

# 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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## Office of Children and Family Services

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### NOTICE OF ADOPTION

#### Child Care Subsidies for Employed Public Assistance Recipients

**I.D. No.** CFS-43-07-00014-A  
**Filing No.** 54  
**Filing date:** Jan. 29, 2008  
**Effective date:** Feb. 13, 2008

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

**Action taken:** Amendment of section 415.2 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 410-w(a)

**Subject:** Child care subsidies for employed public assistance recipients.

**Purpose:** To modify the definition of an eligible employed public assistance applicant or recipient for child care subsidies.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CFS-43-07-00014-P, Issue of October 24, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### Supervised Independent Living Programs

**I.D. No.** CFS-48-07-00008-A  
**Filing No.** 55  
**Filing date:** Jan. 29, 2008  
**Effective date:** Feb. 13, 2008

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

**Action taken:** Amendment of Parts 427, 441 and 447; and addition of Part 449 to Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 374-b and 462(1)(a)

**Subject:** Supervised independent living programs (SILPs).

**Purpose:** To establish standards for the approval and operation of supervised independent living programs and living units.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CFS-48-07-00008-P, Issue of November 26, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

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

The Office of Children and Family Services (Office) received one set of comments from a public employee union. The Office reviewed all comments. The following summarizes the comments and provides the Office's response to the comments.

The Office received a comment relating to the transfer of the authority for certifying supervised independent living programs (SILPS) from the Office to authorized agencies. There was concern that the transfer of authority for certifying SILPS from the Office to authorized voluntary agencies would not increase access to these programs as stated in the needs and benefits section of the Regulatory Impact Statement. The Office reviewed the comment and believes that the proposed regulations reflect the legislative change enacted by Chapter 160 of the Laws of 2004. Chapter 160 added a definition of a supervised independent living program in section 371 (21) of the SSL. A supervised independent living program is defined in statute to mean one or more of a type of agency boarding home operated and certified by an authorized agency (social services district, voluntary authorized agency, or an Indian tribe with a State/Tribal agreement with the Office), in accordance with regulations of the Office to provide a transitional experience for older youth who, based upon their circumstances, are appropriate for transition to the level of care and supervision provided in the program. Thus there is no change to the proposed regulations based on this comment.

The Office received a comment that there was concern that shifting certification authority to authorized agencies is a conflict of interest in that the operating agency is the certifying agency and that such an arrangement will increase opportunities for system abuse. As reflected in the statutory definition of a SILP and in the proposed regulations, the Office maintains a role in establishing the standards for the approval of SILP units. In addition, the Office is responsible for the approval of SILP programs operated by an authorized agency. That role includes the granting waivers of regulatory standards for SILP programs and units. As noted above, the proposed regulations are consistent with current statute and the Office will maintain

a role in the oversight of such programs. Accordingly, there is no change to the proposed regulations based on this comment.

The Office received a comment that there was concern that the proposed regulations establish procedures for certifying SILPS which are different from the certification process of other levels of residential care and would create a precedent for erosion of the child welfare system. Again, the proposed regulations reflect current statute and are consistent with the current authority of authorized agencies to certify foster boarding homes. There will be no changes to the proposed regulations based on this comment.

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## Department of Civil Service

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

#### Jurisdictional Classification

**I.D. No.** CVS-07-08-00001-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from and classify positions in the exempt class in the Department of Health.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class Department of Health, by deleting therefrom the position of Director Adult Services Field Operations and by increasing the number of positions of Health Program Director 3 from 13 to 14 and Special Assistant from 15 to 16.

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-07-08-00002-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, Executive Department under the subheading "Division of Parole," by increasing the number of positions of Assistant Counsel from 5 to 7.

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-07-08-00003-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, State University of New York under the subheading "State University Colleges," by adding thereto the position of Horticultural Technician 1 (1) at SUC at Brockport.

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-07-08-00004-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, Executive Department under the subheading "Office of General Services," by deleting therefrom the position of Executive Mansion Assistant Chef and by increasing the number of positions of Executive Mansion Chef from 1 to 2.

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00005-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, Department of Transportation, by deleting therefrom the position of Secretary and by increasing the number of positions of Special Assistant from 14 to 15.

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00006-P

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

**Proposed action:** Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, Executive Department under the subheading "Division of Veterans' Affairs," by adding thereto the positions of Assistant Deputy Director, Veterans' Affairs Field Operations, Deputy Director, Veterans' Affairs Program Development and Director Public Information; and

Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Veterans' Affairs," by deleting therefrom the position of Director, Veterans' Affairs Public Relations and Training (1).

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00010-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Taxation and Finance under the subheading "Division of Tax Appeals," by increasing the number of positions of Special Assistant from 1 to 2.

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

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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**Division of Criminal Justice  
Services**

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

**Confirmation of a Victim of Human Trafficking**

**I.D. No.** CJS-07-08-00008-EP

**Filing No.** 49

**Filing date:** Jan. 25, 2008

**Effective date:** Jan. 28, 2008

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

**Action taken:** Addition of Part 6174 to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 837(13); and L. 2007, ch. 74, section 14

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

**Specific reasons underlying the finding of necessity:** The proposed rule provides a mechanism to allow a victim of human trafficking to receive interim State services pending certification by the federal government that they are a victim of a severe form of trafficking and therefore eligible for federal services. As part of the federal Trafficking Victims Protection Act of 2000, the federal government provides social services and immigration assistance to persons who are certified to be victims of a severe form of human trafficking. Domestic trafficking victims are eligible to receive social services from existing federal, state, and local services programs. These services include case management, emergency temporary housing, and language and translation services, as well as law enforcement coordination with the federal government to help victims obtain special visas that allow them to remain in the United States. These services are crucial to ensuring victims' assistance in investigating and prosecuting traffickers.

There was a gap in the provision of services, however, for pre-certified victims. Chapter 74 of the Laws of 2007 (effective November 1, 2007) addresses this gap in services by authorizing access to a broad range of

services to pre-certified victims of human trafficking, but only if the Division of Criminal Justice Services, in consultation with the Office of Temporary and Disability Assistance, determines that victim appears to meet the criteria for certification under the federal Trafficking Victims Protection Act of 2000 or is otherwise eligible for federal, state, or local benefits (see Social Services Law section 483-cc). This rule provides the procedure for the Division to make such determinations as required by Social Services Law section 483-cc.

The services authorized by Social Services Law section 483-cc are integral to ensuring victims' assistance in investigating and prosecuting human traffickers. Failure to promulgate this rule on an emergency basis may jeopardize prosecution of human trafficking crimes in New York State.

**Subject:** Confirmation of a victim of human trafficking.

**Purpose:** To implement the provision of Social Services Law section 483-cc by establishing a procedure to determine whether a person appears to be a victim of a severe form of trafficking or appears to be eligible for any Federal, State, or local benefits.

**Text of emergency/proposed rule:** A new Part 6174 is added to Title 9 NYCRR to read as follows:

#### Part 6174

##### Confirmation as a Victim of Human Trafficking

§ 6174.1 Purpose. The provisions of this Part shall govern the Division's determination whether an individual appears to meet the criteria for certification as a victim of a severe form of trafficking in persons as defined in section 7105 of Title 22 of the United States Code or appears to be otherwise eligible for any federal, state or local benefits and services and, if so, referral for services, as provided in Social Services Law § 483-cc.

§ 6174.2 Definitions. When used in this Part:

(a) The term human trafficking victim shall mean a person who is a victim of sex trafficking as defined in section 230.34 of the Penal Law or a victim of labor trafficking as defined in section 135.35 of the Penal Law.

(b) The term Division shall mean the Division of Criminal Justice Services.

(c) The term Commissioner shall mean the commissioner of the Division of Criminal Justice Services.

(d) The term Human Trafficking Director shall mean the Human Trafficking Director within the Division of Criminal Justice Services.

(e) The term Office shall mean the Office of Temporary and Disability Assistance.

§ 6174.3 Confirmation as a human trafficking victim. (a) As soon as practicable after a first encounter with a person who reasonably appears to a law enforcement agency or a district attorney's office to be a human trafficking victim, that agency or office shall notify the Human Trafficking Director and the Office on a form and in a manner prescribed by the Commissioner.

(b) Within three business days after receipt of such referral, the Human Trafficking Director, after consultation with the Office, shall make a determination whether the person appears to either:

(1) meet the criteria for certification as a victim of a severe form of trafficking in persons as defined in section 7105 of Title 22 of the United States Code; or

(2) be otherwise eligible for any federal, state, or local benefits and services.

(c) If upon good cause, and after consultation with the Office, the Director of Human Trafficking determines that more time is required to make such determination, the Director of Human Trafficking may extend the time period set forth in subdivision (b) of this section.

(d) In making such determination, the Human Trafficking Director shall consider, among other things:

(1) the age and citizenship of the person, if known;

(2) the facts and circumstances surrounding the victimization upon which the referral is based;

(3) the facts and circumstances regarding the Penal Law trafficking crime committed against the victim;

(4) whether the person had been recruited, harbored, transported, provided, or obtained for labor or services through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery;

(5) whether the person had been recruited, harbored, transported, provided, or obtained for the purpose of a commercial sex act induced by force, fraud, or coercion; or

(6) whether the person had been recruited, harbored, transported, provided, or obtained for the purpose of a commercial sex act and the person induced to perform such act was less than 18 years old; and

(7) whether the person:

(i) is willing to assist in every reasonable way with respect to the investigation and prosecution of severe forms of trafficking or of state and local crimes where severe forms of trafficking in persons appear to have been involved; and

(ii) whether the person appears to meet the criteria for a bona fide application for a visa under section 1101(a)(15)(T) of Title 8 of the United States Code or is a person whose continued presence in the United States the United States Attorney General and the United States Secretary of Homeland Security are likely to ensure in order to effectuate prosecution of trafficking in persons.

(e) If the Human Trafficking Director determines that the person appears to meet the criteria for certification as a victim of a severe form of trafficking in persons, as defined in section 7105 of Title 22 of the United States Code, or appears to be otherwise eligible for any federal, state or local benefits and services, he or she shall immediately notify the Office in writing which shall thereafter notify the victim and the referring law enforcement agency or district attorney's office, and the Office may assist the victim and referring law enforcement agency or a district attorney's office in making services available to the victim.

(f) If the Human Trafficking Director determines that the person does not appear to meet the criteria for certification as a victim of a severe form of trafficking in persons, as defined in section 7105 of Title 22 of the United States Code, or does not appear to be otherwise eligible for any federal, state or local benefits and services, he or she shall immediately notify in writing the victim, the referring law enforcement agency or district attorney's office, and the Office.

(g) The Human Trafficking Director shall issue to the victim, the Office, and referring law enforcement agency or district attorney's office a written explanation setting forth the basis for his or her determination within ten business days of receipt of the referral.

§ 6174.4 Appeal. (a) A determination by the Human Trafficking Director that the person does not appear to either meet the criteria for certification as a victim of a severe form of trafficking in persons as defined in section 7105 of Title 22 of the United States Code or be otherwise eligible for any federal, state, or local benefits and services may be appealed to the Commissioner.

(b) Such appeal shall set forth the reasons why the appellant believes the determination rendered by the Human Trafficking Director was incorrect, and shall be filed with the Commissioner in writing within twenty business days of issuance of the Human Trafficking Director's written explanation.

(c) The Commissioner, after consultation with the Office, shall issue a written response to the appellant, the Office, and the referring law enforcement agency or district attorney's office within fifteen business days of receipt of the written appeal. If the Commissioner determines that the appellant does appear to either meet the criteria for certification as a victim of a severe form of trafficking in persons as defined in section 7105 of Title 22 of the United States Code or be otherwise eligible for any federal, state, or local benefits and services, the Office may assist the victim and referring law enforcement agency or district attorney's office in receiving services.

§ 6175.5 Consultation with the Office. The Division shall consult with the Office regarding the confirmation of human trafficking victims pursuant to Social Services Law section 483-cc, including, but not limited to, the form and manner in which a law enforcement agency or district attorney's office shall refer a person who reasonably appears to be a human trafficking victim.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 24, 2008.

**Text of rule and any required statements and analyses may be obtained from:** Mark Bonacquist, Division of Criminal Justice Services, Four Tower Place, Albany, NY 12203, (518) 457-8413

**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: Executive Law section 837(13); chapter 74, section 14, of the laws of 2007.

2. Legislative objectives: Executive Law section 837(13) authorizes the Commissioner of the Division of Criminal Justice Services to promulgate

regulations necessary or convenient to the performance of the functions, powers, and duties of the Division. Chapter 74, section 14, of the laws of 2007 authorizes the Division to promulgate regulations necessary for the timely implementation of the provisions of Social Services law section 483-cc.

3. Needs and benefits: In 2007, the United States Department of State estimated that approximately 14,500 to 17,500 people are trafficked into the United States each year for forced labor, involuntary domestic servitude, or sexual exploitation. New York is a frequent hub of such activity. Trafficking also originates domestically, and both types of trafficking frequently involve children. In fact, the Office of Children and Family Services recently estimated that over 2,500 children in New York State are exploited for purposes of commercial sexual activity each year.

The rule provides a mechanism to allow a victim of human trafficking to receive interim State services pending certification by the federal government that they are a victim of a severe form of trafficking and therefore eligible for federal services. As part of the federal Trafficking Victims Protection Act of 2000, the federal government provides social services and immigration assistance to persons who are confirmed to be victims of a severe form of human trafficking. Domestic trafficking victims are eligible to receive social services from existing federal, state, and local services programs. These services include case management, emergency temporary housing, and language and translation services, as well as law enforcement coordination with the federal government to help victims obtain special visas. These services are crucial to ensure victims' assistance in investigating and prosecuting human trafficker crimes.

There was a gap in the provision of services, however, for pre-certified victims. Chapter 74 of the Laws of 2007 addressed this gap in services by authorizing access to a broad range of services to pre-certified victims of human trafficking, but only if the Division of Criminal Justice Services, in consultation with the Office of Temporary and Disability Assistance (OTDA), determines that victim appears to meet the criteria for certification under the federal Trafficking Victims Protection Act of 2000 or is otherwise eligible for federal, state, or local benefits (see Social Services Law section 483-cc). This rule provides the procedure for the Division to make such determinations as required by Social Services Law section 483-cc.

The services authorized by Social Services Law section 483-cc are integral to ensuring victims' assistance in investigating and prosecuting human trafficker crimes. Failure to promulgate this rule on an emergency basis may jeopardize prosecution of human trafficking crimes in New York State.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: There should be minimal costs to law enforcement agencies and district attorneys who will be referring potential victims of human trafficking to the Division and the OTDA.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. Implementation of the confirmation process will be accomplished using existing resources.

c. The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The cost analysis is based on the fact that law enforcement agencies and district attorneys are required only to fax a form containing victim information to the Division and the OTDA.

5. Local government mandates: This proposal would implement the mandate of Social Services Law section 483-cc that law enforcement agencies and district attorneys notify the Division and the OTDA as soon as practicable after their first encounter with a person who reasonably appears to be a human trafficking victim, and provide certain information regarding such victim.

6. Paperwork: The rule requires law enforcement agencies and district attorneys to complete and fax a referral form, prescribed by the Division, as soon as practicable after their first encounter with a person who reasonably appears to be a human trafficking victim which will provide certain information regarding such victim.

7. Duplication: None. There are currently no services available to pre-certified victims of human trafficking.

8. Alternatives: The Commissioner considered not promulgating regulations to implement the provisions of Social Services Law section 483-cc. This alternative was rejected, however, because the Commissioner believes it is necessary to clarify the procedures for law enforcement agencies, district attorneys, and victims to follow in order to implement this new law.

9. Federal standards: As part of the federal Trafficking Victims Protection Act of 2000, the federal government provides social services and immigration assistance to persons who are certified to be victims of a severe form of human trafficking. Domestic trafficking victims are eligible to receive social services from existing federal, state, and local services programs. These services include case management, emergency temporary housing, and language and translation services, as well as law enforcement coordination with the federal government to help victims obtain special visas that allow them to remain in the United States to testify against traffickers. Services are not available, however, for pre-certified, non-citizen victims.

10. Compliance schedule: Regulated parties are expected to be able to comply with the rule immediately.

**Regulatory Flexibility Analysis**

1. Effect of rule: The rule provides a mechanism to allow a victim of human trafficking to receive interim State services pending certification by the federal government that they are a victim of a severe form of trafficking and therefore eligible for federal services. As part of the federal Trafficking Victims Protection Act of 2000, the federal government provides social services and immigration assistance to persons who are confirmed to be victims of a severe form of human trafficking. Domestic trafficking victims are eligible to receive social services from existing federal, state, and local services programs. These services include case management, emergency temporary housing, and language and translation services, as well as law enforcement coordination with the federal government to help victims obtain special visas. These services are crucial to ensuring that victims assist with the investigation and prosecution of human trafficking crimes.

There was a gap in the provision of services, however, for pre-certified victims. Chapter 74 of the Laws of 2007 addressed this gap in services by authorizing access to a broad range of services to pre-certified victims of human trafficking, but only if the Division of Criminal Justice Services, in consultation with the Office of Temporary and Disability Assistance (OTDA), determines that victim appears to meet the criteria for certification under the federal Trafficking Victims Protection Act of 2000 or is otherwise eligible for federal, state, or local benefits (see Social Services Law section 483-cc). This rule provides the procedure for the Division to make such determinations as required by Social Services Law section 483-cc.

2. Compliance requirements: This rule would implement the mandate of Social Services Law section 483-cc that law enforcement agencies and district attorneys notify the Division and the OTDA as soon as practicable after their first encounter with a person who reasonably appears to be a human trafficking victim, and provide certain information regarding such victim. The rule requires law enforcement agencies and district attorneys to complete and fax a referral form, prescribed by the Division, as soon as practicable after their first encounter with a person who reasonably appears to be a human trafficking victim which will provide certain information regarding such victim.

3. Professional services: No professional services are required to comply with the rule.

4. Compliance costs: There should be minimal costs to law enforcement agencies and district attorneys who will be referring potential victims of human trafficking to the Division and the OTDA.

5. Economic and technological feasibility: No economic or technological impediments to compliance have been identified.

6. Minimizing adverse impact: The Division attempted to minimize adverse impact on regulated parties by clarifying and standardizing the referral process for law enforcement agencies and district attorneys offices. Representatives of law enforcement agencies and district attorneys offices were consulted regarding the language of the rule.

7. Small business and local government participation: Representatives of law enforcement agencies and district attorneys offices were consulted regarding the language of the rule. Their comments and suggestions were considered in formulating the rule. The rule does not apply to small businesses.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: The rule applies to every law enforcement agencies and district attorney office in New York State, many of which are located in rural areas.

2. Reporting, recordkeeping and other compliance requirements and professional services: This rule would implement the mandate of Social Services Law section 483-cc that law enforcement agencies and district attorneys notify the Division and the OTDA as soon as practicable after their first encounter with a person who reasonably appears to be a human trafficking victim, and provide certain information regarding such victim.

The rule requires law enforcement agencies and district attorneys to complete and fax a referral form, prescribed by the Division, as soon as practicable after their first encounter with a person who reasonably appears to be a human trafficking victim which will provide certain information regarding such victim. No professional services not already being utilized will be needed to comply with the rule.

3. Costs: There should be minimal costs to law enforcement agencies and district attorneys who will be referring potential victims of human trafficking to the Division and the OTDA.

4. Minimizing adverse impact: The Division attempted to minimize adverse impact on regulated parties by clarifying and standardizing the referral process for law enforcement agencies and district attorneys offices.

5. Rural area participation: Representatives of law enforcement agencies and district attorneys offices, many of whom serve rural areas of the State, were consulted regarding the language of the rule. Their comments and suggestions were considered in formulating the rule.

#### **Job Impact Statement**

The rule provides a mechanism to allow a victim of human trafficking to receive interim State services pending certification by the federal government that they are a victim of a severe form of trafficking and therefore eligible for federal services. As such, it is apparent from the nature and purpose on the proposal that it will have no impact on jobs and employment opportunities.

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## Department of Environmental Conservation

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### **Operation and Maintenance of Dams**

**I.D. No.** ENV-07-08-00011-P

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

**Proposed action:** Amendment of Parts 608 and 673 and section 621.4 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, art. 3, title 3 and art. 15, title 5

**Subject:** Requires all dam owners to operate and maintain dams in a safe condition and adopts requirements for owners dam safety programs, permitting and enforcement.

**Purpose:** To amend 6 NYCRR Parts 608 and 673 and section 621.4 to comply with ch. 364 of the L. 1999, and amend Part 673 to comply with ch. 78 of the L. 2006.

**Public hearing(s) will be held at:** 10:00 a.m.-2:00 p.m., April 15, 2008 at Locust Grove, 2683 South Rd., Poughkeepsie, NY; 10:00 a.m.-2:00 p.m., April 18, 2008 at Holiday Inn, 800 Jefferson Rd., Rochester, NY; and 10:00 a.m.-2:00 p.m., May 2, 2008 at Department of Environmental Conservation, 625 Broadway, Albany, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: <http://www.dec.ny.gov/>):** All of Part 673 is repealed. A new Part 673 is adopted to incorporate Chapter 364 of the Laws of 1999 and Chapter 178 of the Laws of 2006 amendments to statute.

#### 1. Definitions (673.1)

Minor Changes: This section was expanded for clarification to include definitions not previously included and modifies some existing definitions.

Major Changes: A farm pond dam is now defined as a Class A, low hazard dam.

#### 2. Applicability (673.2)

Minor Changes: This section now references applicability to all dams, except as otherwise noted in the regulations.

#### 3. General Provisions (673.3)

Minor Changes: This is a new section addressing the statutory dam safety authority, and the department's liability.

#### 4. Permitting Dam Projects (673.4)

Minor Changes: This is a new section to identify that the permitting requirements are contained in Part 608. There are updated requirements and definitions proposed for Part 608 to be consistent with the revised Part 673.

Incorporates the height and capacity thresholds requiring a permit be obtained for Construction, reconstruction, repair or removal.

#### 5. Hazard Classification (673.5)

Minor Changes: Clarifies language that the department may make changes to a dam's hazard classification at any time.

Adds Class D dam classification to be consistent with the department's program which classifies breached or failed dams, or dams for which permits were issued but the dam was never built.

#### 6. Dam owner responsibilities (673.6)

Major Changes: This is a new section that outlines dam owner responsibilities.

Adds requirement for initial and periodic hazard class verification for Class A dam owners.

Adds requirement for Class B and Class C dam owners to submit an annual certification of ownership, statement that their dam is being operated and maintained in a safe condition, and that their Emergency Action Plan is current.

Adds requirement for owners of Class A dams above the permitting threshold and Class B and Class C dam owners to develop and implement a written Operation and Maintenance Plan.

Adds requirement for Class B and Class C dam owners to report flow in an earthen auxiliary spillway.

Adds requirement for Class B and Class C dam owners to develop, submit and annually update an Emergency Action Plan.

Adds requirement for Class C dam owners to provide for and demonstrate financial assurance.

Add property transfer requirements for all dam owners regarding: notification of the existence of a dam to a new property owner, records transfer, and notification of new ownership to the department and the local municipality.

#### 7. Inspection Process (673.7)

Minor Changes: Clarifies the role of the department to make investigations and conduct inspections.

Adds the new statutory requirement for the department to provide a copy of an inspection report within 30 days to the dam owner and the municipality.

Major Changes: Adds requirements for Class B and Class C dam owners to conduct periodic dam safety inspections at a minimum specified frequency.

Adds requirements for Class B and Class C dam owners to conduct periodic engineering assessments for safety criteria, hazard classification and failure modes at a minimum specified frequency.

#### 8. Hearings and Enforcement (673.8)

Minor Changes: Clarifies dam owner's right to due process for a hearing and the department's enforcement rights.

Clarifies the department's right to recover costs from a dam owner, for actions taken when the dam owner fails to take department directed actions.

#### 9. Deletions

Minor Changes: Deletes Section 673.4 Condition Rating.

#### 10. Part 608

Minor Changes: Incorporates the new applicability provisions of dam height and storage capacity from Chapter 364.

Clarifies permit application submission requirements for technical information to evaluate safety aspects.

Adds provision that, in lieu of a formal department application review for Class A dams, the department may issue a permit upon certification from an engineer that the design conforms with the required safety criteria.

Major Changes: For Class B and C dams, adds permit application submission requirement for an updated Emergency Action Plan.

Adds Class C dam permit application submission requirement for financial assurance.

#### 11. Part 621

Major Changes: Modifies section 621.4 to indicate that all dam projects are "major" not "minor."

**Text of proposed rule and any required statements and analyses may be obtained from:** Jamie Woodall, Department of Environmental Conservation, Bureau of Flood Protection and Dam Safety, 625 Broadway, 4th Fl., Albany, NY 12233-3504, (518) 402-8151, e-mail: jvwoodal@gw.dec.state.ny.us

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

**Public comment will be received until:** 15 days after last public hearing.

**Regulatory Impact Statement**

Statutory authority: Statutory authority for proposed modifications and amendments to regulations governing dam safety is found in Sections 3-0301, 15-0503, 15-0507, 15-0511 and 15-0516 of the Environmental Conservation Law (ECL).

Chapter 364, Laws of 1999 amended ECL Sections 15-0503, 15-0507 and 15-0511 to expressly require all dam owners - whether or not subject to a DEC permit under ECL § 15-0503 - to operate and maintain such structures in a safe condition. The amendments explicitly authorize DEC to adopt regulations requiring dam owners to prepare safety programs including inspections, monitoring, maintenance and operation, and emergency plans, where failure of the dam could cause personal injury, substantial property damage or substantial natural resource damage. This program is defined by the proposed modifications to Part 673. The amendments also increased thresholds for dam construction permits issued by the department. This change is reflected in the proposed modifications to Part 608.

Chapter 17, Laws of 2006 amended the ECL by adding a new Section 15-0516 regarding distribution of department inspection reports of dam safety for intermediate and high hazard dams. This is reflected in proposed language in Part 673.

ECL § 3-0301(m) authorizes the DEC commissioner to adopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter: to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.

Legislative objectives: The objectives of the Chapter 364 amendments are fulfilled by the proposed modifications to New York Codes, Rules and Regulations Title 6 (6 NYCRR) Part 673, Dam Safety Regulations; Part 608, Use and Protection of Waters; and Part 621, Uniform Procedures, by requiring dam owners to prepare and implement safety programs, providing specific elements of such programs, and updating dam construction permit thresholds and procedures.

In accordance with public policy objectives the legislature sought to advance, the proposed regulation modifications provide relief from permitting requirements for construction or repair of small dams, the vast majority of which are presumed to pose a negligible safety threat, while updating, clarifying and strengthening requirements for larger dams which pose a greater threat to public safety.

6NYCRR Part 673 also is amended to include the requirement found in ECL § 15-0516 for department inspection reports of dam safety for intermediate and high hazard dams to be provided to relevant municipal and county officials within thirty days of creating such reports.

Needs and benefits: ECL § 15-0507 states that regulations governing the dam safety program may include requirements for inspections, monitoring, maintenance and operation, emergency action planning, financial security, record keeping and reporting or any other requirement the commissioner deems necessary to safeguard life, property or natural resources. Current dam safety regulations in 6 NYCRR Part 673 do not contain such safety program requirements. Accordingly, the proposed 6 NYCRR Part 673 modifications provide specific details for each of these safety program components.

ECL § 15-0507 also states that such requirements shall only apply to those dams which pose, in the event of failure, a threat of personal injury, substantial property damage or substantial natural resource damage. Accordingly, the proposed safety program elements in 6 NYCRR Part 673 are commensurate with the level of threat associated with potential failure of a given dam. Beyond the specific safety program elements themselves, greater protection from dam failures is provided by making the dam safety regulations more easily understood by dam owners.

In developing the specific proposed safety program elements, the department drew heavily from the following documents which can be viewed at [www.fema.gov](http://www.fema.gov) and [www.damsafety.org](http://www.damsafety.org):

1. "Model State Dam Safety Program," Federal Emergency Management Agency, 1998
2. "Summary of State Laws and Regulations on Dam Safety," Association of State Dam Safety Officials, 2000
3. "Owner-Responsible Periodic Inspection Guidance," Association of State Dam Safety Officials, 2005

Although the state's dam safety program does not derive its authority from any federal laws or regulations, the proposed dam safety program is consistent with federal guidance for state dam safety programs, and comparable to dam safety programs in adjacent states.

In addition to proposed dam safety program enhancements, modifications to 6 NYCRR Part 608, Use and Protection of Waters, are proposed to address two needs. First, the dam construction permit thresholds and definitions need to be consistent with the 1999 amendments and associated Part 673 modifications. Second, to facilitate department review and approval of permit applications, Part 608 is modified to more clearly articulate existing permit application submission requirements.

6NYCRR Part 621, Uniform Procedures, also is modified for consistent use of terms and to eliminate the minor project category for dam permits as reflected in the dam construction permit threshold changes.

Costs: Dam owner costs for initial and continued compliance with the proposed regulations will vary greatly depending upon the unique features of a dam and its hazard classification. The proposed safety program requires most dam owners to implement an operation and maintenance plan and retain a licensed professional engineer for periodic hazard class verification, inspection and assessment. Cost estimates for such engineering services are summarized in Table 1. These estimates were obtained from a recent department survey of consulting engineers located across the state. Dam owner costs for operation, maintenance, repairs and other ordinarily expected activities are considered normal costs associated with owning a dam, and were not considered as a new regulatory requirement generated by the proposed regulations.

Table 1. Cost Estimates for Proposed Engineering Services

	Class A, low hazard dam	Class B, intermediate hazard dam	Class C, high hazard dam
Hazard class verification	\$1,300 - \$8,000	part of engineering assessment	part of engineering assessment
Dam safety inspection	not applicable	\$2,500 - \$12,000	\$4,000 - \$80,000
Engineering Assessment	not applicable	\$6,000 - \$20,000	\$8,000 - \$50,000
Breach of 60 ft. earthen dam (Financial security need)	not applicable	not applicable	\$12,000 - \$1,500,000

For high hazard dams only, the statute and proposed regulations require that owners demonstrate financial security for the life of the dam. Financial security enables the department to readily recoup its costs for taking remedial action when the owner has failed to comply with a Department order to do so, as authorized in ECL § 15-0507. The cost for high hazard dam owners to demonstrate financial security varies considerably and depends upon several factors including the size of the dam, financial well-being of the owner, and the financial instrument that is used. For example, the cost for obtaining financial security is dependent upon a dam owner's credit rating, liquidity of collateral, ability to obtain a letter of credit or capability to bond.

Financial instruments acceptable to the department are described in the guidance document, "Financial Security Demonstration for High Hazard Dams" which will be freely available on the department's website. Examples of financial instruments and their costs include, surety bonds which may be obtained for one to fifteen percent of the bond amount, simple trusts which can be set up for as low as \$1,000 with annual administrative costs that could range from \$5000 to \$10,000, a letter of credit which could cost one to two percent of the credit amount and certificates of deposit which can be issued for as low as \$100 and require a given sum to be set aside.

The proposed regulations require high hazard dam owners to annually certify to the department that the amount of financial security is adequate. In so doing, dam owners may periodically incur an additional cost for an engineer or accountant to determine if the amount of financial security should be adjusted based upon inflation and changes in construction costs.

Costs to the department, state and local governments for the implementation and continued compliance with the proposed regulations are entirely related to their roles as dam owners. Although state agencies are explicitly exempt from these regulations, the state agencies environmental audit process in ECL 3-0311 assures compliance with state environmental laws and regulations. More significantly, the proposed regulations should act to

save substantial costs these entities and the public may incur from dam failures, which can cause loss of life and millions of dollars in damage.

**Local government mandates:** The proposed regulations do not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district except with respect to their roles as dam owners.

**Paperwork:** The proposed regulations require dam owners to prepare and maintain numerous documents regarding the construction, maintenance, repair, operation, inspection and emergency procedures of their dam. The schedule of reporting requirements to the department differs according to a dam's hazard potential. Owners of low hazard dams below permitting thresholds and farm pond dams as defined in Part 673.1(q)\* are not required to submit paperwork. Owners of low hazard dams above permitting thresholds must submit a verification of hazard classification every ten years, the first within five years. Owners of intermediate hazard dams must submit emergency action plans within twelve months, safety inspections every four years and full engineering assessments every ten years, the first within five years. Owners of high hazard dams must submit emergency action plans within twelve months, safety inspections every two years, and full engineering assessments every ten years, the first within three years. In addition, owners of intermediate and high hazard dams must submit an annual statement, on a form provided by the department, certifying that operation and maintenance and emergency action plans are implemented and kept current and, for high hazard dams, that financial security is adequate.

\* Farm pond dam means a low hazard dam that creates a pond for the purpose of soil conservation, propagation of fish, irrigation, watering of livestock, maintenance of wildlife, wildlife habitat enhancement, or general farm use.

**Duplication:** For most dam owners, no relevant rules or other legal requirements of the state and federal government exist that duplicate, overlap or conflict with the proposed modifications of the dam safety regulations.

Dams which are regulated by the Federal Energy Regulatory Commission may be required to conduct inspections which may be similar to the inspections and assessments required under the proposed regulations. To eliminate potential duplication, the proposed regulations provide that the department may accept engineering reports from such federal entities.

Federal phase II stormwater regulations for construction activity require stormwater management. This may entail the construction of stormwater management facilities, like retention ponds, that need to meet dam safety permit and safety program requirements. Duplication is prevented because the stormwater program requirements refer to the state dam safety program when applicable.

**Alternatives:** The department considered three alternatives in developing the proposed regulations. A no action alternative was dismissed because current regulations conflict with the ECL and do not provide the public and natural resources of the state with sufficient protection from potential dam failures.

Although administered in other states, an alternative to require dam owners to obtain a state permit and remit associated annual fees for continued dam operation was dismissed because of added economic burden placed on dam owners, the administrative burden placed on the department, and limited effect on improving dam safety in light of the proposed dam safety program.

A third alternative to require a uniform dam safety program for all dams was dismissed because doing so is inconsistent with the legislative objective to base dam safety requirements on the level of risk associated with different dams. A one size fits all approach would place unnecessary burden on owners of low hazard dams.

**Federal standards:** Applicable federal dam safety regulations do not exist. The department and dam owners are referred to guidance documents, including those listed above, prepared by federal agencies and other dam safety organizations, including the Federal Emergency Management Agency and the Association of State Dam Safety Officials.

**Compliance schedules:** No dam owner will be out of compliance with dam safety regulations through the enactment of the proposed regulations. All new requirements take effect a minimum of twelve months from enactment.

Although an exact number or magnitude of deficiency cannot be determined, required inspections and assessments by dam owners are likely to identify existing dam stability, spillway capacity and maintenance deficiencies at many dams.

#### **Regulatory Flexibility Analysis**

**Effect of Rule:** The statute and proposed regulations require that dam owners operate and maintain a dam in a safe condition. Many local governments own dams for flood control, stormwater management and control, fire protection, drinking water supply, recreation, or aesthetic appeal in parks. Many local governments have acquired dams when owners have failed to pay property taxes. Small businesses may own dams if the dams are located on the property.

The dam inventory database contains 902 dams owned by local governments. Of these, 395 are low (A) hazard dams, 191 are intermediate (B) hazard dams, 201 are high (C) hazard dams, 87 are either failed or were never constructed and pose negligible hazard dams (D), and 28 are not classified.

There are 4850 dams in the database which are privately owned. Privately-owned dams include dams owned by businesses, private individuals and non-profit organizations. There is no further breakdown on dams owned by small businesses.

**Compliance Requirements:** The proposed regulations are the same for dams owned by small businesses or local governments; there are no special exemptions or allowances.

**Professional Services:** The proposed regulations are the same for dams owned by small businesses or local governments. Small business owners and local governments that own dams are subject to the same requirements as other dam owners, and must retain the same level of professional services to comply with the regulations as other dam owners. The requirements are described in the section, "Costs to Dam Owners" in the Regulatory Impact Statement.

**Compliance Costs:** The proposed regulations are the same for dams owned by small businesses or local governments. Small business owners and local governments that own dams are subject to the same requirements as other dam owners, and will likely incur similar costs as other dam owners. The requirements are described in the section, "Costs to Dam Owners" in the Regulatory Impact Statement. Small businesses or local governments who have an engineer on staff may use their engineer to produce the documents required in the proposed regulations, provided the engineer meets the qualifications as described in the definition of engineer in Part 673.1(n).

**Economic and Technological Feasibility:** It is anticipated that small businesses and local governments may struggle to meet the requirements of the proposed regulations, particularly if they own intermediate or high hazard dams. The economic burden of the proposed regulations is likely to be greater if the dam requires extensive maintenance, repairs, or reconstruction to meet current dam safety stability criteria or spillway capacity. However, the goal of the proposed regulation is to protect public safety. If the dam poses a threat to public safety and the municipality is unable to secure financing to bring the dam into compliance with current safety criteria, the department can pursue enforcement, and if the owner fails to bring the dam into compliance, the department will recommend that the dam be breached or removed, and will take actions necessary to protect public safety. It is not acceptable to the department or lawmakers (as evidenced by the 1999 amendment to the statute) that dams not be maintained because of the risk to public safety. Funding is available to municipalities, primarily through the Clean Water/Clean Air Bond Act of 1996 Title 3 – Section 56-0311, but is anticipated to fall far short of meeting the needs of the municipalities. The department is unaware of funding opportunities for small business owners who are seeking to repair or reconstruct their dams, although it may be possible to secure funding from environmental groups for removal of the dam. Non-profit organizations and homeowners associations are also likely to be financially challenged.

**Minimizing Adverse Impacts:** The proposed regulations are the same for dams owned by small businesses or local governments. Small business owners and local governments that own dams are subject to the same requirements as other dam owners, and will likely incur similar costs as other dam owners. The requirements are described in the section, "Costs to Dam Owners" in the Regulatory Impact Statement. It is not acceptable to the department that dams not be maintained, or that dam owners not comply with the proposed regulations because they claim economic hardship, since dams that are not maintained or do not meet dam safety design criteria pose a risk to public safety.

**Small Business and Local Government Participation:** The department has sought input from stakeholders in the development of the proposed regulations. The department has conducted mailings containing the web link to the proposed regulations and invited all dam owners to public outreach sessions. Information was sent to all dam owners listed in the department's dam inventory database, as well as organizations, such as the Federation of Lakes, which include many dam owners. The department

held preliminary stakeholder outreach meetings in Poughkeepsie, Rochester, and Albany to gather input from all dam owners, including local governments and small business owners.

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

**Types and Estimated Numbers of Rural Areas:** The 1999 statute and proposed regulations require that all dam owners operate and maintain a dam in a safe condition. Dams are located in all areas of the state, including rural areas. Therefore, all rural areas may be impacted by the proposed regulation.

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:** The proposed regulations are the same for dams located in rural areas. One proposed exception is for farm pond dam owners. The proposed regulations are not applicable to farm pond dams or to dams below the permitting thresholds. This exclusion for farm pond dams will result in cost savings for farm pond dam owners.

**Costs:** The cost to comply with the proposed regulation will depend upon the dam's hazard classification, as well as the size and condition of the dam. Other than the exclusion for farm pond dam owners, as stated in the above paragraph, it is not expected that there will be any variation in the cost to comply with the regulation based upon rural area status.

**Minimizing Adverse Impacts:** The proposed regulations have been developed to protect public safety. As stated above, dams are located across the state, and many are located in rural areas. A dam's hazard classification is based upon the potential impacts within the inundation area if the dam were to fail. Dams in rural areas with little or no development in the downstream inundation area, would have a lower hazard classification than a dam located in a more developed, heavily populated area. Dams with lower hazard classifications have lesser regulatory requirements. Therefore, the proposed regulations have incorporated a mechanism for minimizing the impacts on dam owners located in rural areas.

**Rural Area Participation:** The department has sought input from stakeholders in the development of the proposed regulations. The department has conducted mailings containing the web link to the proposed regulations and invited all dam owners to public outreach sessions. Information was sent to all dam owners listed in the department's dam inventory database, as well as organizations, such as the Federation of Lakes, which include many dam owners. The department held stakeholder outreach meetings in Poughkeepsie, Rochester, and Albany to gather input from all dam owners, including those located in rural areas.

#### **Job Impact Statement**

**Nature of Impact:** The proposed regulations are likely to create good, high paying technical jobs in engineering and training, as well as construction jobs.

**Categories and Numbers Affected:** The proposed regulations require dam owners retain professional engineers to verify hazard classification, conduct dam safety inspections, and conduct dam safety assessments. Furthermore, these inspections and assessments may identify deficiencies, which dam owners will be required to correct. The dam safety projects generated as a result of the engineering inspections could involve engineers and construction jobs. As a result, it is expected that the proposed regulation will generate additional high paying engineering jobs, as well as construction jobs. The field of dam safety includes two highly specialized areas: civil/structural engineering and hydrologic/hydraulic analysis utilizing computer modeling. There will clearly be a need for civil engineers to have additional training in dam safety. Therefore, there will be an opportunity for companies and colleges to develop training programs and offer specialized training in New York. This would create job opportunities for trainers as well as support staff opportunities. The department has no way of determining the number of engineering or construction jobs or training opportunities. During one of the stakeholder meetings, a manager for a large consulting engineering firm stated that his firm planned on hiring one or two engineers in response to the proposed regulations.

**Regions of Adverse Impact:** There are no adverse job impacts expected.

**Minimizing Adverse Impacts:** There are no adverse job impacts expected.

**Self-employment Opportunities:** The proposed regulations will create an environment favorable for experienced civil engineers, licensed surveyors, and computer modelers specializing in hydrology and hydraulic analysis to start their own businesses. Self-employment opportunities also will likely exist for experienced engineers to conduct training, dam safety inspections and dam safety engineering assessments. Additionally, self-employment opportunities also will likely exist for experienced individu-

als in the construction trades for the erection, reconstruction, repair, breach or removal of dams.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **Non-Prescription Emergency Contraceptive Drugs**

**I.D. No.** HLT-04-08-00003-E

**Filing No.** 51

**Filing date:** Jan. 28, 2008

**Effective date:** Jan. 28, 2008

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

**Action taken:** Amendment of section 505.3(b)(1) of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(v) and 206; Social Services Law, section 363-a(2)

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

**Specific reasons underlying the finding of necessity:** We are proposing that this regulatory amendment be adopted on an emergency basis because emergency contraceptive drugs have been approved by the Federal Food and Drug Administration as a non-prescription drug for women 18 years of age and older. Medicaid law requires a written order for non-prescription drugs. A written order requires that a qualified medical practitioner provide the pharmacy with a written, telephone or fax order for a specific drug for a specific patient. This requirement can delay the use of non-prescription emergency contraceptive drugs. Such drugs are effective if taken within 72 hours of unprotected intercourse but are most effective if taken sooner, ideally within 12 hours. The requirement for a written order impedes earliest access to the drug and reduces the effectiveness of the drug.

The FDA approval of emergency contraceptive drugs as non-prescription drugs is limited to women 18 years of age and older. New York State Medicaid will limit dispensing of this drug to 6 courses of treatment in any 12 month period without a prescription or written order for women 18 years of age and older.

**Subject:** Non-prescription emergency contraceptive drugs.

**Purpose:** To allow access to Federal Drug Administration approved non-prescription contraceptive drugs to be dispensed by a pharmacy without a fiscal order to women 18 years of age and older.

**Text of emergency rule:** Paragraph (1) of subdivision (b) of Section 505.3 is amended to read as follows:

(b) Written order required. (1) Drugs may be obtained only upon the written order of a practitioner, except for *non-prescription emergency contraceptive drugs as described in subparagraph (i) of this paragraph, and for telephone and electronic orders for drugs filled in compliance with this section and 10 NYCRR Part 910.*

(i) *Non-prescription emergency contraceptive drugs for recipients 18 years of age or older may be obtained without a written order subject to a utilization frequency limit of 6 courses of treatment in any 12 month period.*

[(i)] (ii) The ordering/prescribing of drugs is limited to the practitioner's scope of practice.

[(ii)] (iii) The ordering/prescribing of drugs is limited to practitioners not excluded from participating in the medical assistance program.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-04-08-00003-P, Issue of Jan. 23, 2008. The emergency rule will expire March 27, 2008.

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

#### **Regulatory Impact Statement**

Statutory Authority:

The authority for the proposed rule is contained in Sections 363, 363-a and 365-a of the Social Services Law (SSL). Section 363 of the SSL states that the goal of the Medicaid program is to make available to everyone, regardless of race, age, national origin or economic standing, uniform, high quality medical care. Section 363-a of the SSL designates the Department of Health (Department) as the single state agency for the administration of the Medicaid program and provides that the Department shall make such regulations, not inconsistent with law, as may be necessary to implement the provisions of the program. Section 365-a(2)(g) of the SSL defines "medical assistance" as including prescription and non prescription drugs.

**Legislative Objective:**

The proposed rule meets the legislative objective of providing timely access to medically necessary care for indigent Medicaid recipients 18 years of age and older who require emergency contraception. The proposed rule will exempt Federal Food and Drug Administration (FDA) approved over-the-counter drugs for emergency contraception from the Department's regulations which require that a pharmacy have a written order from a practitioner prior to dispensing drugs to Medicaid recipients.

**Needs and Benefits:**

Emergency contraceptive drugs have been available for some time by prescription only. In August of 2006, the FDA approved emergency contraceptive drugs as non-prescription drugs ("over the counter") when used by women 18 years of age and older. According to current State Medicaid regulations, 18 NYCRR Section 505.3(b)(1), pharmacies must have a written order (also known as a fiscal order) from a practitioner prior to dispensing an over-the-counter drug to a Medicaid recipient. The regulations do provide an exception, however, for telephone orders from a practitioner which comply with the provisions of the Education Law with respect to such orders. The requirement for a written order necessitates that the recipient visit or call a licensed practitioner prior to going to the pharmacy and then either bring the written order to the pharmacy, have the pharmacist and the practitioner talk on the phone, or have the practitioner send the order by fax. The Department wants to avoid any time barriers to accessing emergency contraceptive drugs since the drugs are most effective in preventing pregnancy if taken within 72 hours after an act of unprotected sex. The Department is eliminating the written order requirement specifically for FDA approved over-the-counter emergency contraceptive drugs dispensed for use by women 18 years of age and older. Women under 18 years of age must still obtain and present a prescription which meets the requirements of section 6810 of the Education Law in order to obtain these drugs.

**Costs:**

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

There would be no increased costs to the pharmacies for implementation of and continuing compliance with this rule.

**Costs to State Government:**

Because the Department is eliminating the requirement that there be a written order of a practitioner prior to dispensing this over-the counter drug, payment for emergency contraceptive drugs under New York's Medicaid program will no longer comply with the federal requirement for such an order. The Department, therefore, proposes using 100% State funds for payment for these drugs. The agency will absorb costs associated with system changes to remove these claims from the federal payment program. These costs are considered minimal. It is estimated that the additional annual cost of payment for emergency contraceptive drugs to the State will be \$1.5 million. These costs to the State will be offset, however, by estimated cost avoidance from reduced births and deliveries attributed to increased access to emergency contraceptive drugs.

The Department examined two years of Medicaid claim data for emergency contraceptive drugs (date of payment from December 1, 2004 to November 30, 2006). The data was extracted from the eMedNY Data warehouse. The Department made the assumption that costs for these drugs would roughly double after this regulation became effective with 100% of rebate adjusted costs being assumed by the State.

Gross annual savings estimates of approximately \$3.2 million were calculated using birth and delivery costs determined in a recent New York State Department of Health, Office of Medicaid Management study. This study analyzed New York State Department of Health vital statistics and New York State Department of Health Medicaid claim data pertaining to prenatal care, delivery and other associated health care costs. Assuming that eliminating the fiscal order mandate would double prescriptions for contraceptive drugs, the Department used claim data for the one year period December 1, 2005 to November 30, 2006 and assumed that approximately 2 in 100 of these claims would have resulted in a birth and delivery

cost. The Department used a two year period to determine the expected ongoing increase in the cost of these drugs. The Department only used the one year period (December 1, 2005 to November 30, 2006) to calculate savings, which had the effect of creating a more conservative savings estimate. The gross annual savings in the cost of prenatal care, delivery and other health care costs associated with delivery using this methodology would be \$3.2 million, with approximately \$1.5 million each representing the federal and state share of savings. There is no local share in savings because of the local share cap which is set at calendar year 2005 (trended) levels.

**Costs to Local Government:**

There will be no cost to local government.

**Local Government Mandates:**

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

**Paperwork:**

This regulatory amendment will decrease paperwork for medical providers and pharmacies since a fiscal order is not needed for this drug for women 18 years of age or older.

**Duplication:**

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

**Alternatives:**

Currently, a written order of a practitioner is required by federal regulations (42 CFR 440.120(a)(3)) and State Medicaid regulations for the dispensing of emergency contraceptive drugs. The Department considered another proposal to eliminate the need for each recipient to obtain an individual written order from a practitioner for emergency contraceptive drugs. That alternative was to replace the requirement for a fiscal order with a "non-patient specific order" as provided for in section 6909(5) of the Education Law. The non-patient specific order would be written by a qualified medical practitioner in agreement with a specific pharmacy to dispense emergency contraception as an over-the-counter drug to any eligible woman 18 years of age and older who requests it. The order is not patient specific so it would eliminate the delay in treatment inherent in requiring the recipient to obtain a written order. The Department determined this alternative would not likely be available without a statutory amendment because the Education Law and regulations limit its use to situations involving immunizations, emergency treatment of anaphylaxis, purified protein derivative tests and HIV testing.

**Federal Standards:**

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

**Compliance Schedule:**

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

**Regulatory Flexibility Analysis**

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

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

## EMERGENCY RULE MAKING

### DRGs, SIWs, Trimpoints and the Mean LOS

**I.D. No.** HLT-07-08-00007-E

**Filing No.** 47

**Filing date:** Jan. 23, 2008

**Effective date:** Jan. 23, 2008

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

**Action taken:** Amendment of sections 86-1.55, 86-1.62 and 86-1.63 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2803(2), 2807(3), 2807-c(3) and (4)

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

**Specific reasons underlying the finding of necessity:** 86-1.55 Development of Outlier Rates of Payment

The Department of Health and Human Services (HHS), Office of Inspector General, has issued to the New York State Department of Health a final audit report (A-02-04-01022, June 2006) on the State's hospital outlier payment methodology. This report addressed vulnerabilities in the methodology that may result in excessive payments to certain hospitals. HHS noted that NYS does not use the most accurate cost-to-charge data in determining the outlier payments, and that if it had done so there could be savings for the Medicaid program. After reviewing the report and HHS's recommendations, the Department of Health concurs with the findings and has agreed to update the outlier payment methodology to reflect a calculation based on cost-to-charge data from the year of the patient discharge. However, revised regulations need to be adopted in order to implement the HHS recommendations because current regulation does not provide for the use of updated data.

86-1.62 Service Intensity Weights and Group Average Arithmetic Lengths of Stay

86-1.63 Non-Medicare Trim Points

The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). This is required by Section 2807-c(3) of the Public Health Law, which states, "The Commissioner shall establish as a basis for case classification for case based rates of payment the same system of diagnosis-related groups for classification of hospital discharges as established for purposes of reimbursement of inpatient hospital service pursuant to Title XVIII of the Federal Social Security Act (Medicare) in effect on the first day of July in the year preceding the rate period." Additionally, such amendments modify existing DRGs and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

In addition, the SIWs and group average inlier length of stays (LOS) were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. The current SIWs and LOS are based on twelve year old data and need to be updated for hospital payment to reflect prevailing patterns of health use and services. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The amendments provide payors of inpatient hospital services with the new values used to determine the correct case based payment for each DRG for each hospital so hospital claims can be submitted and paid in a timely manner. Additionally, the Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health use and services. Such requirements warrant adoption of these amendments as soon as practicable.

**Subject:** DRGs, SIWs, trimpoints and the mean LOS.

**Purpose:** To update the calculation of outlier payments based on HHS audit findings and recommendations.

**Substance of emergency rule:** 86-1.55 - Development of Outlier Rates of Payment

The proposed amendment of section 86-1.55 of Title 10 (Health) NYCRR is intended to update the calculation of cost outlier payments to reflect a cost to charge ratio which is based on data for the year in which the discharge occurred. Currently the payments are calculated based on the most recent information available, generally two year old cost to charge data.

This amendment is the result of a final audit report by the Department of Health and Human Services on Medicaid hospital outlier payments.

86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system, and additional changes to identify medically appropriate patterns of health resource use for services that are

efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

In addition, the SIWs and group average inlier length of stays were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns. The revised service intensity weights based on 2004 data are being phased-in over a three year period. The weights effective for the period January 1, 2008 through December 31, 2008 will be based on 75% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 25% of the service intensity weights based on 2004 data. The service intensity weights effective for the period January 1, 2009 through December 31, 2009, will be based on 33% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 67% of the service intensity weights based on 2004 data. Effective January 1, 2010 and thereafter, the service intensity weights will be based on 2004 data.

86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system to be based on 2004 data.

General Summary for 86-1.62 and 1.63

The changes in the DRG classification system and service intensity weights described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

**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 April 21, 2008.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2), and 2807(3) and 2807(4) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c(3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG. Chapter 58 of the Laws of 2007 authorizes the SHRPC and the Commissioner to update the cost and statistical base used to determine the SIWs and trimpoints to calendar year 2004 data and to provide for a phase-in of the new weights. PHL section 2807-c (4) authorizes the SHRPC to adopt rules, subject to the Commissioner's approval, for exceptions to case based payments for cost outliers.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendment to section 86-1.55 of Title 10 (Health) NYCRR is intended to revise the methodology for calculating hospital cost

outlier payments. The proposed methodology is based on more current and appropriate cost to charge ratios for determining the outlier expense, which is consistent with the method used in Medicare reimbursement. The proposal will provide for an update to the ratio from the initial payments based on two year old data, to data from the year in which the discharge occurred. This will cause the outlier payments to more accurately reflect reasonable costs incurred by each hospital, and address the problem of excessive over payments.

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) NYCRR are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications. Additionally, the SIWs and trimpoints are updated from the current 1992 cost and statistic base to 2004 data reported to the Department and being phased-in over a three year period.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, and to incorporate the 2004 cost and statistical basis, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Lastly, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

#### Costs:

##### Costs to State Government:

The proposed amendment to 86-1.55, development of outlier payments, is estimated to produce savings to the State.

The amendments to 86-1.62 and 86-1.63 revising the DRGs, SIWs and trimpoints has been legislated as budget neutral; therefore there is no additional costs to the State as a result of these regulation changes.

##### Costs of Local Government:

No increase or decrease in costs to local governments is anticipated as a result of these amendments.

##### Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

##### Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

##### Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

##### Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

##### Duplication:

These regulations do not duplicate existing State and Federal regulations.

##### Alternatives:

The change to the outlier payment methodology is based on an audit by the Department of Health and Human Services. The Department concurs with the findings of the audit and HHS's recommended methodology change; therefore alternatives were not considered.

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to current clinic practices new medical technologies, changes in patient resource consump-

tion, and changes in hospital length of stay patterns. Two alternatives were considered for the means of adjusting the revised SIWs to ensure budget neutrality.

##### Federal Standards:

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

##### Compliance Schedule:

The proposed rule establishes rates of payment as of January 1, 2008; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Katherine Ceroalo, New York State Department of Health Bureau of House Counsel, Regulatory Affairs Unit Corning Tower Building, Room 2438 Empire State Plaza Albany, New York 12237 (518) 473-7488 (518) 473-2019 (FAX) REGSQNA@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

### **Regulatory Flexibility Analysis**

#### Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

#### Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules.

#### Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

#### Economic and Technical Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the outlier payments; the DRG classification system used by the Medicare prospective payment system (PPS), and add new DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications, and the new cost and statistical base.

#### Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there maybe a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no anticipated increases or decreases in hospitals' Medicaid revenues. However, revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

#### Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

#### Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its December 6, 2007 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

### **Rural Area Flexibility Analysis**

#### Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns

with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

No new reporting, record keeping, or other compliance requirements are being imposed as a result of this proposal.

**Professional Services:**

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

**Minimizing Adverse Impact:**

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

**Opportunity for Rural Area Participation:**

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its December 6, 2007 meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the calculation of cost outlier payments and update the diagnosis related group (DRG) classification system for inpatient hospital services as well as the corresponding service intensity weights and length of stay standards. The cost outlier payments are exceptions to the case payment rates for high cost or long stay cases and have been in effect since 1988 in New York State. The DRG classification system, which also has been in effect since 1988, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. The proposed regulations have no implications for job opportunities.

## Division of Housing and Community Renewal

### NOTICE OF ADOPTION

**Qualified Allocation Plan for the Allocation of Low-Income Housing Credits**

**I.D. No.** HCR-46-07-00002-A

**Filing No.** 52

**Filing date:** Jan. 29, 2008

**Effective date:** Feb. 13, 2008

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

**Action taken:** Amendment of sections 2040.1-2040.14 of Title 9 NYCRR.

**Statutory authority:** Executive Order No. 135, dated Feb. 27, 1990 as continued by Executive Order No. 5, dated Jan. 1, 2007; U.S. Internal Revenue Code, section 42(m); and Public Housing Law, section 19

**Subject:** State of New York's qualified allocation plan for the allocation of low-income housing credits and regulations for the allocation of New York State low-income housing tax credits.

**Purpose:** To amend the process by which DHCR reviews Federal low-income housing credit applications and State low-income housing tax credit applications, and utilizes selection criteria, and increase consistency with Federal statutes.

**Substance of final rule:** 9 NYCRR Part 2040 is amended as follows:

1. Alphabetize defined terms.
2. Amend the definition of "adjusted project cost" to clarify it, and delete an unnecessary reference to "approved total project cost".
3. Delete the definitions of the unused terms "approvable costs of a community service facility", "approved total project cost", "gross syndication proceeds", "operating subsidy reserve" and "public offerings".
4. Amend the definition of "code" to provide a current citation to Section 42 of the Internal Revenue Code ("IRC").
5. Add a new defined term "compliance period" to provide a plain language definition of this term, eliminating the need to reference the IRC.
6. Define "extended use period" to provide a plain language definition, eliminating the need to reference the IRC.
7. Add a new defined term "high acquisition cost project" which applies to projects which have acquisition costs above 25% of total development cost and clarifies DHCR's discretion to limit the amount of the developer's fee so that a high acquisition cost does not automatically elevate the developer's fee unreasonably.
8. Add a new defined term "HTFC", an acronym for the Housing Trust Fund Corporation.
9. Add a new defined term "local non-profit organization" to clarify the non-profit participation that will qualify for scoring points.
10. Amend the definition of "operating deficit guarantee" and amend section 2040.3(g)(2)(ii) to clarify DHCR's operating deficit guarantee requirements.
11. Add a new defined term "persons with special needs" to specify those persons for which LIHC-assisted units may be specially targeted.
12. Amend the definition of "preservation project" to eliminate the requirement that these projects be in a crisis situation or be part of a community revitalization plan; and to clarify the commencement of the 30 year period during which the proposed rehabilitation must be sufficient.
13. Add a new defined term "primary market area".
14. Add a new defined term "qualified low-income housing project" to provide a plain language definition of this IRC term.
15. Add a new defined term "supportive housing" to specify DHCR's requirements for a project to be considered supportive housing and therefore eligible for a possible set-aside of Credit.
16. Add a new defined term "visitability" with a corresponding new threshold requirement which incorporates a minimum accessibility standard into the Proposed Rule to assist households with elderly and disabled persons.
17. Revise language at section 2040.3(d)(1) regarding DHCR's process for providing a project with an initial award of Credit to clarify existing policy.

18. Revise language at section 2040.3(d)(2) to clarify DHCR's current process for issuance of a carryover allocation.

19. Replace references to Internal Revenue Service (IRS) Form 8609 with the term "final credit allocation."

20. Eliminate the threshold requirement at section 2040.3(e)(3) that all local governmental approvals required for the project have been obtained. An applicant will have to have initiated the process of securing all necessary governmental approvals and demonstrate that the project is eligible to obtain such approvals.

21. Revise the experience requirement at section 2040.3(e)(6) to clarify that all parties involved in the project must have the requisite experience to develop and operate the proposed project.

22. Require that, at the time of application, the project developers, owners, and managers are not in default of their obligations to any governmental agency pertaining to similar projects.

23. Delete the threshold requirement that there be no change in the project's ownership structure as proposed prior to the issuance of the final credit allocation, eliminating potential ambiguity in the existing rule because section 2040.6(b) permits such changes with the approval of DHCR.

24. Delete the threshold requirement formerly at section 2040.3(e)(10) that the amount of annual credit requested does not exceed \$20,000 per unit.

25. Revise the threshold requirement at section 2040.3(e)(9) (formerly at section 2040.3(e)(11)) to clarify that the per project and per unit caps will be specified in DHCR's annual Notice of Credit Availability ("NOCA").

26. Revise the threshold requirement at section 2040.3(e)(10) to clarify that the "comprehensive market study of the housing needs of low-income individuals in the area..." required by the IRC, must be conducted by professionals pre-approved by DHCR.

27. Clarify that it is the number of bedrooms in a unit (not merely the size of the units) that must be appropriate for the type of occupancy proposed.

28. Add a new threshold requirement at section 2040.3(e)(14) regarding accessibility standards for persons with mobility impairments.

29. Make changes to correspond to the changes made to the term "preservation project", and replacement of that term with "high acquisition cost project".

30. Add a new threshold requirement at section 2040.3(e)(17) which eliminates the owner's right, after 15 years of low-income operation, to request a "qualified contract", requiring DHCR to find a non-profit buyer willing to continue to operate the project under the requirements of the Program. This gives project owners the option to commit to a regulatory period of a minimum of 30 years or to commit to sell the project to the tenants.

31. Add a new threshold requirement which requires all projects to incorporate certain "green building" standards including: utilizing Energy Star appliances, light fixtures and heating systems; water usage and energy efficiency measures; passive radon-reduction if necessary; and, lead-safe work practices.

32. Reorganize section 2040.3(f), "project scoring and ranking criteria" so that the criteria "are listed in descending order according to the relative weight given..." as stated in the section.

33. Delete the "housing needs" scoring criteria at section 2040.3(f)(1) and replace it with a new scoring criteria "community impact/revitalization", which better measures the need in a locality for the type of housing proposed.

34. Delete the "efficiency of credit use" scoring criteria at section 2040.3(f)(2) and replace it with "financial leveraging". The proposed scoring provision eliminates DHCR's awarding of Credit based on the "amount of credit requested for the project." The financial leveraging criteria will award points to the extent other financing sources are utilized to minimize the use of DHCR/HTFC resources, and based upon the amount of credit requested per unit adjusted for unit size.

35. Delete the scoring provision "regulatory period" and replace it with a new criteria "long term affordability." The former provision provided scoring points for projects providing a regulatory period of a minimum of 30 years, which DHCR has made a threshold requirement. This new provision will encourage long-term project affordability by providing points to projects which commit to a minimum regulatory period of longer than 30 years.

36. Add a new scoring criteria "green building". This new scoring criteria will provide an incentive for projects financed with Credit to reduce energy and resource consumption, minimize environmental im-

pacts, and utilize Credit to remediate sites in need of environmental remediation.

37. Amend the "energy efficiency" scoring criteria to provide points for receiving financing through the New York State Energy Research and Development Authority's ("NYSERDA") Multifamily Building Performance Program or the New York State Energy Star Labeled Homes Program, or demonstrating that the project will meet comparable energy efficiency standards.

38. Add a new scoring criteria "fully accessible and adapted, move-in ready units" to provide additional points for projects designed to serve the growing population of persons with mobility, vision and hearing impairments.

39. Delete the "tenant buy-out plan" scoring criteria.

40. Amend the "project amenities" scoring criteria to: modify some criteria, and increase point value and the number of amenities for which points will be given including: Energy Star (or equivalent) air conditioning; laundry facilities or washer/dryer hookups, and dishwashers; discounted broadband internet access; community room; on-site management office; outdoor recreational area and garden space; and computer lab.

41. Amend the "project readiness" scoring criteria so that it better gauges project readiness.

42. Revise the "participation of local tax exempt organizations" scoring criteria formerly at 2040.3(f)(8) and replace it with a renamed scoring criteria "participation of non-profit organizations" to conform the criteria more closely to the wording and requirements of the IRC, reduce the number of points from 5 to 4, and clarify the levels of participation for which points will be awarded.

43. Amend the "special needs" scoring criteria to replace the term "special populations" with the term "persons with special needs", and to add the requirement that projects receiving scoring points submit a "comprehensive service plan" to ensure that persons with special needs are provided with needed services.

44. Add a new scoring criteria "mixed income" to provide 3 points for projects which reserve at least 15 percent of total project units for households earning more than 60 percent of area median.

45. Add a new section "set-asides" which compliments and clarifies DHCR's right to allocate credit to projects which further the State's housing goals.

46. Amend section 2040.3(g)(2)(ii) to recognize that changes in the low-income housing industry have led to the ownership of projects by limited liability companies. The section is also amended to eliminate the statement that the amount of the developer's fee and the method for funding the operating deficit guarantee shall be established at the credit reservation or binding agreement stage.

47. Amend section 2040.3(g)(2)(iii) to eliminate an apparent inconsistency and to clarify that the developer's fee is an allowable cost that may be reduced where an identity of interest has been found, effecting no substantive change.

48. Sunset the regulations regarding projects which are financed by tax-exempt bonds subject to the Private Activity Bond Cap in anticipation of delegating processing to the New York State Housing Finance Agency.

49. Update the rule's Freedom of Information Law reference.

50. Amend section 2040.9(c) to correct a typographical error to confirm the Existing Rule to the IRC's requirement, and DHCR's practice, of conducting inspections in a manner which will not give project owners notice of what units, or what year's records, will be inspected.

51. Amend the scoring section of 9 NYCRR section 2040.14(d) and add a general allocation policy section and a set-aside section in order to coordinate, to the extent possible, the scoring mechanisms, general allocation policies and the set-aside policies for both the LIHC and SLIHC programs.

52. Additionally, DHCR made a number of minor typographical corrections and formatting changes to sections of the Existing Rule for consistency and grammatical reasons.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 2040.2(s), (u), 2040.3(c), (e), (f) and 2040.14(d).

**Text of rule and any required statements and analyses may be obtained from:** Arnon Adler, Division of Housing and Community Renewal, 38-40 State St., Albany, NY 12207, (518) 486-3305

#### **Summary of Revised Regulatory Impact Statement**

##### **1. Statutory Authority:**

Executive Order Number 135, dated February 27, 1990, which was continued in full force and effect by Executive Order Number 5, dated January 1, 2007, authorizes the Commissioner of the Division of Housing

and Community Renewal (“DHCR”) to administer New York State’s annual allotment of federal low-income housing tax credits. U.S. Internal Revenue Code (“IRC”) Section 42(m) provides that Low-Income Housing Credit (“LIHC” or “Credit”) must be allocated pursuant to a “qualified allocation plan” (“QAP”) approved by the Governor. The LIHC program promotes housing for households earning up to 60 percent of the area median income.

Public Housing Law Article 2-A (the “Act”) created the New York State Low-Income Housing Tax Credit Program (“SLIHC”). The Act authorizes DHCR to allocate New York State tax credits to those who invest in the development of eligible housing for households earning up to 90 percent of area median income, and to promulgate rules and regulations necessary to administer the program.

#### 2. Legislative Objectives:

The LIHC and SLIHC programs were enacted to promote housing that is affordable to persons meeting the applicable income eligibility criteria.

#### 3. Needs and Benefits:

The changes to the existing rule (“Existing Rule”) which would be made by this proposed rule (“Proposed Rule”) will amend 9 NYCRR, Part 2040 to:

1. Clarify the definitions and DHCR policies and procedures.
2. Delete unused terms.
3. Update references to IRC Section 42 and the Freedom of Information Law.
4. Provide plain language definitions of IRC terms.
5. Add a new term “high acquisition cost project”.
6. Define “local non-profit organization” and specify non-profit participation that qualifies for scoring points.
7. Amend the rule to account for project ownership by limited liability companies.
8. Define “persons with special needs” to specify those persons for which LIHC-assisted units may be specially targeted.
9. Amend the definition of “preservation project” to eliminate the requirement that these projects be in a crisis situation or be part of a community revitalization plan; and clarify the 30 year rehabilitation sufficiency requirement.
10. Define “primary market area”.
11. Define “supportive housing” to specify DHCR’s requirements for a possible set-aside of Credit.
12. Eliminate the threshold requirement that all local governmental approvals required for the project have been obtained in response to concerns that this disadvantaged worthwhile projects.
13. Require that project participants are not in default of governmental agency obligations pertaining to similar projects.
14. Delete the requirement that there be no change in the project’s ownership structure prior to the final allocation of credit.
15. Delete the threshold cap of \$20,000 per unit because it is too restrictive. This cap will now be specified in DHCR’s annual Notice of Credit Availability (“NOCA”).
16. Specify that the IRC required “comprehensive market study” be conducted by professionals pre-approved by DHCR.
17. Require design features accommodating persons with mobility impairments.
18. Make changes to the term “preservation project”, which correspond to the new term “high acquisition cost project”.
19. Require a minimum 30 year regulatory period in recognition of the State’s need to preserve affordable housing.
20. Require certain energy efficiency and environmental “green building” standards and provide scoring points for additional “green building” measures.
21. Replace the “housing needs” scoring criteria with “community impact/revitalization”, which better measures a locality’s need for the housing proposed.
22. Replace the “efficiency of credit use” scoring criteria with “financial leveraging”, awarding points to the extent DHCR financing is minimized.
23. Amend the “energy efficiency” scoring criteria to provide points for participation in certain programs involving financing from the New York State Energy Research and Development Authority or demonstrating that the project will meet comparable energy efficiency standards.
24. Add a new scoring criteria “fully accessible and adapted, move-in ready units” to encourage projects designed to serve persons with mobility, vision and hearing impairments.
25. Delete the “tenant buy-out plan” scoring criteria which was criticized as impractical for many projects.

26. Amend the “project readiness” scoring criteria so that it better gauges project readiness.

27. Amend the “persons with special needs” scoring criteria to ensure that persons with special needs are provided with appropriate services.

28. Replace the “participation of local tax exempt organizations” scoring criteria with “participation of non-profit organizations” to conform the criteria more closely to the IRC’s wording and requirements and to reduce the point value.

29. Add a “mixed income” scoring criteria to encourage projects which reserve units for households earning over 60 percent of area median income to minimize concentrations of poverty.

30. Amend the “project amenities” scoring criteria to encourage projects which provide additional quality of life amenities.

31. Add a new section “set-asides” which clarifies DHCR’s right to allocate credit to projects which further the State’s housing goals.

32. Amend section 2040.3(g)(2)(ii) to recognize ownership of projects by limited liability companies and to eliminate the statement that the amount of the developer’s fee shall be established at the credit reservation or binding agreement stage.

33. Sunset the regulations regarding projects which are financed by tax-exempt bonds subject to the Private Activity Bond Cap in anticipation of delegating processing to the New York State Housing Finance Agency.

34. Amend the SLIHC program’s “project scoring and rating criteria”, and add a general allocation policy section and a “set-aside” section, in order to coordinate, to the extent possible, the scoring mechanisms, general allocation policies and the set-aside policies, for both the LIHC and SLIHC programs.

35. Additionally, DHCR made a number of minor typographical corrections and formatting changes to sections of the Existing Rule for consistency and grammatical reasons.

#### 4. Costs:

(a) Costs to State Government.

There will be no costs to state government because of the proposed amendments to the rule. DHCR will administer the LIHC and SLIHC programs with existing staff and resources.

(b) Costs to local government.

None.

(c) Cost to private regulated parties.

The changes made by the Proposed Rule should result in no increased costs to regulated parties. Any increase in development costs should be offset by the Credit allocated to the project.

#### 5. Local Government Mandates:

None.

#### 6. Paperwork:

The rule requires the filing of application and supporting documentation to establish eligibility for an allocation of the federal tax credits.

#### 7. Duplication:

None.

#### 8. Alternatives:

The alternative to the Proposed Rule is the Existing Rule which does not adequately address the Division’s need to clarify its definitions, and strengthen and broaden its scoring criteria to meet more programmatic goals. Specifically:

1. The alternative to deleting definitions of unused terms, and alphabetizing defined terms, is to fail to make the rule more readable.

2. The alternative to revising the definition of “code” is the existing outdated reference.

3. The alternative to defining “high acquisition cost project” and the corresponding threshold criteria is to allow developer’s fees to be based on the cost of purchasing existing housing.

4. The alternative to defining “local non-profit organization” and “primary market area” is to fail to respond to the need for more specificity.

5. The alternative to defining “persons with special needs” is to leave the term undefined.

6. The alternative to amending the definition of “preservation project” is the current definition, which hampers efforts to preserving existing housing.

7. The alternative to defining “supportive housing” and reserving the right to set-aside Credit for such housing is to fail to clarify the basis of the State’s discretion to provide additional housing opportunities for persons with special needs.

8. The alternative to providing a definition of “visitability” and adding the corresponding threshold criteria (section 2040.3 (e)(14) of the Proposed Rule) is to fail to ensure that Credit-assisted housing is accessible to elderly persons and persons with mobility impairments.

9. The alternative to revising section 2040.3(d)(1), regarding the issuance of a binding agreement in order to facilitate attainment of financing, is to fail to set forth the general purpose of a binding agreement.

10. The alternative to amending the provision allowing a carryover allocation, despite the failure of the owner to expend 10 percent of the owner's reasonably expected basis, is the current text which indicates that DHCR will continue to make judgment calls regarding carryover allocations, and risk the loss of Credit.

11. The alternative to deleting the reference in section 2040.3(d)(2), setting forth developer fee limits in the carryover allocation, is to retain this provision; IRC requirements make the eliminated timeframe unnecessary.

12. The alternative to eliminating the requirement that all local governmental approvals have been obtained is the current requirement which makes it difficult to develop worthwhile projects.

13. The alternative to revising the experience requirement is to retain the current text which can be misinterpreted.

14. The alternative to amending section 2040.3(e)(8) is the current text which allows parties to participate in the Credit program despite having failed to properly develop or run similar projects.

15. The alternative to eliminating the requirement forbidding changes in the project's ownership is the current text, which creates ambiguity because section 2040.6(b) allows such changes with DHCR approval.

16. The alternatives to eliminating the per unit cap of credit allocations to \$20,000 are not practical, therefore DHCR has determined that the cap should be set forth in the annual NOCA.

17. The alternative to amending the marketing study requirement is to fail to provide needed specificity.

18. The alternative to extending the minimum regulatory period is to fail to provide for the preservation of affordable housing.

19. The alternative to adding "green building" threshold requirements is to fail to promote conservation.

20. The alternatives to the "community impact/revitalization" criteria which replaces "housing needs" include the failure to amend the criteria to better measure the need for the type of housing proposed.

21. The alternative to revising the "efficiency of credit use" scoring criteria, now "financial leveraging", is the current text which hampers the development of worthwhile projects.

22. The alternative to amending the "energy efficiency" scoring criteria is to delete the current text because its components have been made threshold requirements.

23. The alternative to including the "fully accessible and adapted, move-in ready units" scoring criteria is to fail to promote affordable housing designed to serve persons with physical impairments.

24. The alternative to amending the "project amenities" scoring criteria is to fail to encourage projects providing desirable amenities.

25. The alternative to amending the "project readiness" scoring criteria is to fail to better gauge project's readiness to proceed.

26. The alternative to amending the former "participation of local tax exempt organizations" scoring criteria is the current section which has been criticized as over-emphasized. The amendment also ensures compliance with IRC requirements.

27. The alternative to the amendments to the "special needs" scoring criteria is the current text, which does not sufficiently address special needs.

28. The alternative to adding the "mixed income" scoring criteria is to fail to provide an incentive for minimizing concentrations of poverty.

29. The alternative to adding the "set-asides" section is to fail to provide for the special priorities for which DHCR may show a preference or reserve Credit.

30. The alternative to amending section 2040.3(g)(2)(iii) is the current text, which might create ambiguity.

31. The alternative to adding 2040.4(f) is to have DHCR, instead of the New York State Housing Finance Agency, process applications for projects which are financed by tax-exempt bonds subject to the Private Activity Bond Cap, with which the Housing Finance Agency has greater experience.

32. The alternative to amending the SLIHC program's scoring criteria, and adding a general allocation policy section and a set-aside section is to retain the current text which would be inconsistent with the proposed changes to LIHC regulations.

9. Federal Standards:

This Rule does not exceed the minimum standards of the federal government for the LIHC or SLIHC programs.

10. Compliance Schedule:

Not applicable. The rule changes will affect only those who apply to DHCR for allocations of Credit after the amendments to the rule are effective.

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

Insubstantial changes to text of rule as previously submitted with DHCR's Notice of Proposed Rulemaking have had no impact on the validity of the statements made in the Rural Area Flexibility Analysis, Regulatory Flexibility Analysis, or the Job Impact Statement submitted at that time. The changes will not impose any adverse impacts on small businesses, local governments, public or private entities in rural areas, jobs or employment opportunities. Therefore DHCR has not submitted a revised Rural Area Flexibility Analysis, Regulatory Flexibility Analysis, or Job Impact Statement.

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

2040.2(u):

Comments: Recommendations ranged from lowering the percentage of LIHC-assisted units to 15% to raising it to 40%. Commentators sought clarification regarding the required content of comprehensive service plans. Commentators also questioned how they could satisfy DHCR requirements if the local service agencies already serving persons with special needs are unwilling to enter into a project-specific agreement. Several commentators asked if developers could also be the service provider for the project. In addition, commentators questioned whether the comprehensive service plan required by the proposed QAP would trigger the New York State Department of Health's Assisted Living Residences regulation. Additional commentators expressed concern about securing rental or operating assistance for certain target populations which require supportive housing but do not qualify for subsidies. It was further recommended that DHCR should consider the viability of funding social services from project operating income.

Response: Recognizing that the higher, 30% LIHC-assisted unit standard should prove to be a more effective model for supportive housing development, DHCR has revised the QAP accordingly. Experienced service providers are very familiar with the specific elements that must be included in a comprehensive service plan. The role of local service agencies can be memorialized in various types of agreements with the housing developer. DHCR does not believe, nor does it intend, that all LIHC-assisted projects serving frail elderly persons must comply with the Assisted Living Residences regulation proposed by DOH. It is DHCR's understanding that there are a number of rental subsidy programs available for persons with special needs. DHCR will maintain its requirement that supportive services may not be funded from project operating income, since this could potentially threaten the financial and physical viability of the project through its extended use period. Further, DHCR has no objection to permitting developers to also provide supportive services if such an arrangement meets the requirements of the definition.

2040.3(e)(18):

Comments: Clarification of this threshold requirement was requested.

Response: Clarification has been provided in DHCR's Green Building Criteria Reference Manual. DHCR has concluded, however, that it would be helpful to revise the wording of this section to provide additional clarification regarding the requirements for use of energy efficient appliances, light fixtures and heating systems.

2040.3(f)(1):

2040.14(d)(1):

Comments: Commentators expressed concern that projects might not qualify for the maximum points provided due to the project's location or the primary market area, while others were opposed to the substitution of this section for the previous scoring criteria "Housing Needs".

Response: One purpose of the proposed criteria was to provide a scoring incentive for different types of projects facing potentially conflicting affordable housing market conditions and levels of local support. In recognition of the importance of providing a scoring incentive to projects which can secure local support, DHCR will reinstate (iv) from the deleted "Housing Needs" criteria and provide four five point options to get a maximum of fifteen points.

2040.3(f)(9):

2040.14(d)(9):

Comments: Concerns were raised that participation in NYSERDA's program required a significant upfront investment which is only reimbursed if the project is funded.

Response: DHCR proposes revising this provision to provide a more realistic opportunity for projects to participate in the NYSERDA program

by demonstrating the project is eligible for, will participate in, and will meet NYSERDA's standards.

2040.3(f)(13):

2040.14(d)(13):

Comments: Commentators expressed concern that providing two points for the lower level of non-profit organization participation penalized smaller non-profits. Other commentators indicated that the scoring criteria excluded locally-based non-profit organizations which do not perform housing-related services and/or non-profits which have not previously served the primary market area or county in which the project is located.

Response: DHCR considers it important to recognize and encourage the higher level of participation by local non-profit organizations by providing more points for these projects. DHCR agrees that non-profits who are not locally-based, or do not provide housing-related services, can also play an important role in project development and management. Accordingly, this scoring item has been revised to provide such non-profits with one point.

2040.3(f)(15):

2040.14(d)(14):

Comments: Commentators sought clarification on certain aspects of the scoring criteria.

Response: DHCR will provide necessary guidance via its website and technical assistance. DHCR has determined it would be beneficial to broaden the project amenity for outdoor space by replacing the word "patio" with "recreational area".

2040.2(s):

Comments: Commentators expressed concern that this definition excluded an additional income test allowable by the Internal Revenue Code.

Response: The QAP will be revised to provide for this additional income test.

2040.3(c):

Comments: Commentators questioned whether DHCR intended to change its fee processing requirements, given that the proposed revision did not reflect DHCR's current policy in this regard.

Response: No such change in policy was intended, therefore this provision has been revised.

2040.3(e)(15):

Comments: Commentators indicated that the proposed change to the current language could be interpreted as extending the acquisition cost limitation from rehabilitation projects to new construction.

Response: In order to avoid any such misconception, DHCR will revert to the language of the current QAP.

2040.2(j):

2040.3(g)(2)(ii):

Comments: Commentators stated that the risk factors were too vague.

Response: The current proposed high acquisition cost definition and developer's fee provision provide a description of those factors involved in an assessment of the project owner's risk in developing a high acquisition cost project. Prospective applicants have the opportunity to seek technical assistance prior to application submission.

2040.2(p):

Comments: Commentators recommended adding additional categories of persons with special needs.

Response: Several categories of persons recommended for inclusion are already accommodated in the definition. For those categories of persons not included, DHCR has conducted extensive research and has found that the need for such additional designations is unwarranted.

2040.3(f)(12):

Comments: Commentators recommended that the provision be revised to provide additional scoring points to projects serving higher percentages of persons with special needs, and encourage independent living by awarding points to projects based solely on whether the project would give preference to persons with special needs and not based on the delivery of services to those persons.

Response: The provision of additional points for projects proposing higher percentages of units for persons with special needs is not necessary at this time, since DHCR is already providing other incentives for such projects. Projects targeting persons with special needs who do not require extensive on-site services are not required to provide such services in order to qualify for points under this incentive.

2040.2(q):

Comments: Commentators expressed concern that retaining the requirement that a preservation project "averts the loss of affordable housing" would exclude Rural Development Section 515 or other current LIHC-financed projects.

Response: By removing the requirement that projects be carried out pursuant to a workout plan or revitalization plan in the proposed QAP, projects will not have to wait until they are rendered uninhabitable or are no longer economically viable in order to access LIHC. The kinds of projects described in the comments could meet the "averts the loss of affordable housing" provision and qualify as a preservation project.

2040.2(v):

2040.3(e)(14):

Comments: Commentators expressed concern that this standard would conflict with the design standards and building code requirements of individual municipalities. Some supportive housing advocates stated that the design requirements would result in overly large bathrooms in supportive housing units that are generally quite small. It was further noted that the visitability standard was ambiguous and required clarification.

Response: The amended QAP clarifies that visitability standards do not apply when they are irreconcilable with federal, state or local statutes, regulations, ordinances or codes. It is a misconception that visitability requires design of an overly large bathroom. Technical assistance is also available prior to application submission to assist prospective applicants.

2040.3(f)(6):

Comments: Commentators stated that the proposed plan should not require development of these units in advance without regard to the needs and preferences of the individual tenants who will ultimately occupy them, recommending instead that the plan require applicants to establish a reserve to finance the specific adaptations requested by incoming tenants.

Response: While the creation of an adaptation reserve might meet the needs of individuals who have the luxury of waiting until a unit is adapted to meet their needs, many cannot wait the weeks or possibly months necessary to make a unit accessible and move-in ready.

2040.3(e)(3):

Comments: Additional clarification was requested in regard to the significance of the proposed change to this threshold eligibility requirement.

Response: The new terminology and standard provide a broader opportunity for projects to meet threshold eligibility by recognizing all approvals may not have been obtained by the time of initial application.

2040.3(f)(11):

Comments: Mixed comment was received in regard to the proposed reduction of points and de-emphasis of project readiness as a factor in scoring.

Response: DHCR believes de-emphasizing project readiness will increase the competitiveness of difficult to develop, but needed affordable housing projects.

2040.3(f)(2):

Comments: Commentators requested clarification of how the maximum of 13 points would be apportioned between the different elements of this provision, and how DHCR would determine the dollar value of a donation of land/building or a long-term lease provided at a nominal amount.

Response: DHCR will score a number of these elements based on their cumulative contribution to the financing of a project, while continuing to separately assess those elements which have not changed from the current QAP. Donations and leases provided at nominal amounts will be scored based on the difference between the market value of the donation or lease and the nominal amount paid by the applicant.

2040.2(h):

2040.3(e)(17):

Comments: Commentators requested various changes to the proposed definition of extended use period, and suggested that the threshold eligibility period of 30 years be increased to 50 years.

Response: In reference to the request to utilize the definition and threshold eligibility requirement to mandate a 50 year term of affordability, DHCR does not wish to make this a threshold eligibility requirement for all LIHC projects. The proposed definition of extended use period is a verbatim repetition of language in Section 42(h)(6)(D) of the Code.

2040.3(f)(4):

Comments: Concerns were expressed that the new criteria were vague and potentially expensive to implement. Commentators noted that this scoring incentive may disadvantage suburban and rural projects, and stated that the submission of a surface water management plan should not be required at time of application. The feasibility of incorporating photovoltaic panels into projects located in upstate New York was also questioned.

Response: DHCR does not believe that these scoring criteria will increase development costs significantly, believing instead that this change

offers opportunities to reduce operating costs. DHCR also believes that the points assigned to this incentive are appropriate given the need to incorporate sustainable development measures and environmentally sound materials and construction techniques into affordable housing. Projects in both suburban and rural communities have an opportunity to score highly under this incentive based on other available options. DHCR has not requested that applicants provide a completed surface water management plan at the time application; they must only commit to provide a surface water management plan at that time. Finally, DHCR believes the use of photovoltaic panels in many areas of the State is feasible and can significantly reduce the operating costs of affordable housing.

2040.3(e)(10):

Comments: It was recommended that DHCR coordinate its market study requirements with those of the Rural Development's 515 Leveraged Loan Program.

Response: DHCR will continue to accept the market study required by Rural Development.

2040.3(f)(14):

Comments: Concern was expressed that the requirements of the Code present compliance difficulties for mixed income projects.

Response: DHCR recognizes that Code requirements can present compliance challenges for the renting of the next available unit in a LIHC-assisted project. DHCR provides an additional incentive for mixed income projects through its New York State Low-Income Housing Tax Credit Program.

Comments were also received concerning provisions of the QAP for which no change has been proposed, as well as recommendations for new QAP provisions. Since these comments are not germane to the proposed amendments to the QAP, DHCR will review these recommendations at a later date to determine whether additional amendments may be beneficial in the future.

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## Housing Finance Agency

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### NOTICE OF ADOPTION

#### Qualified Allocation Plan

**I.D. No.** HFA-48-07-00003-A

**Filing No.** 53

**Filing date:** Jan. 29, 2008

**Effective date:** Feb. 13, 2008

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

**Action taken:** Amendment of sections 2188.1, 2188.2, 2188.4, 2188.5, and 2188.7 of Title 21 NYCRR.

**Statutory authority:** 26 U.S.C. section 42; Governor Cuomo's Executive Order No. 135 (issued Feb. 27, 1990), continued by Governor Spitzer's Executive Order No. 5 (issued Jan. 1, 2007)

**Subject:** Qualified Allocation Plan (plan).

**Purpose:** To amend the agency's plan to authorize the New York State Housing Finance Agency (agency) to allow Federal Low Income Housing Tax Credits (LIHTCs) with respect to projects financed with proceeds of tax-exempt bonds of issuers other than the agency.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HFA-48-07-00003-P, Issue of November 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:** Jay M. Ticker, Housing Finance Agency, 641 Lexington Ave., New York, NY, (212) 688-4000 ext. 365, e-mail: jayt@nyhomes.org

#### Assessment of Public Comment

The agency received no public comment.

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### Rights of Patients

**I.D. No.** OMH-07-08-00009-E

**Filing No.** 50

**Filing date:** Jan. 28, 2008

**Effective date:** Jan. 28, 2008

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

**Action taken:** Amendment of Part 527 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, arts. 7 and 33

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

**Specific reasons underlying the finding of necessity:** To clarify that persons confined or committed to secure treatment facilities are afforded the same rights to object to care and treatment as those involuntarily committed to hospitals.

**Subject:** Rights of patients.

**Purpose:** To make Part 527 applicable to persons confined/committed to secure treatment facilities operated by OMH as defined in Mental Hygiene Law, 10.03.

**Text of emergency rule:** 1. Paragraph (1) of Subdivision (a) of Section 527.1 of Title 14 NYCRR is amended as follows:

(1) Except as otherwise indicated by the specific context, and with the exception of sections 527.4 and 527.6, this Part shall apply to all psychiatric hospitals operated by the Office of Mental Health, all residential treatment facilities for children and youth, and to all psychiatric hospital services required to have an operating certificate from the Office of Mental Health, and provided further that section 527.8 shall also apply to all secure treatment facilities operated by the Office of Mental Health as defined in section 10.03 of the Mental Hygiene Law.

2. Subdivision (b) of Section 527.1 of Title 14 NYCRR is amended as follows: (b) The intent of this Part is to define the rights of patients receiving treatment at psychiatric hospitals and to extend certain rights provided in section 527.8 of this Part to persons confined or committed to secure treatment facilities operated by the Office of Mental Health as defined in section 10.03 of the Mental Hygiene Law.

3. Section 527.2 of Title 14 NYCRR is amended to read as follows: (a) [Mental Hygiene Law, section 7.07(c),] Section 7.07 of the Mental Hygiene Law gives the Office of Mental Health responsibility for seeing that the personal and civil rights of mentally ill persons receiving care and treatment are adequately protected.

(b) Section [7.09(c)] 7.09 of the Mental Hygiene Law authorizes the [commissioner] Commissioner to adopt regulations necessary and proper to implement any matter under his jurisdiction. [Section 7.09(i)] Such section also requires the [commissioner] Commissioner to promulgate regulations to address the communications needs of non-English-speaking individuals seeking or receiving services in facilities operated or licensed by the Office of Mental Health.

(c) Sections 10.06 and 10.10 of the Mental Hygiene Law give the Office of Mental Health responsibility for providing care, treatment, and control to sex offenders confined or committed to a secure treatment facility, as defined in Section 10.03 of such law.

(b) (d) Article 31 of the Mental Hygiene Law authorizes the commissioner to visit and inspect all services for the mentally ill in the State, and requires providers of certain mental health services to have an operating certificate issued by the Office of Mental Health. Section 31.04 of such law further empowers the [commissioner] Commissioner to issue regulations setting standards for licensed programs for the rendition of services for the mentally ill.

(c) (e) Section 33.02 of the Mental Hygiene Law establishes statutory rights of mentally disabled persons and requires the commissioner to publish regulations informing residents of facilities or programs operated or licensed by the Office of Mental Health of their rights under law.

(d) (f) Section 33.05 of the Mental Hygiene Law provides that each patient in a facility shall have the right to communicate freely and privately with persons outside the facility as frequently as he wishes, subject to

regulations of the commissioner designed to assure the safety and welfare of patients and to avoid serious harassment to others.

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

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

4. Paragraphs (3) and (6) of Subdivision (a) of Section 527.8 of Title 14 NYCRR are amended as follows:

(3) Clinical director means the individual in charge of clinical services at the hospital or a secure treatment facility operated by the Office of Mental Health as defined in section 10.03 of the Mental Hygiene Law, where the patient is receiving care and treatment, or a physician designated by that individual to carry out the responsibilities of the clinical director described in this section.

(6) Patients on involuntary status for the purposes of this section includes patients retained on an involuntary basis pursuant to article 9 of the Mental Hygiene Law, patients retained pursuant to the Criminal Procedure Law, Family Court Act or Correction Law patients on voluntary status for whom application to a court for involuntary retention has been made, [and] minors, other than those admitted on their own application, for whom consent of a parent or guardian cannot be obtained, and persons confined or committed to a secure treatment facility operated by the Office of Mental Health as defined in section 10.03 of the Mental Hygiene Law.

**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 April 26, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Joyce Donohue, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

**Regulatory Impact Statement**

1. Statutory Authority: Section 7.07 of the Mental Hygiene Law gives the Office of Mental Health responsibility for seeing that the personal and civil rights of mentally ill persons receiving care and treatment are adequately protected. Section 7.09 authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his jurisdiction.

Article 33 of the Mental Hygiene Law establishes statutory rights of mentally disabled persons. Section 33.02 of such law requires the commissioner to publish regulations informing patients of their rights under law.

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

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

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

3. Needs and Benefits: Section 527.8 of Part 527 of Title 14 was promulgated in response to the 1986 Court of Appeals decision in *Rivers v. Katz*, 67 NY2d 485. There, the Court held that, absent an emergency, persons held involuntarily at psychiatric facilities could only be treated with antipsychotic medication over their objection following a judicial finding that, first, the person lacks the mental capacity to make a reasoned decision with respect to proposed treatment, and second, the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest.

In 2007, the Legislature enacted Article 10 of the Mental Hygiene Law to provide for the civil management of persons determined to be detained or dangerous sex offenders who are involuntarily confined or committed to secure treatment facilities. Such secure treatment facilities were newly created by this legislation and could not have been contemplated when Section 527.8 of Part 527 of Title 14 NYCRR was promulgated. This

emergency amendment clarifies that such persons are afforded the same rights to object to care and treatment as those non-sex offenders who are involuntarily committed to hospitals.

4. Costs:

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

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

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

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

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

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

8. Alternatives: The only alternative considered was not addressing whether persons determined to be detained or dangerous sex offenders who are involuntarily confined or committed to secure treatment facilities are afforded the same rights to object to care and treatment as those non-sex offenders who are involuntarily committed to hospitals. This alternative was necessarily rejected.

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

10. Compliance Schedule: The regulatory amendments could be implemented immediately.

**Regulatory Flexibility Analysis**

Because it is evident from the nature of the proposed rule that there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

**Job Impact Statement**

It is clear from the nature of this regulatory amendment, which simply clarifies the rights of persons who are confined or committed to secure treatment facilities operated by the Office of Mental Health, that there will be no adverse impact on jobs or employment opportunities in New York State.

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## Public Service Commission

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NOTICE OF ADOPTION

**Submetering of Electricity by Energy Investment Systems, Inc.**

**I.D. No.** PSC-24-07-00010-A

**Filing date:** Jan. 23, 2008

**Effective date:** Jan. 23, 2008

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

**Action taken:** The commission, on Jan. 16, 2008, adopted an order in Case 07-E-0580 approving the petition filed by Energy Investment Systems, Inc. on behalf of Court Plaza Associates and ETC Management Corporation, to submeter electricity at 123-33 83rd Ave., Queens, NY, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Purpose:** To grant the petition of Energy Investment Systems, Inc., on behalf of Court Plaza Associates and ETC Management Corporation, to submeter electricity at 123-33 83rd Ave., Queens, NY.

**Substance of final rule:** The Commission approved a petition by Energy Investment Systems, Inc., on behalf of Court Plaza Associates and ETC Management Corporation, to submeter electricity at 123-33 83rd Avenue,

Queens, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-0580SA1)

## NOTICE OF ADOPTION

### Issues of Stock, Bonds and Other Forms of Indebtedness by Chaffee Water Works Company

**I.D. No.** PSC-41-07-00017-A

**Filing date:** Jan. 23, 2008

**Effective date:** Jan. 23, 2008

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

**Action taken:** The commission, on Jan. 16, 2008, adopted an order approving the petition of Chaffee Water Works Company to enter into a loan agreement with the Environmental Facilities Corporation for an amount up to \$555,438 to finance system improvements and to surcharge customers to repay the principal amount of the loan.

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

**Subject:** Issues of stock, bonds and other forms of indebtedness, and water rates and surcharges to customers.

**Purpose:** To approve Chaffee Water Works Company, Inc. to enter into a loan agreement and surcharge its customers.

**Substance of final rule:** The Commission adopted an order approving the petition of Chaffee Water Works Company to enter into a loan agreement with the Environmental Facilities Corporation for an amount up to \$555,438 to finance system improvements and to surcharge customers to repay the principal amount of the loan, 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. (07-W-0928SA2)

## NOTICE OF ADOPTION

### Submetering of Electricity by Stellar Morrison, LLC

**I.D. No.** PSC-42-07-00015-A

**Filing date:** Jan. 24, 2008

**Effective date:** Jan. 24, 2008

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

**Action taken:** The commission, on Jan. 16, 2008, adopted an order in Case 07-E-1141 approving the petition filed by Stellar Morrison, LLC to submeter electricity at One Building Apartment Complex, 1240 Morrison Ave., Bronx, NY, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Purpose:** To grant the petition of Stellar Morrison, LLC to submeter electricity at One Building Apartment Complex, 1240 Morrison Ave., Bronx, NY.

**Substance of final rule:** The Commission approved a petition by Stellar Morrison, LLC to submeter electricity at One Building Apartment Complex, 1240 Morrison Avenue, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-1141SA1)

## NOTICE OF ADOPTION

### Petition for the Submetering of Electricity by RCP-East, LLC

**I.D. No.** PSC-44-07-00035-A

**Filing date:** Jan. 24, 2008

**Effective date:** Jan. 24, 2008

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

**Action taken:** The commission, on Jan. 16, 2008, adopted an order in Case 07-E-1189 approving the petition filed by RCP-East, LLC to submeter electricity at 1330 First Ave., New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Purpose:** To grant the petition of RCP-East, LLC to submeter electricity at 1330 First Ave., New York, NY.

**Substance of final rule:** The Commission approved a petition by RCP-East, LLC to submeter electricity at 1330 First Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-1189SA1)

## NOTICE OF ADOPTION

### Submetering of Electricity by Atlantic Court, LLC

**I.D. No.** PSC-45-07-00004-A

**Filing date:** Jan. 23, 2008

**Effective date:** Jan. 23, 2008

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

**Action taken:** The commission, on Jan. 16, 2008, adopted an order in Case 07-E-1238 approving the petition filed by Atlantic Court, LLC to submeter electricity at 87 Smith St., Brooklyn, NY, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Purpose:** To grant the petition of Atlantic Court, LLC to submeter electricity at 87 Smith St., Brooklyn, NY.

**Substance of final rule:** The Commission approved a petition by Atlantic Court, LLC to submeter electricity at 87 Smith Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(07-E-1238SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by 735 Avenue of the Americas LLC

**I.D. No.** PSC-46-07-00005-A

**Filing date:** Jan. 23, 2008

**Effective date:** Jan. 23, 2008

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

**Action taken:** The commission, on Jan. 16, 2008, adopted an order in Case 07-E-1276 approving the petition filed by 735 Avenue of the Americas LLC to submeter electricity at 101 W. 24th St., New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Purpose:** To grant the petition of 735 Avenue of the Americas LLC to submeter electricity at 101 W. 24th St., New York, NY.

**Substance of final rule:** The Commission approved a petition by 735 Avenue of the Americas LLC to submeter electricity at 101 West 24th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(07-E-1276SA1)

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

#### Investigation and Remediation of the Coney Island and the Citizens Former Manufactured Gas Plant Sites by National Grid plc, et al.

**I.D. No.** PSC-07-08-00012-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 adopt, in whole or in part, a Jan. 22, 2008 petition for rehearing filed by National Grid plc and KeySpan Energy Delivery New York, concerning one aspect of the commission's Dec. 21, 2007 order adopting gas rate plans for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island.

**Statutory authority:** Public Service Law, sections 22, 65 and 66

**Subject:** Rate treatment of 10 percent of the costs of investigating and remediating the Coney Island and Citizens former manufactured gas plant sites.

**Purpose:** To ensure that KeySpan Energy Delivery New York would be able to recover 100 percent of all reasonable costs of investigating and remediating the Coney Island and Citizens sites, to the extent incurred during the new rate plan. Alternatively, to update the estimated costs for the two referenced sites for purposes of implementing any required cost sharing during the new rate plan.

**Substance of proposed rule:** Under the terms of Commission orders issued in 1996 and 1998, KeySpan Energy Delivery New York (KEDNY) could generally recover in gas rates 100% of its reasonable site investigation and remediation (SIR) costs for former manufactured gas plant (MGP) sites. For two MGP sites, however, the Coney Island and Citizens sites, KEDNY shareholders would enjoy 10% of the savings if the actual, eligible SIR costs were lower than \$33.996 million or would absorb 10% of the incremental costs if the actual, eligible SIR costs were higher than \$33.996 million.

In the August 23 and September 17, 2007 orders, the Commission determined that KEDNY could generally recover in gas rates 100% of its reasonable SIR costs incurred on or after January 1, 2008. Shortly thereafter, National Grid plc acquired KeySpan Corporation and all of the latter's subsidiaries, including KEDNY.

In the December 21, 2007 order on which rehearing is sought, the Commission stated that it did not intend that the August 23 and September 17, 2007 orders would disturb the prior rate plan terms for the Coney Island and Citizens MGP sites. The effect was to reimpose such prior terms, effective January 1, 2008.

The pending petition for rehearing offers arguments to establish that the August 23 and September 17, 2007 decisions were correct with respect to Coney and Citizens sites. Likewise, arguments are offered to suggest that the Commission's December 21, 2007 order with respect to these two sites was incorrect and should be reversed. Alternatively, if some partial reconciliation of SIR costs will continue with respect to these two MGP sites, KEDNY argues that the prior \$33.996 million forecast of SIR costs for these two sites is too low and should be updated.

**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-G-1185SA3)

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

#### Annual Reconciliation of Gas Expenses and Gas Cost Recoveries by Central Hudson Gas & Electric Corporation and KeySpan Energy Delivery Companies

**I.D. No.** PSC-07-08-00013-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, modify, or reject, in whole or in part, the filings made by Central Hudson Gas & Electric Corporation and KeySpan Energy Delivery Companies regarding the commission's order concerning the annual reconciliation of gas expenses and gas cost recoveries and other related matters.

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

**Subject:** Annual reconciliation of gas expenses and gas cost recoveries.

**Purpose:** To consider the filings of various local distribution companies and municipalities regarding their annual reconciliation of gas expenses and gas cost recoveries.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify, or reject, in whole or in part, the filing made by Central Hudson Gas & Electric Corporation for reconsideration and rehearing, and the filing made by KeySpan Energy Delivery Companies for clarification, of the Commission's December 21, 2007 Order concerning the Annual Reconciliation of Gas Expenses and Gas Cost Recoveries, and 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.

(07-G-1101SA2)

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

**Temporary Rates and Charges by Four Seasons Water Corp.**

**I.D. No.** PSC-07-08-00014-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 modify the rates of Four Seasons Water Corp. which went into effect on a temporary basis on Sept. 1, 1998.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10), 89(j), 113 and 114

**Subject:** To examine the reasonableness of the temporary rates and charges contained on Leaf No. 12, revision 0 to Four Seasons Water Corp.'s tariff P.S.C. No. 1—Water.

**Purpose:** To set the appropriate level of permanent rates.

**Substance of proposed rule:** By Order issued and effective August 31, 1998 in Case 98-W-0857, the Commission approved the initial electronic tariff schedule of Four Seasons Water Corp. (Four Seasons) and directed that the rates contained on Leaf No. 12, Revision 0 to be put into effect on a temporary basis on September 1, 1998, subject to refund under Sections 89-c(10), 89-j, 113 and 114 of the Public Service Law. Staff is performing an investigation and will make a recommendation to the Commission as to the proper level of permanent rates. Four Seasons serves about 150 metered customers in the Four Seasons, Amber Hills and Scheckter Subdivisions in the Town of East Fishkill, Dutchess County. Four Seasons' tariff is available on the Commission Documents - Tariffs. The Commission may approve or reject, in whole or in part, or modify Staff's recommendation as to the appropriate level of permanent rates for Four Seasons.

**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-W-0857SA2)

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

**Temporary Rates and Charges by Sagamor Water Corp.**

**I.D. No.** PSC-07-08-00015-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 whether to approve or modify the rates of Sagamor Water Corp. which went into effect on a temporary basis on May 1, 2000.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10), 89(j), 113 and 114

**Subject:** To examine the reasonableness of the temporary rates and charges contained on Leaf No. 12, revision 1 to Sagamor Water Corp.'s tariff P.S.C. No. 1—Water.

**Purpose:** To set the appropriate level of permanent rates.

**Substance of proposed rule:** By Order issued and effective April 20, 2000 in Case 99-W-1708, the Commission approved the initial electronic tariff schedule of Sagamor Water Corp. (Sagamor) and directed Sagamor to file Leaf No. 12, Revision 1 containing Staff's recommended rates to be put into effect on a temporary basis on May 1, 2000, subject to refund under Sections 89-c(10), 89-j, 113 and 114 of the Public Service Law. Staff is performing an investigation and will make a recommendation to the Commission as to the proper level of permanent rates. Sagamor serves about 113 metered customers in the Forest Hills and Sagamor Subdivisions in the Town of East Fishkill, Dutchess County. Sagamor's tariff is 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 the Commission Documents - Tariffs. The Commission may approve or reject, in whole or in part, or modify Staff's recommendation as to the appropriate level of permanent rates for Sagamor.

**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.

(99-W-1708SA2)

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## Racing and Wagering Board

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

**Games of Chance**

**I.D. No.** RWB-07-08-00016-P

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

**Proposed action:** This is a consensus rule making to amend section 5603.8 of Title 9 NYCRR.

**Statutory authority:** General Municipal Law, section 188-a

**Subject:** Games of chance.

**Purpose:** To remove the prohibition against the conduct of games of chance on New Year's Eve.

**Text of proposed rule:** § 5603.8 Sunday, conduct of games on.

Except as provided in the Games of Chance Licensing Law, no games of chance shall be commenced under any license issued under this Chapter on the first day of the week, commonly known and designated as Sunday, unless it shall be otherwise provided in the license issued for the conducting thereof, pursuant to the provisions of a local law or an ordinance duly adopted by the governing body of the municipality wherein the license is issued, authorizing the conduct of games of chance under this Chapter on that day between the hours of noon and midnight only, except if the following day is a legal holiday. Notwithstanding the foregoing provisions of this section, no games of chance shall be conducted on Easter Sunday[,] or Christmas Day. [or New Year's Eve.]

**Text of proposed rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wa-

gery Board, One Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, e-mail: info@racing.state.ny.us

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

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

**Consensus Rule Making Determination**

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

The rulemaking will amend section 5603.8 of subtitle T of 9E NYCRR to conform with amendments to the General Municipal Law that were enacted under Chapter 461 of the Laws of 2003. These non-discretionary statutory provisions are found in General Municipal Law Sec. 195.

The non-discretionary statutory provision removes the exemption prohibiting games of chance from being played on New Year’s Eve.

**Job Impact Statement**

The New York State Racing and Wagering Board has determined that the rule will have no substantial adverse impact on jobs and employment opportunities, as is apparent from the nature and purpose of the rule. Previously, games of chance were not allowed to be conducted on New Year’s Eve. This amendment removes the exemption prohibiting games of chance from being played on New Year’s Eve. This change may slightly increase the amount of money raised by charitable organizations in fundraising and may benefit the charitable organizations, however, this rule will neither add jobs nor have a substantial adverse impact on jobs. Games of chance may only be conducted by volunteers and General Municipal Law 189(11) prohibits any person from receiving remuneration for participating in the management or operations of any game of chance, therefore, there will be no significant impact on jobs.

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

**Internet and Telephone Account Wagering on Horseracing**

**I.D. No.** RWB-33-07-00005-RP

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

**Revised action:** Addition of Part 5300 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 222, 301, 401, 518, 520, 1002 and 1012

**Subject:** Internet and telephone account wagering on horseracing.

**Purpose:** To ensure the integrity of pari-mutuel wagering by adopting licensing and regulatory standards for internet and telephone account wagering. This rule would establish reporting, recordkeeping, operational and application requirements for race track operators and off-track betting corporations within New York State that offer internet and telephone account wagering.

**Substance of revised rule:** 5300.1 Definitions and general provisions.

Contains definitions of various words and terms, when used in this chapter including: Account, Account holder, Account wager, Account wagering, Account wagering center, Account activity, Authorized pari-mutuel wagering entity, Board, Internet, Official, Stored value instrument, Totalisator system, and Wagering device.

5300.2 Account wagering, general.

Allows authorized pari-mutuel wagering entities (hereinafter “entity”) to offer account wagering with prior board approval, restricting accounts to wagering purposes only; and determines which entities account wagers are deemed to be on track wagers and which are to be deemed off-track.

5300.3 Approval of account wagering. Provides that entities authorized to conduct account wagering shall have a Board approved written plan of operation, including at least a proposed system of accepting wagers, internal controls, system security details, account wagering rules, and an independent recording for each transaction.

5300.4 Establishment of an account.

(a) Sets forth minimum criteria for establishment of accounts, allowable purposes, information to be provided, who may open an account, standards for verification of identity, notification standards, information allowed to be collected.

(b) Bearer accounts. Provides standards for the use of bearer accounts evidenced by a card with a PIN number for customers without collecting identity information. 5300.5 Official address. Provides that the entity may use the address listed on the account wagering application for listed purposes,

until the entity is informed by the account holder of a change in address.

5300.6 Changes to account information.

Requires the entity to provide a method for the account-wagering holder to make official changes to his/her account information.

5300.7 Right to refuse an account.

Provides for refusal of account based on business judgment, and for mandatory exclusion of certain persons.

5300.8 Segregation of funds.

Requires the entity to deposit account holder’s money within 72 hours of receipt in a segregated account.

5300.9 Conduct of wagering.

Provides rules for acceptance of wagers from established account holders via the telephone, internet, or other means subject to an approved plan of operation.

5300.10 Record of wager; pari-mutuel tickets.

This section deems all wagers placed through the account wagering system pari-mutuel tickets subject to all rules and laws governing pari-mutuel tickets.

5300.11 Withdrawals and other debits to accounts.

Sets forth standards for withdrawals from accounts, including identity, means, record keeping and time requirements; authorizes electric fund transfers.

5300.12 Credits to accounts.

States requirements for making and crediting deposits and winning payoffs, effect of IRS requirements, and other credits.

5300.13 Account statements.

Sets requirements for frequency, means of delivery and content of account statements.

5300.14 Recordkeeping.

Sets forth recordkeeping requirements for entities, including details and time required to be kept, and how account liabilities are to be recorded on books and records.

5300.15 Confidentiality of accounts.

Requirement for keeping accounts confidential, states exceptions.

5300.16 Closing of accounts.

Sets requirements for closing of accounts at request of account holders.

5300.17 Dormant accounts.

States rule for distribution of dormant accounts.

5300.18 Surcharge.

States rule for suspension of surcharge on accounts.

5300.19 Vouchers.

Defines vouchers and states these are not accounts or account wagers.

5300.20 Reports to board.

Sets forth time and content requirements for reports on handle, number of accounts or other reports.

5300.21 Yearly audit.

Contains minimum frequency requirements for audits.

5300.22 Disputes/complaints.

Sets forth requirements for handling customer disputes including documentation and audit requirements.

5300.23 Cooperation with officials.

Sets forth requirement for entity to cooperate with Board officials upon request.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 5300.1(b), (e), (m), 5300.4(a)(2), (5), (b)(1)(i), (ii), (5)(iv), 5300.7(b), 5300.8, 5300.9(c)(2), 5300.11(a), (b), 5300.12(c), 5300.13(a) and 5300.19(c).

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

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

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

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

While the revisions made to the original proposed rulemaking are substantive for the purposes of Executive Order 20 review by the Governor’s Office of Regulatory Reform and publication as a Revised Rulemaking in the State Register, these revisions will have not require a revised Regulatory Impact Statement nor will the have an impact upon jobs, small business, local government, or state agencies as described in the original Notice of Proposed Rulemaking published on August 15, 2007 (ID No. RWB-33-07-00005-P). The revisions contained in this Revised Rulemak-

ing are consistent with the provisions of the original Proposed Rulemaking. In fact, some of the revisions which were requested by the pari-mutuel wagering entities will relieve them of certain paperwork requirements (such as repealing the requirement that a written record of wagering activity be prepared and allow for electronic records, and repealing the requirement that written monthly statements be sent to the account holders and merely requiring that the statements be available to account holders) and allow pari-mutuel entities more flexibility in making fund transfers (previous language limited fund transfers to electronic transfers).

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment addresses the limited issue of operational and administrative aspects of Internet and telephone account wagering. This rule would affect race track operators and off-track betting corporations throughout New York State, all of who currently offer telephone account wagering. This rule is consistent with current practices employed by such entities, as well as certain disclosure and operational plan requirements of the Racing and Wagering Board. This rule is intended to modify the Board's rules to properly regulate the expansion of pari-mutuel wagering into the realm of the Internet and telephone wagering as authorized by the Legislature in 2006. It does not limit job opportunities. In fact, the increased revenue from pari-mutuel wagering over the Internet may help preserve and expand economic opportunities in the New York State horse racing industry by capturing revenue that is wagered over the Internet on horseracing in other states and countries. Establishing Internet and telephone account wagering standards does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8) because race track operators and off-track betting corporations are not small businesses. Nor does this rule affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry because the race track operators and off-track betting corporations are able to use the current telephone account wagering and Internet server technology that they currently possess.

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

The Board received public comments from six regulated entities. The Board reviewed all of the comments and adopted some of the current revisions based upon the comments received. In cases where issues of rule interpretation were raised, the Board reviewed the comments and if ambiguous or vague language was apparent, the language was revised and clarified. The Board opted not to adopt rule changes that were unique to a specific track or pari-mutuel wagering entity, and has decided that such specifics can be addressed in a Plan of Operation (as required by the rule) so long as the plan of operation is consistent with the overall direction and principals of the revised rulemaking. While the public comments sought clarification or revisions of some of the limited provisions rule, none of the public comments objected to the comprehensive framework of the rulemaking. Generally, there were recurring concerns regarding the use of electronic signatures and verification (particularly in the application and withdrawal processes), cancellation of wagers by account holders, and allowing bearer accounts to be used in multiple locations.

Saratoga Harness suggested that the rules should allow customers to sign up for accounts online upon satisfactory identification and verification, and that the calendar year requirement of Rule 5300.13(a) should be removed, and that the rules should be amended to allow account holders to redeem vouchers through their accounts rather than limiting the accounts to cash and winning tickets.

Vernon Downs submitted comments regarding the restricted use of a Fast Bet Card for wagering at a racetrack, and questioned whether the rule could be interpreted to read that wagers placed through a bearer account may not be cancelled. Vernon Downs asked that the rule allow for cancellations for on-site bettors using bearer accounts. Vernon Downs also had a question regarding the requirement that account wagering funds be deposited into a segregated account within 72 hours. Vernon Downs was concerned that this is problematic given holiday weekends, and recommended the language be changed to "three business days." Vernon Downs also suggested an amendment to allow vouchers to be redeemed through wagering accounts in addition to winning tickets and cash.

Yonkers Raceway submitted comments requesting three amendments to the proposed rulemaking. Yonkers requested that the rules permit an account to be opened by mail, telephone or by electronic means, and not be limited to just in-person applications; that the rule requiring an actual signature on an application be revised to allow for electronic signatures; and the rules be expanded to permit electronic verification with respect to

each account holder's name, principal residence address, date of birth and social security number.

The Board received comments from another pari-mutuel wagering entity which submitted a letter requesting reconsideration of numerous provisions. The comments requested a provision for online applications for account wagering; funding of accounts via wire transfer, debit cards, credits cards and automated clearing house transactions; permit accounts to be opened pending the deposit of funds at a later date wherein no wagering will occur until a deposit is made; the use of electronic signatures or personal identification numbers for account wagering applicants; authentication of an applicant's identity by the use of a social security card and a copy of a driver's license; permit bettors the ability to use their account from one race meet to another; permit bearer account holders to cancel bets in a manner similar to the way non-bearer account bettors cancel their bets; remove the requirement for issuance of written statements to bearer account holders because unscrupulous account holders could use the statement improperly, such as misreporting gambling losses to the IRS; permit withdrawals from accounts using personal identification numbers; and permit the use of vouchers to fund and make withdrawals from wagering accounts.

New York City Off-Track Betting Corporation submitted comments that suggested various revisions to the proposed rulemaking. While there were requests for clarification of certain technical aspects of the rule, there were several requests for substantive revisions. Changes were requested: to the definitions, to allow the opening of an account by e-mail or fax and the use of signature by fax or scanned signature, to allow withdrawals and debits to other accounts via e-mail and fax under proper signature, to allow flexibility in where a bearer's account card can be used in multiple locations similar to how paper vouchers are now used, to allow the cancellation of wagers placed through a bearer account, clarification of the rule regarding the closure of a bearer account, the inclusion of "interactive television" as a means of wagering, the withholding of funds until an account holder provides necessary tax information, and other revisions regarding confidentiality of accounts, closing of accounts and vouchers.

Nassau Downs Off-Track Betting Corporation submitted comments requesting various revisions to the rules that allow for opening new accounts online, the use of digital signatures for verifying a new application, the use of Personal Identification numbers for withdrawals, the use of Nassau Downs' existing Knowledge Based Authentication system for identifying account holders and verifying their signatures, allowing for online notification of rule changes rather than requiring that a copy of the new rules be mailed via postal service to the account holders, to allow wagers that are placed through bearer accounts to be cancelled in a manner similar to existing methods, to clarify the requirement that pari-mutuel entities shall maintain a segregated account from account holders, and to allow bearer account holders to wager at locations other than just the one where they opened their account.

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## Department of Transportation

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### NOTICE OF ADOPTION

#### **Access of Overdimensional Vehicles on the Thruway**

**I.D. No.** TRN-49-07-00001-A

**Filing No.** 48

**Filing date:** Jan. 25, 2008

**Effective date:** Feb. 13, 2008

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

**Action taken:** Addition of section 8160.1(b) to Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, section 385(16)(t); and Transportation Law, section 14(18)

**Subject:** Access of overdimensional vehicles including thruway tandem trailers on 1.55 miles of highway in vicinity of exit 44 of the thruway (Town of Farmington).

**Purpose:** To formalize the department's determination that thruway tandem trailers (twin 48' trailers) can operate on such route.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TRN-49-07-00001-P, Issue of December 5, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** David Woodin, Department of Transportation, 50 Wolf Rd., Albany, NY 12232, (518) 457-1793, e-mail: dwoodin@dot.state.ny.us

**Assessment of Public Comment**

The Department of Transportation received one comment regarding the proposed rulemaking. The comment was from TROMA New York Recycling and urged the Department of Transportation to adopt the subject rule. The comment indicated that the authorization of tandem trailers proposed by the rule would reduce costs and greenhouse gas emissions and save energy.