

# 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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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

#### Educational Stability of Foster Children, Transition Planning and Relative Involvement in Foster Care Cases

**I.D. No.** CFS-27-10-00003-E

**Filing No.** 626

**Filing Date:** 2010-06-17

**Effective Date:** 2010-06-17

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

**Action taken:** Amendment of sections 421.24(c)(19), 428.3(b)(2)(iii), (iv), 428.5(c)(6), (10)(viii), 430.11(c)(1), (2) and 430.12(c); and addition of sections 428.3(b)(2)(v), 430.11(c)(2)(ix), (4), 430.12(c)(4) and (j) to Title 18 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The regulations must be filed on an emergency basis to prevent the loss of federal funding that supports the health, safety and welfare of the children in foster care, children receiving adoption assistance and families receiving child welfare services.

**Subject:** Educational stability of foster children, transition planning and relative involvement in foster care cases.

**Purpose:** The regulations implement the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351).

**Text of emergency rule:** Paragraph (19) of subdivision (c) of section 421.24 is amended to read as follows:

(19) The social services official on *an annual* [a biennial] basis in a written notification must remind the adoptive parents of their obligation to support the adopted child and to notify the social services official if the adoptive parents are no longer providing any support or are no longer legally responsible for the support of the child. *Where the adopted child is school age under the laws of the state in which the child resides, such notification must include a requirement that the adoptive parents must certify that the adopted child is a full-time elementary or secondary student or has completed secondary education. For the purposes of this paragraph, an elementary or secondary school student means an adopted child who is: (i) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (ii) instructed in elementary or secondary education at home, in accordance with the laws in which the adopted child's home is located; (iii) in an independent study elementary or secondary education program, in accordance with the laws in which the adopted child's education program is located, which is administered by the local school or school district; or (iv) incapable of attending school on a full-time basis due to the adopted child's medical condition, which incapacity is supported by annual information submitted by the adoptive parents as part of this certification.*

Subparagraphs (iii) and (iv) of paragraph (2) of subdivision (b) of section 428.3 are amended and a new subparagraph (v) is added to read as follows:

(iii) educational and/or vocational training reports or evaluations indicating the educational goals and needs of each foster child, including school reports and Committee on Special Education evaluations and/or recommendations; [and]

(iv) if the child has been placed in foster care outside of the state, a report prepared every six months by a caseworker employed by either the authorized agency with case management and/or case planning responsibility for the child, the state in which the placement home or facility is located, or a private agency under contract with either the authorized agency or other state, documenting the caseworker's visit(s) with the child at his or her placement home or facility within the six-month period; *and*

(v) *the child's transition plan prepared in accordance with the standards set forth in section 430.12(j) of this Title.*

Paragraph (6) of subdivision (c) of section 428.5 is amended to read as follows:

(6) description of contacts with educational/vocational personnel on behalf of the child, *including, but not limited to, contacts made with school personnel in accordance with sections 430.11(c)(1)(i) and 430.12(c)(4) of this Title;*

Subparagraph (viii) of paragraph (10) of subdivision (c) of section 428.5 is amended to read as follows:

(viii) any information acquired about an absent or non-respondent parent that is in addition to information recorded pursuant to section 428.4(c)(1) of this Part, [and] the results of an investigation into the location of any relatives, including grandparents of a child subject to article 10 of the Family Court Act or section 384-a of the Social Services Law, *and the efforts to identify and provide notification to grandparents and other adult relatives in accordance with the requirements of section 430.11(c)(4) of this Title;*

Subparagraph (i) of paragraph (1) of subdivision (c) of section 430.11 is amended to read as follows:

(1)(i) Standard. Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents, or to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child's service needs can only be met in another available setting at the same or lesser level of care. *The placement of the child into foster care must take into account the appropriateness of the*

child's existing educational setting and the proximity of such setting to the child's placement location. When is it in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school.

Subparagraph (viii) of paragraph (2) of subdivision (c) of section 430.11 is amended, subparagraph (ix) is renumbered as subparagraph (x) and a new subparagraph (ix) is added to read as follows:

(viii) if the child has been placed in a foster care placement a substantial distance from the home of the parents of the child or in a state different from the state in which the parent's home is located, the uniform case record must contain documentation why such placement is in the best interests of the child; [and]

(ix) show in the uniform case record that efforts were made to keep the child in his or her current school, or where distance was a factor or the educational setting was inappropriate, that efforts were made to seek immediate enrollment in a new school and to arrange for timely transfer of school records; and

(x) if the child has been placed in foster care outside of the state in which the home of the parents of the child is located, the uniform case record must contain a report prepared every six months by a caseworker employed by the authorized agency with case management and/or case planning responsibility over the child, the state in which the home is or facility is located, or a private agency under contract with either the authorized agency or other state documenting the caseworker's visit to the child's placement within the six-month period.

Paragraph (4) of subdivision (c) of section 430.11 is added to read as follows:

(4) Within 30 days after the removal of a child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by section 384-a of the Social Services Law, the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with the paragraph must be recorded in the child's uniform case record as required by section 428.5(c)(10)(viii) of this Title.

Paragraph (4) of subdivision (c) of section 430.12 is amended and renumbered paragraph (5) and a new paragraph (4) is added to read as follows:

(4) Education. (i) Standard. The social services district with care and custody or guardianship and custody of a foster child who has attained the minimum age for compulsory education under the Education Law is responsible for assuring that the foster child is a full-time elementary or secondary school student or has completed secondary education. For the purpose of this paragraph, an elementary or secondary school student means a child who is: (a) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (b) instructed in elementary or secondary education at home, in accordance with the laws in which the foster child's home is located; (c) in an independent study elementary or secondary education program, in accordance with the laws in which the foster child's education program is located, which is administered by the local school or school district; or (d) incapable of attending school on a full-time basis due to the foster child's medical condition, which incapability is supported by regularly updated information in the child's uniform case record.

(ii) Documentation. The progress notes for each school age child in foster care must reflect either the education program in which the foster child is presently enrolled or is enrolling; or the date the foster child

completed his or her compulsory education; or where the child is not capable of attending school on a full-time basis, what the medical condition is and why such condition prevents full-time attendance. The social services district must update the progress notes on an annual basis to reflect why such medical condition continues to prevent the foster child's full-time attendance in an education program. On an annual basis, by the first day of each October, the education module in CONNECTIONS must be updated with education information about each school age foster child in the form and manner as required by the Office.

(5) [(4)] Discharge planning. (i) Standard. For any child age 18 or under who is discharged from foster care, the district [shall] must consider the need to provide preventive services to the child and his or her family subsequent to [his] the child's discharge.

(ii) Documentation. The uniform case record form to be completed upon discharge of the child [shall] must show either the recommended type of preventive services and the district's attempts to provide or arrange for these services, or the reasons why these services are deemed unnecessary.

Subdivision (j) of section 430.12 is added to read as follows:

(j) Transition plan. Whenever a child will remain in foster care on or after the child's eighteenth birthday, the agency with case management, case planning or casework responsibility for the foster child must begin developing a transition plan with the child 180 days prior to the child's eighteenth birthday or 180 days prior to the child's scheduled discharge date where the child is consenting to remain in foster care after the child's eighteenth birthday. The transition plan must be completed 90 days prior to the scheduled discharge. Such plan must be personalized at the direction of the child. The transition plan must include specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services. The transition plan must be as detailed as the foster child may elect.

**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 September 14, 2010.

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

#### Regulatory Impact Statement

##### 1. Statutory authority

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its duties pursuant to the provisions of the SSL.

Section 34(3) (f) of the SSL requires the Commissioner of OCFS to promulgate regulations for the administration of public assistance and care within the state.

##### 2. Legislative objectives

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008.

##### 3. Needs and benefits

The regulations will reduce disruption experienced by a child when removed from the child's home and placed into foster care and will enhance continuity in the child's environment.

Regarding the relationship of the child with his or her relatives, the regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to relatives to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. The regulations take into consideration the safety of the child by excluding the need to notify any relative who has a history of family or domestic violence.

The regulations address the need to minimize disruption by requiring the social services district to assess the proximity of the foster care placement to the school the child attended before placement into foster care and the appropriateness of the child remaining in that school upon entry into foster care. Where it is not in the best interests of the child to attend such school, the regulations require the social services district to work with the appropriate local school officials to see that the child is immediately enrolled in a new school.

The regulations also support the preparation of the foster child to transition out of foster care. One of the fundamental needs of any child is his or her education. The regulations clarify that each foster child of school age must either be enrolled in an appropriate educational setting, unless the

child is incapable of attending school, or has completed his or her secondary education. The regulations impose a similar requirement in regard to a child who is in receipt of an adoption subsidy and is of school age. The regulations implement section 204 of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 that amended 42 U.S.C. § 671(a)(30) to provide that States must provide assurances that each school age child receiving Title IV-E foster care or adoption assistance payments is either a full-time elementary or secondary school student, has completed secondary education or is not capable of attending school due to a documented medical condition. This requirement that applies to both foster and adopted children is also reflected in instructions provided to the States by the federal Department of Health and Human Services in Program Instruction ACYF-CB-PI-08-05 issued on October 23, 2008.

The regulations support the transition of older foster children out of foster care by requiring the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. This plan must be developed to meet the needs of the particular foster child, with such child's input. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. Such plan must address such basic post discharge issues as housing, health insurance, education, supports services and employment.

#### 4. Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoption Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained in the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to New York's statewide automated child welfare information system, called CONNECTIONS. As defined in 18 NYCRR 466.2(a), the CONNECTIONS system is administered by OCFS and contains data elements required by applicable State and federal statutes and regulations relating to the provision of child welfare services, including foster care, adoption assistance, adoption services, preventive services, child protective services and other family preservation and family support services. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

#### 5. Local government mandates

The regulations require social services districts to carry out functions similar to those they already have been obligated by State statute and OCFS regulations to perform. Current OCFS regulation 18 NYCRR 430.11(c) requires the social services district placing a child into foster care, whenever possible, to place the child in a foster care setting that permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents. OCFS regulation 18 NYCRR 430.10(b) currently requires the social services district that is contemplating the placement of a child into foster care to attempt, prior to placement, to locate adequate alternative living arrangements with a relative or family friend which would enable the child to avoid placement into foster care. Section 1017 of the Family Court Act and section 384-a of the SSL currently provide that when a child is to be removed from his or her home, the social services district must identify and discuss with such relative, including grandparents, available options to function as the child's foster parent or to assume direct legal custody of the child. The social services district must also notify the relative that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful.

Social services districts are obligated pursuant to section 409-e of the SSL and OCFS regulations 18 NYCRR Part 428 and 430.12 to develop

for each foster child a family assessment and service plan that addresses the needs of the child, including those related to education and the preparation of the child for discharge from foster care. These standards also presently require that foster children over the age of 10 be invited to participate in such planning.

#### 6. Paperwork

The regulations require the recording of the actions taken by the social services district or voluntary authorized agency with case management responsibility in meeting the standards referenced above. Such documentation will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

#### 7. Duplication

The regulations do not duplicate other state or federal requirements. The regulations build on related existing requirements.

#### 8. Alternative approaches

Given the mandates imposed by the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) and the adverse financial consequences for non-compliance, there is no viable alternative to implementing the regulations.

#### 9. Federal standards

Each of the regulatory amendments reflects requirements imposed by the federal Foster Connections to Success and Increasing Adoptions Act of 2008. The regulatory changes relating to relatives and education are federally mandated under Title IV-E of the Social Security Act. New York State must demonstrate that it has implemented such standards in order to have a compliant Title IV-E State Plan which is a condition for New York to continue to receive federal funding for foster care and adoption assistance. The regulatory change relating to the transition plan for aging out foster children is federally mandated under Title IV-B, Subpart 1 of the Social Security Act. New York must demonstrate that it has implemented such standard in order to have a compliant Title IV-B State Plan which is a condition for New York to continue to receive federal child welfare services funding.

#### 10. Compliance schedule

Compliance with the regulations would take effect upon adoption.

### **Regulatory Flexibility Analysis**

#### 1. Effect on Small Businesses and Local Governments

Social service districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social service districts to provide foster care, will be affected by the regulations. There are 58 social service districts and approximately 160 voluntary authorized agencies.

#### 2. Compliance Requirements

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to the relatives to become the child's foster parent or to otherwise care for the child and any option that may be lost by the failure of the relatives to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives who have a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities or mentors and continuing support services, and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that same school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child will be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school or have completed secondary education. The regulations impose a similar requirement post discharge from foster care for a child who is school age and is in receipt of an adoption subsidy.

### 3. Professional Services

It is anticipated that the requirements imposed by the regulations will be implemented by existing case work staff.

### 4. Compliance Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adopted children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

### 5. Economic and Technological Feasibility

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

### 6. Minimizing Adverse Impact

The standards set forth in the regulations reflect mandates imposed on the states by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. Implementation is necessary for New York to continue to be eligible to receive federal funding for foster care, adoption assistance child welfare services and the administration thereof, as required by Title IV-B and title IV-E of the Social Security Act. The regulations do not go beyond the scope of the federal mandates.

### 7. Small Business and Local Government Participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each of the local department of social services in the State of New York of the amendments to OCFS regulations that are necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the OCFS regulations was provided along with a contact person if the local commissioners or their staff had any questions.

### *Rural Area Flexibility Analysis*

#### 1. Types and estimated number of rural areas

Social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social services districts to provide foster care will be affected by the regulations. There are 44 social services districts and the St. Regis Mohawk Tribe that are in rural areas. Currently, there are also approximately 100 voluntary authorized agencies in rural areas of New York State.

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

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the option available to the relative to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives with a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities for mentors and continuing support services and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school, or have completed secondary education. The proposed regulations would impose a similar requirement post discharge from foster care in regard to a school age child who is in receipt of an adoption subsidy.

### 3. Costs

Each of the regulatory amendments is required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these amendments. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan, and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported in CONNECTIONS.

### 4. Minimizing adverse impact

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

### 5. Rural area participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each local department of social services in the State of New York of the amendments to OCFS regulations necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the regulations was provided along with a contact person if the local commissioners or their staff had any questions.

**Job Impact Statement**

A full job impact statement has not been prepared for the regulations. The amendments will not result in the loss or creation of any jobs.

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## Education Department

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

**Charter Schools**

**I.D. No.** EDU-27-10-00010-P

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

**Proposed Action:** Amendment of section 3.16 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 206 (not subdivided), 207 (not subdivided), 305(1), (2) and (20) and 2852(7)

**Subject:** Charter schools.

**Purpose:** Delegates to the Commissioner authority to approve charter revisions, with certain exceptions, pursuant to Education Law section 2852(7).

**Text of proposed rule:** Section 3.16 of the Rules of the Board of Regents is amended, effective October 6, 2010, as follows:

§ 3.16 Delegation of authority with respect to charter schools.

(a) Complaints against charter schools. The Board of Regents delegates to the Commissioner of Education the authority to receive, investigate and respond to complaints presented to the Board of Regents pursuant to Education Law section 2855(4), the authority to issue appropriate remedial orders pursuant to Education Law section 2855(4), and the authority to place a charter school on probationary status and to develop and impose a remedial action plan pursuant to Education Law section 2855(3).

(b) Hearings. The Board of Regents delegates to the Commissioner of Education the authority to conduct and hold public hearings to solicit comments from the community in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a).

(c) Charter revisions.

(1) *The Board of Regents delegates to the Commissioner of Education the authority to approve, on behalf of the Board of Regents, proposed revisions of a charter pursuant to Education Law section 2852(7), except for proposed revisions relating to:*

- (i) *educational philosophy, mission or vision;*
- (ii) *governance or leadership structure;*
- (iii) *the curriculum model or school design changes that are inconsistent with that approved in the current charter;*
- (iv) *hiring or termination of a management company;*
- (v) *school name;*
- (vi) *location, if such revision results in relocation to another school district;*
- (vii) *maximum enrollment, as set forth in the current charter; and/or*
- (viii) *grades served, as set forth in the current charter.*

(2) *Notwithstanding the provisions of paragraph (1) of this subdivision, revisions relating to subparagraphs (i) through (iii) of such paragraph that are determined by the commissioner not to be significant may be approved by the commissioner pursuant to this delegation of authority.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** John B. King, Jr. Senior Deputy Commissioner for P-12, State Education Department, State Education Building, Room 125, 89 Washington Avenue, Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

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

**Regulatory Impact Statement**

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 206 authorizes the Regents, any committee thereof, the Commissioner, the deputy and any associate and assistant commissioner of education and the counsel of the State Education Department to take testimony or hear proofs relating to their official duties, or in any matter which they may lawfully investigate.

Education Law section 207 empowers the Regents and Commissioner to adopt rules and regulations to carry out the State laws regarding education and the functions and duties conferred on the Department.

Education Law section 305(1) provides that the Commissioner is the chief executive officer of the State system of education and of the Board of Regents, and charged with the enforcement of all general and special laws relating to the educational system of the State and the execution of all educational policies determined by Regents. Section 305(2) provides that the Commissioner shall have general supervision over all schools and institutions subject to the Education Law or any statute relating to education. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 2852(7) requires that charter revision be approved by the Board of Regents.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to delegate to the Commissioner of Education the authority of the Board of Regents to approve revisions to the charters of public charter schools, with certain specified exceptions, pursuant to Education Law section 2852(7).

NEEDS AND BENEFITS:

The proposed amendment is necessary to delegate to the Commissioner of Education the authority of the Board of Regents to approve revisions, with certain specified exceptions, to the charter of public charter schools. Having the Board of Regents approve all revisions, including revisions that do not fundamentally affect the school's missions, organizational structure or educational program, and other such changes, is not deemed to be the most appropriate and efficacious means to address these matters, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation to the Commissioner of the Board's authority to approve charter revisions, with certain specified exceptions, will provide for the most efficient and expeditious means to approve and issue charter revisions.

Authority to approve revisions concerning the following would be retained by the Board of Regents and not delegated to the Commissioner:

- (1) educational philosophy, mission or vision;
- (2) governance or leadership structure;
- (3) the curriculum model or school design changes that are inconsistent with that approved in the current charter;
- (4) hiring or termination of a management company;
- (5) school name;
- (6) location, if such revision results in relocation to another school district;
- (7) maximum enrollment, as set forth in the current charter; and/or
- (8) grades served, as set forth in the current charter.

The proposed amendment would authorize the Commissioner to

approve revisions concerning items (1) through (3) above, provided that the revisions are determined by the Commissioner not to be significant.

**COSTS:**

(a) Costs to State government: none.

(b) Costs to local government: none.

(c) Cost to private regulated parties: none. The proposed amendment does not affect any private regulated parties.

(d) Cost to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment merely delegates to the Commissioner the authority to approve charter revisions, with certain specified exceptions, and does not impose any additional costs to the State, local government and the State Education Department beyond those inherent in Article 56 of the Education Law.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment does not impose any program, service, duty or responsibility upon school districts, charter schools or other local governments. It merely delegates to the Commissioner the authority to approve charter revisions, with certain specified exceptions.

**PAPERWORK:**

The proposed amendment does not impose any additional reporting, record keeping or other paperwork requirements upon school districts or charter schools. It merely delegates to the Commissioner the authority to approve charter revisions, with certain specified exceptions.

**DUPLICATION:**

The proposed amendment does not duplicate any existing State or Federal requirements.

**ALTERNATIVES:**

Having the Board of Regents continue to approve all revisions, including revisions that do not fundamentally affect the school's missions, organizational structure or educational program, and other such changes, is not deemed to be the most appropriate and efficacious means to address these matters, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation to the Commissioner of the Board's authority to approve charter revisions, with certain specified exceptions, will provide for the most efficient and expeditious means to approve and issue charter revisions.

**FEDERAL STANDARDS:**

There are no applicable Federal standards.

**COMPLIANCE SCHEDULE:**

The proposed amendment merely delegates to the Commissioner the authority to approve charter revisions, with certain specified exceptions, and does not impose any additional costs or compliance requirements on school districts, charter schools or local governments beyond those inherent in Article 56 of the Education Law. It is anticipated that compliance may be achieved by the effective date of the proposed amendment.

**Regulatory Flexibility Analysis**

**Small Businesses:**

The proposed amendment applies to school districts and charter schools, and will delegate to the Commissioner of Education the authority of the Board of Regents to approve pursuant to Education Law section 2852(7) revisions to the charters of public charter schools, with certain specified exceptions. The proposed amendment does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local Governments:**

**EFFECT OF RULE:**

The proposed rule applies to all school districts and charter schools in the State. There are currently 177 authorized charter schools, 140 of which are currently operating.

**COMPLIANCE REQUIREMENTS:**

The proposed amendment does not establish any reporting, record-keeping or other compliance requirements on school districts or charter schools. It merely delegates to the Commissioner of Education the authority of the Board of Regents to approve revisions to the charters of public charter schools, with certain specified exceptions.

Authority to approve revisions concerning the following would be retained by the Board of Regents and not delegated to the Commissioner:

(1) educational philosophy, mission or vision;

(2) governance or leadership structure;

(3) the curriculum model or school design changes that are inconsistent with that approved in the current charter;

(4) hiring or termination of a management company;

(5) school name;

(6) location, if such revision results in relocation to another school district;

(7) maximum enrollment, as set forth in the current charter; and/or

(8) grades served, as set forth in the current charter.

The proposed amendment would authorize the Commissioner to approve revisions concerning items (1) through (3) above, provided that the revisions are determined by the Commissioner not to be significant.

**PROFESSIONAL SERVICES:**

The proposed amendment does not impose any additional professional services requirements on school districts or charter schools.

**COMPLIANCE COSTS:**

The proposed amendment does not impose any compliance costs on school districts or charter schools. It merely delegates to the Commissioner of Education the authority of the Board of Regents to approve revisions to the charters of public charter schools, with certain specified exceptions.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any compliance costs or new technological requirements on school districts or charter schools.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any compliance requirements or compliance costs on school districts or charter schools. It merely delegates to the Commissioner of Education the authority of the Board of Regents to approve revisions to the charters of public charter schools, with certain specified exceptions. Having the Board of Regents approve all revisions, including revisions that do not fundamentally affect the school's missions, organizational structure or educational program, and other such changes, is not deemed to be the most appropriate and efficacious means to address these matters, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation to the Commissioner of the Board's authority to approve charter revisions, with certain specified exceptions, will provide for the most efficient and expeditious means to approve and issue charter revisions.

**LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Copies of the proposed amendment have been provided to charter schools for review and comment.

**Rural Area Flexibility Analysis**

**TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to all school districts and charter schools within the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. There are

currently 177 authorized charter schools, 140 of which are currently operating.

**REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:**

The proposed amendment does not establish any reporting, record-keeping or other compliance requirements, or impose any additional professional services requirements on school districts or charter schools in rural areas. It merely delegates to the Commissioner of Education the authority of the Board of Regents pursuant to Education Law section 2852(7) to approve revisions to the charters of public charter schools, with certain specified exceptions.

Authority to approve revisions concerning the following would be retained by the Board of Regents and not delegated to the Commissioner:

- (1) educational philosophy, mission or vision;
- (2) governance or leadership structure;
- (3) the curriculum model or school design changes that are inconsistent with that approved in the current charter;
- (4) hiring or termination of a management company;
- (5) school name;
- (6) location, if such revision results in relocation to another school district;
- (7) maximum enrollment, as set forth in the current charter; and/or
- (8) grades served, as set forth in the current charter.

The proposed amendment would authorize the Commissioner to approve revisions concerning items (1) through (3) above, provided that the revisions are determined by the Commissioner not to be significant.

**COSTS:**

The proposed amendment does not impose any compliance costs on school districts or charter schools in rural areas. It merely delegates to the Commissioner of Education the authority of the Board of Regents to approve revisions to the charters of public charter schools, with certain specified exceptions.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any compliance requirements or compliance costs on school districts or charter schools in rural areas. It merely delegates to the Commissioner of Education the authority of the Board of Regents to approve revisions to the charters of public charter schools, with certain specified exceptions. Having the Board of Regents approve all revisions, including revisions that do not fundamentally affect the school's missions, organizational structure or educational program, and other such changes, is not deemed to be the most appropriate and efficacious means to address these matters, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that delegation to the Commissioner of the Board's authority to approve charter revisions, with certain specified exceptions, will provide for the most efficient and expeditious means to approve and issue charter revisions.

**RURAL AREA PARTICIPATION:**

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee. Comments on the proposed amendment were also solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed rule have been provided to charter schools for review and comment.

**Job Impact Statement**

The proposed amendment applies to school districts and charter schools, and will delegate to the Commissioner of Education the Board of Regents' authority pursuant to Education Law section 2852(7) to approve charter revisions, with certain specified exceptions. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**Department of Environmental Conservation**

**NOTICE OF ADOPTION**

**Salmon River Falls Unique Area**

**I.D. No.** ENV-16-10-00011-A

**Filing No.** 629

**Filing Date:** 2010-06-18

**Effective Date:** 2010-07-07

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

**Action taken:** Amendment of section 190.10 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101(3)(b), 3-0301(1)(b), (2)(m), 9-0105(1) and (3)

**Subject:** Salmon River Falls Unique Area.

**Purpose:** Protect public safety and natural resources on the Salmon River Falls Unique Area.

**Text or summary was published** in the April 21, 2010 issue of the Register, I.D. No. ENV-16-10-00011-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Dave Forness, Bureau of State Land Management, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4255, (518) 402-9428, email: dmfornes@gw.dec.state.ny.us

**Additional matter required by statute:** A Negative Declaration was prepared in compliance with Article 8 of the Environmental Conservation Law.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Recreational Harvest Limits for Summer Flounder (Fluke), Scup (Porgy) and Black Sea Bass**

**I.D. No.** ENV-17-10-00004-A

**Filing No.** 665

**Filing Date:** 2010-06-22

**Effective Date:** 2010-07-07

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

**Action taken:** Amendment of Part 40 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0105, 13-0340-b, 13-0340-e and 13-0340-f

**Subject:** Recreational harvest limits for summer flounder (fluke), scup (porgy) and black sea bass.

**Purpose:** To modify the recreational harvest limits for summer flounder, scup and black sea bass in compliance with ASMFC and MAFMC.

**Text of final rule:** Existing Subdivision 40.1(f) of 6 NYCRR is amended to read as follows: Species Striped bass through Atlantic cod remain the same. Species Summer flounder is amended to read as follows:  
40.1(f) Table A - Recreational Fishing.

| Species         | Open Season                                   | Minimum Length | Possession Limit |
|-----------------|---|----------------|------------------|
| Summer flounder | May 15- [June 15 and July 3-August 1] Sept. 6 | 21" TL         | 2                |

Species Yellowtail flounder through Winter flounder remains the same. Species Scup (porgy) licensed party/charter boat anglers is amended to read as follows:

|  |                                   |        |         |
|--|-----------------------------------|--------|---------|
| Scup (porgy)<br>licensed<br>party/charter<br>boat<br>anglers**** | June [12]<br>8-[Aug 31]<br>Sept 6 | 11" TL | 10      |
|  | Sept [1] 7-Oct<br>[15] 11         | 11" TL | [45] 40 |

Species scup (porgy) all other anglers remains the same. Species Black sea bass is amended to read as follows:

|                |   |      |    |
|----------------|---|------|----|
| Black sea bass | [June 1-June 30<br>and Sept 1-Sept<br>30] May 22-<br>Oct 11 and Nov<br>1-Dec 31 | 12.5 | 25 |
|----------------|---|------|----|

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 40.1(f).

**Text of rule and any required statements and analyses may be obtained from:** Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0435, email: swheins@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

#### Revised Regulatory Impact Statement

##### 1. Statutory authority:

Environmental Conservation Law (ECL) sections 13-0105, 13-0340-b, 13-0340-e and 13-0340-f authorize the Department of Environmental Conservation (DEC) to establish by regulation the open season, size, catch limits, possession and sale restrictions and manner of taking for summer flounder, scup and black sea bass.

##### 2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies, and interstate fishery management plans.

##### 3. Needs and benefits:

These regulations are necessary for New York to maintain compliance with the Interstate Fishery Management Plan (FMP) for Summer Flounder and Black Sea Bass as adopted by the Atlantic States Marine Fisheries Commission (ASMFC). New York, as a member state of ASMFC, must comply with the provisions of the Interstate Fishery Management Plans adopted by ASMFC. These FMPs are designed to promote the long-term sustainability of quota managed marine species, preserve the states' marine resources, and protect the interests of both commercial and recreational fishermen. All member states must promulgate any necessary regulations that implement the provisions of the FMPs to remain in compliance with the FMPs. If ASMFC determines a state to be in non-compliance with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP.

This Notice of Adoption will revise the originally proposed recreational season for black sea bass. The originally proposed season was from May 22 through September 12. In April 2010, ASMFC recommended that the black sea bass recreational season be extended from the September 12 closing to closing on October 11 and reopening from November 1 through December 31. This decision was announced after DEC filed the original Notice of Emergency Adoption and Proposed Rule Making with the Department of State, in compliance with the previous recommendations of MAFMC and ASMFC. This rule is consistent with actions taken in other coastal states and the joint FMP for black sea bass. The FMP for black sea bass requires regulations to be consistent among the states along the Atlantic coast; the department must promulgate this proposed regulation to remain in compliance with the FMP. Failure to do so would also cause unnecessary hardship in the recreational fishing industry and for recreational anglers, as this new recommendation would provide greatly enhanced fishing opportunities. This is a non-substantive change to the proposed rule; the scope of the rule is not being expanded, the same regulated community will be impacted and the burden of the rule will not increase.

The adoption of this regulation is necessary for DEC to remain in compliance with the FMP for summer flounder. The ASMFC harvest quota assigned to New York for 2010 is greater than the quota assigned for 2009. Under the existing regulations, it is unlikely that New York recreational anglers will catch the 2010 assigned harvest. The adoption of these regulations will extend the 2010 recreational fishing season for sum-

mer flounder and allow New York State recreational anglers to take advantage of the fishing opportunities made available by the increase in summer flounder quota. The management measures in this regulation will prevent these anglers from exceeding the assigned summer flounder quota and New York State will remain in compliance with the FMP.

Specific amendments to the current regulations include the following:

1. Summer flounder: Implement an open season for the summer flounder recreational fishery from May 15 through September 6.

2. Scup: Implement an open season for scup for recreational anglers aboard licensed party charter vessels from June 8 through September 6. In 2009 the season for recreational anglers aboard licensed party charter vessels was from June through August 31. The scup "bonus" season will be reduced from 45 days in 2009 to 35 days in 2010 with a reduced possession limit, from 45 to 40 fish.

3. Black sea bass: Implement an open season for the black sea bass recreational fishery from May 22 through October 11 and November 1 through December 31. In 2009, the black sea bass recreational fishery was yearlong.

##### 4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

Certain regulated parties (party/charter businesses, bait and tackle shops) may experience some adverse economic effects through a reduction of the recreational black sea bass season from yearlong in 2009 to 204 days in 2010.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

DEC will incur limited costs associated with the implementation and administration of these rules, mostly the costs related to notifying recreational anglers, party and charter boat operators and other recreational support industries of the new rules.

##### 5. Local government mandates:

The proposed rule does not impose any mandates on local government.

##### 6. Paperwork:

None.

##### 7. Duplication:

The proposed amendment does not duplicate any State or Federal requirement.

##### 8. Alternatives:

1. Summer flounder "No Action" Alternative (no amendment to summer flounder regulations) - The "no action" alternative would leave current summer flounder regulations in place. Under existing regulations, it is unlikely that New York recreational anglers will catch the 2010 assigned harvest. New York recreational anglers would not be able to utilize the summer flounder resources that are available with the increased quota for 2010. Party and charter boat businesses would not be able to benefit from the extended recreational season for summer flounder in New York State waters. This alternative was rejected.

2. Scup "No Action" Alternative (no amendment to scup regulations) - The "no action" alternative would leave current scup regulations in place. This alternative implies that New York would take no steps to comply with ASMFC's recommendation and the FMP for scup. Failure to implement the recommended management measures may result in a finding of non-compliance by the ASMFC and a prohibition by NOAA on all fishing for scup until the state comes into compliance with the FMP.

3. Black sea bass "no action" Alternative (no amendment to black sea bass regulations) - The "no action" alternative would leave the current black sea bass season in place. This option would, however, impede DEC's ability to achieve its management objectives for the stock and likely result in New York failing to remain in compliance with the FMP for black sea bass and a possible closure of all fishing for black sea bass in New York. This would have a much more severe economic impact than the imposition of a limited recreational season; this option was rejected.

##### 9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs.

##### 10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via DEC's website of the changes to the regulations. The amendment has already been adopted by an emergency rule making April 12, 2010.

#### Revised Regulatory Flexibility Analysis

##### 1. Effect of rule:

The Atlantic State Marine Fisheries Commission (ASMFC) facilitates cooperative management of marine and anadromous fish species among the fifteen Atlantic Coast member states. The principal mechanism for

implementation of cooperative management of migratory fish is the ASMFC's interstate fishery management plans (FMPs) for individual species or groups of fish. The FMPs are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

ASMFC recently adopted quota changes for summer flounder, scup and black sea bass. The Department of Environmental Conservation (DEC) now seeks to amend its summer flounder, scup and black sea bass regulations to comply with the requirements of the ASMFC FMP. There are severe consequences for failure to comply with FMPs. If ASMFC determines a state to be in non-compliance with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP. Furthermore, failure to take required actions to protect our marine and anadromous resources may lead to the collapse of the targeted species' populations. Either situation could have a significant adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

Those most affected by the proposed rule are recreational anglers, licensed party and charter businesses, and retail and wholesale marine bait and tackle shops operating in New York State. DEC consulted with the Marine Resources Advisory Council (MRAC) and other individuals who chose to share their views on summer flounder recreational management measures. The response indicates that there is a belief that a long season will provide economic benefits to businesses because their customers will take advantage of the additional opportunities to go fishing for summer flounder. The responses received by DEC suggest that a long season will result in more charter bookings, more party boat trips, and more bait and tackle sales. In addition, private individuals (mostly boating anglers) indicated their preference for as long a season as possible to provide them more opportunities to fish for summer flounder. The proposed rule increases the number of days available to recreationally fish for summer flounder, from 78 days in 2009 to 115 days as proposed in the regulations, an increase of 37 days.

This Notice of Adoption will revise the originally proposed recreational season for black sea bass. The originally proposed season was from May 22 through September 12. In April 2010, ASMFC recommended that the black sea bass recreational season be extended from the September 12 closing to closing on October 11 and reopening from November 1 through December 31. This decision was announced after DEC filed the original Notice of Emergency Adoption and Proposed Rule Making with DOS, in compliance with the previous recommendations of MAFMC and ASMFC.

Failure to implement this new recommendation would cause unnecessary hardship to New York State recreational anglers and party and charter boat businesses; this new recommendation will provide more fishing opportunities than the previous ASMFC recommendation. Even though this new ASMFC recommendation extends the black sea bass season from the previous recommendation, from 114 days to 204 days, the proposed 2010 season is reduced significantly from the year long recreational black sea bass season in 2009. This revised rule is a non-substantive change to the proposed rule; the scope of the rule is not being expanded, the same regulated community will be impacted and the burden of the rule will not increase.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected by these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditure on the part of affected businesses in order to comply with the changes. The changes required by the proposed regulations may reduce the income of party and charter businesses and marine bait and tackle shops because of the reduction in the number of days available for recreational fishers to take black sea bass.

There is no additional technology required for small businesses, and this action does not apply to local governments; there are no economic or technological impacts for either.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary for DEC to maintain compliance with the FMPs for summer flounder, scup and black sea bass and to avoid a punitive closure of the scup and black sea bass fisheries and the economic hardship that would ensue with such a closure. Since these regulatory amendments are consistent with federal and interstate FMPs,

DEC anticipates that New York State will remain in compliance with the FMPs.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail bait and tackle shops and other support industries for recreational fisheries. Failure to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being proposed in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

DEC received recommendations from the MRAC, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon comments received from recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners, recreational anglers and state law enforcement personnel. There was no special effort to contact local governments because the proposed rule does not affect them.

*Revised Rural Area Flexibility Analysis*

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder, scup and black sea bass fisheries directly affected by the proposed rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the State. Further, the proposed rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

*Revised Job Impact Statement*

1. Nature of impact:

The promulgation of this regulation is necessary for the Department of Environmental Conservation (DEC) to maintain compliance with the Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass, to avoid potential Federal sanctions for lack of compliance with such plan, and to optimize recreational fishing opportunities available to New Yorkers. The proposed rule increases the summer flounder recreational fishing season by 37 days, from 78 days in 2009 to 115 days. The proposed rule will also reduce the recreational season for black sea bass from a yearlong fishery to 204 days, from the periods from May 22 through October 11 and November 1 through December 31. The season for scup, for recreational anglers aboard licensed party and charter vessels, will be from June 8 through September 6. The scup "bonus" season will be reduced to from 45 days to 35 days, from September 7 through October 11 and the daily possession limit reduced from 45 fish to 40.

Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. Due to the reduction in the number of fishing days for black sea bass, there may be a corresponding reduction of the number of fishing trips and bait and tackle sales during the upcoming fishing season.

2. Categories and numbers affected:

In 2009, there were 524 licensed party and charter businesses in New York State. There were also a number of retail and wholesale marine bait and tackle shop businesses operating in New York; however, DEC does not have a record of the actual number. The number of recreational fishers in New York has been estimated by the National Marine Fisheries Service to be just over 1 million in 2007. However, this Job Impact Statement does not include them in this analysis, since fishing is recreational for them and not related to employment. However, according to a report released by National Oceanic and Atmospheric Administration Fisheries, recreational fishing in New York generated \$424 million in total sales in 2006.

3. Regions of adverse impact:

The regions most likely to receive any adverse impact are within the marine and coastal district of the State of New York. This area included all the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the state, including Long Island Sound and the Hudson River up to the Tappan Zee Bridge.

4. Minimizing adverse impact:

In the development of the proposed rule making, DEC consulted with the Marine Resources Advisory Council and many individuals who chose to share their views on summer flounder recreational management measures to the DEC. In the long-term, the maintenance of sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recre-

ational fisheries. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the summer flounder, scup and black sea bass resources is essential to the survival of the party and charter boat businesses and bait and tackle shops that are sustained by these fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest and to continue to rebuild stocks and maintain them for future utilization.

Based on the above and DEC staff's knowledge and past experience with similar regulations, DEC has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of this rule making.

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

The agency received no public comment.

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## Department of Health

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### NOTICE OF ADOPTION

#### **Revisions to Certificate of Need (CON) Process for Threshold Levels**

**I.D. No.** HLT-12-10-00011-A

**Filing No.** 668

**Filing Date:** 2010-06-22

**Effective Date:** 2010-07-07

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

**Action taken:** Amendment of Parts 405, 410, 420, 600, 703, 705, 709 and 710 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2801-a and 2803(2)(a)

**Subject:** Revisions to Certificate of Need (CON) Process for Threshold Levels.

**Purpose:** To constitute the first phase of regulatory changes as part of the Department's review of the CON process.

**Text or summary was published** in the March 24, 2010 issue of the Register, I.D. No. HLT-12-10-00011-P.

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

**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

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

Three public comments were submitted to the NYS Department of Health ("DOH") in response to this regulation. One comment was received from the Health Care Association of New York State (HANYs), the second was from Orange Regional Medical Center and the third was from the Greater New York Hospital Association (GNYHA). A fourth letter was received after the public comment period for this regulation ended.

HANYs

HANYs expressed overall support for the proposed rule, noting that the proposed regulatory changes would allow the DOH to focus on the most substantial and complex projects, while allowing health care facilities to perform routine maintenance and repair and upgrades either outside of CON or with a simplified review process. HANYs also noted that the proposed rule streamlines the review of health information technology projects. HANYs noted that although they have sought a more aggressive package of reforms through legislation, they are fully supportive of the proposed rule.

Orange Regional Medical Center

Orange Regional Medical Center (ORMC) also submitted comments on the proposed amendments to Part 705 (New Medical Technology and Health Services Demonstration Projects). ORMC did not comment directly on the proposed rule, but rather used the publication of the rule as an opportunity to comment on how the proposed regulatory changes governing demonstration projects may impact proton beam therapy demonstration projects. ORMC commented that proton beam therapy services belong in an academic medical center environment where research is a primary focus and the efficacy, safety, cost-effectiveness of, and need for, this technology can be evaluated. The comment strongly supported the CON process as the only way to allow proton beam therapy centers into New York, and supported the proposed changes to 705 as a way for the

Department to initiate a demonstration project to review proton beam therapy applications. Finally, ORMC expressed a desire to allow community providers to comment on demonstration project applications.

GNYHA

GNYHA expressed "strong support" for the proposed rule, mentioning that it increases review thresholds, consolidates certain levels of review, and adds flexibility to the Department's demonstration project authority. Support for the creation of an electronic CON application, which is currently under design, was also mentioned, as well as further reforms that would streamline the CON process and increase the threshold review levels beyond what is proposed through these amendments.

American Shared Hospital Services (ASHS)

Comments from a California-based healthcare company (ASHS) were received after the public comment period ended. ASHS used the publication of the proposed amendments to Part 705 as an opportunity to comment on the Department's announcement of a proton beam therapy (PBT) demonstration project which authorizes the approval of PBT facilities for a period of ten years. ASHS expressed concern that this would limit access to PBT in New York State. The Department notes that at this time PBT has demonstrated efficacy only for certain relatively rare cancers and that the PBT demonstration project announcement authorizes the approval of additional PBT facilities within the 10-year period, "depending on the findings of the approved project(s), demonstrated need, and the state of medical knowledge at that time."

### NOTICE OF ADOPTION

#### **State Aid for Public Health Services: Counties and Cities**

**I.D. No.** HLT-18-10-00017-A

**Filing No.** 669

**Filing Date:** 2010-06-22

**Effective Date:** 2010-07-07

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

**Action taken:** Amendment of Parts 40 and 42 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 602(3)(a)

**Subject:** State Aid for Public Health Services: Counties and Cities.

**Purpose:** To achieve cost savings and to clarify eligible services for reimbursement of Article 6 of the Public Health Law (State Aid).

**Text or summary was published** in the May 5, 2010 issue of the Register, I.D. No. HLT-18-10-00017-P.

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

**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

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

Six letters of public comment were submitted to the NYS Department of Health (DOH) in response to this regulation, including: the New York State Association of Public Health Officials (NYSACHO), the Hospice & Palliative Care Association of New York State, the New York State Association of Counties (NYSAC) and the New York City Department of Health (NYCDOHMH). These comments and the Department of Health's responses are summarized below:

Comment:

Several commenters voiced opposition to the repeal of § 40-3.1, which allows local health departments (LHD) to include in Municipal Public Health Services Plans (MPHSPs) public health services other than those described as basic or optional in Sub-Parts 40-2 and 40-3, which include, but are not limited to, the costs for transition from the Early Intervention Program to the 3-5/Preschool/Special Education Program and hospice. Currently, once MPHSPs are approved, LHDs are eligible for reimbursement of any costs related to these "other, optional" programs included in state aid applications. The commenters indicate that the proposed elimination of § 40-3.1 would effectively eliminate local flexibility and innovation to address essential and emerging public health priorities.

Response:

The proposed changes are intended to assure that sufficient funding is available to support essential public health services consistent with PHL § 602(3)(b). While the Department appreciates unique circumstances faced by each local health department, we feel confident that limiting reimbursement to the five essential services (community health assessment, health education, family health, disease control and environmental health) will assure that funding is strategically targeted and efficiently allocated while at the same time permitting local health departments the

flexibility to utilize these funds in a matter that is reflective of circumstances, needs and priorities in their community.

Comment:

Several commenters expressed opposition to the proposed elimination of reimbursement for other optional services, specifically transition from the Early Intervention Program (EIP) to the 3-5 Program. Some disagreed with the characterization of these transition services as optional since PHL § 2548 mandates municipalities conduct certain activities to transition children from the EIP to the 3-5 Preschool/Special education program. They suggested that if the activities continue to be required under Article 25 of the NYS Public Health Law, they should continue to be eligible for reimbursement under the Article 6 program. Another commenter objected to the suggestion that there are other funding sources for these activities should the 44 affected counties continue to offer them.

Response:

Transition activities for children in the EIP program are defined as special education activities for which municipalities receive funding from the State Education Department and as such are not a core public health service under Article 6. Further, municipalities may designate any agency or department within the municipality to deliver these services; the LHD is not necessarily responsible; again underscoring that these services are "optional" from the perspective of Article 6 reimbursement. In addition, alternative funding is available to municipalities to support these activities. Consistent with the Department's goal of strategically targeting scarce resources, utilizing alternative resources where available, and assuring delivery and reimbursement of essential public health services, EI transition services will no longer be eligible for reimbursement under Article 6.

Existing funding sources available to offset costs associated with these transitions services include: approximately \$11 million in funding to municipalities from the Department of Health's allocation under its federal Part C of IDEA grant funding and Medicaid administrative reimbursement. One commenter pointed out that there is great variability in the type of activities being claimed by municipalities under General Public Health Work (GPHW) for the "transition from the EIP to the 3-5 Program" category currently. This variability and information that has accompanied claims for this category under GPHW suggest that many of these activities are associated with municipalities' administration of the Preschool Special Education Program rather than eligible public health services.

Comment:

Several commenters voiced opposition to the proposed amendment of § 42.11 that would eliminate state aid for local public health laboratories' function as referral laboratories for community based and commercial labs. Citing the following reasons:

a. Public health laboratory testing of specimens from community-based providers are of value in detecting emerging or re-emerging diseases of public health significance.

b. In times of potential or actual outbreaks, local public health labs request specimens from community based laboratories in order to ascertain important epidemiological data not readily available.

c. When new testing devices or protocols become available, public health laboratory testing of specimens from community based providers can provide important validation evidence.

d. Public health laboratories most often do not receive third party reimbursement for these tests and it is questionable whether they have the capacity to bill.

One commenter suggested alternative language to confirm that Part 40 laboratory testing is eligible for Article 6 reimbursement and laboratory testing required under local health codes would also be reimbursed.

Response:

DOH agrees with the stated value of the testing described above, but eliminating Article 6 reimbursement for such testing is not the intended purpose of the proposed changes to § 42.11. What the proposed changes seek to clarify and limit are those costs not eligible for Article 6 reimbursement, especially the costs related to a public health laboratory's analysis of primary specimens from fee-for-service clients who visited non-health department providers. It is not appropriate for public funds to be used for laboratory testing in cases where other reimbursement is available. When a client is seen by a provider and pays a fee for the provider's service, the resulting clinical laboratory tests should have a fee attached to them by the LHD testing laboratory as well. If the county laboratory wishes to perform the services of a fee-for-service laboratory, it may do so, but all costs of that activity must be recovered by fee and revenue recovery and cannot be reimbursed under Article 6. Article 6 reimbursement is available for basic laboratory testing specifically related to public health programs such as tuberculosis, sexually transmitted diseases, HIV, and childhood lead poisoning prevention, to name a few.

With respect to comments confirming reimbursement for testing performed under Part 40, we believe this is clear as written. The suggested revisions which argue for state reimbursement for testing required under local health codes have not been adopted since they may result in inappropriate and uncontrollable State expenditures.

Comment:

Commenters opposed the addition of § 40-1.53(s) which clarifies that the abatement of public health nuisances is not eligible for reimbursement under Article 6 on the grounds that nuisances are an eligible activity described by Article 6 of the Public Health Law and Part 40 of the regulations.

Response:

While LHDs are required to respond to and investigate the presence of nuisances, Article 13 of the Public Health Law places the responsibility to remove or address the presence of nuisance conditions with the owners of the involved properties. LHDs empowered by their counties to expend funds to address such nuisance conditions have the authority to recover the cost of such activities from the owner in a variety of ways (fees, fines, liens against property, etc.).

Comment:

Several commenters disagreed with the estimated cost savings projected for the proposed changes to both laboratory services, EIP transition costs and other optional services. One commenter indicated that the savings attributed to the proposed limits to optional laboratory services are overstated due to potential errors in coding. Another commenter stated that cost savings attributed to EI transition costs cannot be accurately estimated due to the variability among local EI programs regarding what activities constitute transition.

Response:

The cost data for both items were obtained from quarterly claims for Calendar Year 2008, as reported by the LHDs, which was the most current data at the time the changes were proposed.

Comment:

Commenters opposed the elimination of funding for hospice services under the proposed changes to § 40-3.1 which would eliminate reimbursement for "optional other" services. The comments stated that a hospice's unique inter-disciplinary model supports the Article 6 basic service areas of Community Health Assessment; Health Education and Guidance and Family Health.

The comments also stated that elimination of this reimbursement would eliminate access to quality end-of-life care for the residents of the five counties that would lose Article 6 reimbursement, would put these hospices at great risk for closure, that closure of a hospice means individuals with life-limiting illness will be abandoned when they need the pain and symptom management and psychosocial support provided by hospice, and that hospice services decrease the use of ER visits and hospitalization, thus reducing the consumption of other funding sources.

Response:

The intent of these proposed changes is not to force closures of hospices run by LHDs, but to reduce state aid spending on services that are not required of LHDs. Art. 6 only reimburses 36% of the un-reimbursed eligible hospice costs provided by the LHD, in other words their operating deficit. Private CHHAs are able to operate without subsidies of operating costs. Counties may improve the efficiency of their hospice or subsidize the full amount of the operating deficit to make up for the loss of Article 6 reimbursement for their operating deficit. Hospices are not the primary provider of public health education and guidance, family health services and disease control services as described by PHL and 10 NYCRR 40 to the residents of a municipality. While allowances have been made in the past to allow LHDs to receive reimbursement for hospice costs not covered by other sources of payment, the proposed regulations are an attempt to return to the delivery of core basic public health.

Comment:

A commenter suggested additional language to underscore the consolidation of reporting systems.

Response:

We believe the repeal adequately addresses this point since the State is no longer imposing any additional reporting requirements on the LHDs.

Given the reasons noted above, the Department, after review and due consideration, is adopting the amendments as proposed.

## NOTICE OF ADOPTION

### State Aid for Public Health Services: Counties and Cities-Reimbursement to Municipalities Per PHL Article 6 for Home Health Services

I.D. No. HLT-18-10-00018-A

Filing No. 667

Filing Date: 2010-06-22

Effective Date: 2010-07-07

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

**Action taken:** Amendment of Subparts 40-1 and 40-3 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 602(3)(a)

**Subject:** State Aid for Public Health Services: Counties and Cities-Reimbursement to Municipalities per PHL Article 6 for Home Health Services.

**Purpose:** To achieve cost savings and to clarify eligible services for reimbursement of Article 6 of the Public Health Law (State Aid).

**Text or summary was published** in the May 5, 2010 issue of the Register, I.D. No. HLT-18-10-00018-P.

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

**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

#### Assessment of Public Comment

Public comments were submitted to the NYS Department of Health (DOH) in response to this regulation from the New York State Association of Public Health Officials (NYSACHO), the Home Care Association of New York State (HCA), The New York State Association of Health Care Providers, Inc., and others. These comments and the Department of Health's responses are summarized below:

##### Comment:

Several commenters voiced opposition to eliminating Article 6 reimbursement for home health services provided by local health departments (LHDs) that are not the sole providers of home health services for their counties, citing several issues, e.g.:

The New York State Department of Health (DOH's) characterization of home health care as an optional service which is not central to the state's public health mission is in direct opposition to the fact that access to care is one of the DOH Prevention Agenda initiative priority areas. LHD Certified Home Health Agency (CHHA) services include disease control, health education and guidance, and family health which are core public health services. LHDs delivering CHAA services meet this need and reduce the need for more costly facility-based care.

##### Response:

General public health work (GPHW) services, delivered by LHDs are defined and detailed in 10 NYCRR Part 40. Home care services are primarily for the purpose of post-hospital skilled nursing and personal care. Home care is not the primary method for LHDs to deliver core public health services, i.e., health education and guidance, family health, and disease control services. While some home health care costs have been reimbursed by Article 6 in the past, the proposed regulations are designed to use limited public health funding to support the delivery of core basic public health to the population as a whole. The proposed regulation does recognize that, when the LHD is the sole provider of CHHA services, Article 6 reimbursement is available to assure access to skilled nursing care, personal care and other services provided by CHHAs.

For purposes of Article 6 planning and reimbursement, home health services are defined by 10 NYCRR 4-3.20 and 3.21 as optional services. This is because services to the home bound and chronically ill are not mandated to be delivered by LHDs. Public health services which may need to be delivered in the home can be delivered by the LHD if they are a CHHA or a Licensed Home Care Services Agency (LHCSA).

##### Comment:

Public CHHAs provide services not available through proprietary CHHAs.

Local health departments that provide CHHA services report that in their communities, proprietary CHHAs do not serve the less acute and non-pay cases. LHD-run CHHAs have taken the overflow of referrals from proprietary agencies because they are unable to accept any more patients.

Many counties operating CHHAs serve jurisdictions that are very large geographically and very rural, where proprietary agencies are unwilling to assume the additional expenses necessary to serve all areas of the county.

Other examples of core public health services that public CHHAs provide, not typically provided by proprietary agencies, include home visits for directly observed therapy for tuberculosis, flu shots for elderly homebound who cannot qualify for Medicare, rabies prophylaxis, high risk maternal and child health visits with infants needing the expert intervention of public health nurses, care for uninsured patients and care for patients with high needs that might exceed reimbursement.

##### Response:

The proposed regulations do not prevent LHDs from operating CHHAs, but rather, limits Article 6 public health funding to CHHAs that are the sole CHHA operating in the county. Many LHDs successfully operate CHHAs with limited need for support from Article 6 for operating deficits.

All CHHAs, including proprietary CHHAs, must accept for admission patients whom they can safely serve as described in 10 NYCRR 763.5(b). If agencies discriminate against specific populations, the remedy is

through judicial and administrative proceedings against them, such as federal civil rights (ADA) complaints.

If a CHHA's operating certificate names the entire county, the expectation is that the entire county will be served. It should be noted that there have been no recent complaints (within past 3 years) regarding the failure of an agency to serve a portion of a county. Agency decisions should be based on the ability to safely provide care as required in 10 NYCRR 763.5.

LHDs are required to hold CHHA or LHCSA certificates or licenses in order to provide public health services in homes. Such services are reimbursed by Article 6 under the categories that relate to specific public health programs, such as tuberculosis control, immunization, and maternal and child health. Home care is not the primary method for a LHD to deliver health education and guidance, family health and disease control services. The funding of operating deficits of LHD owned CHHAs is not considered to be a core public health function appropriate for reimbursement under Article 6.

##### Comment:

Elimination of state aid funding in the middle of the year may force closures of publicly operated CHHAs, shifts cost to local tax base, and put local jobs at risk. Elimination of state aid funding mid-year imposes additional cuts to public support of home health care. Recent changes to federal and state reimbursement impacting Medicare and Medicare combined with the proposed reduction in state aid will be detrimental to the sustainability of these services.

##### Response:

Closure of a publicly operated CHHA is a local decision. The intent of the regulation change is to reduce state aid spending on services that are not required of LHDs. There is no intent to force closures. Article 6 only reimburses 36% of the unreimbursed eligible LHD operated CHHA service costs, in other words their operating deficit. Many county run CHHAs are successfully managed without an operating deficit. Counties may improve the efficiency of their CHHA or subsidize the full amount of the operating deficit to make up for the loss of Article 6 reimbursement for their operating deficit. All LHD operated CHHAs are required to provide charity care at a rate of 3.3%. Charity care is required to be provided and supported by the LHDs. The PHL does not require that Article 6 state aid support the provision of CHHA charity care services. Article 6 cannot continue to subsidize the LHDs' share of this charity care.

##### Comment:

Elimination of state aid funding mid year negatively impacts the potential value of CHHAs that are for sale.

##### Response:

It is not the purpose of Article 6 of the PHL to preserve or produce revenue for counties seeking to sell CHHAs.

##### Comment:

Elimination of state aid funding mid year threatens the ability for surge capacity for public health emergencies.

##### Response:

The purpose of home health agencies is to provide home health services. The primary purpose of CHHAs is not to provide emergency surge capacity. Seventeen counties currently don't operate CHHAs (four are pending transition to new owners and three are planning closures) and have made other arrangements for surge capacity in the case of emergencies.

##### Comment in support of provisions of the proposed regulation:

One commenter, The New York State Association of Health Care Providers, Inc., supported the proposal to provide reimbursement to sole CHHA providers, to exclude special needs CHHAs as qualifying providers when determining if municipalities are sole providers, and recommended the option of DOH review of sole provider status and changes in status should changes occur making the LHDs the sole providers.

For the reasons noted above, the Department is adopting the amendments as proposed.

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## Higher Education Services Corporation

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

#### Continental Airlines Flight 3407 Memorial Scholarship Program

I.D. No. ESC-27-10-00004-P

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

**Proposed Action:** Addition of section 2201.12 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 653, 655 and 668-g

**Subject:** Continental Airlines Flight 3407 Memorial Scholarship Program.

**Purpose:** Implementation of the Flight 3407 scholarship program.

**Text of proposed rule:** New section 2201.12 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

*Section 2201.12 Continental Airlines Flight 3407 Memorial Scholarship*

(a) *Authority.* The provisions contained within this regulation are made pursuant to authority granted to the New York State Higher Education Services Corporation in sections 653, 655 and 668-g of the Education Law.

(b) *Definitions.* As used in sections 604 and 668-g of the Education Law:

(1) "Children" shall mean (i) birth children, adopted children, stepchildren in existence and who survive an individual, or children for whom an individual was a legal guardian, and (ii) other children related by blood, adoption or marriage to an individual for whom such individual had assumed and was exercising custody and care as of the date of such individual's death.

(2) "Corporation" shall mean the New York State Higher Education Services Corporation.

(3) "Financial dependent" shall mean a person who is dependent for his or her support upon an individual who has died as a direct result of the crash of Continental Airlines Flight 3407 in Clarence, New York, on February 12, 2009, upon a showing of unilateral dependence or mutual interdependence upon such individual which may be evidenced by a nexus of factors, including, but not limited to, common ownership of property, common house-holding, shared budgeting, and the length of the relationship between the financial dependent and such individual.

(4) "Persons who died as a direct result of the crash" shall include the forty-nine persons aboard Continental Flight 3407 as well as the one person on the ground at the crash site when the crash occurred who died as a result thereof.

(5) "Scholarship" shall mean the Continental Airlines Flight 3407 Memorial Scholarship.

(6) "Spouse" shall mean the legal spouse.

(c) *Eligibility.*

(1) Eligible recipients under section 668-g(1) of the Education Law may be residents or non-residents of New York State and shall attend institutions of higher education within New York State.

(2) Applications shall be filed on forms prescribed by the corporation.

(d) *Burden of Proof.*

(1) It shall be the responsibility of the applicant or his or her agent to provide documentation establishing eligibility for the scholarship.

(2) Documentation may include death and birth certificates, marriage and driver's licenses, joint bank statements or other financial statements, federal or state tax filings, social security cards, court documents, utility bills, or such other documentation as may be required by the corporation.

(3) Determinations will be based on the totality of the documentation provided.

(4) Failure to provide requested documentation or other information may lead to a determination of ineligibility by the corporation.

(5) Determination of an applicant's ineligibility will be final on the date the notice of ineligibility is received by the applicant; however, an ineligible applicant may be reconsidered if additional information is provided that so warrants.

**Text of proposed rule and any required statements and analyses may be obtained from:** George Kazanjian, NYS Higher Education Services Corporation, 99 Washington Avenue, Albany, New York 12255, (518) 473-1581, email: regcomments@hesc.org

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

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

#### **Regulatory Impact Statement**

Statutory authority:

The New York State Higher Education Services Corporation's ("HESC" or "Corporation") statutory authority to promulgate regulations and administer the Continental Airlines Flight 3407 Memorial Scholarship ("Scholarship") is codified within Article 14 of the Education Law.

Pursuant to Education Law § 652(2), HESC was established for the purpose of improving the post-secondary educational opportunities of eligible students through the centralized administration of New York State financial aid programs and coordinating the State's administrative effort in student financial aid programs with those of other levels of government.

In addition, Education Law § 653(9) empowers HESC's Board of Trust-

ees to perform such other acts as may be necessary or appropriate to carry out the objectives and purposes of the Corporation including the promulgation of rules and regulations.

HESC's President is authorized, under Education Law § 655(4), to propose rules and regulations, subject to approval by the Board of Trustees, governing, among other things, the application for and the granting and administration of student aid and loan programs, the repayment of loans or the guarantee of loans made by the Corporation; and administrative functions in support of New York State student aid programs. Also, consistent with Education Law § 655(9), HESC's President is authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out his powers, duties and functions. Finally, Education Law § 655(12) provides HESC's President with the authority to perform such other acts as may be necessary or appropriate to carry out effectively the general objectives and purposes of HESC.

Legislative objectives:

Proposed by Governor Paterson in his Executive Budget and supported by the State Legislature, the Scholarship was enacted as part of the 2009-10 New York State budget (Chapter 57, Pt. EE, Laws of 2009) to provide a college scholarship to the children, spouses and financial dependents of those who died as a result of the crash of Continental Airlines Flight 3407 in Clarence, New York, on February 12, 2009.

HESC is required to administer the scholarship program in which scholarships will be available in amounts similar to the "World Trade Center Memorial Scholarship" Program. In general, for applicants attending a public college or university in New York State, such annual award shall include actual tuition and mandatory educational fees charged to state resident students, actual room and board charged to students living on campus or an allowance for room and board for commuter students, and allowances for books, supplies and transportation. In general, for applicants attending a private college or university in New York State, such annual award shall include an amount equal to the State University of New York (SUNY) four-year college tuition and average mandatory education fees (or the student's actual tuition and fees, whichever is less) charged to state resident students, and allowances for room and board, books, supplies and transportation. In all cases, the total of all aid received by the recipient cannot exceed the student's cost of attendance. Awards are granted for not more than four academic years of full-time undergraduate study or for five academic years if the program normally requires five years.

Needs and benefits:

On February 12, 2009, Continental Airlines Flight 3407 crashed on approach to the Buffalo-Niagara International Airport, in Clarence, New York killing forty-nine passengers and crew as well as one person on the ground. This regulation will provide a college scholarship to the children, spouses and financial dependents of those killed in the crash.

The statutory language of the Flight 3407 Memorial Scholarship is modeled after the Flight 587 Memorial Scholarship which has been successfully administered by HESC. Both the Flight 587 and Flight 3407 statutes provide educational benefits to spouses, children and financial dependents of crash victims. Both programs also award amounts as provided by the World Trade Center (WTC) Memorial scholarship.

Costs:

a. It is anticipated that there will be no costs to HESC for the implementation of, or continuing compliance with, this rule, except for programmatic administration costs. There may be incidental administrative costs to applicants to obtain the vital records they will need from government entities to meet the minimum threshold for award eligibility.

b. The cost of the program is estimated at \$300,000 per year. HESC does not currently have a final estimate of the total number of possible eligible applicants.

c. It is anticipated that there will be no costs to Local Governments for the implementation of, or continuing compliance with, this rule.

Local government mandates:

No program, service, duty or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

This proposal will require potential recipients of the Continental Airlines Flight 3407 Memorial Scholarship to submit an annual application and supporting documentation to establish their eligibility for this program.

Duplication:

No relevant rules or other relevant requirements duplicating, overlapping, or conflicting with this rule were identified.

Alternatives:

The statute enacting the Flight 3407 Memorial Scholarship is consistent with the statute establishing the Flight 587 Memorial Scholarship. Moreover, both of these scholarships are statutorily tied to provisions of the World Trade Center Memorial Scholarship. Since the current regulations

implementing the Flight 587 scholarship have successfully been administered for a number of years, the Flight 3407 proposed regulation were based upon the Flight 587 scholarship regulation model. This approach will provide administrative efficiencies for both programs.

Given the statute authorizing this program, the 'no action' alternative was not feasible.

Federal standards:

This proposal does not exceed any minimum standards of the Federal Government.

Compliance schedule:

HESC will be able to comply with the regulation immediately upon its adoption. In addition, program information can be found on HESC's website using the following link: [http://www.hesc.com/content.nsf/SFC/3/Flight\\_3407\\_Memorial\\_Scholarships](http://www.hesc.com/content.nsf/SFC/3/Flight_3407_Memorial_Scholarships).

#### **Regulatory Flexibility Analysis**

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (Corporation) 'Notice of Proposed Rule Making' seeking to add a new section 2201.12 to Part 2201 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact or impose reporting or other compliance requirements on either small businesses or local governments. The proposed rule would implement the 'Continental Airlines Flight 3407 Memorial Scholarship.'

The rule implements a statutory student scholarship program intended to provide a college scholarship to children, spouses and financial dependents of those who died as a direct result of the crash of Continental Airlines Flight 3407 in Clarence, New York, on February 12, 2009.

The Corporation has determined that this regulation will not impose an adverse economic impact or impose reporting or other compliance requirements on either small businesses or local governments; therefore, a full 'Regulatory Flexibility Analysis for Small Businesses and Local Governments' is not required.

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

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (Corporation) 'Notice of Proposed Rule Making' seeking to add a new section 2201.12 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on public or private entities in rural areas. The proposed rule would implement the 'Continental Airlines Flight 3407 Memorial Scholarship.'

The rule implements a statutory student scholarship program intended to provide a college scholarship to children, spouses and financial dependents of those who died as a direct result of the crash of Continental Airlines Flight 3407 in Clarence, New York, on February 12, 2009.

The Corporation has determined that this regulation will not impose an adverse economic impact on public or private entities in rural areas; therefore, a full 'Rural Area Flexibility Analysis' is not required.

#### **Job Impact Statement**

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (Corporation) 'Notice of Proposed Rule Making' seeking to add a new section 2201.12 to Part 2201 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not have a substantial adverse impact on jobs or employment opportunities. This rule would implement the 'Continental Airlines Flight 3407 Memorial Scholarship.'

The Corporation has determined that this regulation will have no substantial adverse impact on any private or public sector jobs or employment opportunities; therefore a full 'Job Impact Statement' is not necessary.

## Housing Finance Agency

### NOTICE OF ADOPTION

#### **Agency's Qualified Allocation Plan ("Plan")**

**I.D. No.** HFA-44-09-00002-A

**Filing No.** 670

**Filing Date:** 2010-06-22

**Effective Date:** 2010-07-07

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

**Action taken:** Amendment of Part 2188 of Title 21 NYCRR.

**Statutory authority:** 26 U.S.C., section 42; Public Law, 110-289; title I of the U.S. Housing Act of 1937

**Subject:** Agency's Qualified Allocation Plan ("Plan").

**Purpose:** To amend the Agency's Plan to comply with the requirements of the Housing and Economic Recovery Act of 2008 (Public Law 110-289).

**Text or summary was published** in the November 4, 2009 issue of the Register, I.D. No. HFA-44-09-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jay M. Ticker, Associate Counsel, New York State Housing Finance Agency, 641 Lexington Avenue, New York, New York 10022, (212) 872-0365, email: [jticker@nyhomes.org](mailto:jticker@nyhomes.org)

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

The agency received no public comment.

## Hudson River - Black River Regulating District

### EMERGENCY RULE MAKING

#### **Apportionment Grievance Hearing Procedure**

**I.D. No.** HBR-19-10-00004-E

**Filing No.** 627

**Filing Date:** 2010-06-17

**Effective Date:** 2010-06-18

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

**Action taken:** Addition of sections 606.126 through 606.134 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, art. 15, title 21, sections 15-2109(1) and 15-2121(5)

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

**Specific reasons underlying the finding of necessity:** Adoption of the proposed rule pursuant to the traditional SAPA rulemaking process could take months to complete. During the pendency of such rulemaking process, the Board may be in a position to issue a new apportionment and, upon approval of that apportionment by DEC, a new assessment. Such assessment is necessary to secure revenue or, absent immediate collection of such revenue, to support a tax anticipation note. Revenue is necessary to the Regulating District's continued operation and, absent some other agency's adoption of the Regulating District's mission, the maintenance of the high-hazard impoundments under its control. The efficient conduct of the apportionment grievance hearing is central to the successful collection of the assessed amounts following the reapportionment effort. Further, because the Regulating District's available reserves will be exhausted before the final adoption of the proposed rule pursuant to the traditional SAPA process, the Regulating District does not have time to adhere to that process.

Based on the foregoing, and upon the approval granted by the Governor's Office of Taxpayer Accountability; and the NYS Department of Environmental Conservation, the Regulating District Board finds that adoption of the apportionment grievance hearing rule proposal as an emergency rule at the same time that the Regulating District submits the rule to the Governor's Office of Regulatory Reform (GORR) for consideration pursuant to the traditional SAPA process, will afford the Regulating District the opportunity to put the apportionment grievance hearing rule into immediate effect for a period of 90 days. Further, upon such basis the Board finds that Emergency Adoption is necessary for the preservation of public safety or the general welfare and that compliance with the regular rulemaking process would be contrary to the public interest. The Board finds that such circumstances exist in that, without an immediate infusion of cash pursuant to a new assessment, the Regulating District will not be in a position to maintain staff nor perform routine maintenance necessary to protect the high hazard dams under its control.

**Subject:** Apportionment Grievance Hearing Procedure.

**Purpose:** To establish a simplified due process procedure for contesting the apportionment of Regulating District costs.

**Text of emergency rule:** PART 606

#### Review of Apportionment

**Section 606.126 Apportionment Purpose.** Pursuant to statute, the board of the Hudson River-Black River Regulating District must prepare an estimate of the cost of the reservoirs operated by the regulating district and then apportion such cost, less the amount which may be chargeable to the state, among the public corporations and parcels of real estate benefited, in proportion to the amount of benefit which will inure to each such public corporation or parcel of real estate by reason of such reservoir. The regulating district board shall certify such apportionment to the department of environmental conservation for approval. Upon department approval, the apportionment shall be served and filed as required by statute.

**Section 606.127 Apportionment date.** The regulating district shall by resolution determine the apportionment date. The value, condition and ownership of parcels of real estate benefited by the operation of the reservoir shall be determined as of the apportionment date. Unless directed to modify the apportionment by the department, the regulating district may not unilaterally modify the apportionment until after the conclusion of the apportionment grievance hearing.

**Section 606.128 Publication of the Apportionment.** Upon approval of the department, the regulating district board shall place a notice in the regulating district's official newspapers detailing when and where the apportionment roll and the data upon which it is based will be available for review. The notice shall specify:

- 1) The apportionment date;
- 2) The address and telephone number for the regulating district office at which aggrieved persons may make an appointment with regulating district staff to review the apportionment;
- 3) The address and telephone number for the regulating district office at which formal complaints may be filed;
- 4) The last date for the filing of formal complaints;
- 5) The date upon which aggrieved parties must notify the board regarding the basis for the complaint and approximate time required to present written and/or oral testimony in support of the complaint, and;
- 6) The date, time and place for the apportionment grievance hearing at which the regulating district board shall hear formal complaints.

**Section 606.129 Apportionment Grievance Hearing.** Following department approval, service and filing, the regulating district board shall, upon not less than 45 days notice, conduct a public hearing at which all public corporations and owners of parcels of real property interested in or aggrieved by the apportionment shall be afforded an opportunity to present documentary and/or oral testimony contesting such apportionment.

**Section 606.130 Notice to Board of Intent to Seek Modification.** Following the board's publication of notice that it will conduct a public hearing, and at least seven days prior to the commencement of that public hearing, any public corporation or person deeming themselves to have been aggrieved shall notify the Board in writing regarding the basis for the requested modification to the apportionment. The aggrieved party's written complaint shall provide an estimate of the time necessary to present evidence at the apportionment grievance hearing and must be received by the board, at the address indicated on or before the date and time indicated in the board's published notice. The Board shall cause to be published on its website a copy of each such written complaint.

**Section 606.131 Complaint Procedure.** The complaint should include statements, records and other relevant information to support the requested apportionment modification. The aggrieved party may appear at the apportionment grievance hearing in person to present oral and written testimony, and may appear with or without an attorney or other representative. Authorization for appearances by counsel or other repre-

sentation must be put in writing and bear a date within the same calendar year in which the complaint is filed. A quorum of the regulating district board will preside at the apportionment grievance hearing. The Board may require an aggrieved party to submit additional evidence and, should the party willfully refuse to submit such evidence, or should the aggrieved party refuse to answer any material question, the aggrieved party will not be entitled to an apportionment modification or subsequent judicial review.

**Section 606.132 Conduct of Apportionment Grievance Hearing.** There is a presumption that the apportionment determined by the regulating district and approved by the department is correct. The burden to prove otherwise, by substantial evidence, lies with the public corporation or owner of a parcel of real property interested in or aggrieved by the apportionment. Only the current apportionment may be aggrieved. A separate complaint must be filed for each parcel or public corporation.

**Section 606.133 Modification of Apportionment following Apportionment Grievance Hearing.** If, after examining documentary evidence and hearing testimony, the regulating district board shall modify such apportionment, the revised apportionment shall not become effective until approved by the department of environmental conservation and a copy thereof is served and filed in the same manner as upon the completion of the same in the first instance at which time the apportionment shall be final and conclusive. If the regulating district board adopts a resolution approving the apportionment without modification, the apportionment shall be final and conclusive.

**Section 606.134 Judicial Review.** Parties dissatisfied with the final apportionment determination may elect to challenge such apportionment pursuant to Article 78 of the New York Civil Practice Law and Rules.

**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. HBR-19-10-00004-EP, Issue of May 12, 2010. The emergency rule will expire August 15, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Glenn A. LaFave, Executive Director, Hudson River-Black River Regulating District, 350 Northern Boulevard, Albany, New York 12204, (518) 465-3491, email: hrao@hrbrdd.com

#### Regulatory Impact Statement

##### 1. Statutory Authority

The Hudson River – Black River Regulating District (“the District”) is a public corporation created pursuant to Environmental Conservation Law (ECL) Article 15, Title 21. ECL Section 15-2103 declares, “...river regulating districts may be created...” pursuant to ECL Title 21 of Article 15 “...to construct, maintain and operate reservoirs within such districts...” ECL section 15-2105 sets forth direction and criteria for the organization of the boards of river regulating districts and pursuant to ECL section 15-2109(1), “The board shall have the power to make all necessary rules and regulations which shall be effective when approved by the department.”

##### 2. Legislative Objective

The Regulating District was created to regulate the flow of the Hudson River and Black River, primarily for the purposes of flood control and augmentation of low flows. Pursuant to NY ECL 15-2121, the legislature directed the Regulating District Board to apportion the costs to construct and operate the necessary reservoirs, less the amount chargeable to the state, among the public corporations and parcels of real estate benefited thereby. Embodied within that mandate is a requirement that the Board meet at a time and place specified to hear all persons and public corporations interested in or aggrieved by such apportionment and that upon approval or modification of the apportionment, such person or public corporation aggrieved may upon notice to the Board review the determination of the Board in the same manner as a review is had of the determination of a board of assessors in making an assessment. The proposed rule establishes a grievance hearing procedure including notice provisions, complaint parameters, hearing conduct standards and imposing the burden of proof.

The Regulating District's current Rules and Regulations, which govern the use, operation and maintenance of the Great Sacandaga Lake, 6 NYCRR Part 606, were approved on July 13, 1992 by the New York State Department of Environmental Conservation (NYSDEC), adopted October 19, 1992 by Resolution of the Board of the Hudson River-Black River Regulating District, and became effective January 27, 1993. The current rules do not establish a procedure for interested and/or aggrieved parties to exhaust administrative remedies before challenging the statutorily mandated apportionment in a court of law.

The proposed rule additions are consistent with the current rules and regulations previously approved by the NYSDEC to administer the Access Permit System, but will themselves be subject to Department approval as required by NY ECL 15-2109(1).

### 3. Needs and Benefits

#### Needs:

The Proposed Rules are required to allow for the efficient administration of the apportionment grievance process. By statute, the Regulating District is required to prepare a statement showing each public corporation and a description of each parcel of real estate benefitted by the Regulating District's reservoirs and the percentage of the Regulating District's costs to be borne by each. This "apportionment" statement is to be filed with the clerk of each county, town, village, or city affected or containing any real estate which is benefitted. NY ECL 15-2123(3) requires that the legislative body of every such county, town, village or city levy and assess such costs upon the relevant public corporation. The statute further requires that such assessments be collected in the same manner and by the same procedure as general taxes are collected. In short, the Regulating District's costs are to be assessed upon benefited public corporations and parcels based on an apportionment of those costs among those benefited public corporations and parcels. The proposed rules articulate the process through which the counties, towns, villages and cities, as well as the owners of individual parcels, can challenge the Regulating District's determination regarding who should bear the cost to maintain the reservoir facilities which prevent flooding and provide low flow augmentation to the communities benefited.

#### Benefits:

These Proposed Rules will improve the efficiency, predictability, understanding and fairness of the process by which those public corporations and owners of parcels of real estate chosen to share in the cost to operate the Regulating District's facilities can assure themselves that those costs are appropriately allocated among those who benefit from such facilities. Providing an efficient, transparent, forum through which affected parties can advocate for modifications to the apportionment of costs will serve to limit unnecessary effort and expense by the Regulating District and those affected parties.

### 4. Costs

#### Cost to Regulated Parties

As stated above, the Proposed Rules are being developed to provide predictability and finality to the statutorily mandated apportionment grievance process. The public corporations and parcels of real estate benefitted by the maintenance and operation of the Regulating District's reservoirs and related facilities have, to a great extent, received those benefits for decades without shouldering the full burden of providing those benefits. In light of the shift in responsibility occasioned by a federal court decision, many of those municipalities will, for the first time, be faced with collecting and paying assessments for benefits their constituents have taken for granted.

The Regulating District's enabling statute requires that the Regulating District Board apportion the costs to operate the Regulating District's facilities, less the amount which may be chargeable to the state, among the public corporations and parcels of real estate benefitted by such facilities in proportion to the amount of benefit which shall inure to each, NY ECL § 15-2121. The United States Court of Appeals' Albany Engineering v. FERC decision, (2008, 548 F.3rd 1071), has forced the Regulating District to reapportion most costs from the FERC licensed merchant power plants along the Hudson and Sacandaga Rivers to the public corporations in that area. NY ECL § 15-2121 also requires that the Regulating District Board allow persons and public corporations interested in or aggrieved by the Board's apportionment determination to review such determination in the same manner as a review is had of a determination of a board of assessors in making an assessment. The proposed rule establishes a grievance hearing procedure to facilitate the efficient administration of the determination review required by NY ECL § 15-2121(5).

The Proposed Rules implement the statutory requirement for a cost effective, non-judicial, forum through which interested and aggrieved parties can raise concerns and have those concerns addressed. Municipalities will realize cost savings by being able to direct individual constituents to participate in the Regulating District's apportionment grievance hearing process rather than face administrative and court challenges themselves. The Proposed rules will provide the municipalities with definite timeframes, clear direction regarding complaint process and content, and a transparent open meeting at which to rebut established presumptions by meeting the proscribed burden of proof. It is anticipated that public corporations will utilize existing resources to present their concerns, in writing and through oral testimony at hearing, without the need for consultants and/or specialized models or evidence. Non-public interested or aggrieved parties will face costs similar to those faced when mounting an assessment challenge.

#### Cost to Agency

The Regulating District has developed the Proposed Rules utilizing existing staff as an in-house project. The Proposed Rules are not expected to result in additional costs for implementation beyond what the District currently incurs for administration of its typical monthly meeting schedule. The Proposed Rules are expected to facilitate the efficient collection of the

Regulating District's periodic assessment. A transparent, open grievance process is less costly than defending Article 78 challenges.

#### Cost to Local Governments

The Regulating District will be solely responsible for administering the apportionment grievance hearing process. The municipalities have no responsibility for administration. It is important to note that the District pays approximately \$2.6 million in property taxes annually to the municipalities and other taxing jurisdictions around Great Sacandaga Lake and the payment of those taxes will not be affected by this rulemaking.

#### 5. Local Government Mandates

This rule making will not impose any program, service, duty or responsibility upon counties, cities, towns, villages, school districts, fire districts or other special districts.

#### 6. Paperwork

This rule will not impose any reporting requirement, including forms or other paperwork.

#### 7. Duplication

No rules or other legal requirements of either the State or federal government exist at the present time which duplicate, overlay or conflict with the Proposed Rules.

#### 8. Alternatives

The first alternative is the "null alternative" or the "do nothing" alternative. For decades, the Regulating District utilized an apportionment completed in 1925 to allocate its costs among the parcels of real estate and public corporations benefitted by the flood control and flow augmentation provided by the Regulating District's facilities. As such, the statutory provisions which derive from legislation enacted at the turn of the 20th century have remained untested for more than 80 years. In addition, the advent during the 1970's of modern procedures for municipal tax assessment challenges have obscured the procedures used as a guidepost by the Regulating District's enabling statute. Establishing streamlined, transparent procedures through which parties can ensure that they, and their constituents, are assessed only for their appropriate share of the Regulating District's costs weighed against the use of the null alternative.

The process for establishing new grievance hearing procedures resulted in multiple drafts. The first Draft was subject to analysis by the Regulating District's sister state agencies, such as the Department of Environmental Conservation and the Office of Real Property Services.

#### 9. Federal Standards

The federal government has set no standards for the same or similar subject areas addressed by the Proposed Rules. Pursuant to Article 408 of the license issued to the Regulating District by the Federal Energy Regulatory Commission (FERC) the District is required to notify FERC during any rulemaking process affecting Title 6, Part 606 of the New York Code of Rules and Regulations.

#### 10. Compliance Schedule

Upon publication of the Notice of Adoption in the State Register, all regulated parties shall be required to comply with the Proposed Rules.

#### **Regulatory Flexibility Analysis**

Pursuant to SAPA § 202-b(3)(a)(ii), the Hudson River Black River Regulating District (the "District") is not required to prepare a Regulatory Flexibility Analysis for Small Businesses and Local Governments (RFASB/LG) because the Proposed Rules will not impose adverse economic impacts or recordkeeping compliance requirements on small businesses or local governments. Pursuant to the requirements of SAPA, the following represents the statement of findings and the reasons upon which the finding was made that the Rules would impose no adverse economic impacts.

#### Small Businesses

The affected parties will include both commercial and non-commercial parties with property or interests lying within designated floodplains in either the Hudson River Area or the Black River Area. The majority of the affected parties will include non-commercial parties. The commercial parties primarily include non-FERC licensed hydropower entities and retail outlets, marinas, restaurants, warehouse and industrial facilities located within the floodplain adjacent to the Sacandaga and Hudson Rivers and similar commercial parties within similar floodplains for the Black, Beaver and Moose Rivers. These non-commercial and commercial parties own property within one or both of the Regulating District's two River Areas. The Regulating District anticipates preparation of maps and/or property descriptions which clearly delineate those parcels in a given municipality falling within the designated floodplain. The Proposed Rules will provide property owners with 45 days to view such map or description and will guide interested or aggrieved parties in the preparation and submission of written complaints.

The Proposed Rules are not expected to result in an increased need for small businesses to hire professional consultants for compliance. The Proposed Rules will not require small businesses to purchase or lease new computer equipment, hardware or software. The Proposed Rules will not require small business to prepare any additional reports or keep additional

records. As stated in the RIS, the Proposed Rules are being developed to provide predictability and finality to the apportionment grievance process.

#### Local Government Mandates

There will be no costs to local governments for the implementation of the Proposed Rules because the Regulating District will fully administer and fund the apportionment grievance process. Local governments will have the option to contest, but need not contest, an apportionment which affects the municipality and/or its constituents. The Regulating District pays approximately \$2.6 million in property taxes to the municipalities and other taxing jurisdictions around Great Sacandaga Lake, and the payment of these taxes will not be affected by this rulemaking.

This rule making will not impose any program, service, duty or responsibility upon counties, cities, towns, villages, school districts, fire districts or other special districts.

#### Rural Area Flexibility Analysis

Pursuant to SAPA § 202-bb(2), in developing a rule, agencies must consider utilizing approaches to accomplish the objectives of a statute while minimizing any adverse impact on public and private sector interests in rural areas. For the purposes of this SAPA evaluation, a rural area is defined as a county having a population less than 200,000. The eight counties with corporate boundaries within the Hudson River area include: Albany; Rensselaer; Hamilton; Fulton; Washington; Warren; Essex; and Saratoga counties. The five counties with corporate boundaries within the Black River area include: Jefferson; Lewis; Herkimer; Oneida; and Hamilton counties. Of the twelve counties within the two river areas, Essex, Rensselaer, Hamilton, Washington, Warren, Fulton, Jefferson, Lewis, Herkimer and Oneida counties each have a population of less than 200,000 persons, and therefore, the potential impacts on these counties must be considered.

Pursuant to SAPA § 202-bb(4)(a) a Rural Area Flexibility Analysis (RAFA) is not required because the Proposed Rules will not impose adverse impacts or reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Pursuant to the requirements of SAPA, the following represents the statement of findings and the reasons upon which the finding was made that the rule would impose no adverse impacts or recordkeeping compliance requirements:

#### Small Businesses

The affected parties will include both commercial and non-commercial parties with property or interests lying within designated floodplains in either the Hudson River Area or the Black River Area. The majority of the affected parties will include non-commercial parties. The commercial parties primarily include non-FERC licensed hydropower entities and retail outlets, marinas, restaurants, warehouse and industrial facilities located within the floodplain adjacent to the Sacandaga and Hudson Rivers and similar commercial parties within similar floodplains for the Black, Beaver and Moose Rivers. These non-commercial and commercial parties own property within one or both of the Regulating District's two river areas.

The Regulating District anticipates preparation of maps and/or property descriptions which clearly delineate those parcels in a given municipality falling within the designated floodplain. The Proposed Rules will provide property owners with 45 days to view such map or description and will guide interested or aggrieved parties in the preparation and submission of written complaints.

The Proposed Rules are not expected to result in an increased need for small businesses to hire professional consultants for compliance. The Proposed Rules will not require small businesses to purchase or lease new computer equipment, hardware or software. The Proposed Rules will not require small business to prepare any additional reports or keep additional records. As stated in the RIS, the Proposed Rules are being developed to provide predictability and finality to the apportionment grievance process.

#### Local Government Mandates

There will be no costs to local governments for the implementation of the Proposed Rules because the Regulating District will fully administer and fund the apportionment grievance process. Local governments will have the option to contest, but need not contest, an apportionment which affects the municipality and/or its constituents. The Regulating District pays approximately \$2.6 million in property taxes to the municipalities and other taxing jurisdictions around Great Sacandaga Lake, and the payment of these taxes will not be affected by this rulemaking.

This rule making will not impose any program, service, duty or responsibility upon counties, cities, towns, villages, school districts, fire districts or other special districts.

#### Job Impact Statement

Pursuant to SAPA § 201-a(2)(a), a Job Impact Statement for the Proposed Rule additions is not required because it is apparent from the nature and purposes of the Proposed Rules that they will not have a substantial adverse impact on jobs and employment opportunities. The Proposed Rules are required to allow for the efficient administration of the apportionment grievance process.

The affected parties will include both commercial and non-commercial parties with property or interests lying within designated floodplains in either the Hudson River Area or the Black River Area. The majority of the affected parties will include non-commercial parties. The commercial parties primarily include non-FERC licensed hydropower entities and retail outlets, marinas, restaurants, warehouse and industrial facilities located within the floodplain adjacent to the Sacandaga and Hudson Rivers and similar commercial parties within similar floodplains for the Black, Beaver and Moose Rivers. These non-commercial and commercial parties own property within one or both of the Regulating District's two river areas. The proposed rules do not affect the Regulating District's authority to impose assessments upon affected parties, but rather provide clarity to the process necessary to successfully contest such charges. Therefore, there will be no impact on jobs.

#### Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Valuation of Life Insurance Reserves

**I.D. No.** INS-27-10-00007-E

**Filing No.** 661

**Filing Date:** 2010-06-22

**Effective Date:** 2010-06-22

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

**Action taken:** Amendment Part 98 (Regulation 147) of Title 11 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** This amendment to Regulation No. 147 removes restrictions on the mortality adjustment factors (known as X factors) in the deficiency reserve calculation. The current restrictions on the X factors prevent some insurers from using mortality rates with a slope similar to their expected mortality. The purpose of the X factor in the deficiency reserve calculation is to allow insurers to adjust the valuation mortality assumptions so that the mortality rates better reflect experience mortality rates; removal of current restrictions will allow this to occur. In many cases, this will reduce the amount of deficiency reserves held by an insurer. However, in order to safeguard against inappropriate reserve levels, every insurer using an X factor that is less than 100 percent at any duration for any policy is required by Section 98.4(b)(5) of the Regulation to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report that complies with the requirements of the Actuarial Standards of Practice.

This amendment also provides clarification in the calculation of the segment length, and addresses whether recalculation is required when valuation mortality changes. Specifically, for companies that are using the 2001 CSO Preferred Structure Mortality Table, there may be instances where the valuation mortality must be changed to meet the requirements of 11 NYCRR 100 (Regulation 179) with respect to the present value of death benefits over certain future periods. In such instances, the segment length would not need to be recalculated for policies issued prior to January 1, 2009.

These standards have already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted these changes for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standards are not automatically adopted and need to be adopted via an amendment to Regulation No. 147. Insurers domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes. Adopting these standards will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

Adoption of the amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the June 30, 2010 quarterly statement is August 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009 and March 25, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 12, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For all of the reasons stated above, an emergency adoption of this third amendment to Regulation No. 147 is necessary for the general welfare.

**Subject:** Valuation of Life Insurance Reserves.

**Purpose:** Incorporates revisions to National Association of Insurance Commissioners model regulation and actuarial guideline.

**Text of emergency rule:**

Subparagraphs (ii) and (iii) of Section 98.4(b)(5) of this Part are repealed and subparagraphs (iv) through (ix) are renumbered (ii) through (vii).

Section 98.4(b)(5)(v) of this Part, as re-lettered by this amendment above, is amended to read as follows:

(v) The appointed actuary may decrease X at any valuation date as long as X [does not decrease in any successive policy years and as long as it] continues to meet all the requirements of this paragraph;

New subdivisions (c) and (d) are added to section 98.5 to read as follows:

(c) For policies subject to a non-elective change in valuation mortality rates because the requirements for continued use of the prior rates were no longer satisfied, the insurer may, but shall not be required to, recalculate the segments.

(d) For policies subject to an insurer-election to substitute the 2001 Preferred Class Structure Mortality Table for the 2001 CSO Mortality Table:

(1) If the policy was issued on a policy form filed for approval prior to January 1, 2009, the insurer may, but shall not be required to, recalculate the segments; and

(2) If the policy was issued on a policy form filed for approval after January 1, 2009, the insurer shall recalculate the segments using the new valuation mortality rates.

**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 September 19, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

**Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the Third Amendment to Regulation No. 147 (11 NYCRR 98) derives from Sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded the Superintendent by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law requires every insurer authorized

under this chapter to transact the kinds of insurance specified in paragraph one, two or three of subsection (a) of section one thousand one hundred thirteen of this chapter to maintain reserves necessary on account of such insurer's policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities ("reserves") for all outstanding policies and contracts of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves. Reserving has not historically included lapse as a factor in calculations, because it was not relevant to traditional forms of life insurance contracts, and therefore Section 4217 does not expressly include references to lapses. However, new products have been developed that were not contemplated at the time Section 4217 was written, such that lapses may be relevant in reserve calculations in some cases.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of Section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for Section 4217 to such policies and contracts as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on estimates of future experience, or in the case of any plan of life insurance or annuity that is of such a nature that the minimum reserves cannot be determined by the methods described in Section 4217(c)(6) and Section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and must be computed by a method that is consistent with the principles of Sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract. Section 4240(d)(7) states that the Superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principle focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. At the same time, an insurer benefits when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment to section 98.4(b)(5) of Regulation No. 147 (11 NYCRR 98) is necessary to help ensure the solvency of life insurers doing business in New York. The original version of Regulation No. 147, which incorporated the National Association of Insurance Commissioners (NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), was permanently adopted in 2003. In 2004, the Department and other states became aware that some insurers were creating new products in order to avoid the reserve methodologies described in Regulation No. 147. As a result, the NAIC began developing an Actuarial Guideline in 2004 that addressed the concerns of the Department and other regulators by eliminating any perceived ambiguity in the standards for policies issued July 1, 2005 and later. This revision was adopted by the NAIC in October 2005, and Regulation No. 147 thereafter was amended on an emergency basis to reflect the principles of Section 4217 of the Insurance Law and the NAIC standards for policies issued

July 1, 2005 and later. The amendment was permanently adopted effective January 10, 2007.

In September 2006, the NAIC adopted a new version of Actuarial Guideline 38, which included provisions on lapse decrements and a separate asset adequacy analysis requirement for certain universal life with secondary guarantee policies. Regulation 147 was thereafter amended again, and the amendments were adopted on December 26, 2007.

In September 2009, the NAIC adopted revisions to its model regulation related to X factors used for calculating deficiency reserves. The purpose of the X factor in the deficiency reserve calculation is to allow companies to adjust the valuation mortality to mortality that approximates the expected mortality experience of the company. Specifically, the NAIC's revisions remove the following provisions: (1) X could not be less than 20%; and (2) X could not decrease in successive policy years. Additionally, the NAIC adopted a new Actuarial Guideline 46, which provides guidance on the interpretation of the calculation of segment length when there is a change in the valuation mortality rates subsequent to issuance of the policy. For policies issued prior to January 1, 2009, the segment length would not need to be recalculated.

The current restrictions on the X factors in Regulation No. 147 prevent some companies from obtaining mortality with a slope similar to their expected mortality. The removal of these restrictions will enable companies to adjust the valuation mortality to mortality that approximates the expected mortality experience of the company. However, in order to safeguard insureds against inappropriate reserve levels by insurers, the Department requires every insurer using X factors to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves.

This amendment to Regulation No. 147 incorporates both the NAIC revisions to the model regulation and the interpretation of the Actuarial Guideline, thus resulting in consistency between the NAIC and New York and promoting regulatory uniformity across the U.S. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure to maintain higher risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York authorized companies look weaker financially than their peer companies. If New York authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every

company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The amendment to the regulation imposes no new reporting requirements.

7. Duplication: The regulation does not duplicate any existing law or regulation.

8. Alternatives: The only alternative considered by the Department was to not remove the provisions for the X factors and to not include the guidance included in Actuarial Guideline 46 that were adopted by the NAIC in September 2009. The X factor provisions consisted of removing the requirement that X could not be less than 20% and that X could not decrease in successive policy years. The Actuarial Guideline 46 guidance relates to policies issued prior to January 1, 2009, and does not require the contract segments to be recalculated when the valuation mortality rates change after issuance of the policy.

The Department has had numerous discussions with affected insurers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners. These items are part of a larger capital and surplus relief plan for insurers. Adopting these standards will allow New York insurers to be subject to the same standards that have already been adopted by the NAIC and which are being implemented in other states. Insurers authorized in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies authorized in states that have adopted these changes and in those circumstances, New York authorized companies would be at a deficit, from the impression that there is a significant difference in financial stability of New York authorized insurers and those authorized outside the state.

9. Federal standards: There are no federal standards in this subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment removes two provisions from the X factors used in calculating deficiency reserves. However, these changes are voluntary, and insurers are not required to make either of these changes. Additionally, these changes would only affect those insurers that use X factors in calculating deficiency reserves. Since the removal of these provisions were already adopted by the NAIC, insurers that wish to incorporate these changes into their reserve methodology should have adequate time to make these changes.

#### **Regulatory Flexibility Analysis**

##### **1. Small businesses:**

The Insurance Department finds that this amendment will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurers and fraternal benefit societies authorized to do business in New York State, none of which falls within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

##### **2. Local governments:**

The amendment does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

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

1. Types and estimated number of rural areas: Insurers and fraternal benefit societies covered by the amendment do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: There are no reporting, recordkeeping or other compliance requirements associated with this amendment to the regulation. Entities subject to the regulation will not need to engage professional services to comply with the amendment.

3. Costs: This amendment provides for lower minimum standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: The Department has had numerous discussions with affected insurers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners.

#### **Job Impact Statement**

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment sets standards for setting life insurance reserves for insurers and fraternal benefit societies. Compliance should not require the employment of additional personnel or outside contractors.

## **EMERGENCY RULE MAKING**

### **Recognition of the 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities**

**I.D. No.** INS-27-10-00008-E

**Filing No.** 662

**Filing Date:** 2010-06-22

**Effective Date:** 2010-06-22

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

**Action taken:** Amendment of Part 100 (Regulation 179) of Title 11 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** This amendment to Regulation No. 179 extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004 with the superintendent's approval and if certain conditions are met by the insurer related to policies or portions of policies which are coinsured. Previously, this table could only be used for policies issued on or after January 1, 2007. The use of this table allows for the reserves to better match the risks associated with different underwriting classifications.

This standard has already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted this change for year-end

2009. Since New York has a separate regulation addressing this subject matter, the revised standard is not automatically adopted and needs to be adopted via an amendment to Regulation No. 179. Insurers domiciled in states that do not adopt this change by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted this change. Adopting this standard will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

While the anticipated impact of the adoption of this proposed amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis on inforce business for New York authorized life insurers. Additionally, the impact of this change will likely increase over time. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies – an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the June 30, 2010 quarterly statement is August 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009 and March 25, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 12, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For all of the reasons stated above, an emergency adoption of this second amendment to Regulation No. 179 is necessary for the general welfare.

**Subject:** Recognition of the 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities.

**Purpose:** This amendment extends the use of the 2001 CSO Preferred Mortality Table to policies issued on or after January 1, 2004.

**Text of emergency rule:** Paragraph (3) of subdivision (a) of section 100.6 is amended to read as follows:

(3) Part 98.4(b)(5) of this Title: The 2001 CSO Mortality Table is the minimum mortality standard for deficiency reserves. If select mortality rates are used, they may be multiplied by X percent for durations in the first segment, subject to the conditions specified in Parts 98.4(b)(5)(i) – 98.4(b)(5)(ix)(vii) of this Title. In demonstrating compliance with those conditions, the demonstrations may not combine the results of tests that utilize the 1980 CSO Mortality Table with those tests that utilize the 2001 CSO Mortality Table, unless the combination is explicitly required by regulation or necessary to be in compliance with relevant Actuarial Standards of Practice.

Subdivision (a) of section 100.8 is amended to read as follows:

(a) At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in section 100.9 of this Part, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum mortality standard for policies issued on or after January 1, 2007. *For policies issued on or after January 1, 2004, and prior to January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be substituted with the prior approval of the superintendent and subject to the conditions of section 100.9 of this Part.* A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, pursuant to the requirements of this Part, will only be treated as part of the 2001 CSO Mortality Table for purposes of reserve valuation.

**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 September 19, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

**Regulatory Impact Statement**

1. Statutory authority: The superintendent's authority for the adoption of 11 NYCRR 100 (Regulation No. 179) derives from sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, 4517, Article 24, and Article 26 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law requires insurers to maintain reserves for life insurance policies and certificates according to prescribed tables of mortality and rates of interest.

Section 4217(c)(2)(A)(iii) permits, as a minimum standard of valuation for life insurance policies, any ordinary mortality table adopted by the National Association of Insurance Commissioners (NAIC) after 1980, and approved by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioner's reserve valuation method, the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioner's reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the NAIC after 1980, and approved by the superintendent, for use in determining the minimum nonforfeiture standard.

Section 4224(a)(1) prohibits unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for life insurance policies.

Section 4240(d)(7) states the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section, which covers various issues related to separate accounts of insurance companies, including reserve issues.

Section 4517(c)(2) requires fraternal benefit societies to comply with the minimum valuation standards of section 4217 of the Insurance Law for life insurance certificates issued on or after January 1, 1980.

Article 24 describes unfair methods of competition and unfair and deceptive acts and practices.

Article 26 describes unfair claim settlement practices, other misconduct and discrimination.

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. The Insurance Law prescribes the mortality tables and interest rates to be used for calculating such reserves. At the same time, an insurer benefits when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment extends the use of the 2001 CSO Preferred Structure Mortality Table to policies issued on or after January 1, 2004. Use of this table allows for the reserves to better match the risks associated with different underwriting classifications. However, use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. While the anticipated impact of this amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis. Based on a survey conducted by the American Council of Life Insurers, the industry wide impact of allowing the use of this table for policies issued on or after January 1, 2004 is estimated to be a decrease in reserves of approximately \$600 million - \$1.2 billion. The retroactive use of such table will not jeopardize New York's long-standing tradition of protecting insureds from insurers that under-reserve since the use of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the proposed amendment will decrease reserves on income business for New York authorized life insurers - in some cases, by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure to maintain

higher risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York authorized companies look weaker financially than their peer companies. If New York authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves. Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been available for use by insurers since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004, and the use of this table is optional.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this amendment to Regulation No. 179. There are no costs to other government agencies or local governments.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The current rule imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years.

7. Duplication: The regulation does not duplicate any existing law or regulation.

8. Alternatives: The only alternative considered was to not extend the date of using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004. However, this would result in higher reserve requirements for New York authorized life insurers and fraternal benefit societies on some policies, since this change was adopted by the NAIC in September 2009. This change was discussed during various NAIC conference calls and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

This item is part of a larger capital and surplus relief plan for insurers. Adopting this amendment will allow New York insurers to be subject to the same standard that has already been adopted by the NAIC and which is being implemented in other states. Insurers authorized in states that do not adopt this change by December 31, 2009 year-end will be forced to hold higher reserves relative to companies authorized in states that have adopted this change and in those circumstances, New York authorized companies would be at a disadvantage, from the impression that there is a significant difference in financial stability of New York authorized insurers and those authorized outside the state.

9. Federal standards: There are no federal standards in the subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment allows the use of 2001 CSO Preferred Class Structure Mortality Table for policies issued on or after January 1, 2004. Use of the 2001 CSO Preferred Class Structure Mortality Table, however, is not mandatory. Voluntary election of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. The actuarial certification and supporting actuarial report is due annually on March 1. The statistical report required for insurers that use the 2001 CSO Preferred Class Structure Mortality Table is due annually on July 1. Since use of the 2001 CSO Preferred Class Structure Mortality Table was previously in effect and this amendment only extends the date for using the table, insurers should have ample time to meet the reporting requirements.

**Regulatory Flexibility Analysis**

1. Small Businesses:

The Insurance Department finds that this amendment will not impose

any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

#### 2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

#### Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers covered by the regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004. The current regulation imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years. Use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. Voluntary election of such table is conditional on the requirements set forth in the prior version of the regulation, which became effective on December 26, 2007, being met by the insurer.

3. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been able to be used since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004 and the use of this table is optional.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this rule. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: This amendment was discussed during various public NAIC conference calls, and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

#### Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table for use in determining minimum reserve liabilities and nonforfeiture benefits back to policies issued on or after January 1, 2004. Previously, this table could be used for policies issued on or after January 1, 2007. This rule will lower reserve requirements for those insurers that elect to use this table for policies issued on or after January 1, 2004 and therefore decrease the cost of doing business in New York. Compliance should not require the employment of additional personnel or outside contractors.

## EMERGENCY RULE MAKING

### Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-27-10-00009-E

Filing No. 663

Filing Date: 2010-06-22

Effective Date: 2010-06-22

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

**Action taken:** Amendment of Part 83 (Regulation 172) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, sections 4403, 4403-a, 4403-c and 4408-a; L. 2002, ch. 599; and L. 2008, ch. 311

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

**Specific reasons underlying the finding of necessity:** Certain provisions of the Insurance Law require that insurers file financial statements annually and quarterly with the superintendent. These insurers are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as annual and quarterly statement blanks on forms prescribed by the superintendent. The superintendent has prescribed forms and annual and quarterly statement instructions that are adopted from time to time by the National Association of Insurance Commissioners ("NAIC"), as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy procedure and instruction manuals. The latest edition of one of the manuals, the "Accounting Practices and Procedures Manual as of March 2009" ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). This regulation incorporates by reference the Accounting Manual adopted by the NAIC in March, 2009.

The Accounting Manual represents a codification of statutory accounting principles. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. The preamble to the Accounting Manual states that "this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations." Section 83.4 of the proposed regulation sets out the "Conflicts and Exceptions" to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed "goodwill" from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset. Chapter 311 also modified certain limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. Chapter 311 made the changes regarding the treatment of goodwill and EDP equipment subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, "health insurers") will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis. As compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

Absent the amendment being effective immediately, health insurers would be allowed to treat goodwill and EDP equipment, for financial statement purposes, as other regulated insurers do. In other words, the Department is concerned that absent an amendment, the financial statements that health insurers must file with the Department on an annual and quarterly basis may not reflect with sufficient accuracy the true financial condition of such companies.

The proposed rule also adopts SSAP #10R, which was adopted by the NAIC on December 8, 2009. SSAP #10R extends the period over which deferred tax assets ("DTAs") are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section

1301(a)(16), to 15%. SSAP #10R will be included in the Accounting Manual.

Insurance Law Section 1301(a)(18) provides that the superintendent may, by regulation, modify any requirement of Section 1301(a) to conform to any subsequent amendment to the Accounting Manual as adopted from time to time by the NAIC. SSAP #10R will be effective for the annual statement for the year ending December 31, 2009.

Adoption of SSAP #10R will allow New York authorized life insurers to increase the admitted value of deferred tax assets. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on insurers to maintain the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with raising additional capital.

New York authorized insurers would have been at a competitive disadvantage if SSAP #10R was not adopted by year-end 2009. Failure to implement the changes in New York at the same time they were implemented in other states would have made New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to report a higher admitted asset value, the lower RBC ratios generated by the lower admitted asset value will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the June 30, 2010 quarterly statement is August 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009 and March 25, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 7, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the general welfare.

**Subject:** Financial statement filings and accounting practices and procedures.

**Purpose:** To update the regulation to conform to NAIC guidelines, statutory amendments, and to clarify existing provisions.

**Substance of emergency rule:** Subdivision (c) of Section 83.2 of Part 83 is amended to update the publication dates for the Accounting Practices and Procedures Manual ("Accounting Manual"), which is incorporated by reference in Regulation 172. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs").

Subdivision (c) of Section 83.3 is repealed and a new subdivision (c) is adopted to clarify the fact that the Accounting Manual is adopted in its entirety, subject to such conflicts and exceptions as found in Section 83.4 of this part.

Section 83.4 is amended to conform to updates to the Accounting Manual and the provisions of Chapter 311 of the Laws of 2008. Section 83.4 sets out "Conflicts and Exceptions" to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control. Section 83.4 is amended as follows:

Subdivision (b) is amended so that the admitted value of gross deferred tax assets is in accordance with SSAP No. 10R.

Subdivision (c) is repealed and a new subdivision (c) is added to require insurers other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans to depreciate electronic data processing equipment and operating system software over three years.

Paragraph (3) of subdivision (e), which permitted insurers to take credit for aircraft as admitted assets, has been deleted.

Subdivision (h) is amended so that insurers may no longer take credit for certain prepaid real estate taxes as admitted assets.

Subdivision (i), which set forth rules different from the rules set forth in the Accounting Manual for valuing investments in common shares of insurers which are not subsidiaries, has been deleted.

Subdivision (j), which set forth rules different from the rules set forth in the Accounting Manual for the calculation of investment income due and accrued has been deleted.

Subdivision (k) is relettered (i).

Subdivision (l), which set forth rules different from the rules set forth in the Accounting Manual for limitations on accrued mortgage loan interest, has been deleted.

Paragraph (1) of subdivision (m), which set forth rules different from

the rules set forth in the Accounting Manual, for depreciation of life insurers' investments in real estate, has been deleted.

Paragraph (2) of subdivision (m) has been relettered 83.4(j).

Paragraphs (1) and (3) of subdivision (n) have been renumbered paragraphs (1) and (2) of subdivision (k) respectively.

Paragraph (2) of subdivision (n), which set forth rules different from the rules set forth in the Accounting Manual for valuing investments in common shares of insurers which are subsidiaries, has been deleted.

Subdivision (o) is relettered (l).

Subdivision (p), which required all goodwill from assumption reinsurance transactions pertaining to life, deposit-type and accident and health reinsurance to be non-admitted, has been deleted.

Subdivision (q) is relettered (m).

Subdivision (r) is relettered (n).

Subdivision (s) is relettered (o).

Subdivision (t) has been relettered (p), and has been amended to permit insurers, other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans, to admit goodwill in accordance with the Accounting Manual.

Subdivision (u), which set forth rules for declaring and distributing dividends, in the case of the quasi-reorganization of a domestic stock property/casualty insurer, has been deleted.

Subdivision (v) is relettered (q).

Subdivision (w) is relettered (r).

Subdivision (x) is relettered (s).

**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 September 19, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory authority: Insurance Law Sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1407, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404 of the Insurance Law; Sections 4403, 4403-a, 4403-(c)(12) and 4408-a of the Public Health Law; and Chapter 599 of the Laws of 2002 and Chapter 311 of the Laws of 2008.

Insurance Law Section 107(a)(2) defines the term "accredited reinsurer", which is used in sections 83.2, 83.3, and 83.5 of Part 83, to mean an assuming insurer not authorized to do an insurance business in this state but which (i) presents satisfactory evidence to the superintendent that it meets the applicable standards of solvency required in this state, (ii) is in compliance with the conditions prescribed by regulation under which a ceding insurer may be allowed credit for reinsurance recoverable from an insurer not authorized in this state, and (iii) has received a certificate of recognition as an accredited reinsurer issued by the superintendent pursuant to such regulation; provided that no insurer shall be an accredited reinsurer with respect to any kind of insurance not provided for in such certificate.

Insurance Law Sections 201 and 301 authorize the superintendent to prescribe forms and regulations interpreting the Insurance Law, and to effectuate any power granted to the superintendent under the Insurance Law.

Insurance Law Sections 307 and 308 require insurers to file annual and quarterly statements on forms prescribed by the superintendent and in accordance with instructions prescribed by the superintendent. Section 307(a)(1) of the Insurance Law requires every insurer authorized in New York to file an annual statement showing its financial condition in such form as prescribed by the superintendent. Section 307(a)(2) permits the use of the annual statement form adopted from time to time by the National Association of Insurance Commissioners (NAIC).

Insurance Law Section 1109(a) provides that an organization complying with the provisions of Article 44 of the Public Health Law is subject to various specified sections of the Insurance Law, including section 308. Section 1109(e) provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Article 13 specifies the requirements regarding the treatment of assets and deposits in determining the financial condition of insurers for the purposes of the Insurance Law.

Insurance Law Sections 1301 and 1302 define which assets are "admitted" or "not admitted" (only "admitted" assets are included in determining an insurer's solvency).

Insurance Law Section 1301(a)(18) provides that the superintendent may, by regulation, modify any requirement of Section 1301(a) to conform to any subsequent amendment to the NAIC's Accounting Practices and Procedures Manual ("Accounting Manual").

Insurance Law Section 1308 (in conjunction with Insurance Law Section 1301(a)(14)) allows for an authorized insurer to reduce the amount that it must hold in its reserves through the use of reinsurance with another authorized insurer or an accredited reinsurer.

Insurance Law Article 14 establishes the investments that may be used by insurers to satisfy minimum capital, surplus and reserve requirements. It further governs those classes of investments in which insurance companies may invest after satisfying minimum capital, surplus and reserve requirements, and establishes allocation or diversification limits among assets classes. Article 14 also sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Section 1404 establishes the types of reserve investments that may be used by non-life insurers to satisfy reserve requirements.

Insurance Law Section 1405 establishes the types of surplus investments that may be used by life insurers, after minimum capital and reserve requirements have been satisfied.

Insurance Law Section 1407 establishes the types of surplus investments that may be used by property/casualty and certain other insurers, after minimum capital and reserve requirements have been satisfied.

Insurance Law Section 1411 establishes the types of investments that domestic insurers are prohibited from making.

Insurance Law Section 1415 sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Article 15 contains provisions that govern the establishment and operation of holding company systems, including controlled insurers. Insurance Law Section 1501 provides for an administrative determination of the existence or absence of control to determine whether the insurer is a member of a holding company system. Insurance Law Section 1505 establishes standards for transactions between a controlled insurer and other members of the holding company system to safeguard the interests of the insurer and policyholders.

Insurance Law Section 3233 sets forth provisions concerning stabilization of health insurance markets and premium rates.

Insurance Law Section 4117 sets forth provisions concerning loss reserves and loss expense reserves of property/casualty insurance companies.

Insurance Law Section 4233 sets forth provisions concerning the annual statements of life insurance companies, including a provision that in addition to any other matter that may be required to be stated therein, either by law or by the superintendent pursuant to law, every annual statement of every life insurer doing business in New York shall conform substantially to the form of statement adopted from time to time for such purpose by, or by the authority of, the NAIC, together with such additions, omissions or modifications, similarly adopted from time to time, as may be approved by the superintendent.

Insurance Law Section 4239 sets forth provisions concerning allocation and reporting of income and expenses of life insurers.

Insurance Law Article 43 establishes organizational requirements, investment and reserve requirements for non-profit medical and dental indemnity, or health and hospital service corporations organized in this state. The article also establishes "stop loss" funds, from which health maintenance organizations, corporations or insurers may receive reimbursement for claims paid by such entities for members covered under certain contracts.

Insurance Law Section 4301 establishes requirements applicable to the formation and operation of the corporate entity, including composition and term limits of the corporation's board of directors.

Insurance Law Section 4310 sets forth requirements applicable to investments, reserves and the financial condition of not-for-profit health insurers and health maintenance organizations (HMOs).

Insurance Law Sections 4321-a, 4322-a, and 4327 establish state-funded stop loss pools to subsidize claim payments made by HMOs pursuant to policies issued in the individual market and the Healthy NY market.

Insurance Law Section 6404 sets forth provisions concerning the investments that may be used by title insurance corporations. It also sets forth provisions concerning the valuation of various assets of title insurers.

Insurance Law Sections 1109(e) and 4301(e)(5), respectively, provide that the superintendent may promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law pertaining to health maintenance organizations. Public Health Law Article 44 authorizes the superintendent to establish standards governing the fiscal solvency of integrated delivery systems, and requires the filing of financial reports by prepaid health service plans and comprehensive HIV special needs plans.

Pursuant to the above provisions, the superintendent is authorized to implement the Accounting Manual, subject to any provisions in New York law that conflict with particular points in the Accounting Manual. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). The Accounting Manual represents a codification of Statutory Accounting Principles.

Chapter 599 of the Laws of 2002 amended the Insurance Law relating to the treatment of deferred tax assets in the filing of quarterly and annual financial statements by certain insurers.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed "goodwill" from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Chapter 311 also modified the limitations on the ability of insurers to take credit for electronic data processing (EDP) equipment as an admitted asset.

2. Legislative objectives: Certain provisions of the Insurance Law provide that authorized insurers, accredited reinsurers, authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations and integrated delivery systems shall file financial statements annually and quarterly with the superintendent. These entities are subject to the provisions of Sections 307 and 308 of the Insurance Law, which require the filing of what are known as Annual and Quarterly Statement Blanks on forms prescribed by the superintendent. Except with regard to filings made by Underwriters at Lloyd's, London, the superintendent has prescribed forms and Annual and Quarterly Statement Instructions that have been adopted from time to time by the NAIC, as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy, procedure and instruction manuals. One of these manuals, the Accounting Manual, sets forth Statements of Statutory Accounting Principles. The Accounting Manual is incorporated by reference into this regulation.

The preamble to the Accounting Manual states that "this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations." Section 83.4 of the proposed regulation sets out the "Conflicts and Exceptions" to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control.

3. Needs and benefits: Section 83.3 of the regulation provides that the financial statements of all authorized insurers, accredited reinsurers (except Underwriters at Lloyd's, London), authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans (collectively, to as "regulated insurers") shall be completed in accordance with statutory accounting practices and procedures as prescribed by applicable provisions of the Insurance Law and regulations.

The purpose of this Part is to enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by regulated insurers, by clearly setting forth the accounting practices and procedures to be followed in completing annual and quarterly financial statements that must be filed with the Department.

The NAIC has most recently adopted a new Accounting Manual as of March 2009. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of the SSAPs. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. Codification provides examiners and analysts with uniform accounting rules against which insurers' financial statements can be evaluated.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Section 1302 provides a listing of non-admitted assets. Chapter 311 removed "goodwill" from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, "health insurers") will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis. As compared to other regulated

insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

Chapter 311 also modified the limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

On December 8, 2009, the NAIC adopted a new accounting guidance relating to Deferred Tax Assets (SSAP #10R) which will be effective for the annual statement for the year ending December 31, 2009. The accounting guidance will be included in the Accounting Manual.

The proposed rule adopts SSAP #10R. SSAP #10R extends the period over which deferred tax assets (“DTAs”) are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%.

4. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states’ requirements as much as New York’s.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies’ net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers’ overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC’s Accounting Practices and Procedures Manual and adopted in other states.

There is no cost to the Insurance Department for the Accounting Manual, since the Department may obtain it free of charge from the NAIC.

5. Paperwork: To the extent that this rule makes changes in accounting principles, regulated insurers will need to familiarize themselves with this regulation. To the extent that the rule conforms New York’s requirements to those of other states, the need for separate New York filings will be reduced. Once insurers are familiar with the changes, there should be no increase in required paperwork or a net decrease because of the reduced necessity for separate New York filings in other states.

6. Local government mandate: This rule does not impose any obligations on local governments.

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

8. Viable alternatives: Chapter 311 amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent. Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, “health insurers”) will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis.

The superintendent determined that, as compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The Department also contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department’s request and none of the four raised any objections.

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

10. Compliance schedule: Regulated insurers already should be aware of the need to comply with the provisions of the Accounting Manual, since the NAIC issued the most recent version of the accounting Manual in March, 2009. In addition, the NAIC publishes changes to accounting guidance during the interim period before issuance of the new Accounting Manual. Regulated insurers use the Accounting Manuals in preparing their Quarterly Statements and the Annual Statements.

**Regulatory Flexibility Analysis**

The Insurance Department finds that this rule will have no adverse economic impact on local governments, and will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis of this finding is that this rule is directed at regulated insurers, as defined under section 83.3 of this regulation, none of which are local governments.

The Insurance Department is not aware of any adverse impact that this rule will have on small businesses or of any reporting, recordkeeping or other compliance requirements that it will impose on small businesses. This rule is directed at regulated insurers, most of which do not come within the definition of “small business” found in Section 102(8) of the State Administrative Procedure Act, because none is independently owned and operated, and employs less than one hundred individuals.

**Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas: This rule applies to regulated insurers doing business or resident in every county in the state, including those that are, or contain, rural areas, as defined under Section 102(13) of the State Administrative Procedure Act. Some of the home offices of these insurers are located within rural areas.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment does not impose new reporting or recordkeeping requirements. To the extent that the rule conforms New York filings to other states’ requirements, the need for separate New York filings will be reduced. To the extent that the rule renders changes in accounting principles, insurers will need to familiarize themselves with the principles themselves.

3. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states’ requirements as much as New York’s.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies’ net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers’ overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC’s Accounting Practices and Procedures Manual and adopted in other states.

The Accounting Manual specifies substantive changes to eight of the ninety-six “Statements of Statutory Accounting Principles” contained therein. Affected parties will have the opportunity to assess the changes and provide comments to the Department.

4. Minimizing adverse impact: This rule applies to regulated insurers that do business in New York State. It does not impose any unique adverse impact on rural areas. The impact(s) are discussed in items 2 and 3 above.

5. Rural area participation: The Department contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department’s request and none of the four raised any objections. All affected parties, including those doing business in rural areas of the State, will have the opportunity to comment upon and discuss the rule after the proposal is published in the State Register.

**Job Impact Statement**

The Insurance Department has no reason to believe that this rule will have any impact on jobs and employment opportunities. The rule codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

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## Office of Mental Health

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**NOTICE OF ADOPTION**

**Mental Health Services - General Provisions**

**I.D. No.** OMH-15-10-00009-A

**Filing No.** 660

**Filing Date:** 2010-06-21

**Effective Date:** 2010-07-07

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

**Action taken:** Amendment of Part 501 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Mental Health Services - General Provisions.

**Purpose:** To add a definition to existing regulation that states OMH's acceptance of the use of electronic medical records.

**Text or summary was published** in the April 14, 2010 issue of the Register, I.D. No. OMH-15-10-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: [cocbjdd@omh.state.ny.us](mailto:cocbjdd@omh.state.ny.us)

**Assessment of Public Comment**

The agency received no public comment.

## Department of Motor Vehicles

### ERRATUM

A Notice of Adoption, I.D. No. MTV-04-10-00011-A, pertaining to Dealers and Transporters, Motor Vehicle Inspection and Repair Shops, published in the June 23, 2010 issue of the *State Register* contained an incorrect I.D. No. The correct I.D. No. for this rule making is MTV-07-10-00002-A.

## Office of Parks, Recreation and Historic Preservation

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

#### Public Access to Records

**I.D. No.** PKR-27-10-00005-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 461 and Appendix I-2; and add new Part 461 to Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, section 3-09(8); Public Officers Law, section 87(1)

**Subject:** Public access to records.

**Purpose:** To update the agency's Freedom of Information Law (FOIL) regulation.

**Text of proposed rule:** Part 461 and Appendix I-2 are repealed and a new Part 461 is added as follows:

#### PUBLIC ACCESS TO RECORDS

##### Section 461.1 Statement of policy.

(a) The Legislature has provided for public access to government records under the Freedom of Information Law (FOIL) (Public Officers Law, article 6, sections 84-90).

(b) This Part outlines the procedures for obtaining records from the Office of Parks, Recreation and Historic Preservation (office or OPRHP) and personnel responsibilities for providing access to records.

(c) The contact information for the Records Access Officer is OPRHP, Empire State Plaza, Agency Building 1, Albany, NY 12238 or [foil@oprhp.state.ny.us](mailto:foil@oprhp.state.ny.us).

Section 461.2 Designation of the Records Access Officer and Records Appeals Officer.

(a) The commissioner of the office (commissioner) is responsible for administering the Freedom of Information Law and shall designate a Records Access Officer who may, in turn, designate Assistant Records Access Officers. The commissioner shall also designate a Records Appeals Officer.

Section 461.3 Subject matter list, location and time for inspection.

(a) Subject matter list: Categories of records and locations of regional offices are listed at <http://www.nysparks.state.ny.us/inside-our-agency/foil-requests.aspx>.

(b) Locations: (1) If access is granted records shall be available for inspection upon request and appointment during regular business hours at OPRHP's Albany office, Empire State Plaza, Agency Building 1, Albany, NY 12238. Alternatively, the Records Access Officer may make records available for inspection at a regional office or at the State Historic Preservation Office at Peebles Island Resource Center, Delaware Avenue, Cohoes, NY 12047, Telephone No. (518) 237-8643.

Section 461.4 Request for access to records.

(a) A request for access to records shall be addressed to the Records Access Officer, OPRHP, Empire State Plaza, Agency Building 1, Albany NY 12238 or [foil@oprhp.state.ny.us](mailto:foil@oprhp.state.ny.us).

(b) Within five business days after receiving a request that reasonably describes the records, the Records Access Officer shall respond in the medium requested by:

(1) informing the person requesting the records that the request or a portion of the request does not reasonably describe the records sought and including, if possible, directions enabling the person to request the records;

(2) granting or denying access to the records in whole or in part;

(3) acknowledging receipt of the request in writing and including an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and not more than twenty business days after the date of the acknowledgment. However, if it is known that circumstances will prevent disclosing the records within twenty business days from the date of the acknowledgment, the Records Access Officer shall state in writing the reason for not being able to grant the request within this twenty-day time period and shall indicate a date certain within a reasonable time period beyond twenty days when the records will be granted or denied in whole or in part.

(c) In determining a reasonable time for granting or denying a request the Records Access Officer shall consider the volume of the request, the ease or difficulty in locating, retrieving or copying the records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed or withheld pursuant to law, the number of requests received and similar factors that bear on the ability to grant or deny access to records within a reasonable time period.

(d) The Records Access Officer shall redact identifying details in records to prevent any possible unwarranted invasion of privacy as described in the Public Officers Law, article 6, sections 87(2)(b); 89(2)(b), (2-a); and 96. In addition, the Records Access Officer shall not disclose other details that are prohibited from disclosure under federal or State statutes, regulations, policies or privileges, or agreements between or among the State and another state or states or the United States.

(e) The Records Access Officer after receiving payment of the fee prescribed for copies of the requested documents shall provide copies, and shall provide certification of correctness of the copies upon request.

(f) The Records Access Officer shall certify if the records are not in the possession of this agency or they cannot be located after a diligent search.

Section 461.5 Information exempted or excluded from inspection, denial of access to records and appeal procedure.

(a) Exempted or excluded information. The Records Access Officer shall review requested records and deny access to records or delete identifying details that are exempted or excluded from public scrutiny by law.

(b) Denial of access. The Records Access Officer's denial of access shall be in writing and shall state the reason for the denial and advise the requester of the right to appeal within thirty days to the identified Records Appeals Officer.

(c) Appeal procedure. (1) The Records Appeals Officer shall hear

and decide appeals from a denial of access. Appeals shall be made within thirty days of the denial of access and shall be addressed to: Records Appeals Officer, OPRHP, Empire State Plaza, Agency Building 1, Albany, NY 12238.

(2) Appeals from a denial of access shall be in writing and shall specify the:

- (i) date and location of requests for records;
- (ii) records to which the requester was denied access; and
- (iii) name and return address of the requester.

(3) The Records Appeals Officer shall issue a decision within ten business days of receiving the appeal and shall transmit a copy of the appeal and decision to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231.

(4) A final denial on appeal of access to a requested record under this subdivision shall be subject to court review as provided for in article 78 of the Civil Practice Law and Rules.

(d) Protection of trade secrets, critical infrastructure information, and records maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

(1) Identification of records. Any entity submitting records to the office that may be exempted from disclosure pursuant to the Public Officers Law, shall file with the Records Access Officer a written request that those records not be disclosed. The request shall be filed at the time the records are submitted and shall identify the records or portions of records that the submitter believes should not be disclosed and shall indicate the bureau, region or unit of the office to which the records have been submitted.

(2) Custody of records.

(i) Information submitted as provided in this subdivision shall be kept in the custody of the director of the bureau, region or unit responsible for maintaining the records, and the director may designate other individuals within the office to inspect or copy the records.

(ii) The director shall maintain the records apart from all other records in a locked file cabinet or other secure place.

(iii) The Records Access Officer shall not disclose these records until at least fifteen business days after the entitlement to the exception has been finally determined by a court of competent jurisdiction.

(3) Determination of exception. On the initiative of the Records Access Officer, or upon the request of any person for a record exempted from disclosure pursuant to this subdivision, the Records Access Officer shall:

(i) inform the person who requested the exception of the intent to determine whether the exception should be granted or continued;

(ii) permit the person who requested the exception to submit a written statement indicating why the exception should be granted or continued within ten business days of receipt of notification;

(iii) within seven business days of the receipt of the written statement, or within seven business days of the period prescribed for submission of the statement, issue a written reasoned determination granting, continuing or terminating the exception;

(iv) serve copies of the determination upon the person, if any, requesting the record, the person who asked for the exception, and the Committee on Open Government.

(4) Appeal from determination. A denial of an exception from disclosure may be appealed by the person submitting the information and a denial of access to the record under this subdivision may be appealed by the person requesting the record as follows:

(i) Within seven business days of receipt of written notice denying the request for an exception or the request for access to the record, the person asking for the exception or the person requesting the record may appeal to the Records Appeals Officer.

(ii) The appeal shall be in writing and set forth: the name and address of the person asking for the exception or the person requesting the record; the date of the request for the exception or access; the

specific record to which exception or access was denied; the reasons given for the denial; and whether the denial was issued or is considered to be a denial because of failure of the office to respond in a timely manner.

(iii) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who asked for the exception and the Committee on Open Government. The notice shall contain a statement of the reasons for the determination.

(5) A proceeding to review an adverse determination made under paragraph (4) of this subdivision may be commenced pursuant to article 78 of the Civil Practice Law and Rules.

(6) Nothing in this section shall be construed to deny any person access pursuant to the provisions of the Public Officers Law or these regulations to any record or part excepted from disclosure upon the written consent of the person who requested the exception.

Section 461.6 Fees for copies.

(a) No fee shall be charged for inspecting records.

(b) The following fees shall be charged for copying records except where a different fee is prescribed by statute:

(1) Paper copies (9 inches by 14 inches) shall be assessed at \$.25/ per side of each sheet of paper.

(2) All others copies shall be assessed at the actual cost of reproducing the record.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, Empire State Plaza, Agency Building 1, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.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**

No person is likely to object to adoption of this rule because it merely implements streamlines and updates procedures for public access to OPRHP records and implements non-discretionary statutory amendments to FOIL under SAPA Section 102(11).

**Job Impact Statement**

The existing public access to records rule at 9 NYCRR Part 461 does not affect jobs or employment opportunities and repeal and addition of a new Part 461 would not affect jobs or employment opportunities.

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## Public Service Commission

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### NOTICE OF ADOPTION

**Major Electric Rate Filing**

**I.D. No.** PSC-48-09-00009-A

**Filing Date:** 2010-06-18

**Effective Date:** 2010-06-18

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

**Action taken:** On 6/17/10, the PSC adopted an order establishing a rate plan for Central Hudson Gas & Electric Corporation to become effective July 1, 2010.

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

**Subject:** Major electric rate filing.

**Purpose:** To approve an increase in annual electric delivery revenues.

**Substance of final rule:** The Commission, on June 17, 2010, adopted the terms set forth in the joint proposal submitted by Central Hudson Gas & Electric Corporation (company), staff of the Department of Public Service, Multiple Intervenors, and an association of about 50 large utility customers, establishing a rate plan for an increase in annual electric delivery revenues, and other provisions governing the company's electric delivery services, to become effective July 1, 2010 and to continue for at least three years, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(09-E-0588SA1)

### NOTICE OF ADOPTION

#### Major Gas Rate Filing

**I.D. No.** PSC-48-09-00011-A

**Filing Date:** 2010-06-18

**Effective Date:** 2010-06-18

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

**Action taken:** On 6/17/10, the PSC adopted an order establishing a rate plan for Central Hudson Gas & Electric Corporation to become effective July 1, 2010.

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

**Subject:** Major gas rate filing.

**Purpose:** To approve an increase in annual gas delivery revenues.

**Substance of final rule:** The Commission, on June 17, 2010, adopted the terms set forth in the joint proposal submitted by Central Hudson Gas & Electric Corporation (company), staff of the Department of Public Service, Multiple Intervenors, and an association of about 50 large utility customers, establishing a rate plan for an increase in annual gas delivery revenues and other provisions governing the company's gas delivery services, to become effective July 1, 2010 and to continue for at least three years, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(09-G-0589SA1)

### NOTICE OF ADOPTION

#### Waiver of Certain Portions of RG&E's Gas Cost Refund Tariff

**I.D. No.** PSC-03-10-00007-A

**Filing Date:** 2010-06-17

**Effective Date:** 2010-06-17

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

**Action taken:** On 6/17/10, the PSC adopted an order, approving with modifications Rochester Gas and Electric Corporation's (RG&E) petition to return the Tennessee Gas Pipeline refunds to customers on an expedited three month schedule.

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

**Subject:** Waiver of certain portions of RG&E's gas cost refund tariff.

**Purpose:** To approve, with modifications quarterly refunds received from Tennessee Gas Pipeline.

**Substance of final rule:** The Commission, on June 17, 2010, adopted an order, approving with modifications Rochester Gas and Electric Corporation's petition to return the Tennessee Gas Pipeline refunds to customers on an expedited three month schedule, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(09-G-0859SA1)

### NOTICE OF ADOPTION

#### Approving with Modifications, Corning's Petition for Rehearing Dated March 19, 2010

**I.D. No.** PSC-16-10-00001-A

**Filing Date:** 2010-06-21

**Effective Date:** 2010-06-21

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

**Action taken:** On 6/17/10, the PSC adopted an order approving with modifications, Corning Natural Gas Corporation's (Corning) petition for rehearing dated March 19, 2010.

**Statutory authority:** Public Service Law, sections 4(1), 5(2) and 66(1)

**Subject:** Approving with modifications, Corning's petition for rehearing dated March 19, 2010.

**Purpose:** To approve with modifications, the petition for rehearing filed by Corning.

**Substance of final rule:** The Commission, on June 17, 2010, adopted an order approving with modifications, Corning Natural Gas Corporation's (Corning or company) petition for rehearing for relief of their obligation to collect and transfer to the New York State Energy Research and Development Authority (NYSERDA) certain System Benefit Charge funds for NYSERDA-administered Energy Efficiency Portfolio Standard (EEPS) programs, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(07-M-0548SA20)

### NOTICE OF ADOPTION

#### Corning Natural Gas Corporation's Revised Natural Gas Supply and Acquisition Plan

**I.D. No.** PSC-16-10-00004-A

**Filing Date:** 2010-06-21

**Effective Date:** 2010-06-21

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

**Action taken:** On 6/17/10, the PSC adopted an order, approving, with conditions, Corning Natural Gas Corporation's revised Natural Gas Supply and Acquisition Plan.

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

**Subject:** Corning Natural Gas Corporation's revised Natural Gas Supply and Acquisition Plan.

**Purpose:** To approve with conditions, Corning Natural Gas Corporation's revised Natural Gas Supply and Acquisition Plan.

**Substance of final rule:** The Commission, on June 17, 2010, adopted an order, approving, with conditions, Corning Natural Gas Corporation's (Company) revised Natural Gas Supply and Acquisition Plan. The Company has the flexibility of using fixed price contracts or the new

Thomas Corners storage field for its winter supply hedge and, the company will complete the Line 15 upgrade and the connection of Line 15 to the New Thomas Corners Storage field no later than November 1, 2011, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(08-G-1137SA2)

## NOTICE OF ADOPTION

### Rehearing of Commission's Remittal Order

**I.D. No.** PSC-16-10-00006-A

**Filing Date:** 2010-06-18

**Effective Date:** 2010-06-18

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

**Action taken:** On 6/17/10, the PSC adopted an order approving in part and denying in part, the request of Home Depot U.S.A., Inc. and LNT Inc. for rehearing of the Commission's Remittal Order, issued February 2, 2010.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 22, 89-c(1) and (10)

**Subject:** Rehearing of Commission's Remittal Order.

**Purpose:** To approve in part and deny in part the rehearing of Commission's Remittal Order.

**Substance of final rule:** The Commission, on June 17, 2010 adopted an order approving in part and denying in part, the request of Home Depot U.S.A., Inc. and LNT Inc. for rehearing of the Commission's Remittal Order, issued February 2, 2010. Rehearing is granted as to the applicable interest rate to the extent that the interest rate applied to the accumulated excess revenues for the period November 2008 through January 2010 will be the pre-tax rate of return used in setting Independent Water Works, Inc.'s initial rates. Rehearing is denied as to the date of prospective relief, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(05-W-0707SA3)

## NOTICE OF ADOPTION

### Amendments to 16 NYCRR Part 85

**I.D. No.** PSC-16-10-00010-A

**Filing No.** 666

**Filing Date:** 2010-06-22

**Effective Date:** 2010-06-22

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

**Action taken:** Amendment of sections 85-2.4 and 85-2.9 of Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 122(5)(b)

**Subject:** Amendments to 16 NYCRR Part 85.

**Purpose:** To approve amendments to 16 NYCRR Part 85.

**Substance of final rule:** The Commission, on June 17, 2010, adopted amendments to 16 NYCRR Subpart 85-2. The proposed changes are to make non-controversial technical amendments to implement a recent amendment to Article VII of the Public Service Law regarding intervenor funding, repeal an obsolete provision concerning waiver of filing requirements, and make a technical change in § 85-2.9 as a consequence of the repeal.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(10-M-0082SA1)

## NOTICE OF ADOPTION

### Approving with Modifications, St. Lawrence's Petition for Rehearing Dated March 29, 2010

**I.D. No.** PSC-16-10-00020-A

**Filing Date:** 2010-06-21

**Effective Date:** 2010-06-21

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

**Action taken:** On 6/17/10, the PSC adopted an order approving with modifications, St. Lawrence Gas Company Inc.'s ( St. Lawrence) petition for rehearing dated March 29, 2010.

**Statutory authority:** Public Service Law, sections 4(1), 5(2) and 66(1)

**Subject:** Approving with modifications, St. Lawrence's petition for rehearing dated March 29, 2010.

**Purpose:** To approve with modifications, the petition for rehearing filed by St. Lawrence.

**Substance of final rule:** The Commission, on June 17, 2010, adopted an order approving with modifications, St. Lawrence Gas Company, Inc.'s petition for rehearing for relief of their obligation to collect and transfer to the New York State Energy Research and Development Authority (NYSERDA) certain System Benefit Charge funds for NYSERDA-administered Energy Efficiency Portfolio Standard (EEPS) programs, residential program, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(07-M-0548SA21)

## NOTICE OF ADOPTION

### Con Edison's Request for Exclusion of Its Failure to Meet Its 2009 Remote Monitoring System Metric

**I.D. No.** PSC-17-10-00006-A

**Filing Date:** 2010-06-17

**Effective Date:** 2010-06-17

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

**Action taken:** On 6/17/10, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s request for exclusion of its failure to meet its 2009 Remote Monitoring System metric due to extraordinary circumstances in the Long Island City network.

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

**Subject:** Con Edison's request for exclusion of its failure to meet its 2009 Remote Monitoring System metric.

**Purpose:** To approve Con Edison's request for exclusion of its failure to meet its 2009 Remote Monitoring System metric.

**Substance of final rule:** The Commission, on June 17, 2010, adopted an order approving Consolidated Edison Company of New York, Inc.'s request for exclusion from a revenue adjustment of \$10 million for its failure to meet its 2009 Remote Monitoring System metric due to extraordinary circumstances in the Long Island City network, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(08-E-0539SA5)

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

**Bayonne Energy Center, LCC Petition for Lightened Regulation**

**I.D. No.** PSC-27-10-00014-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 a petition from Bayonne Energy Center, LLC for a lightened regulation and confirming that PSL 69 and 70 are pre-empted by Federal Power Act.

**Statutory authority:** Public Service Law, sections 2(13), 5(1)(b), 11, 19, 24, 25, 26, 66, 67, 68, 69, 69-a, 70, 72, 72-a, 75, 76, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118 and 119

**Subject:** Bayonne Energy Center, LCC petition for lightened regulation.

**Purpose:** Consideration of Bayonne Energy Center LLC's petition for lightened regulation.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering a petition from Bayonne Energy Center, LLC (Company) requesting lightened regulation for a 512 MW multi-unit, simple-cycle natural gas-fired electric generating plant in Bayonne, New Jersey and a 2.5 mile submarine transmission cable from Bayonne to the Consolidated Edison of New York, Inc.'s Gowanus sub-station in Brooklyn. Additionally, the Company is seeking confirmation that Public Service Law 68 and 70 are pre-empted by the Federal Power Act as it relates to the project. The Commission may grant, deny or modify, in whole or in part, the petition filed by the Company, and may also consider related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** 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: Secretary@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.

(10-E-0276SP1)

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

**Financing Services for Commercial Customers Participating in EEPS Programs**

**I.D. No.** PSC-27-10-00015-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 whether to authorize New York gas and electric utilities to offer optional zero-interest financing for projects installed through previously approved utility-administered Energy Efficiency Portfolio Standard (EEPS) programs.

**Statutory authority:** Public Service Law, sections 4(1), 5(2) and 66(1)

**Subject:** Financing services for commercial customers participating in EEPS programs.

**Purpose:** To encourage cost effective gas and electric energy conservation in the State.

**Substance of proposed rule:** The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to Central Hudson Gas & Electric Corporation's (Central Hudson) petition submitted on June 16, 2010 seeking to modify certain energy efficiency programs previously approved by the Commission as part of the Energy Efficiency Portfolio Standard (EEPS) proceeding in Cases 07-M-0548 et al. Central Hudson requests authorization to modify its Small Commercial Business Direct Install Program (approved in Case 08-E-1019) and its Mid-Size Commercial Business Program (approved in Case 08-E-1135) to provide optional zero interest financing for energy efficiency projects installed through the programs. In its review of Central Hudson's petition, the Commission will also consider authorizing other New York utilities to offer financing options for energy efficiency projects undertaken by business customers as part of the utilities' approved EEPS programs. The Commission has previously authorized Niagara Mohawk Power Corporation to offer financing services to customers who participate in its energy efficiency Small Business Program approved in Case 08-E-1014.

**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: Secretary@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.

(07-M-0548SP23)

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

**Petition for the Submetering of Electricity**

**I.D. No.** PSC-27-10-00016-P

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

**Proposed Action:** The Public Service Commission is considering to grant, deny or modify, in whole or part, the petition filed by 9271 Group, LLC to submeter electricity at 960 Busti Avenue, Buffalo, New York, located in the territory of National Grid.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

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

**Purpose:** To consider the request of 9271 Group, LLC to submeter electricity at 960 Busti Avenue, Buffalo, New York.

**Substance of proposed rule:** The Public Service Commission is considering to grant, deny or modify, in whole or part, the petition filed by 9271

Group, LLC to submeter electricity at 960 Busti Avenue, Buffalo, New York, located in the territory of National Grid.

**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: Secretary@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.

(10-E-0296SP1)

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

**Whether to Permit the Use of the IMAC Systems Inc. Meter Pulser for Use in Commercial and Residential Gas Meter Applications**

**I.D. No.** PSC-27-10-00017-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Consolidated Edison for the approval to use the IMAC Systems Incorporated Meter Pulser.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Whether to permit the use of the IMAC Systems Inc. Meter Pulser for use in commercial and residential gas meter applications.

**Purpose:** To permit gas utilities in New York State to use the IMAC Systems Inc. Meter Pulser.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Consolidated Edison, to use the IMAC Systems Incorporated Meter Pulser Device for automatic meter readings in commercial and residential natural gas meter applications.

**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, Three Empire State Plaza, Albany, New York 10007, (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, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: Secretary@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.

(10-G-0280SP1)

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## Department of State

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

**Bedding**

**I.D. No.** DOS-27-10-00011-P

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

**Proposed Action:** Addition of Part 199 to Title 19 NYCRR.

**Statutory authority:** General Business Law, sections 385 and 387; Executive Law, section 91

**Subject:** Bedding.

**Purpose:** To specify label requirements for new and used bedding and to specify sanitization requirements for used bedding.

**Text of proposed rule:** A new Subchapter K is added to Chapter V of Title 19 of the NYCRR to read as follows:

*Subchapter K Bedding*

*Part 199 Bedding*

*§ 199.1 Label Requirements for new and used bedding.*

*In addition to the requirements set forth in § 389-a and § 389-b of the General Business Law, each label for new or used bedding shall identify, as appropriate, the name of the seller of the used bedding, the name of the manufacturer of the new bedding, the name of the manufacturer of the used bedding, or the name of repairer, renovator or rebuilder of used bedding. Each label shall also indicate the method used to sanitize the used bedding.*

*§ 199.2 Sanitizing standards for used bedding.*

*Every seller of used bedding, manufacturer of used bedding and repairer, renovator or rebuilder of used bedding shall, prior to the sale or distribution of such bedding, perform at least one of the following sanitizing practices:*

*(1) Replacement with new materials*

*(a) Remove and discard the outer fabric and all soft filling materials such as the inner foam, pad and other bedding components and materials except the springs and, if a box spring, its frame; and*

*(b) Sanitize the springs and, if a box spring, its frame, with a detergent and bleach solution following product label directions; and*

*(c) Replace, with new material, the outer fabric and all soft filling materials and other bedding components except the springs and, if a box spring, its frame. Ensure springs and frame are thoroughly dry before replacing outer fabric, soft filling materials and other bedding components.*

*(2) Or, Sanitization, treatment and encasement*

*(a) Remove the outer fabric, inner foam, pad and other bedding components and materials. Inspect each item for soiling, malodor or pest infestation; and*

*(b) If any material or component appears soiled, malodorous or infested, sanitize with a detergent and bleach solution following the product label directions. Ensure that the material or component is thoroughly dry prior to repairing, renovating or rebuilding. If the item cannot be sanitized without causing damage, it may not be reused; and*

*(c) All other materials or components used in the process of manufacturing, repairing, renovating or rebuilding used bedding must be inspected for soiling, malodor or pest infestation. Soiled, malodorous or infested components may not be used unless sanitized with a detergent and bleach solution following the product label directions. Ensure that sanitized components are thoroughly dried prior to repairing, renovating or rebuilding; and*

*(d) Treat the article of bedding and its materials following product label directions, with a NYS registered pesticide product labeled for use on bedding or mattresses and shown to be an effective sanitization treatment to destroy pathogens and pest infestation on surfaces treated. Ensure the treated article is thoroughly dry prior to encasement; and*

*(e) Encase the bedding in a permanent, non-permeable covering intended to limit the migration of allergen-containing particles from the bedding. New material may be applied over the non-permeable covering. A label indicating the use of the non-permeable covering must be permanently affixed to the outer covering of the bedding. The non-permeable cover shall be of a type specifically manufactured for the intended use. Shipping bags or similar products shall not be used as the non-permeable cover.*

*(3) Or, Alternative method.*

*Use of an alternative method that has been approved by the Department of State, in consultation with the Department of Health. For an*

*alternative method to be approved, the applicant must demonstrate to the satisfaction of the Department of State that the proposed alternative method will both sanitize the bedding and protect a consumer from pathogens, allergens and pest infestation that may be present inside bedding.*

§ 199.3 Segregation of unsterilized articles of bedding or materials.

*All bedding and other materials which have not been sanitized in accordance with this Part shall be separately stored and completely segregated from new or sanitized articles or materials.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Whitney Clark, NYS Department of State, Division of Licensing Services, Alfred E Smith Office Building, 80 South Swan Street, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.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.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Chapters 309 of the laws of 1996 and 249 of the laws of 1999 established Article 25-A of the General Business Law to regulate the bedding industry, including used bedding. Sections 385 and 385-a of the General Business Law, authorize the Department of State, in consultation with the Department of Health, to adopt sanitizing standards for used bedding.

Section 387 of the General Business Law authorizes the Department of State to inspect for sanitization, and to seize and hold for further inspection, any bedding that the Secretary has reason to believe violates the provisions of the Article.

Finally, the Secretary is authorized, in administering and enforcing the provisions of the Article, to use the her authority in the Executive Law and in the provisions of Article 25-A. Section 388 gives the Secretary power to deny, suspend or revoke a used bedding registration for 1) violations of the article or the rules and regulations adopted; or 2) for the practice of fraud, deceit or misrepresentation; or 3) for the filing of a false statement in conjunction with the notice of registration. Section 389 makes it unlawful to sell bedding made, in whole or part, with used materials, unless it is properly labeled in accordance with section 389 and 389-a.

##### 2. Legislative objectives:

The Legislature has directed the Department of State to adopt standards for sanitizing used bedding, require manufacturers, renovators and/or ultimately the sellers of used bedding to make sure bedding with used materials is labeled as such, and to inspect and where appropriate deny, suspend or revoke a registration to enforce the provisions of Article 25-A. Requiring the manufacturer, renovator and/or seller to make sure the consumer is aware that the bedding has used parts gives the consumer useful information, such as the seller, rebuilder/renovator, or manufacturer and the method of sanitizing used, in order to protect the consumer.

Further the public is protected from certain health risks associated with sale and use of used bedding by requiring that used bedding be sanitized in accordance with standards promulgated by the Department of State, after consultation with the Department of Health. This rule proposes standards to achieve that goal.

##### 3. Needs and benefits:

To enforce the provisions of the bedding law, the Department of State must be able to identify the company who sells, manufactures, rebuilds or renovates used bedding. By requiring that the used bedding tag set forth the names of the seller, manufacturer, rebuilder or renovator, the Department of State will be able to identify the company responsible for sanitizing the used bedding.

According to the Department of Health, there does not appear to be a risk of acute communicable disease transmission associate with reused bedding. However, there may be a risk of illness of allergic reactions particularly among individuals with skin allergies, as well as those with asthma.

Numerous articles have been published showing that dust mites

cause allergic reactions and that mattresses are a source of dust mite allergens. Plant, insect, fungal and bacterial parts can also be found in mattresses. These materials, in adequate concentrations, can act as sensitizing agents. As such they are able to produce allergic dermatitis in allergic individuals and may even cause skin irritation in non-allergic individuals. Dust mite allergen has also been associated with sensitization and asthma. Killing the organisms in the mattress does not reduce the allergen levels. However, exposure to allergens from used mattresses can be reduced by creating a barrier between the individual and the source. (See, Efficacy in Allergen Control and Air Permeability of Different Materials Used for Bed Encasement, Peroni, D.G., Ress M., Pigozzi, R., Miraglia del Giudice M., A. Bodini, and Piacentini G.L.; Evaluation of Materials Used for Bedding Encasement: Effect of Pore Size in Blocking Cat and Dust Mite Allergen, Vaughan, John W, McLaughlin, Timothy E., Perzanowski, Matthew S, and Platts-Mills, Thomas A.E.; Laboratory Assessment of the Efficiency of Encasing Materials Against House Dust Mites and Their Allergens, Mahakittikun, V., Komoltri, C, Nochot, H., Angus, A.C, and Chew, F.T.).

Based on the recommendations of the Department of Health, the Department of State is proposing that used bedding be sanitized. Each method of sanitization will protect the public from certain health risks associated with the sale and use of used bedding. Each method will also insure that components of used bedding are thoroughly cleaned and that allergens and other health risks are either minimized or securely contained behind a non-permeable barrier. Other methods of sanitization may be used in conjunction with any of the approved methods.

The Department of State is also requiring that each article of used bedding contain a tag that sets forth the method of sterilization used. This will provide the public with basic health and safety information that will inform them prior to the purchase of an article of used bedding.

##### 4. Costs:

The Department of State estimates the number of used mattresses sold in the State of New York to be approximately 200,000 per year.

The cost associated with printing the method used to sterilize the bedding and the name of the seller, manufacturer, rebuilder or renovator, as appropriate, on the tag is considered to be minimal. At the discretion of the seller, manufacturer, rebuilder or renovator the tag may also contain additional information such as the address or telephone number.

The Department of State was not able to determine the cost of the first two options which require either (a) replacement of the outer covering and soft filling materials or (b) sanitization with a detergent and bleach solution, treatment with a registered pesticide product and encasement in a permanent, non-permeable bed covering. It was determined that costs differ greatly from firm to firm depending on the condition of the bedding. However, it is noted that the costs are expected to be greater than the costs of topical applications currently used by some firms or the costs of covering used bedding without sanitizing prior to covering. Treatment with a pesticide and encasement in a non-permeable bed covering is estimated to be minimal.

The Department has determined that the labor costs associated with these two methods will be minimal. It is estimated that it will take a minimum wage employee one hour or less to complete the labor associated with either of the first two options for an estimated hourly labor cost per mattress of \$6.55.

The cost for a non-permeable cover varies by manufacturer and size. Many retailers of such covers were identified. Prices varied from by vendor, material used and mattress size. For a single or twin, costs ranged from approximately \$3.50 to \$50 or more depending on the material, style and aesthetics, for a queen or king, \$5.00 to \$50 or more. Of note is that these prices, especially the high end quotes, come from retailers marketing to individual purchasers. It is anticipated that wholesale prices to manufacturers of bedding will be far lower. The cost of the most commonly used pesticide product is approximately \$24 per gallon. The application per mattress is approximately 8 ounces. Accordingly, the cost per application is approximately \$1.50 per mattress.

## 5. Local government mandates:

The proposal does not impose any mandates on local governments, school districts, fire districts or special districts.

## 6. Paperwork

The proposal does not impose any new paperwork requirements.

## 7. Duplication:

The proposal does not duplicate any other federal or State requirements.

## 8. Alternatives:

Prior to proposing the rule, the Department of State posted the proposed regulation on its web-site for public comment. No comments were received. Nonetheless, the Department considered several alternatives and will consider any additional alternatives that may be suggested during the formal public comment period.

The Department of State will require the tags to identify the name of the seller, manufacturer, rebuilder or renovator, as appropriate. However, the Department chose to remain flexible and will allow additional information such as telephone number and address to be printed upon the tag.

The Department of State remains flexible by offering several alternative approaches for compliance. By allowing two proposed options the industry does have alternatives. During the rule formation, the Department considered topical applications, vacuuming or steaming to eliminate allergen levels in used mattresses, but there was no supporting evidence that this alternative would be effective. One alternative considered was a topically applied agent known as Sterifab. This product is claimed to be effective in killing microorganisms. However, the application of this product does not in any way address the presence of dust mite detritus and other organic, dead matter which the Department of Health identifies as a significant allergen and health threat. The Department of State did not propose Sterifab application as an alternative because Sterifab does not alleviate the health concerns identified by the Department of Health. The Department of State has, however, proposed an option that will permit the use of Sterifab or another NYS registered pesticide product used in conjunction with a bedding cover. The use of this non-permeable cover will alleviate the health concerns identified by the Department of Health.

Recognizing that new products or technologies may become available in the future, the Department has been careful to provide a mechanism for their approval upon a showing of adequacy. Their approval could thus be expeditiously given, without needing to resort to additional rulemaking.

## 9. Federal standards:

There are no federal standards relating to the sanitation and sale of used bedding.

## 10. Compliance schedule:

Regulated parties shall comply with this rule within six months after it becomes effective.

**Regulatory Flexibility Analysis**

## 1. Effect of rule:

The Department of State estimates that there are approximately 688 sellers, manufacturers, rebuilders or renovators of used bedding sold in New York, each of whom will have to comply with the tagging and sanitization requirements of this proposal. The Department of State estimates that most of those businesses are small businesses.

This proposal will not affect local governments.

## 2. Compliance requirements:

Regulated parties will be required to have the name of their company on the used bedding tag.

Regulated parties will be required to sanitize used bedding by one of two proposed options or by such other method approved by the Department of State in consultation with the Department of Health.

## 3. Professional services:

Regulated parties will not require professional services in order to comply with this proposed rule.

## 4. Compliance costs:

There is no significant cost associated with printing the name of the

seller, manufacturer, rebuilder or renovator, as appropriate, on the used bedding tag. A tag may contain such other information as the seller, manufacturer, rebuilder or renovator may wish to add. For example, address or telephone number.

Insofar as the costs will differ from firm to firm depending on the condition of the bedding, the Department of State was not able to determine the total cost of the first two options which require either (a) replacement of the outer covering and soft filling materials, or (b) sanitization with a detergent and bleach solution, treatment with a registered pesticide product and encasement in a permanent, non-permeable bed covering. The costs will, of course, be greater than the costs of topical applications currently used by some firms or the costs of covering used bedding without sanitizing prior to covering.

The Department has determined that the labor costs associated with these two methods will be minimal. It is estimated that it will take a minimum wage employee one hour or less to complete the labor associated with either of these options for an estimated hourly labor cost per mattress of \$6.55.

The second option requires treatment with a pesticide and encasement in a non-permeable bed covering. These costs are estimated to be minimal. The cost for a non-permeable cover varies by manufacturer and size. Many retailers of such covers were identified. Prices varied from by vendor, material used and mattress size. For a single or twin, costs ranged from approximately \$3.50 to \$50 or more depending on the material, style and aesthetics, for a queen or king, \$5.00 to \$50 or more. Of note is that these prices, especially the high end quotes, come from retailers marketing to individual purchasers. It is anticipated that wholesale prices to manufacturers of bedding will be far lower. The cost of the most commonly used pesticide product is approximately \$24 per gallon. The application per mattress is approximately 8 ounces. Accordingly, the cost per application is approximately \$1.50 per mattress.

## 5. Economic and technological feasibility:

Because there is no significant cost associated with printing the name of the seller, manufacturer, rebuilder or renovator, as appropriate, on the used bedding tag, it will be economically and technically feasible for regulated parties to comply with the tagging portion of the proposal.

Because regulated parties can comply with the sanitization requirement by one of two proposed options, one of which is anticipated to be relatively inexpensive, it will be economically and technically feasible for regulated parties to comply with the sanitization portion of the proposal.

## 6. Minimizing adverse impact:

The proposed rule sets a uniform standard for all businesses. This proposal represents a sanitization standard having the least burden on regulated parties and, at the same time, setting the minimum standard that will protect the public health and safety as required by Article 25-A of the General Business Law. The proposed rule will have an adverse impact on those firms that do not sanitize used bedding in accordance with the proposed standards. However, the adverse impact has been minimized by proposing a sanitization standard that includes encasement in a non-permeable cover as a less costly, less burdensome alternative to disassembly, inspection and washing.

## 7. Small business and local government participation:

In February 1999, the Department sent a letter to 240 companies in the used bedding business asking for their comments on the Department's proposal, which at the time would require disassembly, inspection and washing. Of the comments received, some were favorable. Others objected that the proposal would too costly. Other objected that they did not have the ability to disassembly, inspect and wash. It is not believed that industry views have changed. In response to industry comments, the Department continued discussions with the Department of Health. The result of those discussions was the current proposal.

**Rural Area Flexibility Analysis**

## 1. Types and estimated numbers of rural areas:

The proposed rule will apply uniformly throughout the State. The Department of State estimates that there are approximately 688 sell-

ers, manufacturers, rebuilders or renovators of used bedding sold in New York, some of which are located in rural areas.

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

Regulated parties will be required to have the name of their company on the used bedding tag.

Regulated parties will be required to sanitize used bedding by using one of three options: (1) removal and replacement, (2) sanitization and encasement, or (3) treatment and encasement. Depending on the type of sanitization option elected, regulated parties will likely have to purchase new soft bedding materials, detergent and bleach solution, bedding-covers and/or a NYS registered pesticide product.

3. Costs:

There is no significant cost associated with printing the name of the seller, manufacturer, rebuilder or renovator, as appropriate, on the used bedding tag. A tag may contain such other information as the seller, manufacturer, rebuilder or renovator may wish to add, for example, address or telephone number.

Insofar as the costs will differ from firm to firm depending on the condition of the bedding, the Department of State was not able to determine the cost of the first two options which require either (a) replacement of the outer covering and soft filling materials, or (b) sanitization with a detergent and bleach solution and encasement in a permanent, non-permeable bed covering. The costs will, of course, be greater than the costs of topical applications currently used by some firms or the costs of covering used bedding without sanitizing prior to covering.

The cost of the third option, treatment with a pesticide and encasement in a non-permeable bed covering is estimated to be minimal. The cost for a non-permeable cover varies by manufacturer and size. Many retailers of such covers were identified. Prices varied from by vendor, material used and mattress size. For a single or twin, costs ranged from approximately \$3.50 to \$50 or more depending on the material, style and aesthetics, for a queen or king, \$5.00 to \$50 or more. Of note is that these prices, especially the high end quotes, come from retailers marketing to individual purchasers. It is anticipated that wholesale prices to manufacturers of bedding will be far lower. The cost of the most commonly used pesticide product is approximately \$24 per gallon. The application per mattress is approximately 8 ounces. Accordingly, the cost per application is approximately \$1.50 per mattress.

4. Minimizing adverse impact:

The proposed rule applies uniformly throughout the State and will not have any adverse impact unique to rural areas. This proposal represents a sanitization standard having the least burden on regulated parties and, at the same time, setting the minimum standard that will protect the public health and safety as required by Article 25-A of the General Business Law. The proposed rule will have an adverse impact on those firms that do not sanitize used bedding in accordance with the proposed standards. However, the adverse impact has been minimized by proposing sanitization standards that includes encasement in a non-permeable cover as a less costly, less burdensome alternative to removal and replacement of the outer fabric and soft filling materials.

5. Rural area participation:

In February 1999, the Department sent letters to 240 companies in the used bedding business asking for their comments on the Department's proposal, which at the time would require disassembly, inspection and washing. A number of those companies were located in rural areas. Of the comments received, some were favorable. Others objected that the proposal would too costly. Other objected that they did not have the ability to disassembly, inspect and wash. It is not believed that industry views have changed. In response to the comments received, the Department continued discussions with the Department of Health. The result of those discussions was the proposal to sanitize by one of the three proposed options, two of which include the less costly alternative of encasement in a non-permeable cover with treatment by either a detergent and bleach solution or a NYS registered pesticide product.

#### **Job Impact Statement**

The Department of State does not anticipate that the proposed rule will have a significant impact on jobs and employment opportunities

for manufacturers and sellers of used bedding because companies will have the option of using inexpensive sanitization methods including the use of a bedding cover. The proposal may, in fact, create job opportunities in other industries by creating a market for the increased production of bedding covers and other sanitization methods permitted by the proposal.

In developing the proposal, the Department of State sought to balance the need for sanitization methods with the possible adverse impact of harming existing jobs for those licensees regulated under Article 25-A of the General Business Law. The Department of State has provided options for properly sanitizing used bedding, including the inexpensive alternative of using a non-permeable bedding cover.

The Department of State does not anticipate that the proposed rule will have a disproportionate adverse impact on jobs or employment opportunities in any region of the State. Similarly, the Department does not anticipate that the proposed rule will have any measurable impact on opportunities for self-employment.

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## **Susquehanna River Basin Commission**

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### **INFORMATION NOTICE**

#### **Notice of proposed rule making and public hearing**

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: This document contains proposed rules that would amend the project review regulations of the Susquehanna River Basin Commission (Commission) to: Include subsidiary allocations for public water supply systems under the scope of withdrawals requiring review and approval; improve notice procedures for all project applications; clarify requirements for grandfathered projects increasing their withdrawals from an existing source or initiating a new withdrawal; refine the provisions governing transfer and re-issuance of approvals; clarify the Executive Director's authority to grant, deny, suspend, rescind, modify or condition an Approval by Rule; include decisional criteria for diversions into the basin; amend administrative appeal procedures to broaden available remedies and streamline the appeal process; and make other minor regulatory clarifications to the text of the regulations.

DATES: Comments on these proposed rules may be submitted to the Commission on or before August 10, 2010. The Commission has scheduled two public hearings on the proposed rules, to be held July 27, 2010, in Binghamton, New York, and July 29, 2010, in Harrisburg, Pennsylvania. The locations of the public hearings are listed in the addresses section of this notice.

ADDRESSES: Comments may be mailed to: Mr. Richard A. Cairo, Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391, or by email to [rcairo@srbc.net](mailto:rcairo@srbc.net).

The public hearings will be held on Tuesday, July 27, 2010, at 7:00 p.m., at the Holiday Inn Arena, 2-8 Hawley Street, Binghamton, New York 13901, and Thursday, July 29, 2010, at 10:00 a.m., at the Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17101. Those wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: 717-238-0423, ext. 306; fax: 717-238-2436; e-mail: [rcairo@srbc.net](mailto:rcairo@srbc.net). Also, for further information on the proposed rulemaking, visit the Commission's web site at [www.srbc.net](http://www.srbc.net).

#### SUPPLEMENTARY INFORMATION:

##### Background and Purpose of Amendments

When 18 CFR 806.4 was originally published as final at 71 FR 78570, December 29, 2006, updating and expanding the range of projects subject to Commission review and approval, a pre-existing regulatory provision was omitted inadvertently and this proposed rulemaking attempts to correct that omission. Specifically, 18 CFR § 806.4(a)(2) would be modified to indicate that the taking or removal of water by a public water supplier indirectly through another public water supply system or another water facility (aka, a subsidiary allocation) constitutes a withdrawal that is subject to review and approval.

An amendment to 18 CFR § 806.4(a)(2)(iv) will clarify that sponsors of grandfathered surface or groundwater withdrawal projects are required to submit applications for review and approval whenever the project will increase its withdrawal from an existing source, or initiate a withdrawal

from a new source, or combination of sources. This clarification memorialized existing Commission policy under the current rule.

An amendment to 18 CFR § 806.4(c) will provide that sponsors of certain classes of projects undergoing a change of ownership, and thus triggering review and approval, would have 90 days from the date of ownership transfer to submit applications under the rule. The current rule requires submission of the application on or before the date of ownership change. This amendment is consistent with those recommended for transfers of approval under 18 CFR § 806.6, as discussed below.

The proposed amendments to 18 CFR § 806.6 are intended to clarify that certain approvals may be transferred or conditionally transferred administratively, rather than requiring full Commission action on such transfer requests. The existing phraseology authorizing transfers or conditional transfers of approval “without prior Commission review and approval” was misleading in that respect and is proposed to be deleted, along with other editorial changes intended to add more clarification to this section.

The existing rule also requires certain categories of approvals to initiate the transfer of approval process with the Commission on or before the date of ownership transfer, and yet other categories of approvals are allowed to initiate transfer applications within 90 days of the date of ownership transfer. The proposed language would uniformly require all applications to be submitted within 90 days of the date of ownership transfer.

Another substantive change would break out situations where project sponsors with existing approvals undergo a name change and seek to have the approval changed to reflect the new name. Rather than being categorized as a transfer of approval, which is triggered by a change in ownership, a new subsection is added to more appropriately provide for “re-issuance” of such approvals to reflect the name change of the existing project sponsor.

An amendment is proposed to 18 CFR § 806.7 to clarify that existing language recognizing that agencies of the member jurisdictions exercise “review authority” over projects also regulated by the Commission is intended to mean and should be stated as “review and approval authority.”

18 CFR § 806.15 currently sets notification requirements for project sponsors applying for approvals issued by the Commission under its standard docketing procedures, and for Approval by Rule (ABR) natural gas pad site approvals issued under 18 CFR § 806.22(f). However, ABRs issued under 18 CFR § 806.22(e) are subject to certain notification standards in that section which are inconsistent with the general notification requirements contained in 18 CFR § 806.15. Furthermore, there are also requirements contained in 18 CFR § 806.22(f) that are redundant with those contained in 18 CFR § 806.15 and are therefore unnecessary.

The proposed amendments to this section (and complementary ones proposed for 18 CFR § 806.22(e) and (f)) are intended to result in all notification requirements for all project approvals being consolidated into this section, including all those having general applicability and those that might be specific to certain classes of project applications.

With regard to specific requirements for certain classes, the proposed rulemaking would establish the following revised notification standards:

- For groundwater withdrawal applications, rather than just notifying landowners that are contiguous to the project site, notice would have to be given to all owners currently listed on the tax assessment rolls that are within one-half mile of the proposed withdrawal location.
- For surface water withdrawal applications, rather than just notifying landowners that are contiguous to the project site, notice would have to be given to all owners currently listed on the tax assessment rolls that are within one-half mile of the proposed withdrawal location and whose property borders the stream, river, lake or water body from which the withdrawal is proposed to be taken.
- For consumptive use applications involving a withdrawal, the applicable groundwater or surface water withdrawal requirements noted above would apply. For consumptive use applications that do not involve a withdrawal (such as those supplied by a public water supplier), newspaper notice in the area of the project would be required.
- For out-of-basin diversion applications, there would be additional newspaper notice required in the area outside the basin where the proposed use of the diverted water would occur.
- For into-basin diversion applications, there would be additional newspaper notice required in the area outside the basin where the withdrawal of water proposed for diversion is located.
- For applications to use public water supply a source for water in natural gas development operations, newspaper notice in the area served by the public water supply system would be required.
- For applications to use wastewater discharge as a source for water in

natural gas development operations, newspaper notice would be required in all areas where such discharge water would be used for such development purposes.

In addition to the foregoing, the proposed amendments establish uniform proof of notification standards and would require project sponsors to maintain all proofs of notice for the duration of the approvals related to such notices.

The Approval by Rule (ABR) provisions contained in 18 CFR § 806.22 would be modified to clarify that the Executive Director has the authority not only to grant or deny such ABRs, but to “suspend, rescind, modify or condition” such approvals as well. Such authority was implied in the existing language and the existing policy of the Commission supports that interpretation. The proposed amendment is intended to provide that clarification. A second amendment would require all project sponsors seeking an ABR to satisfy the applicable notice requirements proposed for 18 CFR § 806.15, and noted above.

With regard to ABRs issued under 18 CFR § 806.22(f) for natural gas development projects, language is proposed for subsection (f)(12)(i) to clarify that project sponsors registering approved water withdrawals must record daily and report quarterly the quantity of water obtained from all registered sources. Additionally, subsection (f)(12)(ii) would be modified to delete “other reclaimed waters” as potential sources, thus limiting the class of approvable sources under this provision to public water supply systems and wastewater discharges.

The proposed amendments to 18 CFR § 806.24 would add certain decisional criteria for consideration by the Commission while acting on applications for into-basin diversions, similar to what now is provided for consideration in acting on out-of-basin diversion applications. Specifically, the proffered language would add criteria related to the potential introduction of invasive or exotic species that may be injurious to the water resources of the basin, and the extent to which the proposed diversion would satisfy all other applicable standards contained in subpart C of Part 806.

18 CFR § 806.35 currently indicates that project sponsors have an affirmative duty to pay fees established by the Commission. The proposed amendatory language would expand this to indicate that the purpose of such fees is to cover the Commission’s costs of administering its regulatory program and any extraordinary costs associated with specific projects.

18 CFR § 808.2 currently establishes a procedure for the filing of administrative appeals to actions or decisions rendered by the Commission or the Executive Director. The broad terms of the current regulation have resulted in some abuse of the appeal process, including attempts to file appeals of determinations on requests for administrative appeals, appeals of stay request determinations and other extraneous or repetitive pleadings that frustrate the original purpose of providing the appropriate administrative review envisioned when this rule became effective in 2007. In short, this abuse has been enabled by the fact that there is no limitation on the type of Commission actions that are eligible for appeal under this section, leaving any action of the Commission subject to this process.

Additionally, the current regulation does not contain provisions for handling appeals from administrative level “Access to Records” determinations. The new Access to Records Policy adopted by the Commission in 2009 (Policy No. 2009-02) provides for appeal of such decisions to the Commission. Finally, the current regulation does not specify the authority of an appointed hearing officer to admit or bar intervenor parties based on the principle of standing.

The proposed revisions to 18 CFR § 808.2 generally limit appeals to a single filing, and only to project determinations or records determinations. Executive Director determinations on requests for stay would not be appealable to the Commission and would stand until the time of the Commission proceeding on the appeal (unless overturned by a court of competent jurisdiction). Lastly, the appointed hearing officer is given authority to admit or bar intervenor parties based on the legal principle of standing.

List of Subjects in 18 CFR Parts 806 and 808:

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission proposes to amend 18 CFR Parts 806 and 808 as follows:

#### PART 806-REVIEW AND APPROVAL OF PROJECTS

##### Subpart C - Standards for Review and Approval

1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

2. In § 806.4, revise paragraphs (a)(2) introductory text, (a)(2)(iv), and (c) to read as follows:

## § 806.4 - Projects requiring review and approval.

(a)\*\*\*

(2) Withdrawals. Any project described below shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in § 806.23. Hydroelectric projects, except to the extent that such projects involve a withdrawal, shall be exempt from the requirements of this section regarding withdrawals; provided, however, that nothing in this paragraph shall be construed as exempting hydroelectric projects from review and approval under any other category of project requiring review and approval as set forth in this section, § 806.5, or 18 CFR part 801. The taking or removal of water by a public water supplier indirectly through another public water supply system or another water user's facilities shall constitute a withdrawal hereunder.

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(iv) With respect to groundwater projects in existence prior to July 13, 1978, and surface water projects in existence prior to November 11, 1995, any project that will increase its withdrawal from any source, or initiate a withdrawal from a new source, or combination of sources, by a consecutive 30-day average of 100,000 gpd or more, above that maximum consecutive 30-day amount which the project was withdrawing prior to the said applicable date.

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(c) Any project that did not require Commission approval prior to January 1, 2007, and not otherwise exempt from the requirements of paragraph (a)(1)(iv), (a)(2)(v) or (a)(3)(iv) pursuant to paragraph (b) of this section, may be undertaken by a new project sponsor upon a change of ownership pending action by the Commission on an application submitted by such project sponsor requesting review and approval of the project, provided such application is submitted to the Commission in accordance with this part within 90 days of the date change of ownership occurs and the project features related to the source, withdrawal, diversion or consumptive use of water, or the nature or quantity of water withdrawal, diversion or consumptive use associated with the project do not change pending review of the application. For purposes of this paragraph, changes in the quantity of water withdrawal, diversion or consumptive use shall only relate to increases in quantity in excess of the quantity withdrawn, diverted or consumptively used prior to the change of ownership.

3. In § 806.6, revise paragraphs (a), (b) introductory text, (b)(1), (c) introductory text and (d) introductory text, and add paragraph (e) to read as follows:

## § 806.6 - Transfer and re-issuance of approvals.

(a) An existing Commission project approval may be transferred or conditionally transferred to a new project sponsor upon a change of ownership of the project, subject to the provisions of paragraphs (b), (c) and (d) of this section, and the new project sponsor may only operate the project in accordance with and subject to the terms and conditions of the existing approval pending approval of the transfer, provided the new project sponsor notifies the Commission within 90 days from the date of the change of ownership, which notice shall be on a form and in a manner prescribed by the Commission and under which the new project sponsor certifies its intention to comply with all terms and conditions of the transferred approval and assume all other associated obligations.

(b) An existing Commission project approval for any of the following categories of projects may be conditionally transferred, subject to administrative approval by the Executive Director, upon a change of ownership and the new project sponsor may only operate such project in accordance with and subject to the terms and conditions of the transferred approval:

(1) A project undergoing a change of ownership as a result of a corporate reorganization where the project property is transferred to a corporation by one or more corporations solely in exchange for stock or securities of the transferee corporation, provided that immediately after the exchange the transferor corporation(s) own 80 percent of the voting stock and 80 percent of all other stock of the transferee corporation.

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(c) An existing Commission approval of a project that satisfies the following conditions may be conditionally transferred and the project sponsor may only operate such project in accordance with and subject to the terms and conditions of the conditionally transferred approval, pending action by the Commission on the application submitted in accordance with paragraph (c)(3) of this section:

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(d) An existing Commission project approval for any project not satisfying the requirements of paragraphs (b) or (c) of this section may be conditionally transferred and the project sponsor may only operate such project in accordance with and subject to the terms and conditions of the

conditionally transferred approval, pending action by the Commission on an application the project sponsor shall submit to the Commission, provided that:

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(e) An existing Commission project approval may be re-issued by the Executive Director at the request of a project sponsor undergoing a change of name, provided such change does not affect ownership or control of the project or project sponsor. The project sponsor may only continue to operate the project under the terms and conditions of the existing approval pending approval of its request for re-issuance, provided it submits its request to the Commission within 90 days from the date of the change, which notice shall be on a form and in a manner prescribed by the Commission, accompanied by the appropriate fee established therefore by the Commission.

4. In § 806.7, revise paragraph (a) to read as follows:

## § 806.7 Concurrent project review by member jurisdictions.

(a) The Commission recognizes that agencies of the member jurisdictions will exercise their review and approval authority and evaluate many proposed projects in the basin. The Commission will adopt procedures to assure compatibility between jurisdictional review and Commission review.

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5. Revise § 806.15 to read as follows:

## § 806.15 Notice of application.

(a) The project sponsor shall, no later than 10 days after submission of an application to the Commission, notify the appropriate agency of the member state, each municipality in which the project is located, and the county planning agency of each county in which the project is located, that an application has been submitted to the Commission. The project sponsor shall also publish at least once in a newspaper of general circulation serving the area in which the project is located, a notice of the submission of the application no later than 10 days after the date of submission. The project sponsor shall also meet any of the notice requirements set forth in paragraphs (b) through (e) of this section, if applicable. All notices required under this section shall contain a description of the project, its purpose, the requested quantity of water to be withdrawn obtained from for sources other than withdrawals or consumptively used, and the address, electronic mail address, and phone number of the project sponsor and the Commission.

(b) For withdrawal applications submitted pursuant to § 806.4(a)(2), the project sponsor shall also provide the notice required under paragraph (a) of this section no later than 10 days after the date of its submission to each property owner listed on the tax assessment rolls of the county in which such property is located and identified as follows:

(1) For groundwater withdrawal applications, the owner of any property that is located within one-half mile of the proposed withdrawal location.

(2) For surface water withdrawal applications, the owner of any property that is riparian or littoral to the body of water from which the proposed withdrawal will be taken and is within one-half mile of the proposed withdrawal location.

(c) For projects involving a diversion of water out of the basin, the project sponsor shall also publish a notice of the submission of its application, within 10 days thereof, at least once in a newspaper of general circulation serving the area outside the basin where the project proposing to use the diverted water is located. For projects involving a diversion of water into the basin, the project sponsor shall also publish a notice of the submission of its application, within 10 days thereof, at least once in a newspaper of general circulation serving the area outside the basin where the withdrawal of water proposed for diversion is located.

(d) For applications submitted under § 806.22(f)(12)(ii) to use a public water supply source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in the area served by the public water supply.

(e) For applications submitted under § 806.22(f)(12)(ii) to use a wastewater discharge source, the newspaper notice requirement contained in paragraph (a) of this section shall be satisfied by publication in a newspaper of general circulation in each area within which the water obtained from such source will be used for natural gas development.

(f) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt for the notifications to agencies of member states, municipalities and county planning agencies required under paragraph (a) of this section. The project sponsor shall also provide certification on a form provided by the Commission that it has published the newspaper notice(s) required by this section and made the landowner notifications as required under paragraph (b) of this section, if applicable. Until these items are provided to the Commission,

processing of the application will not proceed. The project sponsor shall maintain all proofs of notice required hereunder for the duration of the approval related to such notices.

6. In § 806.22, revise paragraphs (e)(1)(i) introductory text, (e)(1)(i) (e)(1)(ii), (e)(6), (f)(3), (f)(9), and (f)(12)(i) and (f)(12)(ii) to read as follows:

§ 806.22 Standards for consumptive uses of water.

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(e)\*\*\*

(1) Except with respect to projects involving natural gas well development subject to the provisions of paragraph (f) of this section, any project whose sole source of water for consumptive use is a public water supply system, may be approved by the Executive Director under this paragraph (e) in accordance with the following, unless the Executive Director determines that the project cannot be adequately regulated under this approval by rule:

(i) Notification of Intent: No fewer than 90 days prior to the construction or implementation of a project or increase above a previously approved quantity of consumptive use, the project sponsor shall submit a Notice of Intent (NOI) on forms prescribed by the Commission, and the applicable application fee, along with any required attachments.

(ii) Within 10 days after submittal of an NOI under paragraph (e)(1)(i) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

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(6) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule and will notify the project sponsor of such determination, including the quantity of consumptive use approved.

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(f)\*\*\*

(3) Within 10 days after submittal of an NOI under paragraph (f)(2) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

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(9) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved. The issuance of any approval hereunder shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review pursuant to § 806.4(a).

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(12) The following additional sources of water may be utilized by a project sponsor in conjunction with an approval by rule issued pursuant to paragraph (f)(9) of this section:

(i) Water withdrawals or diversions approved by the Commission pursuant to § 806.4(a) and issued to persons other than the project sponsor, provided any such source is approved for use in natural gas well development, the project sponsor has an agreement for its use, and at least 10 days prior to use, the project sponsor registers such source with the Commission on a form and in a manner as prescribed by the Commission, and provides a copy of same to the appropriate agency of the member state. Any approval issued hereunder shall be further subject to any approval or authorization required by the member state to utilize such source(s). The project sponsor shall record on a daily basis, and report quarterly on a form and in a manner prescribed by the Commission, the quantity of water obtained from any source registered hereunder.

(ii) Sources of water other than those subject to paragraph (f)(12)(i) of this section, including public water supply or wastewater discharge, provided such sources are first approved by the Executive Director pursuant to this section. Any request to utilize such source(s) shall be submitted on a form and in a manner as prescribed by the Commission, shall satisfy the notice requirements set forth in § 806.15, and shall be subject to review pursuant to the standards set forth in subpart C of this part. Any approval issued hereunder shall be further subject to any approval or authorization required by the member state to utilize such source(s).

7. In § 806.24, add paragraph (c)(2), to read as follows

§ 806.24 - Standards for diversions.

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(c)\*\*\*

(2) In deciding whether to approve a proposed diversion into the basin, the Commission shall also consider and the project sponsor shall provide information related to the following factors:

(i) Any adverse effects and cumulative adverse effects the project may have on the Susquehanna River Basin, or any portion thereof, as a result of the introduction or potential introduction of invasive or exotic species that may be injurious to the water resources of the basin.

(ii) The extent to which the proposed diversion satisfies all other applicable standards set forth in subpart C of this part.

8. Revise § 806.35 to read as follows:

§ 806.35 Fees

Project sponsors shall have an affirmative duty to pay such fees as established by the Commission to cover its costs of administering the regulatory program established by this part, including any extraordinary costs associated with specific projects.

PART 808-HEARINGS AND ENFORCEMENT ACTIONS

Subpart A - Conduct of Hearings

10. The authority citation for Part 808 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

11. In § 808.2, revise paragraphs (a), (b), (c), (d), (e), (f), (g), and (h) to read as follows:

§ 808.2 Administrative appeals.

(a) A project sponsor or other person aggrieved by a final action or decision of the Commission or Executive Director on a project application or a records access determination made pursuant to Commission policy may file a written appeal requesting a hearing. Except with respect to project approvals or denials, such appeal shall be filed with the Commission within 30 days of the action or decision. In the case of a project approval or denial, such appeal shall be filed by a project sponsor within 30 days of receipt of actual notice, and by all others within 30 days of publication of notice of the action taken on the project in the Federal Register. In the case of records access determinations, such appeal shall be filed with the Commission within 30 days of receipt of actual notice of the determination.

(b) The appeal shall identify the specific action or decision for which a hearing is requested, the date of the action or decision, the interest of the person requesting the hearing in the subject matter of the appeal, and a statement setting forth the basis for objecting to or seeking review of the action or decision. Appeals omitting any of these elements will be considered incomplete and not considered by the Commission.

(c) Any request not filed on or before the applicable deadline established in paragraph (a) of this section hereof will be deemed untimely and such request for a hearing shall be considered denied unless the Commission otherwise authorizes it nunc pro tunc. Receipt of requests for hearings, pursuant to this section, whether timely filed or not, shall be submitted by the Executive Director to the commissioners for their information.

(d) Petitioners shall be limited to a single filing that shall set forth all matters and arguments in support thereof, including any ancillary motions or requests for relief. Issues not raised in this single filing shall be considered waived and filings may only be amended or supplemented upon leave of the Executive Director. Where the petitioner is appealing a final determination on a project application and is not the project sponsor, the petitioner shall serve a copy of the appeal upon the project sponsor within five days of its filing.

(e) If granted, hearings shall be held not less than 20 days after notice appears in the Federal Register. Hearings may be conducted by one or more members of the Commission, by the Executive Director, or by such other hearing officer as the Commission may designate.

(1) The petitioner may also request a stay of the action or decision giving rise to the appeal pending final disposition of the appeal, which stay may be granted or denied by the Executive Director after consultation with the Commission chair and the member from the affected member state. The decision of the Executive Director on the request for stay shall not be appealable to the Commission under this section and shall remain in full force and effect until the Commission acts on the appeal.

(2) In addition to the contents of the request itself, the Executive Director, in granting or denying the request for stay, will consider the following factors:

(i) Irreparable harm to the petitioner.

(ii) The likelihood that the petitioner will prevail.

(f) The Commission shall grant the hearing request pursuant to this section if it determines that an adequate record with regard to the action or decision is not available, the case involves a determination by the Executive Director or staff which requires further action by the Commission, or that the Commission has found that an administrative review is necessary or desirable. If the Commission denies any request for a hearing, the party seeking such hearing shall be limited to such remedies as may be provided by the compact or other applicable law or court rule.

(g) If a hearing is granted, the Commission shall refer the matter for hearing to be held in accordance with § 808.3, and appoint a hearing officer.

(h) Intervention. (1) A request for intervention may be filed with the Commission by persons other than the petitioner within 20 days of the publication of a notice of the granting of such hearing in the Federal Register. The request for intervention shall state the interest of the person filing such notice, and the specific grounds of objection to the action or decision or other grounds for appearance. The hearing officer(s) shall determine whether the person requesting intervention has standing in the matter that would justify their admission as an intervener to the proceedings in accordance with federal case law.

(2) Interveners shall have the right to be represented by counsel, to present evidence and to examine and cross-examine witnesses.

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Dated: June 22, 2010.  
Thomas W. Beauduy,  
Deputy Director.

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## Department of Taxation and Finance

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### EMERGENCY RULE MAKING

#### Sales of Cigarettes on Indian Reservations

**I.D. No.** TAF-27-10-00013-E

**Filing No.** 664

**Filing Date:** 2010-06-22

**Effective Date:** 2010-06-22

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

**Action taken:** Addition of sections 74.6 and 74.7 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 471(1), (4), and (5); 471-e; and 475 (not subdivided)

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

**Specific reasons underlying the finding of necessity:** Legislation was recently enacted that applies to cigarettes sold to Indian nations and tribes and reservation cigarette sellers on or after September 1, 2010. An emergency measure was the only way for the Commissioner to put regulatory amendments in place on a timely basis to implement the legislation and to comply with the new statutory requirements as well as the rule making requirements of the State Administrative Procedure Act.

**Subject:** Sales of cigarettes on Indian reservations.

**Purpose:** To implement certain provisions of recently enacted legislation concerning sales of cigarettes on Indian reservations.

**Substance of emergency rule:** This rule concerns the collection of taxes on sales of cigarettes made on New York State Indian reservations as required by sections 471 and 471-e of the Tax Law, and provides procedures to be followed by New York State licensed cigarette stamping agents for the certification process required by section 471 of the Tax Law.

Section 1 of the rule adds a new section 74.6 to the cigarette tax regulations to address sales of cigarettes on Indian reservations and to describe the two statutory mechanisms (systems) for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for the personal use and consumption of their qualified members based on their probable demand plus the amount needed for official nation or tribal use. Indian nations or tribes may elect to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law, or, if such election is not made, the prior approval system established in section 471(5) of the Tax Law will be used. Under the prior approval system New York state licensed cigarette stamping agents and wholesale dealers that have received prior approval from the Tax Department may sell certain quantities of stamped untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers. The rule provides specificity concerning the methodol-

ogy and procedures to be used by the department for the statutorily required calculation of probable demand used in both systems.

Section 2 of the rule adds a new section 74.7 to the cigarette tax regulations relating to the statutory provisions of section 471(4) that require every cigarette stamping agent that purchases unstamped packages of cigarettes intended for resale in New York State to annually provide its supplier and the Tax Department with a certification, under penalty of perjury, that the cigarettes will not be resold in violation of Article 20 of the Tax Law. Procedures to be followed for the certification process are set forth in the rule, such as certification signature and swearing requirements, time periods covered by the certification, and the contents of the certification. With regard to the contents, the certification must specifically provide that the agent will only make sales of tax-exempt stamped packages of cigarettes to Indian nations or tribes or to reservation cigarette sellers that are in accordance with the provisions of new section 74.6 of the rule.

Section 3 of the rule provides that it shall take effect on the date that the Notice of Emergency Adoption is filed with the Department of State and shall apply to all cigarettes sold on or after September 1, 2010.

*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 September 19, 2010.

*Text of rule and any required statements and analyses may be obtained from:* John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax\_regulations@tax.state.ny.us

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

A Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not submitted, but will be published in the *Register* within 30 days of the rule's effective date.

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

#### Independent Livery Driver Benefit Fund

**I.D. No.** WCB-27-10-00002-E

**Filing No.** 624

**Filing Date:** 2010-06-16

**Effective Date:** 2010-06-16

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

**Action taken:** Amendment of section 300.1(a)(9); and addition of Part 309 to Title 12 NYCRR.

**Statutory authority:** Executive Law, section 160-eee; and Workers' Compensation Law, sections 2(9), 18-c(2)(a) and 117

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

**Specific reasons underlying the finding of necessity:** Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the Independent Livery Driver Benefit Fund (ILDDBF), then the livery base is deemed the employer of the driver pursuant to WCL § 18-c(5). If the livery base is a member of the ILDDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. To provide the workers' compensation benefits in the limited situations, the legislation created the ILDDBF to purchase a

workers' compensation insurance policy paid for through annual payments from the member livery bases.

Since Chapter 392 was enacted the Board has been working to find a carrier willing to write the policy for the ILDBF. Due to the fact that it is not clear what the liability will be it took almost 18 months to secure an insurance carrier willing to write the policy at an affordable price. During this time the Board reviewed claims of livery drivers that have been established to determine an appropriate presumptive wage as required by Workers Compensation Law § 2(9). The Board also worked with the livery industry and the Board of Directors of the ILDBF to develop appropriate criteria that livery bases must meet to be members of the ILDBF.

Workers' Compensation Law (WCL) § 18-c(5) provides that a livery base that is not a member of the ILDBF is deemed the employer of any livery driver it dispatches for purposes of the WCL. This means that a livery base that does not join the ILDBF must purchase and maintain a full workers' compensation insurance policy covering all drivers that it dispatches. The cost to a livery base for a full workers' compensation policy is approximately \$1,400.00 per car. A base that dispatches 25 cars will be required to pay approximately \$35,000 in premium for the drivers plus premium for any other employees.

In order to join the ILDBF, livery bases must submit an affirmation sworn under penalties of perjury that it meets the prescribed criteria. WCL § 18-c(2) directs the Chair to set by regulation the criteria the livery base must meet. If the Chair fails to act the statute provides default criteria which almost all bases cannot swear are true. For example, the statutory criteria provide that the livery base does not own any of the liveries dispatched. Almost all of the livery bases own one or more of the liveries. In addition, some of the criteria conflict with rules of the Taxi and Limousine Commission that licenses the livery bases and drivers.

The statute does not address the process for terminating membership in the ILDBF. The rule provides such process. It also sets the presumptive wage that will be the basis of the indemnity benefits injured livery drivers will receive.

This rule must be adopted on an emergency basis to ensure that livery bases can submit the required affirmation and join the ILDBF. Without this rule all livery bases would be required to obtain a full workers' compensation policy which most cannot afford.

**Subject:** Independent Livery Driver Benefit Fund.

**Purpose:** To set criteria for membership in Independent Livery Driver Benefit Fund, termination from the Fund and presumptive wage.

**Substance of emergency rule:** The proposed rule amends paragraph (9) of subdivision (a) of section 300.1 to modify the definition of "Prima Facie Medical Evidence" and adds new Part 309 to implement specific provisions regarding the Independent Livery Driver Benefit Fund (ILDBF).

Section 300.1(a) provides definitions of terms. The proposed rule modifies the definition of "Prima Facie Medical Evidence" in paragraph (9) to account for the special requirements for claims of independent livery drivers. Specifically, for independent livery drivers Prima Facie Medical Evidence means a medical report referencing an injury covered the ILDBF as provided in Executive Law § 160-ddd or, if the injury results from a crime, a medical report referencing an injury and a police report stating that a crime occurred.

A new Part 309 to govern the implementation of the ILDBF.

Section 309.1 provides definitions of terms used in Part 309. Among the definitions are "covered services," "crime," "dispatch," "governing Taxi and Limousine Commission," "independent livery base," "independent livery driver," "livery," "livery base," "livery driver," and "New York State Average Weekly Wage."

Section 309.2 provides rules for who may be members of the ILDBF and how membership is terminated. Subdivision (a) of this section states that only livery bases designated by the Workers' Compensation Board (Board) may join the ILDBF. Subdivision (b) of this section provides that a livery base will only be designated by the Board as an independent livery base if it submits the affirmation required by WCL § 18-c(2) attesting that the base meets the criteria set forth in subdivision (c) of § 309.2 and if it provides written notice in the stated time periods of any inaccuracies in or changes to the information in the affirmation. Subdivision (c) of this section requires a livery base to meet the following criteria:

(1) The livery base is not classified by the governing Taxi and Limousine Commission as a black car base or luxury limousine base and is not a member of the New York Black Car Operators' Injury Compensation Fund, Inc.;

(2) All livery drivers dispatched by the livery base provide and determine their own clothing;

(3) All livery drivers dispatched by the livery base set their own hours and days of work;

(4) All livery drivers choose which dispatches or fares to accept, and no livery driver suffers any consequence by the livery base for failing to respond to its dispatch, except that every livery driver must comply with

all requirements of his or her governing taxi and limousine commission regarding acceptance of dispatches, fares, trips, passengers and destinations and a livery base may temporarily deny access to its dispatches for failing to respond to a dispatch in violation of local and state laws and governing taxi and limousine commission rules and regulations regarding refusing dispatches;

(5) All livery drivers may affiliate with one or more other livery bases, except if prohibited by rules or regulations of the governing taxi and limousine commission;

(6) Either the livery driver or livery base may terminate their affiliation at any time, except that a livery base must terminate its relationship with the livery driver in accordance with any rules and regulations of the governing taxi and limousine commission;

(7) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, the owner or registrant of more than fifty (50) percent of the liveries dispatched by the livery base;

(8) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, paying or participating in paying for the purchase, maintenance, repair, insurance, licensing, or fuel, of more than fifty (50) percent of the liveries dispatched by the livery base;

(9) No livery driver dispatched by the livery base receives an Internal Revenue Service form W-2 from such base, or is subject to the withholding of any federal income taxes by the livery base, except a livery base that is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base meets the criteria of paragraph (10) of this subdivision;

(10) If the livery base is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base and it issues an Internal Revenue Service form W-2 to a livery driver or livery drivers, or withholds any federal income taxes for a livery driver or livery drivers, such livery base provides workers' compensation coverage for that livery driver or those livery drivers that is separate from the Fund; and

(11) The livery base does not impose any fines or penalties or both on any livery drivers, except the livery base may impose fines or penalties or both on a livery driver for violating the rules and regulations of the governing taxi and limousine commission regarding the conduct of livery drivers while performing their duties as livery drivers and in order to recover the cost of any fines or penalties or both imposed on the livery base by the governing taxi and limousine commission due to the behavior of that livery driver that violated the rules and regulations of the governing taxi and limousine commission.

Subdivision (d) of § 309.2 sets forth the procedures to terminate the membership of a livery base in the ILDBF.

Subdivision (e) of § 309.2 sets forth that any livery base not designated as an independent livery base shall be deemed the employer of any driver it dispatches and will be responsible for providing workers' compensation coverage for such drivers.

Section 309.3 sets forth requirements for livery drivers. Subdivision (a) of this section states that an independent livery driver is a livery driver who is licensed to drive a livery by the appropriate governing taxi and limousine commission and is dispatched by an independent livery base with which he or she is affiliated. This subdivision provides an independent livery driver injured during a dispatch by an independent livery base may be entitled to benefits in accordance with Insurance Law Article 51 and is not entitled to workers' compensation benefits except as set forth in Workers' Compensation Law § 160-ddd and § 309.3(a)(3). Paragraph (3) of § 309.3(a) sets forth when an independent livery driver is entitled to workers' compensation benefits from the ILDBF. Paragraph (4) of this subdivision makes clear that an independent livery driver is not entitled to workers' compensation benefits from the ILDBF if he or she was not performing covered services or was in violation of the rules and regulations of the governing taxi and limousine commission regarding the solicitation or picking up of passengers at the time of death, crime or injury. Paragraph (5) of this subdivision requires independent livery drivers to file all claims in New York with the Board. Paragraph (6) requires an independent livery driver to provide written notice to the ILDBF in accordance with Workers' Compensation Law § 18. Finally, paragraph (7) sets the presumptive wage for independent livery drivers as \$13,000 annual wage for an average weekly wage of \$250. The presumptive wage may be rebutted by the submittal of competent evidence. Further the presumptive wage will increase each year on July 1st by the percentage increase in the New York State Average Weekly Wage.

Pursuant to subdivision (b) of § 309.3 a livery driver that is not an independent livery driver is the employee of the livery base with which he or she is affiliated.

**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 September 13, 2010.

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

#### Summary of Regulatory Impact Statement

1. Statutory authority: Chapter 392 of the Laws of 2008 amended the Executive Law and WCL to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage.

Executive Law § 160-eee authorizes the Chair of the Workers' Compensation Board (Board) to adopt regulations necessary to effectuate the provisions of Executive Law Article 6-G.

Workers' Compensation Law (WCL) § 18-c(2)(a) directs the Chair to set by regulation the criteria livery bases must meet in order to be considered an independent livery based eligible to join the ILDBF.

The last paragraph of WCL § 2 (9) provides that the Chair shall set by regulation the amounts livery drivers are presumptively deemed to receive in annual wages.

WCL § 117 authorizes the Chair to make reasonable rules consistent with the WCL and Labor Law.

2. Legislative objectives: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the ILDBF, then the livery base is deemed the employer of the driver pursuant to WCL § 18-c(5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. The legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

3. Needs and benefits: The purpose of this rule is to implement specific provisions of Chapter 392. While Executive Law Article 6-G and the amendments to the WCL set forth a framework to govern the ILDBF and the benefits it will pay, the amendment to 12 NYCRR § 300.1 and the addition of Part 309 provide the detail and clarification necessary to actually implement the legislation by setting forth: 1) necessary definitions; 2) the criteria to determine which livery bases may join the ILDBF; 3) clarification on when and which benefits are payable from the ILDBF; and 4) the presumptive average weekly wage. Such detail and clarification is necessary to assist the insurance carrier writing the policy, the bases in determining if it is eligible to join the ILDBF, and the drivers in understanding what action they need to take to obtain benefits.

Currently § 300.1 defines "Prima Facie Medical Evidence" as "a medical report referencing an injury, which includes traumas and illness." This definition is too broad for claims by independent livery drivers as it encompasses all injuries and not just those listed in Executive Law § 160-ddd and or those caused by the commission of a crime. This rule amends the definition of "Prima Facie Medical Evidence" to encompass such provisions.

Executive Law § 160-aaa sets forth the statutory definitions relating to the ILDBF such as "independent livery driver," "covered services," "independent livery base," "livery," "livery driver," and "livery base." Section 309.1 sets forth necessary definitions to properly understand Part 309 and to clarify the implementation of Chapter 392.

In order to be designated as an independent livery base, WCL § 18-c(2) requires an officer or director of the base to submit an affirmation sworn under penalty of perjury attesting that the criteria set by the Chair in regulation are true with respect to the base. In the absence of regulations setting forth the criteria, the statute lists default criteria.

After consulting with the livery industry and the appropriate TLCs, it was determined that the livery bases cannot meet all of the statutory default criteria, in part due to the rules of the TLCs. In addition the statutory criteria does not comport with how the livery industry operates. The criteria in § 309.2(c) has been drafted to reflect how the livery industry operates. By prescribing the criteria livery bases must meet through regulation, it assures that there are owners of livery bases who can attest to the truth of such criteria and join the ILDBF.

In addition to setting forth the criteria that the livery base must attest to in the affirmation, § 309.2 requires livery bases to provide the Board and ILDBF with written notice of any inaccuracies in the information in the affirmation within 5 business days of discovery or knowledge of the inaccuracies and to provide written notice of any changes in the information in

the affirmation within 10 business days of the changes. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c) as required by WCL § 18-c(3).

Article 6-G fails to set forth the procedures and timeframes for termination of a livery base's membership in the ILDBF. Subdivision (d) of § 309.2 covers such termination by setting forth the process when the livery base fails to make the required payments to the ILDBF, when the livery base must leave the ILDBF because it is no longer designated as an independent livery base, and when a livery base decides to leave the ILDBF.

Section 309.3 provides necessary clarification and detail for livery drivers. For example, this section clarifies that a livery driver is an independent livery driver when he or she is appropriately licensed and dispatched by a livery base that is a member of the ILDBF. It also clarifies that the ILDBF only has jurisdiction over claims filed in New York with the Board and that written notice of an injury, illness or death must be provided to the ILDBF in accordance with WCL § 18.

As statutorily mandated § 309.3 sets forth the presumptive wages for livery drivers. After reviewing numerous cases in which a livery driver was found to be an employee and an average weekly wage was set, the Board determined that it was usually set at \$250 per week, unless tax returns or other records showed otherwise. Because this is the rate that is set in existing cases for livery drivers, the rule sets \$250 as the presumptive wage. To ensure the presumptive wage is current, the regulation also provides for yearly adjustments in accordance with the percentage increase in the New York State Average Weekly Wage.

4. Costs: The rule imposes minimal costs on regulated parties. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur postage if the notice is sent through the United States Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver.

Livery drivers will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

The Board will incur costs to approve the affirmations for membership in the ILDBF and provide written notice of the charges and conduct a hearing with regard to possible revocation of a livery base's designation as an independent livery base. These activities will be performed by existing staff and incorporated into existing procedures.

5. Local government mandates: This rule does not impose any mandates or requirements on local governments.

6. Paperwork: This rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. If a livery base wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked.

Livery drivers must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

The Board is required to send written notice to a livery base of the

charges which form the basis for its decision to seek the revocation of the base's designation as an independent livery base.

7. Duplication: This rule does not duplicate any other state or federal rule.

8. Alternatives: One alternative would be to modify the definition of "covered services" to require the independent livery base that dispatched the livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term.

Another alternative would be to fail to clarify that claims for benefits from the ILDBF must be filed in New York. This alternative was rejected and the clarification included to ensure drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3).

A third alternative would be to eliminate all criteria to join the ILDBF so all bases could join. This alternative was rejected as the intent was to address those situations where the status of the driver is unclear. Some livery bases own all of the cars that the drivers operate. In such a case the base is the employer and it is inappropriate for such bases to be part of the ILDBF. However, there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c(2)(i) to allow ownership up to 50% of the vehicles.

9. Federal standards: There are no federal standards that apply.

10. Compliance schedule: The regulated parties can comply with these requirements upon adoption of the rule.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: This rule only governs livery drivers, livery owners and livery bases in New York City (NYC), Westchester County and Nassau County. Therefore, this rule has no impact on small businesses or local governments outside these three areas. Further, the rule only governs livery drivers and bases so it does not impose any requirements or mandates on local governments in NYC, Westchester County or Nassau County. If the rule did govern local governments, it would only govern the NYC Taxi and Limousine Commission (TLC), the Westchester County TLC, the Nassau County TLC and the local governments in Nassau County that license livery bases, livery drivers and/or liveries. The rule will affect the approximately 800 livery bases in the three locations and the owners and drivers of the approximately 25,000 liveries. It is estimated that the majority of livery bases, drivers and livery owners are small businesses. Finally, the rule effects the Independent Livery Driver Benefit Fund (ILDBF) which is a statutorily created non-profit.

2. Compliance requirements: This rule imposes reporting and record-keeping requirements on small businesses. First the rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. There is no specific form for the notice, but it does have to be filed within the specified time periods. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is in violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c). If a livery base that is a small business wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC. This notice is necessary to ensure that the ILDBF does not accept liability for any further claims; the Board is informed that the livery base is now required to have full workers' compensation coverage for all drivers, and the TLC ensures the base complies with its rules.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked. The notice mirrors the required notice when a workers' compensation insurance carrier cancels coverage of an employer.

Livery drivers or their dependents must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who are small businesses who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

3. Professional services: Small businesses will not need any professional services to comply with this rule. The affirmation the livery bases must complete is a form created by the Board and does not require any professional services to complete. The same is true of the written notices the livery bases and livery drivers who are small businesses must submit.

4. Compliance costs: The proposed rule will impose minimal costs on small businesses. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by

statute. WCL § 18-c(2)(a) requires livery bases, including those that are small businesses, to submit an affirmation sworn under penalty of perjury in order to be designated as an independent livery base. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur the cost of postage if the notice is sent through the U. S. Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. The cost will be for postage for the notice to the three entities. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver. Such costs would include obtaining documentation as to the actual wage the driver earned.

Livery drivers, including those that are small businesses, will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. However, the Board may excuse the lack of notice if there is sufficient reason that the notice could not be given, the employer had actual knowledge, or the employer is not prejudiced by the lack of notice. The notice can be hand delivered or mailed. The cost is mainly postage if mailed and is incurred by all workers injured on the job. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Injured workers may file claims by calling a toll free number and providing information over the telephone, by completing and submitting the form online, or by completing a paper form and mailing it to the Board. Only if the livery driver completes and mails the paper form will he or she incur costs. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage. Livery drivers, who are small businesses, may hire a legal representative with respect to a claim for workers' compensation benefits. Such livery drivers will not incur any out of pocket costs as WCL § 24 requires legal representatives to be paid fees awarded by the Board and paid out of any indemnity benefits paid to the livery driver. The acceptance of a fee directly from a livery driver is a misdemeanor.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

5. Economic and technological feasibility: It is economically and technologically feasible for small businesses to comply with this rule. The affirmation is a form prescribed by the Board and is simple to complete. There are no required forms or formats for the written notices livery bases must submit. Livery drivers who are small businesses can provide the written notice and complete the claim form for benefits without any assistance. However, livery drivers may retain a legal representative with respect to their claim who may assist them when completing the claim form and seeking a higher wage than the presumptive wage. Pursuant to Executive Law § 160-ddd requires the ILDBF to purchase an insurance policy, which it has done. The insurance carrier will handle the claims and payment of benefits and bill and collect the annual payment from the livery bases.

6. Minimizing adverse impact: The rule was drafted to ensure that livery bases would be able to join the ILDBF and livery drivers could access benefits when injured or killed within the provisions of Executive Law § 160-ddd. To minimize adverse impact on both the livery bases and drivers the regulation does not modify the definition of "covered services." It was suggested that "covered services" be defined to require the independent livery base that dispatched the injured livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term. The definition of "covered services" for the ILDBF is almost the same as the definition for that same term for the Black Car Fund. The Appellate Division, Third Department in *Aminov v. N.Y. Black Car Operators Injury Comp. Fund*, 2 A.D.3d 1007 (3d Dept. 2003) specifically found that the time waiting for a dispatch is covered. Therefore, modifying the definition as suggested would not be appropriate. Further defining "reasonable time" as twenty minutes has no reasonable basis.

To minimize adverse impacts the rule clarifies that claims for benefits

from the ILDBF must be filed in New York. This clarification ensures livery drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3). For example, benefits could be awarded for injuries that do not meet the statutory requirements or set an average weekly wage above the presumptive wage without further evidence. When the insurance carrier writing the policy to cover these claims set the cost of the policy it was based on benefits only being paid as provided in statute and regulation. Any awards above the statutory or regulatory levels would cause the premium for the policy to increase, potentially beyond the means of the bases.

The rule sets criteria bases must meet to join the ILDBF to minimize the adverse impact of the default criteria provided in WCL § 18-c(2). Without the criteria in the rule livery bases that own any liveries would be unable to join the ILDBF. While it is inappropriate for the livery base to own all or a majority of the liveries, as such a base would clearly be the employer; there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c(2)(i) to allow ownership up 50% of the vehicles.

The criteria in the rule account for the rules of the governing TLCs to eliminate adverse impacts from conflicts between the rules and the criteria in the statute. The criteria in WCL § 18-c(2)(iv) provides that livery drivers choose which dispatches or fares to accept, however the governing TLCs have rules prohibiting drivers from refusing to accept certain fares. If this criterion was not modified in the rule, no base would be able to submit the affirmation sworn under penalties of perjury.

7. Small business and local government participation: The rule was drafted after discussions with groups representing the livery bases, the ILDBF Board of Directors, the NYC TLC and the Westchester County TLC. Drafts of the regulation were shared with representatives of livery bases, the ILDBF Board of Directors, the NYC TLC, Westchester County TLC and Nassau County TLC.

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

This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. The rule only applies to livery bases, livery drivers, livery owners and taxi and limousine commissions in New York City, Westchester County and Nassau County. The seven affected counties do not have populations less than 200,000 and therefore do not fall within the definition of a rural area as provided in Executive Law § 481(7). As the rule does not apply to any rural areas a Rural Area Flexibility Analysis is not required.

#### **Job Impact Statement**

The proposed rule will not have an adverse impact on jobs. This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates the Independent Livery Driver Benefit Fund (ILDBF) to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. This rule ensures that livery bases are eligible and can afford to join the ILDBF so that the bases can continue to operate. This rule also implements Chapter 392 so that livery drivers who are killed, injured due to a crime or suffer a catastrophic injury as provided in Executive Law § 160-ddd can obtain workers' compensation benefits.

## **EMERGENCY RULE MAKING**

### **Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies**

**I.D. No.** WCB-27-10-00006-E

**Filing No.** 628

**Filing Date:** 2010-06-18

**Effective Date:** 2010-06-19

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:** This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

**Purpose:** To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

**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 442 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 under which 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 for 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 September 15, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Special Counsel to the Chair, New York State 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 (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. 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 voluntarily decide to designate a pharmacy or pharmacy network and require 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 as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network 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 with other forms. 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.

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 the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate the use of a designated network it will incur some costs from providing the required notice.

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. 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 if they object to any such bills. This process is required by WCL § 13(i)(1) - (2). 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 businesses and local governments 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 and self-insured non-municipal employers are required by statute to file objections to prescription drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, 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 sav-

ings 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 chooses to utilize 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 the 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 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 nec-

essary 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 from imposition of new fee schedules and payment procedures. 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.