (2) made pursuant to compulsory legal process.

#### Section 7000.12 Qualified recipients.

(a) Qualified recipients shall be not-for-profit entities, tax-exempt under section 501(a) of the Internal Revenue Code, or any successor provision, eligible to receive distributions of IOLA funds pursuant to one or both of the following categories:

(1) Qualified legal services providers which shall be an entity which operates within New York State and provides direct civil legal services without charge to poor persons within a geographical area in New York State; or

(2) Administration of justice providers which shall be an entity which operates within New York State and which:

(i) enhances civil legal services to the poor through innovative and cost effective means;

(ii) provides direct civil legal services either to groups of clients currently underserved by legal services, such as the elderly or the disabled, or in an area of representation, whether substantive or geographical, that cannot be or is not effectively served by individual qualified legal services providers;

(iii) provides legal, management or operational training, or legal, management, support service, or technical assistance, or direct legal assistance, informational advocacy or litigation support to qualified legal services providers; or

(iv) which otherwise promotes the improvement of the administration of justice.

(b) All qualified recipients shall:

(1) ensure that the funds received are expended in accordance with the provisions of section 97-v of the State Finance Law, section 497 of the Judiciary Law and this Part;

(2) preserve the attorney-client privilege in all cases;

(3) ensure that no one shall interfere with any attorney funded in whole or in part by IOLA funds in fulfilling a professional responsibility to a client as established by the code of professional responsibility and the provisions of section 97-v of the State Finance Law, section 497 of the Judiciary Law and this Part; and

(4) prohibit discrimination, as defined by the applicable laws of the United States and the State of New York, against (i) any person applying for employment or employed by the qualified recipient; or (ii) any person

seeking participation in or the benefits or proceeds of, a program or programs supported in whole or in part by IOLA funds.

(c) Recognizing that the IOLA funds available for distribution may not be sufficient to make distributions to all qualified recipients submitting applications for such funds which merit funding, the board of trustees shall from time to time establish funding priorities. Among the factors to be considered by the board of trustees in establishing the priorities shall be:

(1) if there are two or more qualified recipients in a geographical area who have applied for IOLA funding, the board shall distribute available funds annually based upon a determination by the board in its discretion of the merits of the applications of the qualified recipients and the impact that distribution to the qualified recipients will have on ensuring the delivery of stable, economical and high quality civil legal services to that area;

(2) absent special circumstances, qualified recipients shall have substantial sources of income used for the provision of civil legal services to the poor in addition to the funds requested;

(3) expansion and improvement of existing qualified recipients shall be preferred over requests to provide IOLA funding to establish new qualified recipients, except in instances of unique and difficult to serve areas and groups;

(4) requests shall be encouraged for applications for IOLA funds which will result in the development and strengthening of pro bono programs which generate the provision of substantial voluntary legal services to the poor;

(5) the level of professional standards and efficiency and quality of services;

(6) the provisions for client participation in program planning, priority setting and operation;

(7) provisions which prohibit attorneys employed full-time in legal assistance activities supported all or in part by IOLA funds from engaging in any compensated outside practice of law;

(8) the encouragement of cooperative proposals from multiple qualified recipients in a given service area;

(9) the level of client and community support for the services for which IOLA funds are being sought;

(10) whether a qualified support and training provider applicant seeking IOLA funds to provide training and support services to qualified legal service providers has obtained the approval of a majority of the programs it seeks to assist; and

(11) qualified support and training provider applicants seeking IOLA funds to provide direct legal services either to groups of clients currently underserved by legal services or in areas of representation that cannot effectively be serviced by individual qualified legal services providers shall demonstrate the need for such services.

#### 7000.13 Use of funds.

(a) No IOLA funds distributed pursuant to section 97-v of the State Finance Law, section 497 of the Judiciary Law and this Part may be used for any of the following purposes:

(1) the provision of legal services with respect to any fee-generating case unless adequate representation is unavailable;

(i) for the purposes of this subparagraph, fee-generating case shall mean any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party;

(ii) other adequate representation is deemed unavailable if any one of the following factors are met:

(a) it has been determined that free referral is not possible for any of the following reasons:

(1) the case has been rejected by the local lawyer referral service or by two attorneys in private practice who have experience in the subject matter of the case;

(2) neither the referral service nor at least two attorneys in private practice who have experience in the subject matter of the case will consider the case without payment of a consultation fee;

(3) the case is of the type which attorneys in private practice in the area ordinarily do not accept without prepayment of a fee;

(4) emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with the code of professional responsibility, referral will be attempted at a later time;

(b) recovery of damages is not the principal object of the case and a request for damages is ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is

necessary for effective defense or because of applicable rules governing joinder of counterclaims;

(c) a court has appointed a qualified recipient or an attorney employed by a qualified recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction;

(d) the case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(b) Criminal proceedings. No funds distributed pursuant to this Part shall be used for the provision of legal assistance with respect to any criminal proceeding or any action in the nature of habeas corpus collaterally attacking a criminal conviction.

(c) Prohibition on the use of funds for political purposes. No funds distributed pursuant to this Part shall be used either directly or indirectly to contribute to any political party or association, or any candidate for public or party office, and no political test or qualification shall be used in making any decision, taking any action, or performing any function under these regulations.

#### 7000.14 Client financial eligibility for services.

(a) A person eligible to receive legal services from funds allocated pursuant to this Part must have an income that does not exceed 125 percent of the official poverty threshold as defined by the United States Office of Management and Budget, except in the following circumstances:

(1) the person is seeking legal assistance to secure benefits provided by a governmental program for the poor;

(2) the person would be eligible but for the receipt of benefits provided by a governmental income maintenance program; or

(3) the person's circumstances require that eligibility should be allowed on the basis of one or more of the factors set forth in subdivision (b) of this section.

(b) In addition to income, a recipient shall consider other relevant factors in determining whether a person is eligible to receive legal assistance. Factors to be considered shall include:

(1) current income, taking into account seasonal variations in income;

(2) liquid assets;

(3) fixed debts and obligations, including Federal and local taxes and medical expenses;

(4) child care, transportation, mandatory payroll deductions and other expenses necessary for employment;

(5) age or physical infirmity of resident family members;

(6) the cost of obtaining private legal representation with respect to the particular matter in which assistance is sought;

(7) the consequences for the individual if legal assistance is denied; and

(8) any other factors related to financial inability to afford legal assistance.

(c) A recipient may provide legal assistance to a group, corporation, or association if it:

(1) is primarily composed of persons eligible for legal assistance under these regulations; or

(2) has as its primary purpose the furtherance of the interests of persons in the community who are unable to afford legal assistance; and

(3) provides information showing that it lacks, and has no practical means of obtaining, funds to retain private counsel.

(d) A recipient shall adopt a simple form and procedure to obtain information to determine eligibility in a manner that promotes the development of trust between attorney and client. If there is substantial reason to doubt the accuracy of the information, a recipient shall make appropriate inquiry to verify it in a manner consistent with the attorney-client relationship. Information furnished to a recipient by a client to establish financial eligibility shall not be disclosed to any person who is not employed by the recipient in a manner that permits identification of the client without the express written consent of the client.

(e) If an eligible client becomes ineligible due to a change in circumstances, a recipient shall discontinue representation if the change in circumstances is sufficiently likely to continue for a period which will enable the client to retain private legal assistance, and discontinuation is not inconsistent with the attorney's professional responsibility.

#### 7000.15 Applications for grants and contracts.

(a) The board of trustees shall seek submissions of grant and contract applications on a regular and periodic basis, and distribute available IOLA funds, after the payment of administrative expenses, to qualified recipients pursuant to the provisions of this Part on the basis of the merits

of the applicants. The board of trustees may delegate the screening of the funding applications to its staff or other entity it deems appropriate.

(b) All applicants seeking funds pursuant to this Part shall:

(1) submit a written grant proposal;

(2) respond adequately to the recommended grant proposal format and any additional requests for information;

(3) agree to carry out the program for which funds are requested, report on its progress and results, and return any funds not utilized in accordance with the grant;

(4) cooperate with all data collection and evaluation activities requested and submit annually an audited financial statement by a certified public accountant and a report of the programs on which the IOLA funds were expended.

(c) All grant and contract applications submitted to the board of trustees shall include the following information:

(1) community characteristics demonstrating the need for legal services and describing the affiliation with existing legal services providers, volunteer lawyer programs and local bar associations;

(2) organizational structure of the applicant, including policy board composition, sources and amounts of other funding, planning and priority setting processes, and client and community input and support;

(3) description of the applicant, including community outreach, office and staffing patterns, staff qualifications, specialty units, client statistics, client screening, intake and referral procedures, systems of quality control (case assignment and review, supervision and follow-up training, technical assistance and other support), client grievance procedures and staff and program evaluation;

(4) description of the program for which IOLA funding is sought;

(5) program budget which sets forth the proposed use of the requested IOLA funds and a timetable and self-assessment plan to monitor the implementation and operation of the proposed program;

(6) the documentation to be provided by the applicants shall include: (i) tax-exempt status; (ii) latest audited financial statements; (iii) affirmative action policy; (iv) current professional liability coverage; and (v) approval of the proposal by the applicant's board of directors; and

(7) any other relevant information requested by the executive director.

7000.16 Processing applications.

Review and approval of the grant and contract applications shall be completed within three months of the date set for the submission of the funding application, and if the amount to be distributed differs from the funds requested, within 30 days after notification of such proposed distribution, each qualified recipient shall submit a modified budget and narrative explaining how the funds will be utilized.

7000.17 Payment of grants and contracts.

All payments from the IOLA fund shall be made by the State Comptroller upon certification and authorization of the trustees of the fund.

7000.18 Denial of grants and contracts.

(a) The board of trustees shall have the power to determine that an applicant for funding is not qualified to receive funding or is not the most meritorious of competing applicants, to deny or reduce future funding, or to terminate existing funding.

(b) In reaching a decision, the board of trustees shall take into consideration the amount of funds available for distribution, the continuity, competence and cost-effectiveness of the services provided, the provider's compliance with the terms and conditions of the grant and the requirements of these regulations, the standing of the recipient in the client community being served, the viability of an alternate provider of services and the disruption of services caused by a change in the identity of the provider. If a decision is made to terminate or deny refunding of a grant, the board of trustees may authorize temporary funding if necessary to enable a grant recipient to close or transfer current matters in a manner consistent with its professional responsibilities to its current clients. Where the board of trustees has funded an applicant for general operating support on a recurring basis, a decision to terminate funding or deny refunding will normally only be based on:

(1) a substantial failure to comply with the terms and conditions of the grant or the requirements and restrictions of these regulations;

(2) a substantial failure to use the grant to provide economical and effective legal assistance as measured by generally accepted professional standards and the provisions of these regulations; or

(3) a lack of sufficient funds available for distribution pursuant to these regulations.

(c) The provisions of subdivision (b) of this section shall not apply to any grant awards which the board of trustees designates, at the time such award is made, as one time in nature.

7000.19 Advisory council.

The board of trustees may from time to time establish one or more advisory councils made up of representatives of qualified recipients and members of the private bar and communities serviced in order to assist in the promotion of IOLA accounts and to provide advice in the development and implementation of the programs initiated by this Part. The members of the advisory council will receive no compensation for their services but, in the discretion of the board, may be entitled to receive reimbursement for their actual and necessary expenses incurred in the discharge of their duties.

7000.20 Adoption and amendment of regulations.

New regulations may be adopted, and any regulation may be amended or repealed, by the trustees at any regular or special meeting, provided that notice of the proposed adoption, amendment or repeal has been given to all trustees at least seven days before the meeting and, provided further, that any amendment of a provision of this Part, which by its terms requires action by a special vote, shall become effective only if adopted by such special vote. In addition, any such regulation proposed by the board of trustees to be adopted, amended or repealed may be so adopted, amended or repealed only in accordance with Article 2 of the State Administrative Procedure Act. Copies of all regulations shall be made available to the public at all offices of the fund.

7000.21 Construction of regulations.

This Part shall be liberally construed to accomplish the objectives of the fund and the policies of the trustees.

7000.22 Fiscal year.

The fund shall be on March 31st fiscal year.

**Text of proposed rule and any required statements and analyses may be obtained from:** Stephen Brooks, General Counsel, Interest on Lawyer Account Fund, 11 E. 44th St., New York, NY 10017, (646) 865-1541, e-mail: sbrooks@iola.org

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

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

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

The Interest on Lawyer Account's Board of Trustees (Board) is authorized to adopt rules for the administration of the Interest on Lawyer Account (IOLA) fund pursuant to State Finance Law (SFL) § 97-v and Judiciary Law (Jud. L) § 497. SFL § 97-v(3)(d) authorizes the Board to adopt rules for the "administration of the IOLA fund to carry out the purposes and provisions of this section and of section four hundred ninety-seven of the judiciary law." Jud. L § 497(6)(b) requires attorneys to deposit certain client funds into an IOLA account for which the banking institution pays an interest rate not less than the rate paid on "similar accounts" and which does not impose charges or fees greater than those imposed on such "similar accounts."

Canon 9 of the Code of Professional Responsibility provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Ethical Consideration 9-5 requires attorneys to maintain client funds separately from their own. Disciplinary Rule 9-102 provides that an attorney who has received client funds incident to his or her practice of law has a fiduciary responsibility to safeguard such funds. The Disciplinary rule further provides guidance for the maintenance of client funds in an account separate from the lawyer's business or personal accounts, as well as the requisite record keeping for such accounts. Jud. L §§ 497(2-a) similarly provides that funds received by an attorney from a client in the course of his or her practice of law are "funds received in a fiduciary capacity." Jud. L § 497(2) provides that certain funds received in a fiduciary capacity may, in the professional judgment of the lawyer, be deemed "qualified funds" to be deposited in an IOLA account.

In addition, the Code of Professional Responsibility Canon 1 requires that "A Lawyer Should Assist in Maintaining the Integrity of the Legal Profession." Ethical Consideration 1-1 prescribes as a basic tenet that attorneys have a professional responsibility to help to ensure that every person in our society has ready access to independent legal services. Canon 2 requires that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." Ethical Consideration 2-1 requires, among other things, that it is an important function of a lawyer to make legal services fully available.

The proposed rule is critical to fulfilling the statutory responsibility to provide adequate funding to assist in the delivery of funding for legal services to the poor and other underserved citizens of the State. The rule will also assist lawyers to fulfill their professional responsibility to make legal services available while adhering to their fiduciary responsibility to safeguard client funds.

#### 2. Legislative Objectives:

The purpose of the IOLA Fund is to provide funding through grants and contracts to not-for-profit entities that are engaged or assist in the delivery of civil legal services to the poor, and the improvement of the administration of justice. The Fund's revenue is entirely derived from the interest earned on lawyers' IOLA escrow accounts.

The proposed rule furthers that purpose by explicating the existing statutory requirement that banking institutions set interest rates on IOLA accounts that are not less than those they pay on similar accounts.

#### 3. Needs and Benefits:

Created in 1983, the IOLA program requires an attorney to open an IOLA bank account to deposit nominal or short term funds held by the attorney on behalf of a client or third party. This means that funds that would otherwise generate no net interest can be pooled to generate interest income. The bank then sends the interest earned, net of charges and fees, to the IOLA fund. The money is used to award grants to civil legal service providers.

Most IOLA accounts, however, bear extremely low rates of interest in New York, compared to those in other leading states. Through this regulation, the IOLA Board, which administers the IOLA system, is seeking to increase the interest rates paid on IOLA accounts to meet the statutory requirement that the interest rate payable on IOLA accounts be not less than the rate paid by the bank on "similar accounts." The current regulations provide the same standard as the statute. Historically, this standard has been interpreted by financial institutions to require the payment of interest rates comparable to the type of interest bearing accounts that pay the lowest interest, that is, "NOW" accounts.

The most significant revision will be to require attorneys to maintain their IOLA accounts only in banks that meet a "best customer" standard for the interest paid on such accounts. That is, the interest rate paid on the IOLA account must be at least as great as the rate the bank offers its best customers on similarly-sized accounts at that bank. Establishment of the best customer standard in regulation has been shown to be necessary to detail what the statutory provision "similar account" means and how such statutory requirement must be fulfilled.

This change should result in many millions of dollars of additional interest payments to the IOLA fund.

#### 4. Costs:

If between 75% and 85% of the December 2007 total estimated balance of \$3.1 billion in IOLA accounts were subject to an interest rate of 2.75%, instead of a weighted average rate of .57%, the range of increased annual revenue would be between \$45 million and \$55 million, approximately.

Account management, recordkeeping and reporting costs have not been assessed by banks to the Fund in the past, except for routine fees and charges typically applied to retail accounts.

#### 5. Local Government Mandates:

Local governments are not affected by the proposed rule.

#### 6. Paperwork / Reporting Requirements:

No additional paperwork will be required of attorneys to open or maintain IOLA accounts. Under existing rules, attorneys and law firms must notify the IOLA fund within 30 days after establishing an IOLA account and provide certain identifying information. These requirements will continue.

All participating financial institutions will have to report, in the form and manner prescribed by the IOLA fund, on the best rate paid to their best customers for each of the types of accounts specified in the rule. To enable attorneys and law firms to open and maintain an IOLA account, an eligible banking institution will be required to provide to the IOLA Board within 30 days of its effective date information that demonstrates compliance with the provisions of the rule. In addition, eligible banks will be required to provide such information thereafter as requested by the Board.

#### 7. Duplication:

The proposed rule does not duplicate existing State or federal requirements. It is comparable to rule in effect in many other states.

#### 8. Alternatives:

One alternative was to make no changes to the existing rules; however, this alternative was rejected, because the goal is to enable the IOLA Fund to enforce its existing statute and receive increased revenue from IOLA

accounts to increase the availability of high quality civil legal services for the poor. Maintaining the status quo would fail to increase such funding.

Another alternative considered by the IOLA Board was to require financial institutions to pay a rate of interest on IOLA accounts equal to the interest rates paid on similar accounts at other financial institutions. This alternative was rejected based on the interpretation of statutory authority. Judiciary Law § 497(6)(b) provides that the interest rate on IOLA accounts must be not less than the rate paid by the banking institution on similar accounts at that bank. The Board interprets this provision as not authorizing a comparison of the rates paid at various banks to establish what the rate on "similar accounts" is.

#### 9. Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government. The federal government does not regulate IOLA accounts.

#### 10. Compliance Schedule:

Attorneys and law firms are currently required by existing regulation to maintain IOLA accounts for client funds. There are no changes to the requirement to maintain IOLA accounts, or to prepare certain paperwork or maintain certain records. Therefore, attorneys and law firms should be able to comply with the proposed rule upon its adoption.

Financial institutions must provide to the IOLA Board within 30 days of the proposed rule's adoption and periodically thereafter information that demonstrates compliance with the regulatory requirements.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The rule will affect all banks, including those banks that may be considered small businesses because they employ 100 or fewer full-time employees (FTE) in the State. Although they are not independently owned and operated, there are approximately 107 bank branches that employ fewer than 100 FTEs that may be affected by the proposed rule. These entities would need to account for and remit to the IOLA fund at least quarterly the interest earned on IOLA accounts maintained by such bank branch. However, the existing regulations already impose the same obligations on banking institutions, including branches with fewer than 100 FTEs. Attorneys and law firms with fewer than 100 full time employees may be affected by the rule. It is, however, impossible to determine which, if any, attorney or law firm will be adversely affected by the changes in interest rates paid on IOLA accounts. If an attorney or law firm maintain their IOLA account at a bank that will no longer be eligible to maintain IOLA accounts because they do not pay the best customer interest rate required by the rule, the attorney or law firm will need to change the location of their IOLA account to an eligible banking institution. The current regulations also require attorneys and law firms to notify the IOLA fund of establishing an IOLA account within 30 days. Local governments are not affected by the proposed rule.

#### 2. Compliance Requirements:

As indicated, banking institutions would need to account for and remit to the IOLA fund at least quarterly the interest earned on IOLA accounts maintained by such bank branch. However, the existing regulations already impose the same obligations on banking institutions, including branches with fewer than 100 FTEs. The proposed regulations require attorneys to notify the IOLA fund within 30 days of establishing an IOLA account of the account number and name and address of the banking institution where the account has been established. If an attorney or law firm currently maintains an IOLA account at a banking institution that becomes ineligible to maintain IOLA accounts or an attorney or law firm establishes a new IOLA account, such information would have to be provided to the IOLA Board within 30 days of relocating or establishing the IOLA account. The number of law firms with fewer than 100 full time employees is unknown. The current regulations contain the same notification requirements for attorneys and law firms.

#### 3. Professional Requirements:

The regulations would not require the hiring of additional staff or independent professionals. No special expertise would be necessary for an attorney or law firm to provide the notification of the establishment of an IOLA account. Banking institutions already must account for the interest to be collected and paid on IOLA. Therefore, it is anticipated that no additional employees or professionals would need to be hired to comply with the proposed rule.

#### 4. Compliance Costs:

No significant compliance costs would result from the proposed rule.

#### 5. Economic and Technological Feasibility:

The regulations will not impose additional economic or technological burdens on banking institutions, attorneys or law firms.

6. Minimizing Adverse Impact:

There are no significant adverse impacts anticipated from the proposed rule.

7. Small Business and Local Government Participation:

During the development of the proposed rule, IOLA met with representatives of several banking institutions that currently maintain IOLA accounts. These discussions illustrate that there is emerging consensus among banking institutions concerning the proposed standards for interest rates to be paid by banks to remain eligible to maintain IOLA accounts.

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas:

There are 86 banking institutions that have branches located in rural areas. The number of attorneys and law firms located in rural areas of the State is unknown.

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

All banking institutions, including those banks or branches located in rural areas, would need to account for and remit to the IOLA fund at least quarterly the interest earned on IOLA accounts maintained by such bank branch. However, the existing regulations already impose the same obligations on banking institutions and their branches. The proposed and existing regulations require attorneys to notify the IOLA fund within 30 days of establishing an IOLA account of the account number and name and address of the banking institution where the account has been established. The number of law firms located in rural areas cannot with any reasonable certainty be determined. The current and proposed regulations contain the same notification requirements for attorneys and law firms, including attorneys and law firms located in rural areas of the State.

3. Costs:

No significant compliance costs would result from the proposed rule.

4. Minimizing adverse impact:

There are no significant adverse impacts anticipated from the proposed rule.

5. Rural area participation:

During the development of the proposed rule, IOLA met with representatives of several banking institutions that currently maintain IOLA accounts, including representatives of banks with branches located in rural areas. These discussions illustrate that there is emerging consensus among banking institutions concerning the proposed standards for interest rates to be paid by banks to remain eligible to maintain IOLA accounts.

**Job Impact Statement**

The IOLA Board has determined that the proposed rule will not have a substantial adverse impact on jobs and employment opportunities. The proposed rule would revise the standards concerning the interest rates paid on IOLA Accounts. These changes would have no impact on the creation or retention of jobs or employment opportunities in the State.

Rulemaking for this rule is expected to be filed shortly; however to continue operation of this game feature, this emergency adoption is necessary. This feature is intended to improve somewhat slow revenues and will provide needed aid to education this fiscal year.

**Subject:** Lotto Extra game feature.

**Purpose:** To add the Lotto Extra game feature to current New York Lottery regulations.

**Text of emergency rule:** Section 1. Part 2817 is amended by adding a new section 2817.12 to read as follows:

*Section 2817.12 Lotto Extra.*

(a) *Lotto Extra is a feature of New York's Lotto game. Except as otherwise noted in this section, the rules of Lotto apply to all Lotto Extra wagers.*

(b) *Lotto Extra shall determine winners from bet tickets by correctly matching some or all of the numbers in the player's number selection against the winning numbers, bonus number and Extra bonus number drawn by the Lottery for that drawing.*

(c) *Players of Lotto Extra are automatically included in the respective Lotto drawing, and have the added benefit of matching their number selections against the Extra bonus number for additional prize levels not available to Lotto players.*

(d) *To place a bet, a purchaser must communicate the desired game bet data to an agent by presenting a completed Lotto Extra playcard or by requesting a Lotto Extra quick pick. The playcard provides for the player's number selections, number of drawings requested and the option for Cash Value or Annuity Payments if the jackpot is won. The agent will issue a bet ticket. Such bet ticket will reflect the numbers played by the purchaser on that wager as the Lotto Extra.*

(e) *Forty percent of the gross Lotto Extra sales for each Lotto drawing shall be paid into the New York Lottery prize account for allocation of prize winnings.*

(f) *Not less than 38 percent of gross Lotto Extra sales for a particular drawing shall be the amount allocated to the winning pool for that particular game.*

(g) *During each Lotto drawing, the Lottery will draw an Extra bonus number. Numbers will be drawn in the following sequence: the first randomly chosen six numbers will be the winning numbers; the seventh number will be the bonus; and the eighth number will be the Extra bonus number.*

(h) *Lotto Extra bets may be purchased for a minimum of \$2.00 per two game panels; \$1.00 of such bet is on the Lotto game, and \$1.00 of such bet is for the Lotto Extra feature.*

(i) *Determination of Prizes: The prize structure and odds for this feature are:*

	Match	Odds	Pool Percentage
5	+ Either Bonus	3,754,789.50	14.50%
5		147,246.65	5.50%
4	+ Either Bonus	29,449.33	25.25%
4		2,355.95	5.75%
3	+ Either Bonus	883.48	15.00%
3		108.18	11.00%
2	+ Either Bonus	72.12	23.00%
	Overall Odds	40.47	100.00%

(j) *In the event that supplemental prize funds are necessary to fund prizes for Lotto Extra, those funds will be supplemented from unclaimed prize funds in accordance with sixteen hundred fourteen (a) of this article.*

**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 August 8, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Julie B. Silverstein Barker, Acting General Counsel, New York Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: jrbarker@lottery.state.ny.us

**Regulatory Impact Statement**

1. Statutory authority: Pursuant to the authority conferred in New York State Tax Law, Section 1604[a] and the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 21, Chapter XLIV, Section 2817, the following official game rules shall take effect and shall remain in full force and effect throughout the New York Lottery's LOTTO Extra as a new feature to the existing LOTTO game.

2. Legislative objectives: The purpose of operating Lottery games is to generate revenue for the support of education in the State. Amendment of

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## Division of the Lottery

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### EMERGENCY RULE MAKING

**Lotto Extra Game Feature**

**I.D. No.** LTR-22-07-00005-E

**Filing No.** 487

**Filing date:** May 11, 2007

**Effective date:** May 11, 2007

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

**Action taken:** Addition of section 2817.12 to Title 21 NYCRR.

**Statutory authority:** Tax Law, section 1604(a)

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

**Specific reasons underlying the finding of necessity:** The New York Lottery will be conducting Lotto Extra as a feature to the existing game available to New York's Lotto players. Game sales commenced on March 1, 2007. This game is necessary to assist the Lottery in reaching its projected revenue target for this fiscal year. A Notice of Proposed

these regulations forwards the mission of the New York State Lottery to generate revenue for education.

3. Needs and benefits: The New York Lottery has sustained competitive pressure from large jackpot lottery games in adjoining states. New Yorkers routinely travel outside the state to participate in those games. The New York Lottery's LOTTO Extra, as an existing game feature, allows the New York Lottery to continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who participate in large jackpot lottery games while also providing more opportunities for players to win prizes. The New York Lottery's LOTTO Extra as a new feature to existing games is anticipated on a full annual basis, to bring in more than \$5.4 million in revenue to benefit education in the State.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, since funds originally appropriated for the expenses of operating the existing lottery games are expected to be sufficient to support this new game.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the New York State Lottery's experience in operating State Lottery games for more than 30 years.

5. Local government mandates: None.

6. Paperwork: There are no changes in paperwork requirements. Game feature brochures will be issued by the New York State Lottery for public convenience at retailer locations free of charge.

7. Duplication: None.

8. Alternatives: The alternative to adding New York Lottery's LOTTO Extra as an existing game feature is not to proceed and forfeit the investment already made by the New York State Lottery for the game feature. The failure to proceed will also result in lost revenue to education that is anticipated to be earned.

9. Federal standards: None.

10. Compliance schedule: None.

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

The proposal does not require a Regulatory Flexibility Statement, Rural Flexibility Statement or Job Impact Statement. There will be no adverse impact on jobs, rural areas, small business or local governments.

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## Office of Mental Retardation and Developmental Disabilities

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### NOTICE OF ADOPTION

#### Fee Setting

**I.D. No.** MRD-12-07-00003-A

**Filing No.** 493

**Filing date:** May 15, 2007

**Effective date:** June 1, 2007

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

**Action taken:** Amendment of sections 671.7, 679.6 and 690.7 of Title 14 NYCRR.

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

**Subject:** Fee setting in home and community-based (HCBS) waiver community residential habilitation services, clinic treatment facilities, and day treatment facilities for persons with developmental disabilities.

**Purpose:** To propose amendment establishing cost of living (COLA) adjustments and trend factors applicable to these facilities and services, effective June 1, 2007.

**Text or summary was published** in the notice of proposed rule making, I.D. No. MRD-12-07-00003-P, Issue of March 21, 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 written comments from one provider agency regarding this proposed rule making. The comment and OMRDD's response are as follows:

1. Comment: The provider noted that it was appreciative of the COLA, but opined that the cost of living had gone far beyond the proposed percentage. The provider stated that it had hoped that OMRDD would look into the current economic situation and offer at least a 3.5% rate increase for the COLA.

Response: In accordance with legislative directive, the Cost of Living Adjustment (COLA) is predicated on the estimated Consumer Price Index (CPI) as published by the Congressional Budget Office. The authorizing legislation prescribes that the estimated CPI be reconciled to the actual CPI when it is published by the Bureau of Labor statistics. Insofar as possible, the correction is factored into the succeeding year's COLA.

Another OMRDD initiative which also aims to improve providers' abilities to recruit and retain staff offered supplemental funding in addition to the COLA. Health Care Enhancement monies were available upon application and provided fiscal relief to employees confronted with escalating health related costs.

Not only did OMRDD strive to align the COLA with objective economic indices, it presented an added opportunity for providers to mitigate the effects of rising costs.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### **Postretirement Benefits Other Than Pensions by United Water New Rochelle**

**I.D. No.** PSC-37-06-00018-A

**Filing date:** May 15, 2007

**Effective date:** May 15, 2007

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

**Action taken:** The commission, on Feb. 27, 2007, adopted an order permitting United Water of New Rochelle (UWNR) to continue to amortize annually the initial transition obligation (ITO) of \$124,957 providing that it offsets the original \$147,000 pension asset against the remaining postretirement benefits other than pensions (OPEB) deferral balance to reduce costs to customers.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(3) and (4)

**Subject:** UWNR's amortization of \$124,957 in OPEB costs described as an ITO.

**Purpose:** To approve UWNR to amortize \$124,957 in OPEB costs described as ITO.

**Substance of final rule:** The Commission adopted an order permitting United Water of New Rochelle (UWNR) to continue to amortize annually the Initial Transition Obligation of \$124,957 providing that it offsets the original \$147,000 pension asset against the remaining Postretirement Benefits Other than Pensions deferral balance to reduce costs to customers, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-

1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-W-1221SA2)

### NOTICE OF ADOPTION

#### Municipal Electric Pole Attachment Rates

**I.D. No.** PSC-04-07-00011-A

**Filing date:** May 9, 2007

**Effective date:** May 9, 2007

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

**Action taken:** The commission, on April 18, 2007, approved the methods for determining pole attachment rates charged by municipal electric companies.

**Statutory authority:** Public Service Law, sections 65(1), 66(5) and (12)

**Subject:** Municipal electric pole attachment rates.

**Purpose:** To approve methods for determining municipal electric pole attachment rates.

**Substance of final rule:** The Public Service Commission adopted an order setting a proxy pole attachment rate for municipal electric companies, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-1427SA1)

### NOTICE OF ADOPTION

#### Order Resolving Complaint by Transbeam, Inc.

**I.D. No.** PSC-07-07-00010-A

**Filing date:** May 11, 2007

**Effective date:** May 11, 2007

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

**Action taken:** The commission, on April 18, 2007, adopted an order concerning the petition for rehearing filed by Transbeam, Inc. for the Dec. 18, 2006 order resolving complaint.

**Statutory authority:** Public Service Law, section 22

**Subject:** Petition for rehearing of order resolving complaint regarding billing dispute.

**Purpose:** To approve the petition for rehearing.

**Substance of final rule:** The Commission adopted an order concerning the Petition for Rehearing filed by Transbeam, Inc. of the December 18, 2006 Order Resolving Complaint.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-C-1354SA1)

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

#### Inter-Carrier Telephone Service Quality Standards and Metrics by the Carrier Working Group

**I.D. No.** PSC-22-07-00011-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 modification to existing inter-carrier telephone service quality measures and standards as proposed by the Carrier Working Group and recommended by staff.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Inter-carrier telephone service quality standards and metrics.

**Purpose:** To review recommendations from the Carrier Working Group to incorporate appropriate modifications to the existing inter-carrier telephone service quality measures and standards.

**Substance of proposed rule:** The Commission is considering modifications to the New York State Inter-Carrier Service Quality Guidelines (the C2C Guidelines), which were established, and are routinely updated, in Case 97-C-0139. Revisions to the C2C Guidelines are proposed by the Carrier Working Group (CWG), an industry group that meets regularly and whose active participants includes the incumbent and competitive local exchange telecommunications carriers in New York State and the Staff of the Department of Public Service. Department Staff will be making recommendations to modify the C2C Guidelines applicable to Verizon New York Inc. and Frontier Telephone of Rochester, which may be derived by consensus of the Carrier Working Group or by analysis of the CWG parties' non-consensus positions. The specific modifications to the C2C Guidelines being considered by the Commission in this action include: administrative changes (*i.e.*, non-process changes of a clerical nature or that correct minor errors) and process changes to the Pre-Ordering performance measurements (*i.e.*, PO-7 metric which measures the timeliness of software problem resolution) and the Ordering performance measurements (*i.e.*, OR-6 metric which measures the percent of orders completed as ordered by the CLEC). The most recent version of the C2C Guidelines is available at: <http://www.dps.state.ny.us/carrier.htm>.

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

**Data, views or arguments may be submitted to:** Jaclyn A. 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. (97-C-0139SA29)

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

#### Interconnection Agreement between New Cingular Wireless PCS, LLC and Frontier Telephone of Rochester, Inc.

**I.D. No.** PSC-22-07-00012-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 modification filed by New Cingular Wireless PCS, LLC and Frontier Telephone of Rochester, Inc. to revise the interconnection agreement effective on June 1, 1998.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Inter-carrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the New Cingular Wireless PCS, LLC and Frontier Telephone of Rochester, Inc. interconnection agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between New Cingular Wireless PCS, LLC and Frontier Telephone of Rochester, Inc. in June 1998. The companies subsequently have jointly filed amendments to change legal entity from Genesee Telephone Company to New Cingular Wireless PCS, LLC.

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

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

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

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

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

(98-C-1045SA2)

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

**Tax Refund by Verizon New York Inc.**

**I.D. No.** PSC-22-07-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Verizon New York Inc. (Verizon) to retain that portion of an approximately \$4 million property tax refund, \$2.5 million of which is allocable to its regulated, intrastate New York operations, received from the City of New York on March 5, 2007.

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** To determine the disposition of a tax refund received by Verizon.

**Purpose:** To consider a petition by Verizon to retain that portion of a tax refund allocable to its regulated, intrastate New York operations received on March 5, 2007.

**Substance of proposed rule:** On April 23, 2007, Verizon New York Inc. (Verizon) filed a petition proposing a disposition of the portion of a tax refund allocable to its regulated, intrastate New York operations. The tax refund (of approximately \$3,944,000 in total) was the result of the successful litigation of a property tax claim against the City of New York. Verizon requests permission to retain that portion of the tax refund allocable to its regulated, intrastate New York operations (approximately \$2,500,000). The Commission may approve or reject in whole or in part, Verizon's request.

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

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

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

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

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

(07-C-0487SA1)

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

**Interconnection Agreement by Citizens Telecommunications Company of New York, Inc., et al.**

**I.D. No.** PSC-22-07-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Citizens Telecommunications Company of New York, Inc., Ogden Telephone Company, Frontier Telephone of Rochester, Inc., Frontier Communications of New York, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca Gorham, Inc., and Cornerstone Telephone Company, LLC for approval of an interconnection agreement executed on April 26, 2007.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Citizens Telecommunications Company of New York, Inc., Ogden Telephone Company, Frontier Telephone of Rochester, Inc., Frontier Communications of New York, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca Gorham, Inc. and Cornerstone Telephone Company, LCC have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc., Ogden Telephone Company, Frontier Telephone of Rochester, Inc., Frontier Communications of New York, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of AuSable Valley, Inc., Frontier Communications of Seneca Gorham, Inc. and Cornerstone Telephone Company, LCC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until April 26, 2009, or as extended.

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

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

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

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

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

(07-C-0533SA1)

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

**Demand Side Management Program by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-22-07-00015-P

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

**Proposed action:** The Public Service Commission is considering a request by Consolidated Edison Company of New York, Inc. (Con Edison or the company) for authorization to commence an expanded Demand Side Management Program in its service territory prior to the expected date of the company's next electric rate plan. The commission may approve, reject, or modify, in whole or in part Con Edison's request for such an expanded Demand Side Management Program.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** Authorization for recovery of incremental program costs and lost revenue associated with program implementation.

**Purpose:** To consider whether Con Edison's Demand Side Management proposed program changes should be authorized prior to the expected date of the company's next electric rate plan.

**Substance of proposed rule:** Consolidated Edison Company of New York, Inc. (Con Edison or the Company) filed a request for authorization for recovery of incremental program costs and lost revenue associated with the implementation of an expanded Demand Side Management (DSM) program for the company's electric operations. Con Edison also requests that the Commission approve its proposed energy efficiency incentive framework prior to, and/or for inclusion in the company's next electric rate plan. Con Edison's proposed program envisions the expansion of its targeted DSM program; establishment of a service area program geared toward obtaining permanent demand reductions in its service territory; and the development of new program initiatives.

The Commission may approve, reject, or modify, in whole or in part, Con Edison's request, and it may also consider other related matters.

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

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

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

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

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

(04-E-0572SA12)

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

**Advanced Metering Infrastructure Surcharge by New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation**

**I.D. No.** PSC-22-07-00016-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, proposals filed by New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation (NYSEG/RG&E) to implement an advanced metering infrastructure surcharge within its electric and gas tariff schedules to become effective Jan. 1, 2008.

**Statutory authority:** Public Service Law, sections 5(b), 65 and 66(1)

**Subject:** NYSEG/RG&E plans pertaining to advanced metering.

**Purpose:** To implement a formula rate mechanism for the recovery of advanced metering costs for NYSEG's/RG&E's electric and gas tariffs.

**Substance of proposed rule:** New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation (NYSEG/RG&E) propose to implement a formula rate delivery surcharge that would be added to customers' monthly or minimum charge. The delivery surcharge would allow NYSEG/RG&E to recover the costs, net of program savings, of implementing an Advanced Metering Infrastructure program. The proposals also include an update to the advanced metering plans filed on February 1, 2007 by NYSEG/RG&E in connection with three on-going proceedings, Cases 02-M-0514, 00-E-0165 and 94-E-0952. In an order issued on August 1, 2006 in these cases, the Commission directed electric utilities to file comprehensive plans for development and deployment, to the extent feasible and cost effective, of advanced metering systems for the benefit of all customers. Gas utilities were directed to assess the feasibility of developing, offering, and installing advanced metering systems for large volume gas customers. The filings have a proposed effective date of January 1, 2008. The Commission may approve, modify or reject, in whole or in part NYSEG's/RG&E's filings.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our**

**website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(02-M-0514SA9)

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

**Waiver of Rules by Empire Video Services Corporation**

**I.D. No.** PSC-22-07-00017-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition from Empire Video Services Corporation for a waiver of sections 895.1 and 895.5(a), (b) and (c) of the commission's rules regarding buildout, primary service area and line extension policies for the Town of Prattsburgh (Steuben County).

**Statutory authority:** Public Service Law, section 222(1) and (3)

**Subject:** Waiver of sections 895.1 and 895.5 (a), (b) and (c) of the commission's rules for Empire Video Services Corporation.

**Purpose:** To allow Empire Video Services Corporation to construct their cable television system within their telephone company's footprint, which will be their cable franchise area.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition to waive sections 895.1, 895.5(a), 895.5(b) and 895.5(c) from Empire Video Services Corporation regarding buildout, primary service area and line extension policies for the Town of Prattsburgh (Steuben County).

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

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

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

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

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

(06-V-0605SA2)

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

**Accounting Treatment of Pension Internal Reserve Account by New York Water Service**

**I.D. No.** PSC-22-07-00018-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, a petition of New York Water Service for authority to accrue carrying charges on the amounts actually deposited in an external pension fund in excess of the amount of its pension expense rate allowances.

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

**Subject:** Accounting treatment of pension internal reserve account.

**Purpose:** To resolve whether interest should be calculated on the amounts deposited in an external pension fund in excess of the amount of New York Water Service's pension expense rate allowances.

**Substance of proposed rule:** The Commission is considering the petition of New York Water Service for authority to accrue carrying charges on amounts actually deposited in an external pension fund in excess of the amount of its pension expense rate allowances. The Commission may approve, modify, or reject, in whole or in part the request of New York Water Service.

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

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

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

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

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

(07-W-0463SA1)

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

**Electronic Tariff Filing by Corlear Bay Property Owners Association, Inc.**

**I.D. No.** PSC-22-07-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by the Corlear Bay Property Owners Association, Inc. for approval of its electronic tariff schedule, P.S.C. No. 1—Water.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f) and 89-c(1) and (10)

**Subject:** Electronic tariff filing.

**Purpose:** To approve an electronic tariff schedule, P.S.C. No. 1—Water, for the Corlear Bay Property Owners Association, Inc.

**Substance of proposed rule:** On May 11, 2007, Corlear Bay Property Owners Association, Inc. (the Association) filed an electronic tariff schedule, P.S.C. No. 1—Water, which sets forth the rates, charges, rules and regulations under which the Association will provide water service to become effective August 1, 2007. Among the provisions, the new updated electronic tariff defines when a bill will be delinquent, modifies the written notice of discontinuance of service provision, establishes a late payment charge and a returned check charge. The restoration of service charge will be at a rate agreed upon by the members of the Association and will appear on all written notices of discontinuation of services. The tariff also expands on language relative to terms of payment and ratesetting. The Association currently provides water service on a seasonal basis from May 15 to October 15 to 28 customers and continuous service to 1 customer located in the Village of Keeseville in the Town of Chesterfield, Essex County. The Association's tariff will be available on the Commission's Home page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us) located under Commission Documents — Tariffs). The Commission may approve or reject, in whole or in part, or modify the petition.

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

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

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

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

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

(07-W-0544SA1)

## Department of Taxation and Finance

### NOTICE OF ADOPTION

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel**

**I.D. No.** TAF-10-07-00001-A

**Filing No.** 492

**Filing date:** May 15, 2007

**Effective date:** May 15, 2007

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

**Action taken:** Amendment of section 492.1(b)(1) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning April 1, 2007 and ending June 30, 2007, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-10-07-00001-P, Issue of March 7, 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](mailto:tax_regulations@tax.state.ny.us)

**Assessment of Public Comment:**

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

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

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax**

**I.D. No.** TAF-22-07-00007-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 492.1(b)(1) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning July 1, 2007, and ending Sept. 30, 2007, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

**Text of proposed rule:** Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xlvi) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xlv) April-June 2007					
14.0	22.0	38.6	14.0	22.0	36.85
(xlvii) July-September 2007					
14.0	22.0	38.6	14.0	22.0	36.85

**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:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: tax\_regulations@tax.state.ny.us

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

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

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

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

**Refunds, Credits and Reimbursements of Motor Fuel Tax**

**I.D. No.** TAF-22-07-00008-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 415.1-415.3 and 415.5 of Title 20 NYCRR.

**Statutory authority:** Tax Law, section 171, subd. First

**Subject:** Refunds, credits and reimbursements of motor fuel tax.

**Purpose:** To reflect statutory changes extending the period for applying for a refund, credit or reimbursement from two years to three years.

**Text of proposed rule:** Section 1. Paragraph (1) of subdivision (c) of section 415.1 of such regulations is amended to read as follows:

(c) (1) Unless otherwise provided in this Part, a claim for refund, credit or reimbursement must be filed with the Department of Taxation and Finance within [two] *three* years from:

(i) the date of the purchase, in the case of the purchaser; or

(ii) the date of the sale, in the case of the seller, of the motor fuel so subject to refund, credit or reimbursement.

Section 2. Subdivision (b) of section 415.2 of such regulations is amended to read as follows:

(b) "Moneys paid in error." (1) Where motor fuel upon which the motor fuel tax has been paid is sold under any circumstances such that if the tax had not been paid the sale would not have been considered taxable under article 12-A of the Tax Law, such tax paid in error may be refunded. A claim for refund of motor fuel tax erroneously paid must disclose the nature of the erroneous payment and be filed with the department within [two] *three* years from the time the erroneous payment was made or within [two] *three* years from the time the tax-paid motor fuel was so sold.

(2) Where a distributor and the Department of Taxation and Finance have consented in writing pursuant to section 419.1 of this Title to extending the period of time in which a determination of tax may be made and such agreement is made within the [two-year] *three-year* periods specified in paragraph (1) of this subdivision, the period of time in which a distributor may file a claim for refund of motor fuel tax erroneously paid will not expire prior to six months after the expiration of the extended period within which a determination of tax may be made.

Section 3. Subdivision (h) of section 415.3 of such regulations is amended to read as follows:

(h) Where a distributor and the Department of Taxation and Finance have consented in writing pursuant to section 419.1 of this Title to extending the period of time in which a determination of tax may be made and such agreement is made within [two] *three* years from the date of the purchase of motor fuel subject to reimbursement, the period of time in which the distributor may file a claim for reimbursement under this section will not expire prior to six months after the expiration of the extended period within which a determination of tax may be made.

Section 4. Section 415.5 of such regulations is amended to read as follows:

Section 415.5 Erroneous payments to claimant. (Tax Law, section 289-c(3))

In the event of an erroneous or excessive payment to a claimant, the Department of Taxation and Finance may recover such amount from the claimant in the same manner as a tax imposed by article 12-A of the Tax Law. Determinations of erroneous or excessive payments must be made within [two] *three* years after the date of such erroneous or excessive payment.

**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:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: tax\_regulations@tax.state.ny.us

**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 the amendments merely reflect statutory changes that are not controversial in nature. The rule makes no changes in administrative policies regarding existing statutes and has no impact on taxpayers.

The purpose of this proposal is to reflect statutory changes made by Chapter 302 of the Laws of 2006 which extend the period for applying for a refund, credit or reimbursement under article 12-A of the Tax Law from two years to three years. The amendments to sections 415.1-415.3 and 415.5 simply conform the regulations with the amended statute.

**Job Impact Statement**

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no impact on jobs and employment opportunities. The rule merely reflects statutory changes made by Chapter 302 of the Laws of 2006 extending the period for applying for a refund, credit or reimbursement under article 12-A of the Tax Law from two years to three years.

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

**Regional Average Retail Sales Price for Motor Fuel and Diesel Motor Fuel**

**I.D. No.** TAF-22-07-00009-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 Part 561 and repeal Part 562 of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First, and 1142(1)

**Subject:** Regional average retail sales price for motor fuel and diesel motor fuel.

**Purpose:** To amend Part 561 and repeal Part 562, relating to the regional average retail sales prices of motor fuel and diesel motor fuel, to reflect statutory amendments.

**Text of proposed rule:** Section 1. Subdivision (b) of section 561.1 of such regulations is amended to read as follows:

(b)(1) Every distributor of motor fuel must pay a prepaid sales tax on each gallon of motor fuel which it:

[(1)](i) imports or causes to be imported into this State for use, distribution, storage or sale in the State; or

[(2)](ii) produces, refines, manufactures or compounds in this State.

(2) Such prepaid tax [is based on the prescribed regional average retail sales price and], *as prescribed in section 1111(e) of the Tax Law*, must be passed through to subsequent purchasers purchasing for resale.

Section 2. Subdivision (b) of section 561.3 of such regulations is amended to read as follows:

(b) The prepaid tax is based upon [the regional average retail sales price prescribed for] the region in which the motor fuel is imported, produced, refined, manufactured or compounded. The rate of *prepaid* tax for [purposes of computing the prepayment will either be six or seven percent, depending on the] *each* region [in which the motor fuel is located. See

sections 561.11 and 561.12 of this Part for further information regarding the prescribed regional average retail sales price and the regions created for purposes of the tax on motor fuel] *is prescribed in section 1111(e)(2) of the Tax Law.*

Section 3. The examples in subdivisions (b) and (c) of section 561.9 of such regulations are REPEALED.

Section 4. Sections 561.11 and 561.12 of such regulations are REPEALED.

Section 5. Section 561.15 of such regulations is amended to read as follows:

Section 561.15 Diesel motor fuel.

Except as otherwise provided, the provisions of this Part pertain to motor fuel and do not specifically apply to diesel motor fuel. See [section] sections 1102 and 1111(e) of the Tax Law for the imposition of the prepaid tax on diesel motor fuel. [See, also, Part 562 of this Title.]

Section 6. Part 562 of such 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:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: tax\_regulations@tax.state.ny.us

**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 the amendments merely reflect statutory changes that are not controversial in nature. The rule makes no changes in administrative policies regarding existing statutes and has no impact on taxpayers.

The purpose of this proposal is to amend Part 561 and repeal Part 562 of the Sales and Use Taxes Regulations relating to the regional average retail sales price of motor fuel and diesel motor fuel, to reflect statutory amendments made by Part M-1 of Chapter 109 of the Laws of 2006.

#### Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no impact on jobs and employment opportunities. The rule merely amends Part 561 and repeals Part 562 of the Sales and Use Taxes Regulations relating to the regional average retail sales price of motor fuel and diesel motor fuel, to reflect statutory changes made by Part M-1 of Chapter 109 of the Laws of 2006.

legislation (including recent amendments thereto) requires the addition of new forms of assistance to the rule.

**Subject:** Economic development and job creation throughout New York State.

**Purpose:** To provide the framework for administration of the JOBS Now Program, evaluation criteria, terms and conditions, and the application and evaluation process. The amended Rule makes changes to expand the type of program assistance available and makes the JOBS Now Program assistance in accordance with the requirements of the enabling legislation for the Dairy Assistance Program.

**Substance of emergency rule:** The JOBS Now program (the "Program") was created pursuant to Chapter 309 of the Laws of 1996 (the "Enabling Legislation"). The general purpose of the Program is to promote the economic health of New York State (the "State") and increase economic activity within the State by encouraging the expansion of business within the State and the attraction of businesses to the State.

The Enabling Legislation creates Section 16-h of the New York State Urban Development Corporation Act (the "UDC Act") which governs the Program. The Enabling Legislation requires the New York State Urban Development Corporation d/b/a the Empire State Development Corporation (the "Corporation") to promulgate rules and regulations for the Program (the "Rules") in accordance with the provisions of the State Administrative Procedure Act ("SAPA"). The Rules set forth the framework for the eligibility, evaluation criteria, application and project process and administrative procedures of the Program as follows:

#### 1. Program Assistance:

a) Job Creation Grants to eligible businesses undertaking eligible projects, which grant may be used by the recipient to defray its State or local tax liability for any taxable period beginning on or after the date such grant is approved by ESD.

b) Worker training grants to eligible businesses undertaking eligible projects as full or partial reimbursement of the cost incurred by such businesses in conducting programs of worker training in connection with the eligible expansion or attraction project, including, without limitation, programs of recruitment, skills training and/or upgrading, productivity enhancement and total product/service quality improvement.

c) Capital loans and grants to eligible businesses undertaking eligible projects to finance, in connection with such projects, the acquisition of land, buildings, and machinery and equipment, or an interest therein; new construction, renovation or leasehold improvements; infrastructure improvements, including, without limitation, drainage systems, sewer systems, access roads, parking areas, sidewalks, docks, wharves, water supply systems and demolition and site clearance, preparation and improvement; and costs related to the above including, without limitation, legal expenses, appraisal costs, brokerage commissions, interest costs, survey expenses, design, architectural and engineering fees and expenses, site preparation expenses and relocation expenses; provided, however, that Program funds shall not be awarded for consultant costs relating to the preparation of an application for Program assistance.

d) Interest Subsidy Grants for the benefit of eligible businesses undertaking eligible projects to offset debt service costs associated with loans made to such businesses by a private lending institution, either directly or through an intermediary such as an industrial development agency of the State, to finance, in connection with such projects, the acquisition of land, building, or machinery and equipment, or an interest therein; new construction, renovation or leasehold improvements; and infrastructure improvements, as set forth in paragraph C. above.

e) Working capital loans and loan guarantees to or for the benefit of eligible businesses undertaking eligible projects to finance capital-related expenses such as, without limitation, accounts receivable and inventory, provided that such expenses are necessary to upgrade and reconfigure the business's competitive position. Working capital assistance shall be provided primarily in the form of loan guarantees; working capital loans shall be provided only under limited circumstances, as determined in ESD's sole discretion.

The proposed amended Rule expands the types of assistance available under the Program. Specifically, the proposed Section 4242.11 allows for payments to producers of milk to assist the dairy farmers of New York State and their industry in a time of great need and to prevent further loss of the dairy industry and its infrastructure which are critical to New York State's agricultural economy.

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire August 11, 2007.

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## Urban Development Corporation

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### EMERGENCY RULE MAKING

#### Economic Development and Job Creation Throughout New York State

**I.D. No.** UDC-22-07-00006-E

**Filing No.** 489

**Filing date:** May 14, 2007

**Effective date:** May 14, 2007

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

**Action taken:** Amendment of Part 4242 of Title 21 NYCRR.

**Statutory authority:** L. 1994, ch. 169; L. 2001, ch. 471; Urban Development Corporation Act, section 5(4); and L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** Effective provision of economic development assistance in accordance with the enabling

**Text of emergency rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, Urban Development Corporation d/b/a Empire State Development Corporation, 633 Third Ave. 37th Fl., New York, NY 10017, (212) 803-3792

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

Chapter 57 of the laws of 2007 created Article 21-D of the Agricultural Markets Law and amended Section 16-h of the New York State Urban Development Corporation Act to permit the Commissioner of Agriculture and Markets (the "Commissioner") and the New York State Urban Development Corporation, d/b/a Empire State Development Corporation (the "Corporation") to implement the Dairy Assistance Program (the "Program") to promote economic development in the State by assisting the dairy producers of New York State in a time of great need and to prevent further loss in the dairy industry and its infrastructure which are critical to the State's agricultural economy.

##### 2. Legislative Objective:

The objective of the statute authorizing the Program is to promote the economic health of New York State by facilitating the creation or retention of jobs or increasing business activity within municipalities or regions of the State.

##### 3. Need and Benefits:

The Program's legislation assists job creation throughout the State by providing the following types of assistance:

a) The Program pays eligible producers the difference between target prices to be established by the Commissioner and the combined announced Northeast Federal Order Statistical Uniform Price plus the amount of the Milk Income Loss Contract X payment rate on a per-hundredweight basis. Further, other factors may be used by the Commissioner in determining payment to producers for milk.

1. Evaluation Criteria – The Corporation, will review and act upon information provided to the Corporation by the Commissioner with respect to applications for assistance provided by applicants to the Commissioner and the Commissioner's determinations pursuant to Article 21-D of the Agricultural and Markets Law regarding eligibility requirements and award criteria.

2. Application procedure – Approval of applications shall be made only upon a determination by the Corporation after consultation with the Commissioner and based upon the information provided by the Commissioner.

##### 4. Costs:

The changes should not increase costs for the Program.

The funding source is appropriation funds. Savings will occur as a result of the use of standard applications by the Commissioner which allow Department of Agriculture and Markets staff to efficiently assist in the application process and for UDC staff to efficiently process information provided by the Commissioner for prompt payment of Program assistance to applicants determined to be eligible by the Commissioner based on amounts determined by the Commissioner.

##### 5. Local Government Mandates:

There is no imposition of any mandates upon local governments by the amended rule.

##### 6. Paperwork:

There are no additional reporting or paperwork requirements as a result of this amended rule. Standard applications used by the Department of Agriculture and Markets will be employed.

##### 7. Duplication:

There are no duplicative, overlapping or conflicting rules or legal requirements, either federal or state.

##### 8. Federal Standards:

There are no applicable federal government standards which apply. However, the Commissioner of the Department of Agriculture and Markets shall request the United States Department of Agriculture's Farm Service Agency to provide production data for producers and assist the Department of Agriculture and Markets in administering the Program.

##### 9. Alternatives:

This Program was created by the Legislature in our representative form of government. The Corporation is implementing this legislation. It is not for the Corporation to say what harm would be caused by doing nothing. With respect to implementing legislation, doing nothing is NOT an option.

##### 10. Compliance Schedule:

No significant time will be needed for compliance.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of Rule:

The amended Rule will improve the accessibility of the program to eligible entities throughout the State and enable the Corporation to more effectively administer the Program. The goal of such improvements is to better achieve the Program's objectives, including assisting the State's dairy producers, the retention and creation of employment opportunities, and to otherwise contribute to the economic health of New York State.

The proposed amended Rule expands the types of assistance available under the Program. Specifically, the proposed Section 4242.11 allows for payments to producers of milk to assist the dairy farmers of New York State and their industry in a time of great need and to prevent further loss of the dairy industry and its infrastructure which are critical to New York State's agricultural economy.

This should not affect the Program's accessibility to small business.

##### 2. Compliance Requirement:

No affirmative acts will be needed to comply.

##### 3. Professional Services:

No professional services will be needed to comply.

##### 4. Compliance Costs:

No initial costs will be needed to comply with the amended rule.

##### 5. Economic and Technological Feasibility:

The Rule makes assistance feasible for small businesses that are dairy producers, by expressly stating that all producers shall be reimbursed for up to four million eight hundred thousand pounds of milk until such time as thirty million dollars in state funding is expended. The Rule is also economically feasible for local governments to coordinate their respective economic development and job retention and attraction efforts with the program. There are no aspects of the Rule that make the assistance or the Rule technologically infeasible for small business or local government.

##### 6. Minimizing Adverse Impact:

The revised rule will have no adverse economic impact on small business or local governments.

##### 7. Small Business and Local Participation:

The Program is a product of the legislative process and, thereby, has had the input of all small businesses participating in the representative process of government. The Program emphasizes the effective provision of economic development throughout New York State. Small business may participate by requesting assistance when the requisite eligibility criteria are met. Pursuant to the enabling legislation, the Corporation will work with the Commissioner of Agriculture and Markets who will work with local entities to make the assistance available.

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

A Rural Area Flexibility Analysis Statement is not submitted because the amended rule will not impose any adverse economic impact, reporting requirements, recordkeeping or other compliance requirements on public or private entities in rural areas.

#### **Job Impact Statement**

A JIS is not submitted because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. In fact, the proposed amended rule should have a positive impact on job creation because it will facilitate administration of and access to the JOBS Now program for providing assistance to dairy producers pursuant to the Dairy Assistance Program, which should improve the opportunities to maintain and create of jobs throughout the State by encouraging the continuation of the State's dairy industry.