

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Audit and Control

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

#### Repeal of Part 2 of Title 2 NYCRR

**I.D. No.** AAC-03-09-00008-P

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

**Proposed Action:** This is a consensus rule making to repeal Part 2 of Title 2 NYCRR.

**Statutory authority:** State Finance Law, section 8

**Subject:** Repeal of Part 2 of Title 2 NYCRR.

**Purpose:** To repeal Part 2 of Title 2 NYCRR.

**Text of proposed rule:** Part 2 of Title 2 NYCRR is repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Wendy H. Reeder, Office of the State Comptroller, 110 State Street, Albany, New York 12236, (518) 474-5714, email: wreeder@osc.state.ny.us

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

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

#### Consensus Rule Making Determination

The proposed regulatory activity repeals Part 2 of Title 2 of the NYCRR. Such Part contains regulations which merely repeat the State Finance Law regarding general accounting measures of appropriations. The law is unambiguous and the regulations simply re-state the law.

Accordingly, the regulations are unnecessary and should be repealed as a general housekeeping measure. Regulated parties and the agency will not be affected by this change and will continue to business as normal.

Therefore, no person is likely to take issue with this proposed regulatory activity.

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## Department of Correctional Services

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### NOTICE OF ADOPTION

#### Officials of State Correctional Facilities

**I.D. No.** COR-44-08-00003-A

**Filing No.** 2

**Filing Date:** 2009-01-02

**Effective Date:** 2009-01-21

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

**Action taken:** Repeal of section 50.1(e), (q), (w) and (cc), addition of section 50.1(n) and amendment of section 50.1(i) of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112; Criminal Procedure Law, section 1.20, subd. 33 and section 2.10, subd. 25

**Subject:** Officials of State Correctional Facilities.

**Purpose:** To update the listing of designated officials in section 50.1, 7 NYCRR.

**Text or summary was published** in the October 29, 2008 issue of the Register, I.D. No. COR-44-08-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

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

#### Packages and Articles Sent or Brought to Institutions

**I.D. No.** COR-03-09-00002-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 724.2(a)(1) of Title 7 NYCRR.

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

**Subject:** Packages and Articles Sent or Brought to Institutions.

**Purpose:** To remove the reference to inmates "under sentence of death" consistent with New York State Court of Appeals decision.

**Text of proposed rule:** The Department of Correctional Services amends 7 NYCRR, section 724.2(a)(1) as indicated below:

Section 724.2 Applicability.

(a) This Part applies to all inmates except for those:

(1) assigned to a special housing unit or in special housing status (see Chapter VI of this Title)[, or under sentence of death];

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.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

In accordance with Correction Law section 112, the Commissioner of the Department of Correctional Services has the authority to promulgate rules and regulations for the government of each correctional facility. The ruling made by the New York State Court of Appeals in *People v. Taylor*, 9 N.Y.3d 129 (2007), determined that the New York State death penalty sentencing statute enacted in 1995 violates the New York State Constitution on its face and it was not within the power of the judiciary to save the statute. Therefore, the Department has determined that no person is likely to object to the adoption of this proposed rulemaking (removal of the reference to inmates "under sentence of death") because it merely repeals regulatory provisions which are no longer applicable to any person (SAPA 102(11)(a)).

#### Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities.

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

#### Public Contacts of Institutions and Employees

**I.D. No.** COR-03-09-00009-P

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

**Proposed Action:** This is a consensus rule making to repeal section 51.19 of Title 7 NYCRR.

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

**Subject:** Public Contacts of Institutions and Employees.

**Purpose:** To remove references to inmates "under sentence of death", "electric chair" and "execution", due to NYS Court of Appeals ruling.

**Text of proposed rule:** The Department of Correctional Services repeals and reserves section 51.19 of Title 7 NYCRR.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

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

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

#### Consensus Rule Making Determination

The Department of Correctional Services has determined that no person is likely to object to the proposed action because it merely repeals a regulatory provision which is no longer applicable to any person. See SAPA 102(11)(a)

7 NYCRR 51.19 provides the Department's policy statement for the exclusion of interviews for inmates under a sentence of death, tours and photographs of the electric chair and the restriction from photographing an execution. The New York State Court of Appeals in *People vs. Taylor*, 9N.Y.3d 129 (2007), determined that the New York State death penalty sentencing statute enacted in 1995 violates the New York State Constitution on its face and that it is not within the power of the judiciary to save the statute. Since then, the New York State Legislature has not passed a new death penalty statute. Therefore, any reference to a sentence of death and/or the related subject matter in this section is unnecessary.

The Department's authority resides in section 112 of Correction Law, which grants the commissioner the management and control of all matters relating to the government of the Department.

#### Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities.

## Department of Economic Development

### EMERGENCY RULE MAKING

#### Empire Zones Reform

**I.D. No.** EDV-03-09-00018-E

**Filing No.** 7

**Filing Date:** 2009-01-06

**Effective Date:** 2009-01-06

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

**Action taken:** Amendment of Parts 10 through 14 of Title 5 NYCRR.

**Statutory authority:** General Municipal Law, art. 18-B, section 959

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

**Specific reasons underlying the finding of necessity:** The Empire Zones Program reforms as enacted by Chapter 63 of the Laws of 2005 were designed to improve the cost-effectiveness and accountability of the program for all New Yorkers. However despite these reforms, the program continues to grow at a rate that is unsustainable and benefits some companies that do not meet their job commitments. In some cases, the tax benefits a company receives exceed the economic return to the State. Prudent financial management of this and all public programs is an imperative at all times but even more important when the State is experiencing fiscal difficulties. Additional regulatory action is needed immediately to protect the integrity of the program, enhance its strategic focus, improve its cost-effectiveness, increase accountability, and mitigate the impact on the General Fund.

One area of particular concern relates to regionally significant projects. Regionally significant projects should be limited to those businesses that would have the most significant economic impact for local communities and the State by restricting eligibility to projects that export a substantial amount of their goods or services to customers outside of New York State. These "export" type of projects ensure that net new economic activity will be created in the State versus simply redistributing economic activity between different communities of the State, or providing incentives for projects where such incentives are not necessary to create or retain jobs.

To increase accountability, job creation for regionally significant projects would have to occur in a timely manner. The timeframe for achieving job targets would be reduced from five to three years. This change would make firms more accountable for job creation by reducing the incentive for companies to inflate job numbers knowing they have five years of zone benefits in which to achieve their goals.

Participation would also be limited to companies that provide a greater economic return on the State's investment in order to improve the cost-effectiveness of the Program. A statewide standard would be adopted based on the cost-benefit factors defined in law. Specifically, there would need to be twenty dollars of economic development benefits in the form of wages and capital investments for every one dollar of tax credits a business would receive. For projects where the economic development benefits are justified based on non-quantitative factors, there would need to be at least five dollars of such benefits for every one dollar of tax credits. In addition, the non-quantifiable terms identified in the law for strategic industry cluster or its supply chain would be defined to ensure that only businesses that are truly part of a strategic industry cluster or its supply chain can qualify based on the non-quantifiable factors of the cost-benefit analysis.

In order to hold businesses more accountable for their commitments and realize annual savings in program costs, these regulatory changes need to be adopted immediately. With 82 empire zones statewide, 10-20 applications are being submitted to the State weekly. Once businesses are in the Program, the annual costs are borne by the State for a 10 year period.

These changes are expected to immediately reduce the number of eligible applicants by about 30% in order to achieve the objectives of strategic focus, improved cost-effectiveness, greater accountability and ultimately help preserve the program during the immediate fiscal crisis and beyond.

**Subject:** Empire Zones reform.

**Purpose:** To continue implementing Zones reforms and adopt changes that would enhance the program's strategic focus.

**Substance of emergency rule:** The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2005, as well as a comprehensive review of administrative procedures and existing regulations for the purpose of making the program more strategic, cost effective and accountable to taxpayers. The amended laws require the existing Empire Zones to identify revised zone boundaries—that is, placement of zone acreage into “distinct and separate contiguous areas”—which has not yet been completed. The existing regulations fail to address this requirement, and at the same time, contain several outdated references. The proposed regulations will correct these two items and improve the program's administrative procedures. The Empire Zone regulations contained in 5 NYCRR Parts 10 through 14 are hereby amended as follows:

First, pursuant to Chapter 63 of the Laws of 2000 and Chapter 63 of the Laws of 2005, the emergency rule would reflect the name change of the program from Economic Development Zones to the Empire Zones and add reference to three new tax benefits: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

Second, the emergency rule would conform the regulations to existing statutory terminology, definitions and practices. For example, an incorrect reference to a local empire zone administrator is being corrected to read local empire zone certification officer or simply, the local empire zone, if applicable. Pursuant to statute, the chief executive officer must ensure that the information on a designation application is accurate and complete, not the local legislative body. The requirements for a shift resolution did not contain all the criteria as set forth in statute. Certain regulatory provisions regarding application for zone designation were not in accord with the statute, such as whether certain information must be contained in local law rather than the application itself. In addition, tracking the statutory changes from Chapter 63 of the Laws of 2005, census tract zones are renamed “investment zones”, county-created zones are renamed “development zones”, and the new term “cost-benefit analysis” is defined. The emergency regulation also tracks the amended statute's deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

Third, the emergency rule would amend the Department's discretionary provision that limits the designation of nearby lands in investment zones to 320 acres. Such regulatory limitations are arbitrary and unnecessarily exceed or are inconsistent with State statute, and at the same time place undue limits on the reconfiguration of zones; municipalities cannot effectively utilize zone acreage to create opportunities for business investment and job growth in economically distressed areas that are not necessarily located in eligible or contiguous census tracts. At the same time, the Department is required to provide guidance in regulation on placement of nearby zone lands, and cannot countenance abuse of the program's requirements on acreage placement. Thus, placement of nearby lands can exceed 320 acres provided that the municipality demonstrates that (1) there is insufficient existing or planned infrastructure within eligible or contiguous tracts to accommodate business development in a highly distressed area, or to accommodate development of strategic businesses or (2) placing up to 960 acres in eligible or contiguous census tracts would be inconsistent with open space and wetland protection or (3) there are insufficient lands available for further business development within eligible or contiguous census tracts or (4) lands previously designated in the eligible or contiguous census tracts that were otherwise suitable for development and have not had any appreciable commercial activity or capital investment or (5) changes to eligible census tracts as a result of the 2000 Census, combined with the requirement in the amended statute that the distinct and separate contiguous areas accommodate already designated lands, alter the amount of nearby acreage used and available for development.

Fourth, the emergency rule clarifies the statutory requirement from Chapter 63, L. 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within

that municipality. The purpose of this is to fulfill the intent of the new statutory amendments that the counties place a substantial portion of the zone acreage within eligible or contiguous census tracts, and this provision follows essentially the same method for concentrating acreage within distressed areas as the General Municipal Law employed for census tract zones.

Fifth, the emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage, however, any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

Sixth, the emergency rule clarifies the new statutory requirement that certain defined “regionally significant” projects can be located outside of the new distinct and separate contiguous areas. There are four categories of projects identified in Chapter 63; only one category of applications, manufacturers projecting the creation of 50 or more jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Such projects must be projects that are exporting a substantial amount of goods or services beyond the State. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 100% of the minimum jobs required to meet the definition of regionally significant project within 3 years of the date of designation of the project as regionally significant. Failure to achieve the minimum job creation requirement would trigger a decertification process.

Seventh, the emergency rule elaborates on the “demonstration of need” requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

Eighth, the emergency rule clarifies Chapter 63's permission for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be “grandfathered” shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

Ninth, the emergency rule tracks Chapter 63's requirement that new zone development plans, created in the conjunction with the new distinct and separate contiguous areas to be approved by the Empire Zones Designation Board, are to be approved by the Department within 90 days of submission. The emergency rule defines the date of submission for each zone as the date of approval of the distinct and separate contiguous areas by the Empire Zones Designation Board.

Tenth, the emergency rule fulfills the requirements of Chapter 63 to subject all businesses applying for zone benefits to meet a “cost-benefit analysis”. The cost-benefit analysis is to be included in the zone development plan by the applicant municipality. The definition included in the emergency rule establishes a minimum economic development benefit to cost ratio of 20:1 for a project to be eligible for certification. A project that does not meet the 20:1 ratio but can be justified based on non-quantifiable factors must meet a minimum ratio of 5:1. In addition, definitions for strategic industry cluster and supply chain are included in the rule.

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community development projects are not necessarily required to be certified. There is a strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1,

2005 would be considered to be located within its respective Empire Zone, and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in the Zone that would include job creation.

Twelfth, the emergency rule would revise the application process in order to ensure timely action and improve efficiency and accountability. For example, the proposed process would no longer require the applicant to submit an application to both the Department and the Department of Labor. In addition, the proposed process allows the applicant to cure incomplete or deficient applications within a set time period.

Lastly, the emergency rule would add certain programmatic information that is helpful to zone administrators, applicants, and practitioners such as the method for determining the effective dates for certifications and boundary revisions.

The full text of the rule is available at [www.empire.state.ny.us](http://www.empire.state.ny.us)

**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 5, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Thomas P. Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany NY 12245, (518) 292-5123, email: [tregan@empire.state.ny.us](mailto:tregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt rules and regulations governing the criteria of eligibility for empire zone designation, the application process, and the joint certification of a business enterprise.

##### **LEGISLATIVE OBJECTIVES:**

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to recent statutory amendments and the remaining revisions conform the regulations to existing statute or clarify administrative procedures of the program. It is the public policy of the State to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within areas designated as Empire Zones. The proposed amendments help to further such objectives by enabling the Department of Economic Development to administer the program in a more efficient manner. In addition, these amendments further the Legislative goals and objectives for the Empire Zones program, particularly as they relate to regionally significant projects and the cost-benefit analysis. With these changes, the Department strives to make the Program more strategic, cost-effective and accountable to the taxpayers of the New York state.

##### **NEEDS AND BENEFITS:**

The emergency rule is required in order to bring the regulations into accord with statute and to improve the overall administration and effectiveness of the program. There are several benefits that would be derived from this emergency rulemaking. First, the emergency regulations would conform to statutory provisions and thereby eliminate potential confusion to the practitioner. Second, the emergency rule would clarify the application process to ensure timely action and improve efficiency and accountability. Third, the rule seeks to reform the Empire Zones program to make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

##### **COSTS:**

I. Costs to private regulated parties (the Business applicants): None. The emergency regulation will not impose any additional costs to the business applicants beyond the existing program. In fact, there may be a cost savings due to a clearer application and the ability to cure application deficiencies rather than being immediately denied.

II. Costs to the regulating agency for the implementation and continued administration of the rule: While there will be additional costs to the Department of Economic Development associated with the emergency rule making, this is a result of the statutory changes which the emergency regulation language tracks or interprets. All existing Empire Zones have to revise their boundaries as a result of the statutory changes, with certain exceptions tied to specific types of business or the timing of certain applications. This has resulted in more paperwork and additional staff time and will continue even more so as regulatory changes add additional scrutiny to the review and evaluation of projects attempting to gain eligibility into the program.

III. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

IV. Costs to local governments (the Local Zone administration): None. The emergency regulation will not impose any additional costs to the local

zone administration beyond any additional costs associated with implementing the statutory requirements which reform the program. In the long term, there may be some cost savings in regards to staff time due to a clarification of program requirements.

##### **LOCAL GOVERNMENT MANDATES:**

None. Local governments are not mandated to participate in the Empire Zones Program. If a local government chooses to participate, there is a cost associated with local administration. However, this emergency rule does not impose any additional costs to the local governments beyond any additional costs associated with implementing the statutory requirements which reform the program.

##### **PAPERWORK:**

The emergency rule does create additional paperwork, insofar as the various Empire Zones have to refile applications to reconfigure their Zone acreage, identify regionally significant projects and "grandfathered" businesses where necessary, and process boundary revisions before deadlines enumerated in statute which are reproduced verbatim from the statute.

##### **DUPLICATION:**

The emergency rule will not duplicate or exceed any other existing Federal or State statute or regulation.

##### **ALTERNATIVES:**

No alternatives were considered with regard to amending the regulations in response to statutory revisions. Certain alternatives to policies seeking to be adopted were considered in certain subject areas where the Legislature provided some room for interpretation; for example, acreage devoted to existing businesses outside of the reconfigured zone areas, creation of investment zones within development zones, the placement of "nearby" acreage, the location of "grandfathered" businesses and the continuation of community development projects. In each case, interpretation was geared to preserving, to the extent possible, the expectation of benefits for existing zone businesses, making zone reconfiguration as clear as possible for existing zones, and enabling zone acreage to be utilized in the most effective manner. Finally, with regard to the application process, an alternative was considered to include more time for review of the application at the State level. This alternative was rejected because it was determined that certification of a business, which has a complete and sufficient application, should not be delayed.

##### **FEDERAL STANDARDS:**

There are no federal standards in regard to the Empire Zones program; it is purely a state program that offers, among other things, state and local tax credits. Therefore, the emergency rule does not exceed any Federal standard.

##### **COMPLIANCE SCHEDULE:**

The affected State agencies (Economic Development and Labor), local zone administration and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented.

#### **Regulatory Flexibility Analysis**

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact, reporting, record-keeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

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

The program is a statewide program. There are eligible municipalities and businesses in rural areas of New York State. However, participation is entirely at the discretion of eligible applicant municipalities and eligible business enterprises. The program does impose some responsibility on those municipalities and businesses which participate in the program such as submitting applications and reports. The emergency rule will not impose

any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency regulation will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The emergency regulation relates to the Empire Zones Program. The Empire Zones Program itself is a job creation incentive. The emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency regulations, which result from statutory-based reforms, will enable the program to better fulfill its mission: job creation and investment for economically distressed areas. At the same time, businesses currently receiving benefits will not have their status jeopardized as a result of the emergency regulations. Because it is evident from the nature of the emergency regulations that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Education Department

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

**Special Education Programs and Services**

**I.D. No.** EDU-31-08-00014-RP

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

**Proposed Action:** Amendment of sections 200.4 and 200.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 4402(1-7), 4403(3) and 4410(13)

**Subject:** Special education programs and services.

**Purpose:** To extend date for required use of State forms for IEPs, prior written notice (notice of recommendation) and meeting notice.

**Text of revised rule:** 1. Paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective April 9, 2009, as follows:

(2) Individualized education program (IEP). If the student has been determined to be eligible for special education services, the committee shall develop an IEP. IEPs developed [on or after January 1, 2009,] *for the 2011-12 school year, and thereafter*, shall be on a form prescribed by the commissioner. In developing the recommendations for the IEP, the committee must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or districtwide assessment programs; and any special considerations in paragraph (3) of this subdivision. The IEP recommendation shall include the following:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .
- (ix) . . .
- (x) . . .
- (xi) . . .
- (xii) . . .

2. Paragraph (1) of subdivision (a) of Section 200.5 of the Regulations of the Commissioner of Education is amended, effective April 9, 2009, as follows:

(1) Prior written notice (notice of recommendation) that meets the requirements of section 200.1(oo) of this Part must be given to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation,

educational placement of the student or the provision of a free appropriate public education to the student. [Effective January 1, 2009, the prior] *Prior written [notice] notices issued during the 2011-12 school year, and thereafter*, shall be on [the] a form prescribed by the commissioner.

3. Paragraph (1) of subdivision (c) of Section 200.5 of the Regulations of the Commissioner of Education is amended, effective April 9, 2009, as follows:

(1) Whenever the committee on special education proposes to conduct a meeting related to the development or review of a student's IEP, or the provision of a free appropriate public education to the student, the parent must receive notification in writing at least five days prior to the meeting. The meeting notice may be provided to the parent less than five days prior to the meeting to meet the timelines in accordance with Part 201 of this Title and in situations in which the parent and the school district agree to a meeting that will occur within five days. The parent may elect to receive the notice of meetings by an electronic mail (e-mail) communication if the school district makes such option available. [Effective January 1, 2009, meeting notice] *Meeting notices issued during the 2011-12 school year, and thereafter*, shall be on a form prescribed by the commissioner.

**Revised rule making(s) were previously published in the State Register on** October 22, 2008.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 200.4(d)(2), 200.5(a)(1) and (c)(1).

**Text of revised proposed rule and any required statements and analyses may be obtained from** Lisa Struffolino, State Education Department, Office of Counsel, State Education Building, Room 148, Albany, NY 12234, (518) 473-4921, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Rebecca H. Cort, Deputy Commissioner, VESID, New York State Education Department, Room 1606, One Commerce Plaza, Albany, NY 12234, (518) 473-2714, email: rcort@mail.nysed.gov

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

**Revised Regulatory Impact Statement**

Since publication of a Notice of Revised Rule Making in the State Register on October 22, 2008, the proposed amendment has been revised as follows.

The regulations that require, commencing on January 1, 2009, the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of recommendation) were adopted in September 2007. Since that date, the Department sought extensive comment from the field on the development of the forms from stakeholders across the State. In response to the comments, the regulations were amended by emergency action, effective October 28, 2008, to extend the initial effective date for required use of the forms from January 1, 2009 to September 1, 2009. Subsequently, in response to public comment, the Department is now proposing to further extend the initial effective date by requiring IEPs developed for, and meeting notices and prior written notices (notices of recommendation) issued during, the 2011-12 school year, and thereafter, be on forms prescribed by the Commission.

The above revision requires that the Needs and Benefits, Local Government Mandates and Paperwork sections of the previously published Regulatory Impact Statement be revised as follows:

**NEEDS AND BENEFITS:**

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date by which school districts would be required to use the forms prescribed by the Commissioner for individualized education programs (IEPs), Committee on Special Education (CSE) and Committee on Preschool Special Education (CPSE) meeting notices and for prior written notices (notice of recommendation).

The regulations that require the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of recommendation) as of January 1, 2009 were adopted in September 2007. In response to public comment, the Department is proposing to further extend the initial effective date by requiring IEPs developed for, and meeting notices and prior written notices (notices of recommendation) issued during, the 2011-12 school year be on forms prescribed by the Commission. Extending the date for the required use of these forms will allow additional time for VESID to work with stakeholders to field check proposed forms and to provide profes-

sional development on the new forms. Furthermore, the additional extension should provide the needed time for cost-effective conversion to the State's required forms and for the State to make professional development available through no-cost means such as informational materials, web-conferencing and professional development through its technical assistance networks. In addition, extending the effective date for the required use of the State forms will avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-09 school year.

#### LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations. The proposed amendment will extend the initial effective date for requiring the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice.

Section 200.4 was revised to require IEPs developed for the 2011-2012 school year, and thereafter, be on a form prescribed by the Commissioner.

Section 200.5 was revised to require prior written notices (notices of recommendation) and meeting notices issued during the 2011-2012 school year, and thereafter, be on a form prescribed by the Commissioner.

#### PAPERWORK:

The proposed amendment will extend the initial effective date for requiring the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice, and does not impose any additional paperwork requirements.

#### *Revised Regulatory Flexibility Analysis*

Since publication of a Notice of Proposed Rule Making in the State Register on October 22, 2008, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision to the proposed amendment requires that the Compliance Requirements, Costs and Minimizing Adverse Impact sections of the Regulatory Flexibility Analysis for Small Businesses and Local Government be revised as follows:

#### COMPLIANCE REQUIREMENTS:

The proposed amendment will extend the date for required use of the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice, and does not impose any additional compliance requirements upon local governments beyond those imposed by federal statutes and regulations.

Section 200.4 was revised to require IEPs developed for the 2011-2012 school year, and thereafter, be on a form prescribed by the Commissioner.

Section 200.5 was revised to require prior written notices (notices of recommendation) and meeting notices issued during the 2011-2012 school year, and thereafter, be on a form prescribed by the Commissioner.

#### COMPLIANCE COSTS:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the initial effective date for requiring the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice, and does not impose any additional costs beyond those imposed by federal statutes and regulations and State statutes.

#### MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the initial effective date for requiring the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice, and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes.

The regulations that require the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of

recommendation) as of January 1, 2009 were adopted in September 2007. In response to public comment, the Department is proposing to further extend the effective date by requiring IEPs developed for, and meeting notices and prior written notices (notices of recommendation) issued during, the 2011-12 school year be on forms prescribed by the Commission. Extending the date for the required use of these forms will allow additional time for VESID to work with stakeholders to field check proposed forms and to provide professional development on the new forms. Furthermore, the additional extension should provide the needed time for cost-effective conversion to the State's required forms and for the State to make professional development available through no-cost means such as informational materials, web-conferencing and professional development through its technical assistance networks. In addition, extending the effective date for the required use of the State forms will avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-09 school year.

#### *Revised Rural Area Flexibility Analysis*

Since publication of a Notice of Proposed Rule Making in the State Register on October 22, 2008, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision to the proposed amendment requires that the Reporting, Recordkeeping and Other Compliance Requirements and Professional Services, the Costs, and the Minimizing Adverse Impact sections of the Rural Area Flexibility Analysis be revised as follows:

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

The proposed amendment will extend the date for required use of the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice, and does not impose any additional compliance requirements upon rural areas beyond those imposed by federal statutes and regulations.

Section 200.4 was revised to require IEPs developed for the 2011-2012 school year, and thereafter, be on a form prescribed by the Commissioner.

Section 200.5 was revised to require prior written notices (notices of recommendation) and meeting notices issued during the 2011-2012 school year, and thereafter, be on a form prescribed by the Commissioner.

The amendment does not impose any additional professional service requirements on rural areas, beyond those imposed by federal statutes and regulations and State statutes.

#### COSTS:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice, and does not impose any additional costs beyond those imposed by such federal statutes and regulations and State statutes.

#### MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice, and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for school districts in rural areas.

The regulations that require the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of recommendation) as of January 1, 2009 were adopted in September 2007. In response to public comment, the Department is proposing to further extend the effective date by requiring IEPs developed for, and meeting notices and prior written notices (notices of recommendation) issued during, the 2011-12 school year be on forms prescribed by the Commission. Extending the date for the required use of these forms

will allow additional time for VESID to work with stakeholders to field check proposed forms and to provide professional development on the new forms. Furthermore, the additional extension should provide the needed time for cost-effective conversion to the State's required forms and for the State to make professional development available through no-cost means such as informational materials, web-conferencing and professional development through its technical assistance networks. In addition, extending the effective date for the required use of the State forms will avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-09 school year.

#### **Revised Job Impact Statement**

Since publication of a Notice of Revised Rule Making in the State Register on October 22, 2008, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as revised, relates to the provision of special education programs and services to students with disabilities, and is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice. Because it is evident from the nature of the revised rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

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

Since publication of a Notice of Revised Rule Making in the State Register on October 22, 2008, the State Education Department received the following new comments that were not otherwise addressed in the Assessment of Public Comment published in the State Register.

##### *General*

##### **1. COMMENT:**

Some were concerned that the September 1 effective date would require districts to use two different formats in the same year and parents would receive two different individualized education programs (IEPs) and that changing forms in September will interfere with accurate reporting of Basic Education Data System (BEDS) data. Most commenters recommended a further delay in the implementation of the required forms. These ranged from recommendations to delay the implementation timeline to January 2010; coordinating it with annual reviews for 2009-10 school year; deferring until July 1, 2010 so that training can occur on previously scheduled conference days; delaying until September 2010 to allow for field testing, adequate training of staff prior to implementation, and software updates; postponing the date to the 2010-2011 school year to eliminate problems and unnecessary expenditures emanating from the September 1, 2009 mid-cycle change in IEP forms, to avoid districts from having to conduct costly training over the summer of 2009, to eliminate problems districts will have compiling Department mandated data directly from student IEPs; and to allow the Department time to consider the comments on the proposed forms and notices and work with constituents to develop revised documents.

##### **DEPARTMENT RESPONSE:**

Section 200.4(d) has been revised to require IEPs developed for the 2011-12 school year, and thereafter, to be on a form prescribed by the commissioner; and sections 200.5(a) and (c) have been revised to require all meeting notices and prior written notices developed during the 2011-12 school year and thereafter to be on a form prescribed by the Commissioner. The revised rule for IEP implementation would mean that IEPs developed at annual review meetings for IEPs that would be in effect during the 2011-12 school year (July 1 - June 30) would need to be on the State forms. This should clarify that, effective 2011-12, only one IEP form would be used for all students with disabilities during that school year.

##### **2. COMMENT:**

The amendment to the Regulations relating to State forms for IEPs, meeting notice and prior written notice should not be passed.

##### **DEPARTMENT RESPONSE:**

The Board of Regents acted to mandate the use of State forms based on the State's findings that IEPs varied greatly from school district to school district across the State and that many school district's IEPs did not include the information required by the Regulations of the Commissioner of Education. In addition, the State found that the CSE/CPSE meeting notices and prior written notices provided to parents did not always fully inform parents of the information they need and are entitled to have. By mandating these forms, students' IEPs will be more appropriately

developed, parents will be more fully informed and school districts are more likely to meet compliance requirements.

The regulation to require use of the State's forms for IEPs, prior written notices and meeting notices were first adopted in September 2007, as part of a separate rulemaking (EDU-12-07-00004). The regulations were revised, through emergency action at the October 2008 Board of Regents meeting, to extend the effective date of the use of the forms until September 1, 2009. The rule is being further revised to require the use of the State's forms for all notices issued during the 2011-12 school year and all IEPs in effect for that school year.

##### **3. COMMENT:**

A few commenters stated that the proposed regulations had been promulgated without the benefit of a cost analysis; that considerable local (human and fiscal) resources would be required to implement the proposed forms, including cost for training of special education staff, software development and training for clerical staff; training of preschool providers will impact county costs; due to technological issues the new forms would need to be handwritten and will require more staff resources; the increased length of IEPs and parent letters will increase mailing and printing costs. One individual stated that the forms, as proposed, would result in additional paperwork and increased individualization of letters which is contradictory to the intent of the Individuals with Disabilities Education Act (IDEA) to reduce paperwork burden. Requiring the use of the State's forms will leave districts more vulnerable to legal challenges and will increase litigation costs.

##### **DEPARTMENT RESPONSE:**

The Department anticipates that the use of the State forms will have a positive benefit to inform parents of IEP meetings to encourage parent participation; to develop IEPs that are individualized to include the required components; and to fully inform parents of the proposed recommendations for their children. In addition, the use of State forms should assist school districts to be in compliance with the federal and State requirements, thereby resulting in a savings to both school districts and the State in time and resources spent for State complaints submitted to the Department for procedural noncompliance and in requests for impartial hearing decisions that are the result of substantive procedural noncompliance in areas affecting the free appropriate public education of the student.

In response to concerns requiring unintended costs relating to the length of the IEPs and professional development, the proposed State forms for IEPs, meeting notice and prior written notice only include information necessary to meet existing federal and State requirements. For school districts that were providing the required information, the State forms should not result in IEPs of increased length. The actual length of each student's IEP will vary depending on a particular student's needs to be documented and on the various printing/format options the school district may elect to use (e.g., landscape versus portrait, two-sided pages, and font size).

To offset concerns about related professional development costs, the Department will broadly disseminate informational materials, conduct web conference training accessible from desk computers, and provide professional development sessions through its technical assistance networks. While one of the IEP software companies used by school districts in this State has indicated it will not be passing on the cost of any changes related to converting their paperwork processes and computerized management, others may. For school districts that use software programs to generate IEPs, meeting notices or prior written notices, the extension of time for implementation should provide ample time for this conversion to occur in a cost effective manner.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content**

**I.D. No.** HLT-49-08-00014-E

**Filing No.** 5

**Filing Date:** 2009-01-05

**Effective Date:** 2009-01-05

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

**Action taken:** Amendment of Part 59 of Title 10 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, section 1194(4)(c) and Environmental Conservation Law, section 11-1205(6)

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

**Specific reasons underlying the finding of necessity:** Immediate adoption of this amendment is necessary for preservation of the public safety. The amendment, once adopted, will enable law enforcement agencies to use a breath alcohol testing device, which, while not currently listed in 10 NYCRR Section 59.4, is approved for use by the National Highway Traffic Safety Administration.

A new Conforming Products List was published in the Federal Register on June 29, 2006, adding a state-of-the-art evidential breath test instrument: the DataMaster DMT. Under a Division of Criminal Justice Services project fully funded through the Governor's Traffic Safety Committee, the DataMaster DMT will replace 475 breath test instruments currently used by more than 420 police agencies statewide. The Division of Criminal Justice Services has informed the Department of its expectation to begin distribution of the first lot of approximately 40 DataMaster DMT instruments on or about April 30, 2007.

Failure to update the list by emergency rulemaking will result in confusion as to the DataMaster DMT's approval for use in New York State, resulting in defense challenges to the legal admissibility of evidentiary results obtained with the device. Such failure would obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older DataMaster models become unusable, thereby adversely affecting public safety. Moreover, the federal and State lists of approved breath testing devices must be identical to avoid legal challenges to prosecutions for alcohol-related offenses and preclude inadmissibility of evidence, and to ensure effective enforcement of the laws against driving while intoxicated.

**Subject:** Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content.

**Purpose:** To update the conforming products list of breath alcohol testing devices currently approved for use by the NHTSA.

**Text of emergency rule:** Subdivisions (c) and (d) of Section 59.1 are amended as follows:

(c) Chemical tests/analyses include breath tests conducted on those instruments found on the Conforming Products List of Evidential Breath Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration, published in the Federal Register on [June 4, 1999. Such list is set forth in section 59.4 of this Part.] *December 17, 2007. Copies are available for public inspection and copying by appointment at the Department of Health, Records Access Office, Corning Tower, Empire State Plaza, Albany, New York.*

(d) Training agency or agencies means the [Bureau for Municipal Police] *Office of Public Safety* of the Division of Criminal Justice Services, the Division of State Police, *the Nassau County Police Department, the Suffolk County Police Department, and/or the New York City Police Department.*

The heading for Section 59.4 is amended, and existing subdivisions (b) of Section 59.4 is replaced by a new subdivision (b), as follows:

59.4 Breath [testing ] *analysis* instruments.

(b) At the request of the training agency responsible for the maintenance of a breath analysis instrument, the commissioner shall approve the instrument provided the model has been accepted by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA) as an evidential breath measurement device. The commissioner's approval may be based on evidence that the model appears on NHTSA's current Conforming Products List as published in the Federal Register, or evidence that the device has been accepted by NHTSA as an evidential breath measurement device, but the device has not yet been added to the published Conforming Products List. The commissioner shall make available upon request a list of approved breath analysis instruments.

**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 submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-49-08-00014-P, Issue of December 3, 2008. The emergency rule will expire March 5, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

#### Regulatory Impact Statement

Statutory Authority:

The New York State Vehicle and Traffic Law, Section 1194(4)(c), and the Environmental Conservation Law, Section 11-1205(6), authorize the Commissioner of Health to adopt regulations concerning methods of testing breath for alcohol content.

Legislative Objectives:

This amendment allows law enforcement/police agencies to use state-of-the-art equipment for breath alcohol testing, as approved by the Commissioner of Health. This action fulfills the legislative objective of ensuring effective enforcement of the law against driving while intoxicated.

Needs and Benefits:

In 1986, the Commissioner of Health adopted the Conforming Products List of Evidential Breath Measurement Devices, as established by the National Highway Traffic Safety Administration, under 10 NYCRR Sections 59.1(c) and 59.4(b). The Traffic Safety Administration's list is periodically revised to include additional approved testing devices. Affected parties are law enforcement agencies that train police organizations in the use of breath testing devices and the organizations/agencies whose staff conduct testing, including the New York State Police; the State Division of Criminal Justice Services' Office of Public Safety; and the Police Departments of Nassau County, Suffolk County, and the City of New York. This amendment updates the name of one training agency, and identifies the three more recently recognized training agencies that currently participate in breath analysis operator training of law enforcement officials statewide.

A new Conforming Products List was published in the Federal Register on June 29, 2006, and again on December 17, 2007, with each publication announcing approval of state-of-the-art evidential breath test instruments. The Division of Criminal Justice Services has requested approval to use the DataMaster DMT, due, in part, to a project fully funded through the Governor's Traffic Safety Committee, that will allow replacement of 475 breath test instruments currently used by more than 420 police agencies Statewide. Many of the new instruments have already been distributed and have been engaged in the field since emergency adoption of an amendment incorporating the June 29, 2006 Conforming Products List. The State Police have expressed an interest in using and training others in the use of the more recently federally-approved Draeger Alcotest 9510, pending amendment of this Part to include this device.

It is of great importance to the public welfare of the State that Part 59 be accurate and clear as a reference tool for the prosecutors and defense attorneys Statewide who rely on the provisions of Part 59 daily in adjudicating alcohol-related offenses. This amendment would remove from Part 59 the lengthy listing of breath analysis devices, and incorporate the listing by reference to the Federal Register date of publication. Although Department staff rigorously proofread the express terms in an effort to detect incorrect transcription of the multi-page listing's complex text, the Federal Register itself may contain errors. The proposed incorporation by reference would more surely eliminate either type of error that could be used by the defense to sway the outcome of a DWI case. Eliminating the need to duplicate in Part 59, in its entirety, the complex text of the Conforming Products List as published in the Federal Register, would also allow for more timely regulatory amendment by consensus rule, to simply revise the Federal Register publication date. More timely amendment would ensure more timely access to state-of-the-art technologies for breath alcohol analysis.

The amendment requires the Department to make the Conforming Products List available upon request; therefore, the Department will retain copies of the Federal Register editions that include such a list. The amendment also authorizes the Department to approve, upon request by a training agency, the use of an evidentiary breath analysis instrument prior to promulgation of the instrument's federal approval by publication in the Federal Register. This authorizing provision would eliminate the sometimes significant lag time between National Highway Traffic Safety Administration approval of a new device and publication of the updated device listing, thereby allowing more timely access by training agencies to state-of-the-art devices.

This proposed amendment, once adopted, will make these devices available for use by law enforcement agencies without risk of evidentiary challenge to prosecution, and will ensure effective enforcement of the laws against driving while intoxicated.

COSTS:

Costs to Private Regulated Parties:

The requirements of this regulation are not applicable to any private parties regulated by the Department.

Costs to State Government:

Adoption of additions and revisions to the Conforming Products List does not necessitate purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not require affected parties to incur new costs. Both the Division of Criminal Justice Services and the State Police have requested timely amendment of Part 59 in order that they may use state-of-the-art breath analysis devices to replace devices that are unable to be repaired as parts become increasingly scarce. Moreover, the Division of Criminal Justice Services expects the newer model instrument, which utilizes improved diagnostics, an enhanced operating system and an outboard printer, to generate cost savings from

fewer instrument malfunctions, resulting in less downtime. Thus, this amendment's authorizing use of updated models of breath analysis devices will result in decreased costs to law enforcement agencies.

**Costs to Local Government:**

Adoption of additions and revisions to the Conforming Products List through incorporation by reference does not require purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not impose any additional costs to police departments operated by local governments, including the City of New York Police Department. Police departments operated by local governments may experience cost savings for the same reasons described under Costs to State Government.

**Costs to the Department of Health:**

Adoption of additions and revisions to the Conforming Products List does not impose any costs on the Department.

**Local Government Mandates:**

This regulation does not impose any new mandate on any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

No new reporting requirements or forms are imposed as a result of the proposed amendment.

**Duplication:**

This regulation is consistent with, but does not duplicate, other State and federal statutes concerning approved breath alcohol measurement devices.

**Alternative Approaches:**

Failure to update the regulation by incorporating by reference the most current list of evidentiary devices will result in confusion as to device approval for use in New York State, resulting in defense challenges to the admissibility of results obtained with the device. Such failure will obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older breath analyzer models become unusable, thereby adversely affecting public safety. At the present time, there are no acceptable alternatives to pursuing permanent adoption of the rule as written.

**Federal Standards:**

The proposed rule does not exceed any minimum standards of the federal government; it merely adds new federally approved devices to the Conforming Products List, to be consistent with federal standards.

**Compliance Schedule:**

Regulated parties should be able to comply with these regulations effective upon filing a Notice of Emergency Adoption with the Secretary of State.

**Regulatory Flexibility Analysis**

No Regulatory Flexibility Analysis is required pursuant to Section 202-b(3)(b) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse economic impact on small businesses or local governments, and does not impose reporting, record keeping or other compliance requirements on small businesses or local governments. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

**Rural Area Flexibility Analysis**

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse impact on facilities in rural areas, and does not impose any reporting, record keeping or other compliance requirements on regulated parties in rural areas. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

**Job Impact Statement**

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

## EMERGENCY RULE MAKING

**Service Intensity Weights (SIW) and Average Lengths of Stay**

**I.D. No.** HLT-03-09-00003-E

**Filing No.** 1376

**Filing Date:** 2008-12-31

**Effective Date:** 2008-12-31

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

**Action taken:** Amendment of section 86-1.62 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-c(3)

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

**Specific reasons underlying the finding of necessity:** The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the service intensity weights for 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." The current service intensity weights (SIWs) are updated to be consistent with the proposed DRG modifications.

Effective January 1, 2008, the SIWs 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 SIWs 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. The proposed regulatory update is required to implement the second year of the phase-in of the new service intensity weights. Such requirements warrant adoption of these amendments as soon as practicable.

**Subject:** Service Intensity Weights (SIW) and Average Lengths of Stay.

**Purpose:** Modifies the Service Intensity Weights (SIW) for DRGs.

**Substance of emergency rule:** 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 service intensity weights (SIWs) for the diagnosis related group (DRG) classification system for inpatient hospital services.

Effective January 1, 2008, the DRG classification system used in the hospital case payment system was 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 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, were based on 75% of the service intensity weights in effect as of December 31, 2007 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. Effective January 1, 2009, the service intensity weights are being revised to reflect the phase-in described above.

General Summary for 86-1.62

The changes in the service intensity weights for the DRG classification system described above (Section 86-1.62 of Title 10 (Health NYCRR)) 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 an emergency adoption, to be valid for 90 days or less. This rule expires March 30, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@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 service intensity weights (SIWs) for the diagnosis related groups (DRGs). Sections 34, 34-a and 34-b, of Part C of 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 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 amendments to sections 86-1.62 of Title 10 (Health NYCRR) are intended to make current regulations consistent with changes made to the service intensity weights (SIWs) for the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). The SIWs 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 must be recalculated to be 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 in sections 86-1.62. Lastly, the amendment provides 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. This amendment incorporates the second year of the phase-in of the new service intensity weights.

##### **COSTS:**

##### **Costs to State Government:**

The amendment to 86-1.62 revising the SIWs has been legislated as budget neutral; therefore there is no additional cost 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:**

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 clinical practices, new medical technologies, changes in patient resource consumption, and changes in hospital length of stay patterns. Two alternatives were considered for the means of adjusting the revised SIWs to ensure budget neutrality. The first alternative was to apply a neutrality adjustment in the calculation of the SIWs. However, since the SIWs are formulated on non-Medicare costs and the budget neutrality provision in statute applies to Medicaid expenditures, this approach was rejected. Instead, budget neutrality for Medicaid expenditures will be achieved by applying an adjustment to the Medicaid hospital inpatient rates.

##### **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, 2009; 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, Rm. 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, record keeping 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 Technological 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 service intensity weight for the DRG classification system used by the Medicare prospective payment system (PPS). The current SIWs are updated to be consistent with the proposed DRG modifications, and the 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 86-1.62 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 November 20, 2008 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 associa-

tions, 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 86-1.62 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 November 20, 2008 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 service intensity weights for the diagnosis related group (DRG) classification system for inpatient hospital services. 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.

**Office of Mental Health**

**EMERGENCY  
RULE MAKING**

**Medical Assistance Payment for Outpatient Programs**

**I.D. No.** OMH-03-09-00005-E

**Filing No.** 1378

**Filing Date:** 2008-12-31

**Effective Date:** 2008-12-31

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

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

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.04, 43.02; Social Services Law, sections 364 and 364-a

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

**Specific reasons underlying the finding of necessity:** The amendments are a result of the serious fiscal condition of New York State, the Financial Management Plan of the enacted 2008-09 State Budget and the August Special Economic Session of the Legislature.

**Subject:** Medical Assistance Payment for Outpatient Programs.

**Purpose:** Effect a modest rate reduction in reimbursement for continuing day treatment programs and modify current methodology.

**Substance of emergency rule:** This rule will amend the provisions of 14 NYCRR Part 588, Medical Assistance Payment for Outpatient Programs that pertain to the reimbursement of continuing day treatment programs. The proposed regulations will effectuate a reduction in the fees paid to continuing day treatment programs for services provided on or after January 1, 2009 and before April 1, 2009, and will implement a change in the reimbursement methodology for services provided on or after April 1, 2009.

**Overview**

The proposed regulations use a two-step process to adjust the current methodology for reimbursing continuing day treatment programs for persons with serious mental illness. The first step will consist of implementing a reduction in the fees paid to continuing day treatment programs for services provided on or after January 1, 2009 and before April 1, 2009. The second step consists of modifying the reimbursement methodology from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009.

**Requirements**

The first phase of the proposal effectuates a modest rate reduction for services provided on or after January 1, 2009, but continues the current reimbursement methodology, in which the amount of reimbursement for a given visit is based upon the number of hours of an individual's attendance, until April 1, 2009 to allow providers sufficient time to implement the systems changes necessary to operate under the new reimbursement methodology. Under the second phase of the proposal, for services provided on or after April 1, 2009, providers will be reimbursed using a modified threshold fee. Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. The proposed regulation establishes a methodology in which there are two threshold fees-a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours and receives at least three reimbursable services.

Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to 5 hours, so long as at least one reimbursable service is provided during the visit. On average,

individuals receive between two and three services during a five-hour visit. The proposed regulations ensure that individuals will receive at least this level of service across all providers.

The proposed regulations also continue the current pass through methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, which allows for an add-on to the individual provider's fee based upon the capital costs incurred by the provider. The proposed regulations also specify that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health 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 March 30, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, 8th Floor, Albany, NY 12228, (518) 474-1331, email: cocbjdd@omh.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

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

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

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

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The amendments to Part 588 are consistent with the goals and objectives of the Medicaid program to ensure that individuals with serious mental illness receive effective services to address their illness and that providers receive adequate reimbursement to pay for such care.

3. Needs and Benefits: The proposed regulations modify the current methodology for reimbursing continuing day treatment programs for persons with serious mental illness from one based upon hours of attendance in program to one utilizing a modified threshold approach. The proposed regulations are also needed to effect savings in the operation of the Medicaid program.

The first phase of the proposal effectuates a modest rate reduction for services provided on or after January 1, 2009, but continues the current reimbursement methodology until April 1, 2009 to allow providers sufficient time to implement the systems changes necessary to operate under the new reimbursement methodology. Under the second phase of the proposal, for services provided on or after April 1, 2009 providers will be reimbursed using a modified threshold fee.

Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. The proposed regulation establishes a methodology in which there are two threshold fees—a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours, and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours, and receives at least three reimbursable services.

Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to 5 hours, so long as at least one reimbursable service is provided during the visit. On average, individuals receive between two and three services during a five-hour visit. The proposed regulations ensure that individuals will receive at least this level of service across all providers.

The proposed regulations also continue the current methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, and specify that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health Law.

4. Costs:

a) Costs to regulated parties: The reduction of Medicaid payments will

impact all non-State operated continuing day treatment programs (approximately 150 programs) and approximately 6 mental health day treatment programs. The impact of these reductions totals approximately \$23 million in gross Medicaid funds for the providers impacted by the reductions.

b) Costs to State and Local government and the agency: Medicaid services typically involve both a state and county share in matching the federal portion. The state share of these outpatient initiatives is \$11.5 million, with no impact to local governments. The decrease is being implemented after the local share Medicaid cap is already in place. (The local share Medicaid cap was an initiative included in the enacted State budget for 2005-2006, under which the state pays for increases in the local share of Medicaid after January 1, 2006.) The proposed changes to reduce the reimbursement to these programs shall be effective January 1, 2009.

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

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

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

8. Alternatives: To address the serious fiscal condition of New York State, the Financial Management Plan of the enacted 2008-09 State Budget, along with the August Special Economic Session of the Legislature included reductions in rates of payments for the impacted programs. Further, the Office of Mental Health has proposed changes to the reimbursement methodology from hourly fees to half day/full day reimbursement, with a minimum number of services required for each reimbursement category. This simplifies the billing structure, while ensuring that individuals receive at least a standard level of services across providers. The reduction in payment rates was required by the State Budget. Consideration was given to not changing to a half day/full day reimbursement methodology, but the proposed methodology was determined to be preferable to the existing methodology due to the fact that it is less confusing, and more amenable to the establishment of a uniform standard for services.

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: This rulemaking is effective upon adoption.

#### **Regulatory Flexibility Analysis**

The proposed rule adjusts the Medicaid reimbursement for continuing day treatment programs consistent with the 2008-09 State budget. Medicaid services typically involve both a state and county share in matching the federal portion. The state share of these outpatient initiatives is \$11.5 million, with no impact to local governments. The decrease is being implemented after the local share Medicaid cap is already in place. Further, the rule also modifies the current reimbursement methodology, but in order to give providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology, that restructuring will not take effect until April 1, 2009. For these reasons, a regulatory flexibility analysis is not submitted with this notice.

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

The proposed rule adjusts the Medicaid reimbursement for continuing day treatment programs consistent with the 2008-09 State budget. Medicaid services typically involve both a state and county share in matching the federal portion. The state share of these outpatient initiatives is \$11.5 million, with no impact to local governments. The decrease is being implemented after the local share Medicaid cap is already in place. 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**

A Job Impact Statement is not submitted with this notice because the proposed rule adjusts the Medicaid reimbursement for continuing day treatment programs consistent with the 2008-09 State budget and modifies the current reimbursement methodology. The restructuring will not take effect until April 1, 2009, in order to give providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking.

## Office of Mental Retardation and Developmental Disabilities

### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Trend Factors for 2009

**I.D. No.** MRD-03-09-00004-EP

**Filing No.** 1377

**Filing Date:** 2008-12-31

**Effective Date:** 2009-01-01

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

**Proposed Action:** Amendment of sections 81.10, 635-10.5, 671.7, 680.12, 681.14 and 690.7 of Title 14 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** Emergency regulations are necessary to continue to reimburse providers and maintain the stability of the current service system, which ensures that individuals have access to necessary supports and services.

**Subject:** Trend factors for 2009.

**Purpose:** To continue the methodologies used to calculate rates/fees for rate/fee periods beginning 1/1/09.

**Public hearing(s) will be held at:** 10:30 a.m., March 23, 2009 at Bernard Fineson DC - Bldg. 1; 80-45 Winchester Blvd., Queens Village, NY; 10:30 a.m., March 25, 2009 at OMRDD, 44 Holland Ave., Counsel's Office Conf. Rm., 3rd Fl., Albany, NY.

**Interpreter Service:** Interpreter services will be made available to hearing impaired 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.

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

**Text of emergency/proposed rule:** Paragraph 81.10(b)(4) - Add new subparagraph (v):

(v) 0.00 percent for the 2009 fee period.

Paragraph 635-10.5(i)(1) - Add new subparagraph (xxvii):

(xxvii) 0.00 percent to trend 2008-2009 costs to 2009-2010.

Note: Rest of paragraph is renumbered accordingly.

Paragraph 635-10.5(i)(2) - Add new subparagraph (xxvii):

(xxvii) 0.00 percent to trend calendar 2008 costs to calendar year

2009.

Note: Rest of paragraph is renumbered accordingly.

Clause 671.7(a)(1)(vi)(a) - Add new subclause (17):

(17) For calendar year 2009:

NYC and Nassau, Rockland,

Suffolk, and Westchester Counties \$ 31.97 per day

Rest of State \$ 30.97 per day

Note: Rest of clause remains unchanged.

Clause 671.7(a)(1)(xvi)(a) - Add new subclause (15):

(15) 0.00 percent from January 1, 2009 through December

31, 2009.

Clause 671.7(a)(1)(xvi)(b) - Add new subclause (15):

(15) 0.00 percent from July 1, 2009 through June 30, 2010.

Paragraph 680.12(d)(3) - Add new subparagraph (xxii):

(xxii) 0.00 percent for 2009.

Add new subclause 681.14(c)(3)(ii)(b)(9):

(9) If a facility is subject to an expanded desk audit per subclause (2) of this clause, but the desk audit has not been completed by January 1, 2009 or July 1, 2009, OMRDD shall continue the rate established according to the first sentence of subclause (3) of this clause and, if applicable, further trended to 2009 or 2009-2010 dollars until OMRDD completes the expanded desk audit. Upon OMRDD's completion of the expanded desk audit, for the base period and subsequent periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.

Subparagraphs 681.14(h)(1)(xviii)-(xix) are amended and a new subparagraph (xx) is added as follows:

(xviii) 2.97 percent for 2006-2007 to 2007-2008; [and]

(xix) 3.52 percent for 2007-2008 to 2008-2009 [.]; and

(xx) 0.00 percent for 2008-2009 to 2009-2010.

Subparagraphs 681.14(h)(2)(xviii)-(xix) are amended and a new subparagraph (xx) is added as follows:

(xviii) From February 1, 2007 to December 31, 2007, facilities will be reimbursed operating costs that result in a full annual trend factor of 2.97 percent for the rate period. On January 1, 2008, the trend factor for the previous rate period shall be deemed to be the 2.97 percent full annual trend; [and]

(xix) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend [.]; and

(xx) 0.00 percent for 2008 to 2009.

Subparagraphs 681.14(h)(3)(xxvi)-(xxvii) are amended and subparagraph (xxviii) is added as follows:

(xxvi) 2.97 percent for 2006-2007 to 2007-2008; [and]

(xxvii) 3.52 percent for 2007-2008 to 2008-2009 [.]; and

(xxviii) 0.00 percent for 2008-2009 to 2009-2010.

Subparagraphs 681.14(h)(4)(xxvi)-(xxvii) are amended and subparagraph (xxviii) is added as follows:

(xxvi) From February 1, 2007 to December 31, 2007, facilities will be reimbursed operating costs that result in a full annual trend factor of 2.97 percent for the rate period. On January 1, 2008, the trend factor for the previous rate period shall be deemed to be the 2.97 percent full annual trend; [and]

(xxvii) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend [.]; and

(xxviii) 0.00 percent for 2008 to 2009.

Subparagraph 690.7(d)(6)(iii) is amended by adding new clause (g) to read as follows:

(g) From April 1, 2009 to March 31, 2010 the trend factor shall be 0.00 percent for all facilities.

**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 30, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, OMRDD, Regulatory Affairs Unit, Office of Counsel, 44 Holland Ave., Albany, NY 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

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

#### Regulatory Impact Statement

1. Statutory Authority:

a. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OMRDD.

2. Legislative Objectives: These emergency/proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The promulgation of these emergency/proposed amendments concerns methodologies for rates or fees for voluntary agency providers of the following services:

a. Programs authorized by OMRDD to operate as integrated residential communities (amendments to section 81.10).

b. Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5).

c. Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7).

d. Specialty Hospitals (amendments to section 680.12).

e. Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD) (amendments to section 681.14).

f. Day treatment facilities serving people with developmental disabilities (amendments to section 690.7).

3. Needs and Benefits: OMRDD has historically increased operating revenues to providers on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement stays abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. The foremost goal to sustain operations was complemented by an eagerness to develop and expand programs. For the last nine years, relatively robust economies have dictated annual trend factors ranging from 2.97 percent to 6.69 percent with an average of 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from those that gave impetus to the previous trend factors. The recessionary nature and high unemployment that define the current economy suggest that inflation may be in check and that staff recruitment and retention achieved through additional monetary stimulus may not be required. The tentative economy suggests a conservative and limited approach to expansion with an aim to conserve resources and to promote efficiency and economy. In this vein, OMRDD will not be implementing a positive trend factor for 2009 and 2009/2010. OMRDD views the economy as having slowed sufficiently so that existing reimbursement levels should be adequate.

The rapidly changing and deteriorating economy prevented the State from being able to determine an appropriate trend factor for the above programs until the middle of December. This did not allow enough time for proposal and promulgation of these amendments within the regular SAPA procedural time frames. The amendments continue the various reimbursement methodologies used to establish rates/fees for the above services, thereby maintaining current funding levels for these services and the stability of OMRDD's service system, which in turn ensures that New Yorkers with developmental disabilities continue to have access to necessary supports and services.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments. Since the amendments establish trend factors of zero percent, there are no costs associated with the emergency/proposed amendments. They only continue the various reimbursement methodologies used to establish rates/fees for the referenced developmental disabilities facilities and services, thereby maintaining current funding levels.

There are no additional costs to local governments resulting from the emergency/proposed amendments.

The amendments to section 671.7 also update the SSI per diem allowances consistent with levels determined by the Federal Social Security Administration. There are no additional costs attributable to this conforming amendment, either to the State or to local governments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The emergency/proposed amendments are necessary to continue funding of the affected facilities at levels of reimbursement that are currently in effect.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: No additional paperwork will be required by the emergency/proposed amendments.

7. Duplication: The emergency/proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

8. Alternatives: The current course of action as embodied in these emergency/proposed amendments reflects what OMRDD believes to be a fiscally prudent, cost-effective reimbursement of the facilities and developmental disabilities services in question. No alternatives to these trend factors were considered. There is no alternative to emergency adoption that would allow for prompt, timely implementation of the trend factor provisions contained in the emergency/proposed amendments.

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

10. Compliance Schedule: The emergency rule is effective January 1, 2009. OMRDD has concurrently filed the rule as a Notice of Proposed Rule Making, and it intends to finalize the rule as soon as possible within the time frames mandated by the State Administrative Procedure Act. These amendments do not impose any new requirements with which regulated parties are expected to comply.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: These emergency/proposed regulatory amendments will apply to voluntary not-for-profit corporations that operate the following facilities and/or provide the following services for persons with developmental disabilities in New York State:

Programs certified by OMRDD as integrated residential communities (amendments to section 81.10). As of December 2008, there were only two such programs authorized by OMRDD to operate as integrated residential communities. They serve approximately 105 persons.

Individualized Residential Alternative (IRA) facilities, and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite and prevocational services for the approximately 63,920 persons receiving such services as of December 2008.

Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). As of December 2008, OMRDD funds voluntary operated community residence facilities which serve approximately 400 persons.

Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2008, there were approximately 5,530 people served in ICF/DD facilities in New York State.

Day Treatment Facilities for Persons with Developmental Disabilities, (amendments to section 690.7). As of December 2008, there were approximately 2,260 people served in Day Treatment facilities in New York State.

While most of the above services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites (e.g. IRAs or Day Habilitation programs) employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses.

There is only one Specialty Hospital (amendments to section 680.12) which serves approximately 50 people, certified to operate in New York State. It employs more than 100 persons and would therefore not be considered a small business as contemplated under the State Administrative Procedure Act (SAPA).

The emergency/proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will continue to provide appropriate funding for small business providers of developmental disabilities services.

Since the amendments do not increase funding of the referenced services or programs, they will not result in any costs to local governments.

2. Compliance requirements: There are no additional compliance requirements for small businesses or local governments resulting from the implementation of these emergency/proposed amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The emergency/proposed amendments do not alter this requirement. Therefore, no additional professional services are required as a result of most of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these emergency/proposed amendments. OMRDD has considered the desirability of a small business regulation guide to assist provider agencies with this rule, as provided for by new section 102-a of the State Administrative Procedure Act. However, since the emergency/proposed rule requires no compliance effort on the part of the regulated service providers (most of which could be considered as small businesses under SAPA), OMRDD does not, at this time, contemplate the development of any such small business regulation guide.

5. Economic and technological feasibility: The emergency/proposed amendments are concerned with rate/fee setting in the affected facilities or services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: The purpose of these emergency/proposed amendments is to continue to reimburse providers of the referenced services at current levels. The trend factor provisions do not increase or decrease funding of small business providers of services.

These amendments impose no adverse economic impact on regulated parties or local governments. Therefore, regulatory approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small business and local government participation: OMRDD has discussed the proposal for 0% trend factors with the provider associations. In addition, the proposal was a part of the 2009-10 Executive Budget which has been widely disseminated among local governments and the provider community.

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

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or signifi-

cant reporting, record keeping or other compliance requirements on public or private entities in rural areas. The amendments are concerned with the reimbursement methodologies which OMRDD uses in determining the reimbursement of the affected developmental disabilities services or facilities. Since the amendments do not increase or decrease funding for the affected facilities or services, OMRDD expects that their adoption will not have adverse effects on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported budgets and costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

**Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with the reimbursement methodologies which OMRDD uses in determining the appropriate reimbursement of the affected developmental disabilities services or facilities. The amendments continue to reimburse the various facilities or services at current levels of reimbursements for the rate/fee periods beginning January 1, 2009. As discussed in the Regulatory Impact Statement, the amendments are not expected to have any adverse impacts on jobs or employment opportunities in New York State.

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

**ICF/DD Efficiency Adjustment**

**I.D. No.** MRD-03-09-00019-P

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

**Proposed Action:** Amendment of section 681.14 of Title 14 NYCRR.

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

**Subject:** ICF/DD efficiency adjustment.

**Purpose:** To promote efficiency and economy OMRDD is implementing an across the board reduction in reimbursement for operating costs.

**Text of proposed rule:** Subdivision 681.14(g) is amended as follows:

(g) Adjustments.

(1) Effective January 1, 2005 for Region II and III facilities, and effective July 1, 2005 for Region I facilities, there shall be an efficiency adjustment for under 31-bed facilities as described herein and applied as a reduction to reimbursable operating costs.

([1]i) A determination shall be made as to whether each provider has a per bed surplus or loss for all its under 31-bed facilities.

([i]a) Surplus/loss shall equal operating revenue minus operating costs.

([a]I) For purposes of this efficiency adjustment, operating revenue and costs are net of day treatment, day service, transportation, and regional FTE add-ons.

([b]2) Revenue for determining the surplus/loss calculations for all facilities in all regions is from the rate effective July 1, 2004.

([c]3) Costs for determining the surplus/loss calculations are from the 2001 or 2001-2002 cost reporting year, trended to 2004 or 2004-2005 dollars.

([ii]b) The value of the surplus/loss is divided by the total number of beds in all of the provider's under 31-bed facilities to determine the provider's per bed surplus/loss value.

([2]ii) Regional ranking of the per bed surplus/loss value.

([i]a) Within each of the three regions, the per bed surplus/loss values are ranked and identified in descending order.

([ii]b) Within each region, the ranking is divided into five groups.

Region I	Surplus/Loss Range (Per Bed)
Efficiency Group 5	\$17,498 to \$4,289
Efficiency Group 4	\$4,288 to \$523
Efficiency Group 3	\$522 to (\$2,986)

Efficiency Group 2	(\$2,987) to (\$7,465)
Efficiency Group 1	(\$7,466) to (\$42,035)

Region II	Surplus/Loss Range (Per Bed)
Efficiency Group 5	\$17,478 to \$6,354
Efficiency Group 4	\$6,353 to \$4,081
Efficiency Group 3	\$4,080 to \$873
Efficiency Group 2	\$872 to (\$5,343)
Efficiency Group 1	(\$5,344) to (\$16,087)

Region III	Surplus/Loss Range (Per Bed)
Efficiency Group 5	\$12,398 to \$7,216
Efficiency Group 4	\$7,215 to \$2,207
Efficiency Group 3	\$2,206 to (\$1,049)
Efficiency Group 2	(\$1,050) to (\$6,440)
Efficiency Group 1	(\$6,441) to (\$15,631)

([3]iii) Each of the five groups within each region is assigned an ordinal weight.

Group 5 = 5

Group 4 = 4

Group 3 = 3

Group 2 = 2

Group 1 = 1

([4]iv) Determination of total adjustment per facility.

([i]a) The number of beds in the facility is multiplied by its assigned ordinal weight and the result is multiplied by \$334.

([ii]b) The facility's reimbursable operating costs are reduced by the amount determined in subparagraph (i) of this paragraph.

([5]v) Reallocation of costs. The following changes to cost allocations for all under 31-bed facilities are effective January 1, 2005 for Region II and III facilities, and effective July 1, 2005 for Region I facilities.

([i]a) General insurance costs are reallocated from base year administration OTPS costs to base year support OTPS costs.

([ii]b) Property and casualty insurance costs are removed from base year administration OTPS costs. Property and casualty insurance costs from the appropriate cost report period are included in capital costs.

([iii]c) Expensed equipment costs from the base year cost report are included in support OTPS costs. Expensed equipment costs are not included in capital costs.

(2) *Effective April 1, 2009 for providers subject to reporting requirements governing Regions II and III and effective October 1, 2009 for providers subject to reporting requirements governing Region I, there shall be an efficiency adjustment for under-31 bed facilities of 3 per cent applied as a reduction to reimbursable operating costs. For purposes of appealing a rate, the effects of this efficiency adjustment shall not be construed as a basis for loss. In executing appeal procedures, OMRDD's determination of a provider's financial position shall be calculated net of the effects of this efficiency adjustment.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

**Additional matter required by statute:** Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has on file a Negative Declaration with respect to this Action. OMRDD has determined that the action herein will have no effect on the environment, and an E.I.S. is not needed.

**Regulatory Impact Statement**

1. Statutory Authority -

a. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction is stated in the New York State Mental Hygiene Law Section 13.09(b).

b. Section 43.02 of the Mental Hygiene Law grants the commissioner the authority to establish rates and fees for payment under the Medicaid program for facilities licensed by OMRDD and it requires the commissioner to adopt rules and regulations to effectuate Section 43.02.

2. Legislative Objectives - These amendments further the legislative

objectives embodied in the sections 13.09(b) and 43.02 of the Mental Hygiene Law.

3. Needs and Benefits - OMRDD is implementing a 3 percent across the board reduction in reimbursement for operating costs for all under thirty-one bed Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). The rationale for this measure derives from the nature of the current economy and OMRDD's perspective on the financial status of ICF/DDs in recent years.

OMRDD has historically increased providers' operating revenues on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement keep abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. For the last nine years, relatively robust economies have dictated annual trend factors ranging from 2.97 percent to 6.69 percent with an average of 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from those that gave impetus to the years of increased reimbursement. The recessionary nature and high unemployment that define the current economy suggest that inflation may be in check and that staff recruitment and retention achieved through additional monetary stimulus may not be required. Moreover, OMRDD expects that a contraction in the economy may signal a contraction in provider spending.

Recent consolidated fiscal report filings demonstrate that providers realizing a surplus outnumber those realizing a deficit. This finding coupled with the external economic environment suggests that the efficiency adjustment will not compromise delivery of service but could potentially better align reimbursement with costs.

#### 4. Costs -

a. There are no costs to providers of ICF/DD services to implement or comply with the proposed rule. However, providers in aggregate will experience a reduction in reimbursement of \$18 million. This reduction represents 3% of the total reimbursement for operating costs received by providers of ICF/DD services, which is \$600 million in aggregate.

b. There is a reduction in costs to the state and federal governments as a result of this fee schedule amendment. The aggregate reduction will be \$18 million, which represents \$9 million in federal funds and \$9 million in state funds.

c. There are no costs to local governments as a result of these specific amendments.

#### 5. Paperwork -

There will be no additional paperwork required as a result of these amendments. Providers will bill Medicaid for ICF/DD services in the same way they have always billed.

#### 6. Local Government Mandates -

a. There are no new requirements imposed on local governments by this amendment.

#### 7. Duplication -

a. The amendment does not duplicate any existing State or Federal requirement.

#### 8. Alternatives -

a. In its efforts to promote greater economy in the under thirty-one bed ICF/DDs, OMRDD had developed three alternatives to implementing an efficiency adjustment. These alternatives were discussed with provider representatives. OMRDD respectfully acquiesced to their expressed preference for this bottom line uniform cut in under thirty-one bed ICF/DDs.

#### 9. Federal Standards -

a. The amendment does not exceed any minimum standard of the federal government for the same or similar subject area.

#### 10. Compliance Schedule -

a. OMRDD intends to finalize and file the proposed amendment within and according to the timeframes provided by the State Administrative Procedure Act. (SAPA).

### **Regulatory Flexibility Analysis**

1. Types and number of small businesses and local governments rule applies -

a. These proposed regulatory amendments will apply to agencies which operate Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees would themselves be classified as small businesses. OMRDD estimates that approximately 111 ICF/DD provider agencies would be affected by the proposed amendments.

b. Local governments do not have a share of the Medicaid costs for ICF/DDs. There are no costs to local governments as a result of these specific amendments.

2. Reporting, record keeping, compliance requirements -

a. There will be no additional paperwork as indicated in the Regulatory Impact Statement. Providers will bill Medicaid for ICF/DD services in the same way they have always billed.

#### 3. Cost to implement and comply with this rule -

a. There are no costs to providers of ICF/DD services to implement or comply with the proposed rule. However, providers in aggregate will experience a reduction in reimbursement of \$18 million. This reduction represents 3% of the total reimbursement for operating costs received by providers of ICF/DD services, which is \$600 million in aggregate.

b. There is a reduction in costs to the state and federal governments as a result of this fee schedule amendment. The aggregate reduction will be \$18 million, which represents \$9 million in federal funds and \$9 million in state funds.

c. There are no costs to local governments as a result of these specific amendments.

4. Assessment of the economic and technological feasibility of compliance -

a. There is no new technology required by the rule.

5. How the rule is designed to minimize economic impact -

OMRDD is implementing a 3 percent across the board reduction in reimbursement for operating costs for all under thirty-one bed Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). The rationale for this measure derives from the nature of the current economy and OMRDD's perspective on the financial status of ICF/DDs in recent years.

OMRDD has historically increased providers' operating revenues on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement keep abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. For the last nine years, relatively robust economies have dictated annual trend factors ranging from 2.97 percent to 6.69 percent with an average of 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from those that gave impetus to the years of increased reimbursement. The recessionary nature and high unemployment that define the current economy suggest that inflation may be in check and that staff recruitment and retention achieved through additional monetary stimulus may not be required. Moreover, OMRDD expects that a contraction in the economy may signal a contraction in provider spending.

Recent consolidated fiscal report filings demonstrate that providers realizing a surplus outnumber those realizing a deficit. This finding coupled with the external economic environment suggests that the efficiency adjustment will not compromise delivery of service but could potentially better align reimbursement with costs.

#### 6. Small business and local government participation -

a. The Provider Associations were made aware of the proposed regulations on two separate occasions. The regulations were discussed and presentations made at meetings held in October 2008 and they had the opportunity to comment during the pre-submission period. The Provider Associations encompass numerous provider agencies from across New York State.

### **Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for the proposed amendment is not being submitted because the amendment will not impose any adverse economic impact on rural areas or on reporting, record keeping or other compliance requirements on public or private entities in rural areas.

OMRDD is implementing a 3 percent across the board reduction in reimbursement for operating costs for all under thirty-one bed Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). The rationale for this measure derives from the nature of the current economy and OMRDD's perspective on the financial status of ICF/DDs in recent years.

OMRDD has historically increased providers' operating revenues on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement keep abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. For the last nine years, relatively robust economies have dictated annual trend factors ranging from 2.97 percent to 6.69 percent with an average of 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from those that gave impetus to the years of increased reimbursement. The recessionary nature and high unemployment that define the current economy suggest that inflation may be in check and that staff recruitment and retention achieved through additional monetary stimulus may not be required. Moreover, OMRDD expects that a contraction in the economy may signal a contraction in provider spending.

Recent consolidated fiscal report filings demonstrate that providers realizing a surplus outnumber those realizing a deficit. This finding

coupled with the external economic environment suggests that the efficiency adjustment will not compromise delivery of service but could potentially better align reimbursement with costs.

**Job Impact Statement**

A Job Impact Statement for the proposed amendment is being submitted because, while it is not apparent from the nature and purpose of the rule that there may be a substantial adverse impact on jobs and/or employment opportunities, the potential for such impact exists, especially when coupled with other regulatory changes being proposed to effectuate budget savings.

The rule implements a three percent across the board reduction in reimbursement for operating costs for all under 31 bed Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). The rationale for this measure derives from the nature of the current economy and OMRDD's perspective on the financial status of ICF/DDs in recent years.

Specifically, as OMRDD historically increased providers' operating revenues on an annual basis an average of a 4.84 percent each year over the last nine years, this has resulted in many providers realizing a surplus as demonstrated by recent consolidated fiscal report filings. This finding, along with the external economic environment, suggests to OMRDD that the efficiency adjustment of a three percent reduction will not compromise delivery of service but could potentially better align reimbursement with costs. Additionally, OMRDD expects that a contraction in the economy may signal a contraction in provider spending which may result in a loss in employment opportunities.

While OMRDD will not dictate how each agency implements the three percent reduction, it anticipates that most or many agencies will realize the reduction by tapping into their surpluses or by other efficiencies. To the extent that any agency does reduce or eliminate jobs, they will be bound to maintain minimum staffing ratios for an ICF/DD at each facility.

ICF/DDs with fewer than 31 beds employ people in administration, clinical and direct care/support positions. All of these job categories could potentially be affected by this rule. There are approximately 862 jobs in the administration category for less than 31 bed ICF/DDs; approximately 1341 jobs in the clinical category and approximately 9457 jobs in the direct care/support category.

There are ICF/DDs with fewer than 31 beds throughout New York State. To the extent jobs are lost, it is not anticipated by OMRDD that a disproportionate adverse impact on jobs or employment opportunities will occur in any area or region of the state as a result of this rule.

OMRDD has minimized any unnecessary adverse impacts on existing jobs by giving ICF/DD providers maximum flexibility in how they will respond to this adjustment and has urged them to do so without impacting jobs. As stated in the Regulatory Impact Statement, the majority of ICF/DDs have surpluses. These surpluses and the slowing economy mean that ICF/DDs may be able to absorb the adjustment without any change in staffing and without significant cuts in spending. Where ICF/DDs do have to adjust spending, they may very well be able to accomplish necessary savings without impacting staffing levels.

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## Department of Motor Vehicles

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

**Repair Shop Review Board**

**I.D. No.** MTV-03-09-00010-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 82.16 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 398-f and 398(g)(2)

**Subject:** Repair Shop Review Board.

**Purpose:** Makes technical amendments related to the composition and role of the Repair Shop Review Board.

**Text of proposed rule:** Subdivisions (a) and (b) of section 82.16 are amended to read as follows:

(a) The commissioner shall establish a review board. Such board shall consist of persons who have engaged in the automotive repair shop business for at least five years representing the automobile repair shop

industry, persons who shall be laymen having no association with the automotive repair shop industry representing consumers, and persons who are attorneys admitted to practice in this State and who have no interest in or represent as an attorney an automotive repair shop. Members of the review board shall be appointed insofar as is practical to provide for representation of different geographic areas of the State, and shall serve in no other capacity in the Department of Motor Vehicles. The number of persons appointed to such review board shall be determined by the commissioner and shall be appointed to serve at his pleasure. [Five] Three persons, [two] one of whom shall be an automotive repair shop industry representative[s], [two] one of whom shall be a consumer representative[s], and one of whom shall be an attorney appointed pursuant to the provisions of this subdivision, shall as a panel review each appeal from a determination of the hearing officer. Such attorney shall serve as the chairman of such panel with respect to any such review. *At least two votes shall be required to take final action on each appeal.*

(b) The review board shall review and determine all appeals. [After such review, the board shall recommend to the commissioner whether to affirm, reverse or modify the initial determination of the hearing officer or to remand the case to a hearing officer to determine additional facts.] *Such determination may be to affirm, reverse or modify the initial determination of the hearing officer or to remand the case a further hearing to determine additional facts.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Carrie L. Stone, Department of Motor Vehicles, Counsel's Office, Room 526, 6 Empire State Plaza, Albany, NY 12228, (518) 474-0871

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

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

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

**Consensus Rule Making Determination**

Vehicle and Traffic Law (VTL) section 398-f (2) was amended by Chapter 55 of the Laws of 1992 to provide that the Repair Shop Review Board shall be comprised of: "Three persons, one of whom shall be automotive repair shop industry representatives[sic], one of whom shall be consumer representatives[sic], and one of whom shall be an attorney appointed pursuant to the provisions of this subdivision, shall as a panel review each appeal from a determination of the hearing officer."

Part 82.16 of the Commissioner's regulations was not amended to make the corresponding changes in relation to the composition of the Review Board.

Chapter 448 of the Laws of 1995 also amended section 398-f to provide that the commissioner of motor vehicles would no longer review the decisions of the Review Board. It further provided that the Board could affirm, reverse or modify the initial determination of the hearing officer. Part 82.16 was not amended to reflect this change in the Board's and commissioner's responsibilities.

Since this proposed regulation merely conforms Part 82.16 to the relevant statutory provisions, a consensus rulemaking is appropriate.

**Job Impact Statement**

A Job Impact Statement is not submitted with this proposed rule because it will have no adverse impact on job development in New York State.

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## Public Service Commission

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

**To Review Utility Tariff, Operating, and Infrastructure Changes to Reduce Electric Losses on Electric Delivery System**

**I.D. No.** PSC-03-09-00011-P

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

**Proposed Action:** The Commission is considering whether to adopt, modify or reject modifications to Rochester Gas and Electric Co.'s (RG&E) reactive power tariffs filed with the Commission on December 23, 2008.

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

**Subject:** To review utility tariff, operating, and infrastructure changes to reduce electric losses on electric delivery system.

**Purpose:** Reduce electric delivery losses to conserve energy statewide.

**Substance of proposed rule:** The Commission is considering a report and tariff revisions filed by Rochester Gas and Electric Corporation (RG&E) in compliance with Commission Orders in Case 08-E-0751 issued June 23 and July 17, 2008. The report identifies major sources of losses on RG&E's transmission and distribution system and identifies potential measures and programs available to mitigate those losses. The report also sets forth the basis for the development of a new RG&E reactive power tariff. In compliance with these Commission Orders, RG&E filed tariffs to establish a new reactive power rate of \$0.00127 per reactive kilovolt-ampere hour that would be applicable to all customers with demands greater than 300 kW in any three of the last twelve months. RG&E also proposes to adopt a 97% economic power factor correction level for billing purposes. The Commission may approve, reject or modify, in whole or in part, RG&E's report and proposed tariffs.

**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:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.state.ny.us

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

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

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

(08-E-0751SA2)

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

**To Review Utility Tariff, Operating, and Infrastructure Changes to Reduce Electric Losses on Electric Delivery Systems**

**I.D. No.** PSC-03-09-00012-P

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

**Proposed Action:** The Commission is considering whether to adopt, modify or reject modifications to Consolidated Edison Company of New York, Inc.'s (Con Edison) Rider T tariff, Volt-Ampere Reactive (VAR) Improvement Program filed with the Commission on December 23, 2008.

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

**Subject:** To review utility tariff, operating, and infrastructure changes to reduce electric losses on electric delivery systems.

**Purpose:** Reduce electric delivery losses to conserve energy statewide.

**Substance of proposed rule:** The Commission is considering a report and tariff revisions filed by Consolidated Edison Company of New York, Inc. (Con Edison) in compliance with Commission Orders in Case 08-E-0751 issued June 23 and July 17, 2008. The report identifies major sources of losses on Con Edison's transmission and distribution system and identifies potential measures and programs available to mitigate those losses. The report also sets forth the basis for the development of a new Rider T to Con Edison's volt-ampere reactive (VAR) power tariff. In compliance with these Commission Orders, Con Edison filed tariff amendments to establish a VARs improvement program applicable to full service and retail access customers. The Commission may approve, reject or modify, in whole or in part, Con Edison's proposed tariff and requests.

**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:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.state.ny.us

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

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

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

(08-E-0751SA5)

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

**To Review Utility Tariff, Operating, and Infrastructure Changes to Reduce Electric Losses on Electric Delivery Systems**

**I.D. No.** PSC-03-09-00013-P

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

**Proposed Action:** The Commission is considering whether to adopt, modify or reject modifications to Orange & Rockland Utilities, Inc.'s Rider O, Voltage Ampere Reactive (VAR) Improvement tariffs, filed with the Commission on December 23, 2008.

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

**Subject:** To review utility tariff, operating, and infrastructure changes to reduce electric losses on electric delivery systems.

**Purpose:** Reduce electric delivery losses to conserve energy statewide.

**Substance of proposed rule:** The Commission is considering a report and tariff revisions filed by Orange and Rockland (O&R) in compliance with Commission Orders in Case 08-E-0751 issued June 23 and July 17, 2008. The report identifies major sources of losses on O&R's transmission and distribution system and identifies potential measures and programs available to mitigate those losses. The report also sets forth the basis for the development of O&R's reactive power tariff. In compliance with these Commission Orders, O&R also filed tariff amendments to establish a reactive power rate applicable to Service Classification No. 8 – General Service Time of Use customers. O&R also proposes to adopt a 97% economic power factor correction level for billing purposes and to institute a reactive charge per reactive kilovolt-ampere hour of \$0.00127. The Commission may approve, reject or modify, in whole or in part, O&R's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.state.ny.us

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

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

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

(08-E-0751SA4)

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

**To Review Utility Tariff, Operating, and Infrastructure Changes to Reduce Electric Losses on Electric Delivery Systems**

**I.D. No.** PSC-03-09-00014-P

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

**Proposed Action:** The Commission is considering whether to adopt, modify or reject modifications to Central Hudson Gas & Electric Corporation's (CHG&E) reactive demand tariff revisions filed with the Commission on July 31, 2008.

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

**Subject:** To review utility tariff, operating, and infrastructure changes to reduce electric losses on electric delivery systems.

**Purpose:** Reduce electric delivery losses to conserve energy statewide.

**Substance of proposed rule:** The Commission is considering a report and tariff revisions filed by Central Hudson Gas & Electric Corporation (CHG & E) in compliance with Commission Orders in Case 08-E-0751 issued June 23 and July 17, 2008. The report identifies major sources of losses on CHG & E's transmission and distribution system and identifies potential measures and programs available to mitigate those losses. The report also sets forth the basis for the development of CHG & E's reactive power tariff. In compliance with these Commission Orders, CHG & E also filed tariff amendments, which include proposed changes to its Reactive Demand Tariffs and Charges for Service Class 3 – Large Power Primary Service customers and Service Class 13 – Large Power Substation and Transmission Service customers. The Commission may approve, reject or modify, in whole or in part, CHG & E's report and tariff proposal.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillinger, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillinger@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-E-0751SA6)

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

**Capacity Release Provisions**

**I.D. No.** PSC-03-09-00015-P

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

**Proposed Action:** The Commission is considering a proposal filed by National Fuel Gas Distribution (the company) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service - P.S.C. No. 8.

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

**Subject:** Capacity Release Provisions.

**Purpose:** To revise the company's capacity release provisions.

**Substance of proposed rule:** The Commission is considering a proposal filed by National Fuel Gas Distribution Corporation (National Fuel) to add a new tariff provision to enable Energy Services Companies to take release of the company's suitable, available pipeline capacity at the same weighted cost of capacity paid by the company's sales customers. The Commission may approve, reject or modify, in whole or in part, National Fuel's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillinger, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillinger@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-G-1503SA1)

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

**Interconnection of the Networks between Frontier of Rochester and Bandwith.com for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-03-09-00016-P

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

**Proposed Action:** The PSC is considering whether to approve or reject a proposal filed by Frontier Communications of Rochester for approval of an Interconnection Agreement with Bandwith.com CLEC, LLC executed on September 1, 2008.

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

**Subject:** Interconnection of the networks between Frontier of Rochester and Bandwith.com for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Frontier of Rochester and Bandwith.com.

**Substance of proposed rule:** Frontier Communications of Rochester and Bandwith.com CLEC, LLC have reached a negotiated agreement whereby Frontier Communications of Rochester and Bandwith.com CLEC, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their network lasting until September 1, 2009.

**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:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillinger, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillinger@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-C-1430SA1)

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

**To Review Utility Tariff, Operating, and Infrastructure Changes to Reduce Electric Losses on Electric Delivery Systems**

**I.D. No.** PSC-03-09-00017-P

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

**Proposed Action:** The Commission is considering whether to adopt, modify or reject Niagara Mohawk Power Corp., d/b/a National Grid, reactive power tariffs - PSC No. 207 SC-3, SC-3A.

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

**Subject:** To review utility tariff, operating, and infrastructure changes to reduce electric losses on electric delivery systems.

**Purpose:** Reduce electric delivery losses to conserve energy statewide.

**Substance of proposed rule:** The Commission is considering a report filed by Niagara Mohawk Power Corporation, d/b/a National Grid (Niagara Mohawk) in compliance with Commission Orders in Case 08-E-0751 issued June 23 and July 17, 2008. The report identifies major sources of losses on Niagara Mohawk's transmission and distribution system and identifies potential measures and programs available to mitigate those losses. The report also sets forth a basis not to develop changes to Niagara Mohawk's reactive power tariff and proposes a pilot to achieve loss savings by balancing load in the company's eastern region. The Commission may approve, reject or modify, in whole or in part, Niagara Mohawk's report and requests.

*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:* Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

*Data, views or arguments may be submitted to:* Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.state.ny.us

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

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

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

(08-E-0751SA3)

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## Department of State

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### EMERGENCY RULE MAKING

#### Continuing Education for Licensed Home Inspectors

**I.D. No.** DOS-03-09-00007-E

**Filing No.** 4

**Filing Date:** 2009-01-05

**Effective Date:** 2009-01-05

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

**Action taken:** Addition of Subpart 197-3 to Title 19 NYCRR.

**Statutory authority:** Real Property Law, section 444-f

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

**Specific reasons underlying the finding of necessity:** This rule was adopted on an emergency basis to preserve and enhance the public welfare. Article 12-B of the Real Property Law (Home Inspection Professional Licensing Act, which became effective December 31, 2005), requires that no person shall conduct a home inspection for compensation unless that person is licensed as a home inspector in accordance with requirements set forth in the statute, including meeting specific standards for education and experience. Further, § 444-f(1) of Article 12-B, requires that applicants for renewal of a license as a home inspector must complete a course of continuing education approved by the Secretary of State. Accordingly, to ensure that prospective applicants continue to meet the educational standards required for their profession, this rule has been adopted on an emergency basis. As such, it is similar to those required by other regulatory statutes, and provides a greater measure of assurance to the general public that home inspectors are qualified for licensure. As part of fulfilling its ongoing obligation to provide appropriate guidelines and standards for the profession, the state home inspection council has only recently adopted the number of course hours required for meeting the continuing education requirement, thus necessitating the adoption of this rule on an emergency basis.

**Subject:** Continuing education for licensed home inspectors.

**Purpose:** Establish standards for continuing education for licensed home inspectors.

**Text of emergency rule:** Subpart 197-3 is added to 19 NYCRR Part 197 to read as follows:

**SUBPART 197-3. HOME INSPECTION CONTINUING EDUCATION COURSES**

**Section 197-3.1 General requirements.**

(a) *Renewals.* For all home inspection licenses that expire prior to December 31, 2008, no renewal license shall be issued unless said licensee has completed 6 hours of approved continuing education within the two-year period immediately preceding such renewal. For all home inspection licenses that expire on or after December 31, 2008, no renewal license shall be issued unless said licensee has completed 24 hours of approved continuing education within the two-year period immediately preceding such renewal.

(b) *Course approval.* No offering of a course of study in the home inspection field for the purpose of compliance with the continuing education requirements of subdivision (a) of this section shall be acceptable for credit unless such course of study has been approved by the Department of State under the provisions of this Part.

**Section 197-3.2 Approved entities.**

Continuing education home inspection courses (herein referred to as "sponsors") may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency approved by the Commissioner of Education; public or private schools; and home inspection related professional societies and organizations. Types of instruction which shall not be acceptable as meeting continuing education requirements include such courses as:

(a) offerings in basic computer skills training, instructional navigation of the Internet, instructional use of generic computer software or industry specific report writing software, instruction in personal motivation, business marketing, salesmanship, radon and pests, and any other instruction that is unrelated to home inspection.

**Section 197-3.3 Request for approval of course of study.**

The following applies to courses to be presented in a class-room setting where the instructor is present with the class. Requests for approval of courses of study in the home inspection field to be given to satisfy the requirements for continuing education under the provisions of this Part shall be made 60 days before the proposed course is to be given. The request shall include the following:

- (a) name, address and telephone number of the applicant;
- (b) if applicant is a partnership, the names of the partners in the entity; if a corporation, the names of any persons who own five percent or more of the stock of the entity;
- (c) title of each course to be offered;
- (d) location of each course offered;
- (e) duration and time of each course offered;
- (f) procedure for taking attendance;
- (g) a detailed outline of the subject matter of each course or seminar. The outline shall contain the amount of time each segment of the course or seminar lasts, as well as the teaching techniques used in each segment. Each course or seminar will contain at least one hour of instruction, and at most 24 hours of instruction; and
- (h) description of materials to be distributed to the participants.

**Section 197-3.4 Program Approval.**

Sponsors of courses of study may file applications for approval within 30 days of the completion of that course. The sponsor conducting the program may not guarantee to licensees that approval will be granted. Advertisements of such courses of study must indicate that such approval is not guaranteed.

**Section 197-3.5 Successful completion of course.**

(a) Any course for continuing education shall be accepted for credit on the basis of attendance only. For those courses that have received pre-instruction approval from the Department of State, the course administrator must submit to the Department of State within 15 days of completion of the class, the names of all individuals who successfully complete the approved course together with the unique identification number assigned by the Department of State to all such individuals. For those courses that have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator must submit this information to the Department of State within 15 days of having been granted post-instruction approval by the Department of State.

(b) Evidence of successful completion of the course must be furnished to students in certificate form. The certificates must indicate the following: the name of the approved entity, the name of the course, the code number of the course, and that the student who shall be named has satisfactorily completed a continuing education course approved by the Department of State and the number of hours earned. The certificate must be signed and dated by the person authorized to sign certificates. For those courses that have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator shall provide this course certificate to qualified course attendees within 30 days of having received Department of State course approval.

**Section 197-3.6 Equivalency Credit.**

(a) A licensee who teaches an approved home inspection course pursuant to Subpart 197-2 of this Part or an approved course offered for continuing education shall be credited with two hours for each hour of actual teaching performed. Records of such teaching shall be maintained by the person or organization presenting the course and certified on forms prescribed by the Department of State. The records of such teaching shall be deemed records of attendance for all purposes of these rules. Credit shall not be awarded for teaching the same course more than once in a license cycle. Instructors must submit evidence of such teaching experience with an equivalency application as prescribed by the Department of State.

(b) Individuals who complete a course of study offered outside of the State of New York, which course has not been approved by the Department of State, may file a request to the Department to have such course count as credit toward their New York continuing education requirement. All applications for such consideration must be submitted with official documentation of satisfactory completion and the official descriptions of the course of study as prescribed by the Department of State. Upon receipt of such a request, the Department of State will review and evaluate the out-of-state course to determine if all or a portion of the course may be credited toward the applicant's New York continuing education requirement. Within 30 days of receipt of a request, the Department of State will approve or deny the request for New York continuing education credit.

(c) All applications for and evidence of equivalency credit must be submitted to the Department of State for consideration at least 30 days prior to the expiration of the license.

**Section 197-3.7 Extension of time to complete courses.**

The Department of State may grant an extension to any licensee who evidences bona fide hardship precluding completion of the continuing education requirements prior to the time the renewal application is to be filed. A licensee seeking such an extension shall submit a written request, together with the evidence demonstrating such hardship. Within 30 days of receipt of a request, the Department of State will notify the licensee whether their request for an extension has been granted or denied.

**Section 197-3.8 Computation of instruction time.**

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling 60 minutes.

**Section 197-3.9 Attendance and Record Retention.**

(a) No licensed person shall receive credit for any course presented in a class-room setting if he or she is absent from the class room, during any instructional period, for a period or periods totaling more than 10 percent of the time prescribed for the course pursuant to section 197-3.3(g) of this Part, and no licensed person shall be absent from the class room except for a reasonable and unavoidable cause.

(b) The person or organization conducting the course shall certify to the Department of State the name of each licensed person who successfully completed the course of study and his or her unique identification number as assigned by the Department of State, and shall maintain its attendance records and a copy of such report for three years and, in addition, shall maintain the following records concerning the course:

(1) the approval number issued by the Department of State for the course;

(2) title and description of the course;

(3) the dates and hours the course was given; and

(4) the names and Unique Identification numbers of the persons who took the course and whether they completed it successfully.

**Section 197-3.10 Policies concerning course cancellation and tuition refund.**

Any educational institution or other organization requesting from the Department of State approval for home inspection courses must have a policy relating to course cancellation and tuition refunds. Such policy must be provided in writing to prospective students prior to the acceptance of any fees.

**Section 197-3.11 Auditing.**

A duly authorized designee of the Department of State may audit any course offered and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

**Section 197-3.12 Change in approved course of study.**

There shall be no change or alteration in any approved course of study without prior written notice to, and approval by, the Department of State.

**Section 197-3.13 Suspensions and denials of school approval.**

The Department of State may deny, suspend or revoke the approval of a home inspection school, if it is determined that it is not in compliance with the law and rules. If disciplinary action is taken, a written order of suspension, revocation, or denial of approval will be issued. Anyone who objects to such denial, suspension or revocation shall have the opportunity to be heard by the Secretary of State or his or her designee pursuant to Real Property Law section 444-i.

**Section 197-3.14 Open to public.**

All courses approved pursuant to this Part shall be open to all members of the public regardless of the membership of the prospective student in any home inspection professional society or organization.

**Section 197-3.15 Facilities.**

Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course.

**Section 197-3.16 Faculty.**

(a) Each instructor for an approved home inspection course of study must be approved by the Department of State. To be approved, an instructor must submit an application along with a resume reflecting three years of experience as a home inspector during which time the applicant has completed at least 250 home inspections.

(b) An instructor who does not qualify under subdivision (a) of this section may be approved as a technical expert if the instructor submits an application and resume establishing, to the satisfaction of the Department of State, that the applicant is an expert in and has at least three years' experience in a specific technical subject related to home inspection. Approval by the Department of State shall specify the subject(s) within the home inspection course or course module for which approval is given.

**Section 197-3.17 Continuing education credit.**

No continuing education course will be considered for continuing education credit more than once within the two year cycle of renewal.

**Section 197-3.18 Registration period.**

Each registration or renewal period for approved programs or courses shall be for 12 months or a part thereof, said period to commence on January 1 or date thereafter and to continue until December 31.

**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 4, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Linda D. Cleary, Esq., Department of State, Division of Licensing Services, 80 South Swan Street, P.O. Box 22001, Albany, NY 12231, (518) 473-2728

**Regulatory Impact Statement**

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, enacted as Chapter 461 of the Laws of 2004, and amended by Chapter 225 of the Laws of 2005, provides that no person shall perform a home inspection for compensation unless that person is licensed as a home inspector. The statute sets forth minimum standards of education and experience required to obtain a license as a home inspector. These include the successful completion of an extensive course of study of not less than one hundred forty hours, including at least forty hours of field-based inspections in the presence of a licensed home inspector, professional engineer or architect; performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination.

Real Property Law, § 444-f(1) provides that licenses for home inspectors shall be valid for two years and are subject to renewal only after successful completion of a course of continuing education approved by the Secretary of State in consultation with the home inspection council. This rule fulfills that obligation by outlining the continuing education requirements for home inspectors and setting appropriate standards for approval of home inspection courses. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

In enacting Article 12-B of the Real Property Law, the legislature emphasized the significant role played by home inspectors and the reliance consumers place upon their reports in purchasing homes, especially when encouraged to do so by mortgage lenders. Recognizing that not all persons providing this service may be reliable, this legislation was enacted to provide additional assurance to consumers that those individuals performing such inspections are qualified to do so. The statute sets minimum standards for the home inspection profession, which include an extensive course of study of not less than one hundred forty hours, including at least forty hours of field based inspections in the presence of a licensed home inspector, professional engineer or architect; the performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination. In addition, all applicants for renewal of a license must have successfully completed a course of continuing education approved by the Secretary of State.

Thus, Article 12-B was designed to "protect the public," especially from those who present themselves as qualified professionals without the necessary education and experience. This rule re-enforces the stated objectives of the Legislature when it enacted Article 12-B by providing appropriate standards for maintaining the skills required by professional home inspectors.

3. Needs and benefits:

Real Property Law § 44-f(1) requires all home inspectors seeking renewal of their licenses to have successfully completed a course of continuing education approved by the Secretary of State, in consultation with the home inspection council. Created by statute, the home inspection council is an advisory board that advises the Secretary of State on the need for certain regulatory action, including continuing education. The home inspection council has advised the Secretary of State that this rule making is necessary to ensure that all home inspectors who apply for renewal of their licenses will have had the opportunity to meet the statutory continuing education requirement.

The rule making will pro rate the continuing education requirement for certain licensees. Licensees whose licenses expire prior to December 31, 2008 will have to complete six hours of approved continuing education. Those whose licenses expire on or after December 31, 2008 will be required to complete the full 24 hours of continuing education.

In addition, consumers benefit from the assurance that persons hired to inspect the homes they purchase continue to meet the qualifications and experience needed to render professional service.

4. Costs:

a. Costs to regulated parties:

Licensees seeking renewal will be required to pay the cost of attending and completing an approved course of study for the required number of hours. The Department has conferred with several education providers throughout the State and estimates that course providers will charge an average of \$480 for 24 hours of continuing education courses. Based on a review of continuing education fees currently being charged by course providers, the Department of State determined that each continuing education unit costs a student approximately \$20.00 per credit; or \$480 for 24 hours of continuing education.

b. Costs to the Department of State:

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

c. Costs to State and local governments:

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

5. Local government mandates:

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

6. Paperwork:

The rule requires that each applicant seeking renewal of a home inspector's license obtain and retain certificates as evidence of the successful completion of the required number of hours of continuing education.

7. Duplication:

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

8. Alternatives:

During regular meetings, the state home inspection council reviewed and considered various proposals for compliance with the statutory mandate for continuing education standards, ultimately recommending approval of the number of hours, courses of study, and methods of ensuring compliance adopted by this rule. The home inspection council considered waiving the continuing education requirement completely, or reducing the requirement to a de minimus amount. The Department, in consultation with the council determined that six hours of continuing education was appropriate for those whose licenses expire prior to December 31, 2008, insofar as it provides an accommodation to those licensees, while providing protections to consumers by guaranteeing that all licensed home inspectors complete an appropriate amount of continuing education.

9. Federal standards:

There are currently no federal standards requiring continuing education courses for licensed home inspectors.

10. Compliance schedule:

Applicants for renewal of a home inspector's license have two years in which to comply with the continuing education requirement, with a prorated reduction for renewal of licenses expiring less than two years from the effective date of this rule. The Department of State maintains a list on its website of approved continuing education providers, with their relevant contact information to assist licensees to locate approved continuing education courses. Therefore, regulated parties will be on notice of, and have adequate time to comply with, the requirements imposed by the proposed rule making.

McKinney's Session Laws of New York, 2005, p. 1951.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The rule affects all licensed home inspectors (individuals, firms, companies, partnerships, limited liability companies, or corporations) who seek renewal of a home inspector's license. Each such applicant will be required to expend the time and incur the costs of attending the required number of hours needed for successful completion of an approved course of continuing education, and obtain a certificate as evidence of successful completion of that requirement. However, it is not anticipated that this requirement will place an undue financial burden, or impose a hardship for those applicants seeking to maintain their qualifications for providing professional services to consumers.

The rule does not apply to local governments.

2. Compliance requirements:

Applicants seeking renewal of their licenses will be required to attend

and complete an approved course of study of continuing education, and obtain certificates as proof of the successful completion of these courses.

3. Professional services:

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

4. Compliance costs:

It is anticipated that small businesses will incur only the costs of any fees required for attending and completing an approved course of continuing education. It is estimated that the cost of completing 24 hours of continuing education will be \$480 per licensee.

5. Economic and technological feasibility:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs or require technical expertise as a result of implementation of this rule.

6. Minimizing adverse economic impact:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs as a result of implementation of this rule.

7. Small business and local government participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council are diverse and include owners of small businesses. The subject matter of the proposed rule was further discussed at meetings of the home inspection council which were open to public comment.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

This rule applies equally to all licensed home inspectors in all areas of the state—urban, suburban and rural. The rule does not apply to public entities located in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Reporting and recordkeeping requirements include the obligation of all applicants seeking renewal of their licenses to maintain course completion certificates as proof of completing the required continuing education. Applicants for renewal of a home inspector's license in rural areas will not need to employ any additional professional services in order to comply with this rule.

3. Costs:

Other than the estimated cost of \$480 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any costs of compliance as a result of this rule.

4. Minimizing adverse impact:

Other than the estimated cost of \$480 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance.

5. Rural area participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council represent geographically diverse areas including rural areas of New York State. In addition, the subject matter of the proposed rule was discussed during open meetings of the home inspection council and which were open to public comment.

**Job Impact Statement**

This rule will not have any substantial adverse impact on jobs and employment opportunities. As a result of enactment of Article 12-B of the Real Property Law, which became effective December 31, 2005, any person performing a home inspection for compensation in this state must obtain a license. Licenses are valid for two years, and may be renewed only upon successful completion of an approved course of continuing education. Inasmuch as this rule affects only those licensed home inspectors who seek renewal of license, it promotes employment opportunities by ensuring that only those qualified to provide this service will be licensed.

## Workers' Compensation Board

### EMERGENCY RULE MAKING

#### Pharmacy and Durable Medical Equipment Fee Schedules

**I.D. No.** WCB-03-09-00006-E

**Filing No.** 3

**Filing Date:** 2009-01-02

**Effective Date:** 2009-01-02

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

**Action taken:** Addition of Parts 440 and 442 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117, 13 and 13-o

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

**Specific reasons underlying the finding of necessity:** Claimants are unduly burdened by having to pay out-of-pocket for prescription medications thus reducing the amount of benefits available to them to pay for cost of living expenses.

**Subject:** Pharmacy and durable medical equipment fee schedules.

**Purpose:** To adopt pharmacy and durable medical equipment fee schedules.

**Substance of emergency rule:** Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 450 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances where an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills

for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets forth that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 1, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Esq., NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

#### Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment.

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and durable medical equipment. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to designate a pharmacy or pharmacy network which requires claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network.

This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days. This section describes how carriers will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation concurrently. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs and durable medical equipment.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement and pharmacy or network notification, the savings afforded to carriers and self-insured employers will be substantially the same for local governments.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. The notice posted by pharmacies will include the contact information for the listed carriers. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

#### **Regulatory Flexibility Analysis**

##### **1. Effect of rule:**

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills or durable medical equipment bills if they object to any such bills. This process is required by statute. This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if

they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small business and local government by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

##### **2. Compliance requirements:**

Self-insured municipal employers, self-insured non-municipal employers are required by statute to file objections to prescription drug bills or durable medical equipment bills within a forty five day time period if they object to the bill, otherwise they will be liable to pay for the bill if the objection is not timely filed. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

##### **3. Professional services:**

It is believed that no professional services will be needed to comply with this rule.

##### **4. Compliance costs:**

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that utilizes a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

##### **5. Economic and technological feasibility:**

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is one source for average whole sale prices and it can be obtained for less than \$100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

##### **6. Minimizing adverse impact:**

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

##### **7. Small business and local government participation:**

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

***Rural Area Flexibility Analysis***

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills or durable medical equipment bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

***Job Impact Statement***

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.