

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.

Office of Alcoholism and Substance Abuse Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Service Standards for Chemical Dependence Outpatient and Opioid Treatment Programs

I.D. No. ASA-15-11-00005-P

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

Proposed Action: Repeal of Parts 822 and 828; and addition of new Part 822 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(c), 19.07(e), 1909(b), 1916, 19.21(b), 19.40, 32.01, 32.07(a), 32.05(b) and 32.09(b)

Subject: Service standards for Chemical dependence outpatient and opioid treatment programs.

Purpose: Combine service standards of outpatient and opioid services and implement a new more cost effective payment methodology.

Substance of proposed rule (Full text is posted at the following State website: www.oasas.state.ny.us): The proposed amendments to the above named regulation are being submitted for public review and comment. The proposed amendments include REPEAL of current Parts 822 and 828 and concurrent promulgation of a new regulation combining amended versions of Parts 822 and 828 as subparts of a new Part 822 regulating the majority of outpatient services (Part 816 - outpatient detoxification and Part 823- outpatient services for youth remain separate Parts). The proposed regulations include technical amendments as well as substantive changes prompted by the evolution of treatment practices and social attitudes that affect policies and program goals of NYS Office of Alcohol-

ism and Substance Abuse (OASAS) for outpatient treatment and medically assisted treatment. The new Part 822 also implements a new structure for billing and amending the OASAS State Plan for Medicaid known as Ambulatory Patient Groups (APG). This required significant redefinition of services and review of programs for maximum regulatory compliance as well as maximum clinical success.

The proposed new Part 822, is divided into subparts; Subparts 822-1, 822-2 and 822-3 are applicable to all outpatient services certified as chemical dependence outpatient programs or opioid treatment programs (OTP). Subpart 822-1 contains general provisions including background, legal base, incorporation by reference, a savings and renewal clause, effective date and severability provisions. Subpart 822-2 contains six subsections. The first subsection is a definitions section incorporating old definitions from the former Part 822 and Part 828. It also adds new definitions including: clinical staff, medical staff, peer advocates, episode of care, visit, patient, and various services which may be provided in outpatient or opioid treatment facilities. There are new subsections establishing recordkeeping requirements applicable to all outpatient providers and those specific to each type of provider (outpatient chemical dependence, outpatient rehabilitation, and OTP). There is a new subsection containing detailed requirements governing how programs document specific treatment services. Finally, the subsection governing the provision of services in excess of the clinical needs of a patient has been relocated to this Section. Subpart 822-3 sets forth the requirements for submission of Medicaid claims. This section also limits the volume of services that can be billed to Medicaid during a daily visit and throughout a patient's episode of care. Subpart 822-4 contains the programmatic requirements for outpatient programs and incorporates provisions necessary to utilize the APG services and billing methodologies. Subpart 822-5 contains the programmatic requirements for OTP's and incorporates the provisions necessary to utilize the APG services and billing methodologies. Programmatic changes were incorporated into the recently promulgated Part 828 (effective by emergency) that conformed OASAS regulations to new federal rules promulgated in 2001. Proposed changes also reflect agency policy and research supported treatment developments that recognize opioid addiction as a chronic illness that can be treated effectively with certain medications (medication assisted treatment) in conjunction with supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and, vocational rehabilitation. Amendments throughout the new Part 822 reflect agency policy goals related to recovery services, language consistency, improved efficiency for providers, elevated professionalism of treatment clinicians, and more effective agency regulation.

Merging the regulations governing outpatient chemical dependence services and medication assisted treatment will continue to reinforce the consolidation of drug and alcohol treatment into a unified system of chemical dependence treatment that began in 1992 (Chapter 223 of the Laws of 1992) with the creation of OASAS. It is the consensus of participants in an OASAS-provider consultation process that the following proposed amendments would advance the goals of guaranteeing patients the best care and treatment delivered in a manner that is also cost effective and accountable:

- 822-4: Chemical Dependence Outpatient Services
- Allow three pre-admission assessment visits to allow more time for data collection and establishing counselor-patient trust
 - Define primary focus of a pre-admission assessment
 1. Chemical use assessment;
 2. Screening for co-occurring disorders; and
 3. Other priority issues based on presenting complaint and circumstances
 - Focus on immediate issues addressed in the initial assessment
 - Eliminate the regulatory need for Level of Care for Alcohol and Drug Treatment Referral (LOCADTR)
 - Increase the stringency of diagnostic and admission criteria
 - Require a multidisciplinary team case conference to approve the comprehensive treatment/recovery plan

- Link the comprehensive evaluation and treatment/recovery plan more tightly together; both due within 45 days of admission and containing similar criteria
- Extend time for physician signature on the treatment/recovery plan to ten days (if he/she is not part of the multi-disciplinary team)
- Permit programs to defer a treatment/recovery plan goal if clinically justified and focus on functional areas where a problem was identified through the evaluation
- Require a progress note for each session; clarifies more specific criteria expected in notes on individual counseling or group sessions
- Clarify the programmatic and billing requirements specific to programs certified to provide Outpatient rehabilitation services.
- Re-number sections for greater ease in reading and understanding
- Better define and specify Quality Improvement activities
- Include patient-centered language
- Require medical directors to become certified in an areas of addiction medicine
- Provide for alternative assessment for referrals from an OASAS approved DWI provider/practitioner to eliminate redundancy.

822-5: Opioid Treatment Programs

- Conform OASAS regulations to federal regulations (42 CFR Part 8) regarding certification of opioid treatment programs (OTP)
- Add regulations related to buprenorphine (methadone alternative) treatment, removing an obstacle to physicians to administer buprenorphine in OTPs where clients may receive supportive services
- Provide for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers
- Provide guidelines for certified providers to provide services at additional locations
- Require medical directors to become certified in an area of addiction medicine
- Requires testing for Hepatitis only where clinically indicated and makes testing for STDs optional
- Increase flexibility in toxicology testing
- Eliminate the requirement for OASAS approval for methadone dosage increases above 200 milligrams
- Recognize that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services
- Add language that states only clients with a primary diagnosis of opioid addiction may be admitted to an OTP
- Give OTP's discretion to allow patient to go to their private physician for the required annual physical
- Add new language to accommodate transfer patients
- Provide greater flexibility in counselor to patient staffing ratios
- Allow added flexibility for providing patients with take home medication and remove agency approval on a one-time basis for up to 30 days take home dose
- Add recall to reduce diversion
- Define role of security guards at the OTP
- Define aftercare
- State specialized services that are not defined by regulation must be approved by OASAS prior to implementation
- Require provider to establish a community relations policy and committee
- Detail the requirements for a quality improvement policy
- Requires 50% of the counseling staff to be CASAC or CASAC-T within four years

The proposed amendments also contain provisions developed in consultation with an agency/provider work group tasked with effectuating a reduction in paperwork for both OASAS and its certified providers. For example, the proposed regulations will reduce the number of individual patient exemptions and general waivers from current regulation, saving providers and the agency costly administrative time. An estimated monthly average of 10 requests for waivers would be eliminated. The proposed regulation allows more flexibility in take home medication and clinic schedule changes, two areas that represent the highest number of individual patient exemptions. The proposed regulation removes a requirement for OASAS approval for methadone dosage increases above 200 milligrams. This change was based on the review of several available studies. In January 2007, 103 of 115 certified clinics requested a waiver from OASAS regarding prior OASAS approval for methadone dosage increases; granting the waiver resulted in 114 fewer individual patient exemptions regarding dosage increases during 2007. The proposed draft regulations eliminate the need for providers to submit this waiver renewal upon recertification.

OASAS solicited comments on the proposed regulations and possible alternatives from a cross-section of New York's upstate and downstate treatment provider community, as well as urban and rural programs. OASAS utilized statewide coalition groups, Alcoholism and Substance

Abuse Providers of New York State (ASAP) and the Committee of Methadone Program Administrators (COMPA), to distribute the proposed regulation to its members and collect comments. All comments received were reviewed and incorporated wherever appropriate. The proposed regulations were also shared with the National Alliance of Methadone Advocates (NAMA), New York States Council of Local Mental Hygiene Directors, and New York State's Advisory Council, as well as posted on the OASAS website.

Text of proposed rule and any required statements and analyses may be obtained from: Trisha R. Schell-Guy, Associate Counsel, OASAS, 1450 Western Avenue, Albany, NY 12203, (518) 485-6244, email: trishaguy@oasas.state.ny.us

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

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

Regulatory Impact Statement

The proposed amendments submitted for public comment include: REPEAL of Parts 822 and 828; and concurrent promulgation of a new Part 822 that incorporates provisions of Parts 822 and 828 as subparts. Amendments are primarily technical due to changes in Medicaid billing (Ambulatory Patient Groups or "APGs"), but some substantive changes reflect evolutions in treatment and social attitudes that have had an impact on agency goals for outpatient treatment including medically assisted treatment.

The proposed Part 822, consists of subparts. Subpart 822-2 and Subpart 822-3 include common definitions, recordkeeping, documentation, billing, and excessive services sections applicable to all Part 822 certified services. Subpart 822-4, Outpatient Services, incorporates APGs; Subpart 822-5, Opioid Treatment Programs (OTP), incorporates APGs into the recently promulgated Part 828 (effective by emergency) that conformed OASAS regulations to new federal rules promulgated in 2001. Amendments throughout the new Part 822 reflect agency policy goals related to recovery services, language consistency, improved efficiency for providers, elevated professionalism of clinicians, and more effective agency regulation.

1. Statutory Authority:

Section 19.07(c) of the Mental Hygiene Law (MHL) charges the Office with the responsibility to ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment that is effective and of high quality.

Section 19.07(e) of the MHL authorizes the commissioner of the Office of Alcoholism and Substance Abuse Services (commissioner) to adopt standards including necessary rules and regulations pertaining to chemical dependence treatment services.

Section 19.09(b) of the MHL authorizes the commissioner to adopt regulations necessary and proper to implement any matter under his/her jurisdiction.

Section 19.16 of the MHL requires the commissioner to establish and maintain, either directly or through contract, a central registry for purposes of preventing multiple enrollment in opioid treatment programs.

Section 19.21(b) of the MHL requires the commissioner to establish and enforce regulations concerning the licensing, certification, and inspection of chemical dependence treatment services.

Section 19.40 of the MHL authorizes the commissioner to issue operating certificates for the provision of chemical dependence treatment services.

Section 32.01 of the MHL authorizes the commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by article 32 of the MHL.

Section 32.07(a) of the MHL authorizes the commissioner to adopt regulations to effectuate the provisions and purposes of article 32 of the MHL.

Section 32.05(b) of the MHL provides that a controlled substance designated by the commissioner of the New York State Department of Health as appropriate for such use may be used by a physician to treat a chemically dependent individual pursuant to section 32.09(b) of the MHL.

Section 32.09(b) of the MHL provides that the commissioner may, once a controlled substance is approved by the commissioner of the New York State Department of Health as appropriate for such use, authorize the use of such controlled substance in treating a chemically dependent individual.

2. Legislative Objectives:

Article 32 of the Mental Hygiene Law (§ 32.01) enables the commissioner to regulate and assure consistent high quality of services within the state for persons suffering from chemical abuse or dependence, their families and significant others, and those at risk of becoming chemical abusers or chemically dependent. The current 14 NYCRR Part 822 establishes the requirements for outpatient services; the current 14 NYCRR Part 828 establishes the requirements for chemotherapy substance abuse treatment (methadone or other approved substance). The repealed Parts 822 and 828

are amended and combined into one new Part 822 consistent with the statutory mandate of Article 32. Merging outpatient services and medication assisted treatment reinforces the consolidation of drug and alcohol treatment into a unified system begun in 1992 with the creation of OASAS (Chapter 223 of the Laws of 1992).

3. Needs and Benefits:

The proposed amendments advance the goals of guaranteeing patients treatment in a manner that is cost effective and accountable. The proposed amendments are needed because of: (1) mandated implementation of APGs and development of an amended Medicaid State Plan; (2) issues identified during an on-going dialogue with OASAS certified providers and affiliated stakeholders to define a "gold standard" for treatment and/or identify "best practices" for quality patient-centered care; (3) anticipated impacts of federal health insurance reform; and (3) an ongoing collaborative effort between OASAS and certified providers to consolidate administrative requirements and reduce paperwork.

For example, the proposed amendments improve patient-centered care and reduce paperwork by deferring the completion deadline to 45 days after admission for key clinical documents (comprehensive evaluations and treatment/recovery plans) that require multiple impersonal forms and interviews.

Most significantly, the regulations provide clinical and Medicaid billing guidance to support conversion of the current Medicaid outpatient threshold visit reimbursement system to the APG methodology. APGs disaggregate the current Medicaid threshold rates and service categories into discrete service categories and payment levels that more accurately define provided services and reflect the Medicaid reimbursable costs associated with delivering a particular service. The regulation anticipates the movement to "medical homes" inherent in recent federal health insurance reforms by requiring provider medical directors to be certified by the American Society of Addiction Medicine (ASAM) and to prescribe buprenorphine and methadone for treatment of heroine addiction. This requirement is part of larger OASAS policy priority to raise the standard of professionalism for all clinicians in the field of addiction treatment.

4. Costs:

Additional costs, if any, are primarily up front, and offset by improved treatment outcomes, increased efficiency, and clearer compliance directives; in some cases, anticipated additional costs are mitigated by grandfathering and extended terms for compliance.

a. Costs to regulated parties:

Service providers are regulated parties. Providers' revenue from Medicaid reimbursements may be affected by APG implementation depending on the type of program and the array of services a provider offers. Currently a provider receives a threshold visit fee that is the same regardless of the amount or type of services provided in a visit. Under the APG methodology, a provider may bill for multiple services provided during a visit and will receive a fee for each service reflecting the resources utilized to provide the service. In addition, some dual-certified providers now receive an Article 28 reimbursement based on the Department of Health diagnosis and treatment center reimbursement methodology. Reimbursement for these providers' may be affected if their dual certification status changes because generally an Article 28 reimbursement fee is greater than the Article 32 OASAS clinic fee.

To reduce any negative impact of APG reimbursement OASAS will phase in introduction of APG reimbursement over three periods by using a blend of the current fee structure and the APG reimbursement methodology. During all phases of APG implementation, OASAS will be carefully monitoring any impact of the transition to APGs on not-for-profit providers' state aid funding.

Providers may incur some up-front administrative costs associated with the phased-in implementation of the APG billing methodology; however this may be balanced by reduced staff time in other areas such as processing individual and general regulatory waivers made unnecessary by the proposed regulatory revisions. In addition, extensive input and involvement of providers and regulatory personnel prior to promulgation of this regulation means both providers and agency staff have been anticipating the changes from APGs and other amendments for some time and have been preparing in advance for implementation. OASAS had already been providing additional technical assistance to OTPs.

Phased-in timelines for new requirements related to Qualified Health Professionals (QHPs) began with promulgation of the emergency Part 828; therefore, providers are already requiring medical directors to be certified in Addiction Medicine and to be buprenorphine certified and working towards the goal of 50% of staff as QHPs. Most OASAS outpatient programs already meet or exceed the QHP requirement because Credentialed Alcohol and Substance Abuse Counselors trainees are counted towards the 50% requirement. The requirement that within four years of hiring, medical directors shall be ABMS (American Board of Medical Specialties) or ASAM (American Society of Addiction Medicine) certified reflects an agency policy priority to raise the standard of professional-

ism for clinicians in the field of addiction treatment. Cost impact on regulated parties would arise when a medical director needs to complete a course of training to achieve certification currently a one-time cost of \$1600-\$1800 for the certification test, plus ASAM membership. OASAS estimates approximately 100 currently ASAM certified medical directors; current medical directors are grandfathered, and a four year grace period for new hires will also mitigate any current regional shortage of certified addiction physicians. Medical directors will also be required to become certified to prescribe buprenorphine at a cost of approximately \$160.00 for an on-line course. Although providers will incur additional costs because of these certification requirements, the agency sees this as an essential requirement in order to secure the central role of addiction treatment professionals in the future health care marketplace.

Providers will not incur any additional costs for materials.

b. Costs to the agency, state and local governments:

OASAS does not anticipate increased administrative costs. Costs to the agency and state government may increase due to the requirement of medical director Board certifications. Costs for training and memberships, although primarily one-time costs, will be reflected in provider operating costs and therefore state aid funding.

Counties, cities, towns or local districts will incur no additional costs.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

6. Paperwork / Reporting:

Clarification and streamlining of documentation and reporting requirements will facilitate compliance and avoid confusion/inconsistencies that have previously resulted in regulatory citations, audit disallowances and other sanctions. Paperwork will be reduced by reducing requests for patient exemptions and regulatory waivers and by eliminating duplicate information gathering wherever possible. For example, the requirement that OASAS approve methadone dosage increases above 200 milligrams is removed. Programs providing treatment for a patient population with a high turnover rate, such as OTPs, need not repeat admission procedures under certain conditions. Similarly, alternative assessments are permitted for referrals from an OASAS approved DWI provider/practitioner to eliminate redundancy. The deferral of the completion deadline to 45 days after admission for key clinical documents (comprehensive evaluations and treatment/recovery plans) also means a significant amount of paperwork is not completed for those patients who may not be appropriate for admission or who drop out in the early stages of treatment.

7. Duplications:

There are no duplications of other state or federal requirements.

8. Alternatives:

Subpart 822-4: Implementation of APGs is required of all Mental Hygiene Offices and Dept. of Health.

Subpart 822-5: Implementation of APGs is required of all Mental Hygiene Offices and Dept. of Health.

The alternative of promulgating amendments to Parts 822 and 828 as separate Parts, rather than as a single combined outpatient regulation as proposed, would defeat the agency policy goal of merging outpatient services and medication assisted treatment to reinforce the consolidation of drug and alcohol treatment into a unified system begun in 1992 with the creation of OASAS (Chapter 223 of the Laws of 1992). Because of the mandated implementation of APGs affecting all outpatient services, combining them into one regulation is the most efficient regulatory structure.

9. Federal Standards:

822-4: No federal standards exceed the regulatory requirements of this subpart.

822-5: Federal regulations set minimum standards for OTPs. New York's regulations are more stringent than federal standards.

10. Compliance Schedule:

Providers must comply with the proposed changes beginning July 1, 2011. All standards of Medical Assistance reimbursement applicable to chemical dependence outpatient and opioid treatment programs shall be contingent on approval the state plan amendment associated with APG's and Federal financial participation. Operating certificates issued by the Office prior to the promulgation of the new Part 822 for the operation of a programs subject to regulations of the former Parts 822 and 828 remain in effect until the term of such operating certificate has been renewed or such operating certificate is suspended or revoked through process of law.

Regulatory Flexibility Analysis

Effect of Rule (Types / Numbers):

For purposes of this regulatory flexibility analysis, small businesses were considered to be chemical dependence outpatient and opioid treatment providers. The proposed amendments will impact approximately 481 certified providers of outpatient services and all 115 certified providers of opioid treatment. Some of these providers are small businesses.

Compliance Requirements:

Regardless of program size, it is anticipated that there will be no new reporting or recordkeeping imposed on local governments or small businesses. There are no new mandates or administrative requirements placed on local governments.

Professional Services and Compliance Costs:

The requirement that within four years of hiring, medical directors shall be ABMS (American Board of Medical Specialties) or ASAM (American Society of Addiction Medicine) certified reflects an agency policy priority to raise the standard of professionalism for clinicians in the field of addiction treatment. Cost impact on outpatient and opioid treatment providers would arise when a medical director needs to complete a course of training to achieve certification currently a one-time cost of \$1600-\$1800 for the certification test, plus ASAM membership. Medical directors will also be required to become certified to prescribe buprenorphine at a cost of approximately \$160.00 for an on-line course. Phased-in timelines for new requirements related to Qualified Health Professionals (QHPs) began with promulgation of the current emergency Part 828; therefore, opioid treatment providers are already requiring medical directors to be certified in Addiction Medicine and to be buprenorphine certified and working towards the goal of 50% of staff as QHPs. Most OASAS outpatient programs already meet or exceed the QHP requirement because Credentialed Alcohol and Substance Abuse Counselors trainees are counted towards the 50% requirement. Although providers will incur additional costs because of these certification requirements, the agency sees this as an essential requirement in order to secure the central role of addiction treatment professionals in the future health care marketplace.

Outpatient and opioid treatment providers' revenue from Medicaid reimbursements may be affected by Ambulatory Payment Group (APG) implementation depending on the type of program and the array of services a provider offers. Currently a provider receives a threshold visit fee that is the same regardless of the amount or type of services provided in a visit. Under the APG methodology, a provider may bill for multiple services provided during a visit and will receive a fee for each service reflecting the resources utilized to provide the service. In addition, some dual-certified providers now receive an Article 28 reimbursement based on the Department of Health diagnosis and treatment center reimbursement methodology. Reimbursement for these providers may be affected if their dual certification status changes because generally an Article 28 reimbursement fee is greater than the Article 32 OASAS clinic fee.

To reduce any negative impact of APG reimbursement OASAS will phase in introduction of APG reimbursement over three periods (2 twelve-month periods and 1 final 6 month period) by using a blend of the current fee structure and the APG reimbursement methodology. During all phases of APG implementation, OASAS will be carefully monitoring any impact of the transition to APGs on not-for-profit providers' state aid funding.

Providers may incur some up-front administrative costs associated with the phased-in implementation of the APG billing methodology; however this may be balanced by reduced staff time in other areas such as processing individual and general regulatory waivers made unnecessary by the proposed regulatory revisions. In addition, extensive input and involvement of providers and regulatory personnel prior to promulgation of this regulation means both providers and agency staff have been anticipating the changes from APGs and other amendments for some time and have been preparing in advance for implementation. OASAS had already been providing additional technical assistance to OTPs.

It is expected that over time all providers (regardless of size) will realize cost savings from more efficient delivery of services. Providers will not incur any additional costs for materials.

There will be no impact on costs of local governments.

Economic / Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule.

Minimizing Adverse Economic Impacts:

The proposed amendments incorporate the work of several agency/stakeholder workgroups whose tasks included developing a "gold standard" for treatment; identifying "best practices" for quality patient-centered care; reducing the administrative burden on clinical staff while improving efficiency and productivity; and fulfilling the legislative mandate to implement the APG reimbursement system throughout the OASAS outpatient system. Potential adverse economic impact and the approaches specified in section 202-b(1) of the State Administrative Procedure Act were addressed by all workgroups because the primary goals are to improve patient care, cost effectiveness and efficiency.

Small Business and Local Government Participation:

The need for many of these changes was initially identified through a process of on-going statewide dialogue between OASAS, OASAS certified providers, and affiliated stakeholders begun in the summer of 2007. The proposed amendments were presented to the OASAS Executive Team and Advisory Council and were distributed for comment to members of the provider/stakeholder community. Comments from the provider/

stakeholder community and local government groups were reviewed and incorporated where appropriate. The lengthy process of amending and consolidating outpatient and opioid treatment into one regulation for all outpatient services together with adding the provisions necessary to effectuate the new APG reimbursement methodology has disseminated information among providers resulting in a better understanding of the intent of the consolidated regulation: to enable implementation of homogeneous services under one unified APG payment methodology, improve patient care and enable a more efficient use of provider resources.

Rural Area Flexibility Analysis

Types / Numbers:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

The proposed amendments to Part 822 will impact approximately 481 certified providers of outpatient services; proposed amendments to Subpart 822-5 of Part 822 will impact all 115 certified providers of opioid treatment. Some of these providers may be located in rural areas although the vast majority of opioid treatment providers are located in urban areas.

Compliance Requirements:

There will be no new reporting or recordkeeping imposed on providers in rural areas as a result of these amendments.

Professional Services and Compliance Costs:

The requirement that within four years of hiring, medical directors shall be ABMS (American Board of Medical Specialties) or ASAM (American Society of Addiction Medicine) certified reflects an agency policy priority to raise the standard of professionalism for clinicians in the field of addiction treatment. Cost impact on outpatient and opioid treatment providers throughout the state would arise when a medical director needs to complete a course of training to achieve certification currently a one-time cost of \$1600-\$1800 for the certification test, plus ASAM membership. Medical directors will also be required to become certified to prescribe buprenorphine at a cost of approximately \$160.00 for an on-line course. Phased-in timelines for new requirements related to Qualified Health Professionals (QHPs) began with promulgation of the current emergency Part 828; therefore, opioid treatment providers are already requiring medical directors to be certified in Addiction Medicine and to be buprenorphine certified and working towards the goal of 50% of staff as QHPs. Most OASAS outpatient programs already meet or exceed the QHP requirement because Credentialed Alcohol and Substance Abuse Counselors trainees are counted towards the 50% requirement. Although providers will incur additional costs because of these certification requirements, the agency sees this as an essential requirement in order to secure the central role of addiction treatment professionals in the future health care marketplace.

Regardless of location, outpatient and opioid treatment providers' revenue from Medicaid reimbursements may be affected by Ambulatory Payment Group (APG) implementation depending on the type of program and the array of services a provider offers. Currently a provider receives a

threshold visit fee that is the same regardless of the amount or type of services provided in a visit. Under the APG methodology, a provider may bill for multiple services provided during a visit and will receive a fee for each service reflecting the resources utilized to provide the service. In addition, some dual-certified providers now receive an Article 28 reimbursement based on the Department of Health diagnosis and treatment center reimbursement methodology. Reimbursement for these providers may be affected if their dual certification status changes because generally an Article 28 reimbursement fee is greater than the Article 32 OASAS clinic fee.

To reduce any negative impact of APG reimbursement OASAS will phase in introduction of APG reimbursement over three periods (2 twelve-month periods and 1 final 6 month period) by using a blend of the current fee structure and the APG reimbursement methodology. During all phases of APG implementation, OASAS will be carefully monitoring any impact of the transition to APGs on not-for-profit providers' state aid funding.

Regardless of location, providers may incur some up-front administrative costs associated with the phased-in implementation of the APG billing methodology; however this may be balanced by reduced staff time in other areas such as processing individual and general regulatory waivers made unnecessary by the proposed regulatory revisions. In addition, extensive input and involvement of providers and regulatory personnel prior to promulgation of this regulation means both providers and agency staff have been anticipating the changes from APGs and other amendments for some time and have been preparing in advance for implementation. OASAS had already been providing additional technical assistance to OTPs.

It is expected that over time all providers, regardless of location (rural, urban or suburban), will realize cost savings from more efficient delivery of services. Providers will not incur any additional costs for materials.

Minimizing Adverse Economic Impacts:

The proposed amendments incorporate the work of several agency/stakeholder workgroups whose tasks included developing a "gold standard" for treatment; identifying "best practices" for quality patient-centered care; reducing the administrative burden on clinical staff while improving efficiency and productivity; and fulfilling the legislative mandate to implement the APG reimbursement system throughout the OASAS outpatient system. Potential adverse economic impact and the approaches specified in section 202-bb(2) of the State Administrative Procedure Act were addressed by all workgroups because the primary goals are to improve patient care, cost effectiveness and efficiency.

Opportunity for Rural Area Participation:

The need for many of these changes was initially identified through a process of on-going statewide dialogue between OASAS, OASAS certified providers, and affiliated stakeholders throughout the state begun in the summer of 2007. The proposed amendments were presented to the OASAS Executive Team and Advisory Council and were distributed for comment to members of the provider/stakeholder community. Comments from the provider/stakeholder community, including providers in rural areas, and local government groups were reviewed and incorporated where appropriate. The lengthy process of amending and consolidating outpatient and opioid treatment into one regulation for all outpatient services together with adding the provisions necessary to effectuate the new APG reimbursement methodology has disseminated information among providers resulting in a better understanding of the intent of the consolidated regulation: to enable implementation of homogeneous services under one unified APG payment methodology, improve patient care and enable a more efficient use of provider resources.

Job Impact Statement

The proposed Part 822 should have no substantial adverse impact on jobs or economic opportunities in New York State. No reduction in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the amendments do not deviate from the staffing requirements set forth under the former Part 822 and Part 828 which have been merged into the proposed Part 822. The proposed Part 822 contains clarifications to existing provider actions. Although not required, treatment providers may hire additional staff, such as Peer Advocates, to provide new services that are available under the proposed Part 822 resulting in increased employment opportunities in New York State.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Ambulatory Patient Group Outpatient Rate Reimbursement Methodology

I.D. No. ASA-15-11-00006-P

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

Proposed Action: Amendment of Part 841 of Title 14 NYCRR.

Statutory authority: Social Services Law, section 364; Mental Hygiene Law, sections 19.07(e), 1909(b), 19.15(a), 19.40, 32.01, 32.07(a) and 32.09; and L. 2009, ch. 58, part C, subpart 23

Subject: Ambulatory Patient Group Outpatient Rate Reimbursement Methodology.

Purpose: Implement a new more cost effective payment methodology for outpatient providers.

Text of proposed rule: Section 841.1(a) is amended to read as follows:

Section 841.1 Background and intent

(a) The purpose of this Part is to establish standards for reimbursement and participation in the Medical Assistance Program, as authorized by title 11 of article 5 of the Social Services Law, for services provided by chemical dependence providers certified or co-certified by the Office of Alcoholism and Substance Abuse Services. This Part does not apply to [facilities certified by the Office of Alcoholism and Substance Abuse Services and licensed pursuant to Article 28 of the Public Health Law] *hospital based programs*.

A new subdivision (g) is added to Section 841.2 to read as follows:

(g) Pursuant to section 23 of Part C of chapter 58 of the laws of 2009, the Commissioner is authorized, with the approval of the Commissioner of Health and the Director of the Budget, to promulgate regulations pursuant to Article 32 of the Mental Hygiene Law utilizing the Ambulatory Patient Group (APG) methodology described in subdivision (c) of section 841.14 of this Part for the purpose of establishing standards and methods of payments made by government agencies pursuant to title 11 of article 5 of the Social Services Law for chemical dependence outpatient clinic services otherwise subject to the provisions of this Part.

Section 841.4(b)(3) is amended to read as follows:

(3) a chemical dependence outpatient or opioid treatment program [service which is] certified under Part 822 of this Title by the Office of Alcoholism and Substance Abuse Services; or

Sections 841.14, 841.15 and 841.16 are renumbered sections 841.15, 841.16 and 841.17 and a new section 841.14 is added to read as follows:

Section 841.14 Medical assistance payments for chemical dependence outpatient and opioid treatment programs

(a) This section shall be effective on July 1, 2011 and shall govern Medicaid rates of payments for OASAS certified or co-certified ambulatory care services provided in the following categories of facilities:

(1) chemical dependence outpatient clinics certified or co-certified pursuant to Part 822 of this Title;

(2) opioid treatment clinics certified or co-certified pursuant to Part 822 of this Title;

(3) chemical dependence outpatient rehabilitation programs certified or co-certified pursuant to Part 822 of this Title; and

(4) chemical dependence outpatient services for youth certified or co-certified pursuant to Part 823 of this Title.

(b) Notwithstanding subdivision (a) of this section, the provisions of this Part shall not apply to the following:

(1) hospital based chemical dependence outpatient clinics;

(2) hospital based opioid treatment providers; and

(3) payments made on behalf of persons enrolled in Medicaid managed care or in the family health plus program.

(c) Definitions

As used in this Part, the following definitions apply:

(1) Ambulatory Patient Group (APG) shall mean a defined group of outpatient procedures or services which reflect similar patient characteristics and resource utilization and which incorporate the ICD-9-CM diagnosis codes and CPT and HCPCS procedure codes as defined below.

(2) Ancillary services shall mean those laboratory and radiology tests and procedures ordered to assist in patient diagnosis and/or treatment.

(3) APG weight shall mean a numeric value that reflects the relative expected average resource utilization (cost) for each APG as compared to the expected average utilization for all other APG's. Procedure-based APG weight shall mean a numeric value that reflects the relative expected average resource utilization (cost) for a specific procedure. A procedure that has been assigned its own weight shall have its payment derived from its procedure-specific weight without regard to the weight of the APG to which the procedure groups.

(4) Base rate shall mean the numeric value that must be multiplied by the APG weight for a given APG to determine the total Medicaid payment for a service.

(5) Case mix index shall mean the actual or estimated average final APG weight for a defined group of APG visits.

(6) Coding Improvement Factor (CIF) is a numeric value used to adjust for more complete and accurate coding for visits upon implementation of the APG reimbursement system. The CIF will be developed to assure that New York State Department of Health is in full compliance with federally approved reimbursement levels.

(7) Consolidation/Bundling shall mean the process for determining if a single amount is appropriate in those circumstances when a patient receives multiple APG procedures during a single patient visit. In some cases, a procedure will be considered part of a more complicated procedure. In this case, the payment for the less complicated procedure will be included in the payment for the more complicated procedure and the claim line for the less complicated procedure will show zero payment for that procedure. Consolidation logic is defined in the 3M Health Information Systems' APG Definitions Manual version 3.1 dated March 6, 2008 and as subsequently amended by 3M.

(8) Current Procedural Terminology (CPT) Codes is the systemic listing and coding of procedures and services provided to a patient. It is a subset of the Healthcare Procedure Coding system (HCPCS). The CPT and HCPCS are maintained by the American Medical Association and the Federal Centers for Medicare and Medicaid Services (CMS) and are updated annually.

(9) Discounting shall mean the reduction in APG payment that results when unrelated, additional procedures or ancillary services are performed during a single patient visit.

(10) Episode shall mean a unit of service consisting of all services coded on a claim. All services on the claim are considered to be part of the same APG visit and are not segmented into separate visits based on coded dates of service as would be the case with "visit" billing. Under episode billing, an episode shall consist of all medical visits and/or significant procedures that are provided to a patient on a single date of service plus any ordered ancillaries, ordered on the date of the visit or date of the significant procedure(s), resulting from the medical visits and/or significant procedures, some of which may have been done on a different date of service from that of the medical visits and/or significant procedures. Multiple episodes cannot be coded on the same claim. The calculation of the APG payment by the APG software may be either visit based or episode-based depending on the rate code used to access the APG software logic. References to "visits" in this Part shall be deemed to refer also to "episodes" for billing purposes.

(11) Existing Payment for Blend shall mean the reimbursement rate/fee in effect on June 30, 2011.

(12) Final APG weight shall mean the allowed APG weight for a given visit as expressed by the applicable APG software, and as adjusted by all applicable consolidation, packaging, discounting and other applicable adjustments.

(13) Healthcare common procedure coding system (HCPCS codes) shall mean a comprehensive, standardized coding and classification system for health services and products.

(14) Hospital based shall mean a program that is operated by and certified as a hospital pursuant to Article 28 of the Public Health Law and identified as such by the Department of Health.

(15) International Classification of Diseases, 9th Revision (ICD-9) is a comprehensive coding system maintained by the Federal Centers for Medicare and Medicaid Services. It is maintained for the purpose of providing a standardized, universal coding system to identify and describe patient diagnosis, symptoms, complaints, conditions and/or causes of injury or illness. It is updated annually.

(16) Packaging shall mean those circumstances in which payment for routine ancillary services or drugs shall be deemed as included in the applicable APG payment for a related significant procedure or medical visit. Medical visits also package with significant procedures, unless specifically excepted in regulation. There is no packaging logic that resides outside the software.

(17) Peer Group shall mean a group of providers that share a common APG base rate. Peer groups may be established based on geographic region, types of services provided or categories of patients.

(18) The Downstate Region shall consist of the five counties comprising New York City, and the counties of Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, and Dutchess.

(19) The Upstate Region shall consist of all counties in the state other than those counties included in the Downstate Region.

(20) Visit shall mean a unit of service consisting of all the APG services performed for a patient on a single date of service.

(d) System Transition

There will be a transition to APG reimbursement consisting of a blended payment. For chemical dependence outpatient clinics it will be comprised of an existing payment for blend portion of the fees established pursuant to 18 NYCRR 505.27 and the APG reimbursement established pursuant to this Part. For opioid treatment clinics it will be comprised of an existing payment for blend portion of the fees established pursuant to 10 NYCRR 86-4.39 and the APG reimbursement established pursuant to this Part. The blended payment will be calculated as follows:

(1) The Office shall identify the existing payment for blend payment for each provider based upon the reimbursement rate/fee in effect on June 30, 2011; and

(2) Payments will be made pursuant to the following transition schedule:

(i) Phase 1 shall be the 12 month period beginning on July 1, 2011. Providers shall receive 75% of the existing payment for blend payment and 25% of the calculated value of the APG reimbursement established pursuant to this Part;

(ii) Phase 2 shall be the 12 month period following Phase 1. Providers shall receive 50% of the existing payment for blend payment and 50% of the calculated value of the APG reimbursement established pursuant to this Part;

(iii) Phase 3 shall be the 6 month period following Phase 2. Providers shall receive 25% of the existing payment for blend payment and 75% of the calculated value of the APG reimbursement established pursuant to this Part;

(iv) Phase 4 providers will receive 100% APG reimbursement established pursuant to this Part.

(e) Rates for new providers during the transition period

(1) Newly certified providers commencing outpatient services pursuant to this section will receive the existing payment for blend payment they would have received had they begun providing services prior to commencement of this Part.

(f) APG Categories and associated weights

(1) APG categories shall be subject to periodic revision. The APG categories specific to chemical dependency outpatient and opioid treatment services include the following:

APG	HCPCS/CPT	APG Description
315	G0396	Counseling or Individual brief Psychotherapy, alcohol or substance abuse intervention
315	90804	Counseling or Individual brief Psychotherapy, office visit
316	G0397	Individual Normative, Comprehensive Psychotherapy, alcohol or substance abuse intervention
316	90806	Individual Normative, Comprehensive Psychotherapy, office
317	T1006	Family/Couple Counseling
317	90846	Family Psychotherapy without patient
318	H0005	Group Counseling, alcohol and or drug services
318	90849	Group Counseling, multiple family group therapy session for multiple similarly situated families
318	90853	Group Counseling, Group psychotherapy
322	H0020	Methadone Administration
322	H0033	Oral medication administration, direct observation
323	H0001	Metal Hygiene Assessment, alcohol or drug assessment
323	H0002	Metal Hygiene Assessment, behavioral health screening for admission eligibility determination
323	90801	Metal Hygiene Assessment, Normative, Psychiatric diagnosis interview
324	H0049	Mental Health Screening and Brief Assessment, Alcohol and/or Drug screening
324	H0050	Mental Health Screening and Brief Assessment, Alcohol and/or Drug service, brief intervention
324	T1023	Mental Health Screening and Brief Assessment, Program intake assessment
327	S9480	Intensive Outpatient Program (IOP)
328	H2001	Outpatient Rehab 2-4 Hour Duration
329	H2036	Outpatient Rehab 4 Hour and Above Duration
426	H0014	Routine Medication Management and Monitoring, Alcohol and/or drug services
426	M0064	Routine Medication Management and Monitoring, Visit for Drug Monitoring

426	90862	<i>Routine Medication Management and Monitoring, Medication Management</i>
490	H0038	<i>Peer Counseling</i>
490	90882	<i>Complex Care Coordination</i>

(2) The Department of Health, in consultation with the Office shall assign weights associated with all CPT and HCPCS procedure codes which can be used to bill any APG category, including those referenced in this Part. The assigned weights shall be set forth at 10 NYCRR Part 86. The Office shall maintain and update a list of weights associated with APG categories set forth in this Part. Such list may include APG categories not specifically associated with chemical dependency outpatient and opioid treatment services, but which may appropriately be billed by providers subject to this Part. Such list shall be published in the State Register and posted on the Office's website.

(g) Base Rates

Base rates for chemical dependence outpatient services as set forth in 14 NYCRR 822 and outpatient chemical dependency services for youth as set forth in 14 NYCRR Part 823 shall be developed by the Office, and subject to the approval of the Department of Health, in accordance with the following:

(1) Separate base rates shall be established based on the location of such provider in the Upstate or Downstate region and such base rates shall reflect differing regional cost factors and include capital reimbursement;

(2) Additional discrete base rates may be developed by the Office for such peer groups as may be established by regulation in this Part; and

(3) Base rates may be periodically adjusted to reflect changes in provider case mix, service costs and other factors as determined by the Office.

(h) System Updating

(1) The following elements of the APG rate-setting system shall be reviewed at least annually, with all changes published in the State Register and posted on the Office's website:

(i) The listing of reimbursable APG categories and associated weights assigned to each such APG set forth in this Part;

(ii) The base rates;

(iii) The applicable ICD-9 codes, or subsequent ICD categorization, utilized in the APG software system;

(iv) The Applicable CPT/HCPCS codes utilized in the APG software system; and

(v) The APG software system.

Text of proposed rule and any required statements and analyses may be obtained from: Trisha R. Schell-Guy, OASAS, 1450 Western Avenue, Albany, NY 12203, (518) 485-6244, email: trishaguy@nycap.rr.com

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

Part 841 - Medical Assistance for Chemical Dependence Services - will be amended to incorporate the implementation of the new Part 822 General Service Standards for Chemical Dependence Outpatient and Opioid Treatment Programs in the Medicaid program and provide clear guidance regarding Medicaid billing and related party transactions.

1. Statutory Authority

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

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

Section 19.15(a) of the Mental Hygiene Law bestows upon the Commissioner the responsibility of promoting, establishing, coordinating, and conducting programs for the prevention, diagnosis, treatment, aftercare, rehabilitation, and control in the field of chemical abuse or dependence.

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue a single operating certificate for the provision of chemical dependence services.

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

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

Section 32.09 of the Mental Hygiene Law gives the Commissioner the

authority to issue operating certificates to providers of chemical dependence services.

Section 364 of the Social Service Law provides that each office within the Department of Mental Health shall be responsible for establishing and maintaining standards for medical care and services received in institutions operated by it or subject to its supervision pursuant to the mental hygiene law.

Section 23 of part C of chapter 58 of the laws of 2009, authorizes the Commissioner to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health and the Director of the Budget, utilizing the Ambulatory Patient Group (APG) methodology for the purpose of establishing standards and methods of payments for chemical dependence outpatient clinic services.

2. Legislative Objectives

Article 32 of the Mental Hygiene Law (§ 32.01) sets forth provisions enabling the Commissioner to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The amendments to Part 841 will provide the authority for the Office of Alcoholism and Substance Abuse Services (OASAS) to set Medicaid Reimbursement of Proposed Part 822 services in line with the Legislature's mandates to convert Medicaid reimbursement of certain ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through APG's.

3. Needs and Benefits

The proposed amendments implement the provisions Section 23 of part C of chapter 58 of the laws of 2009, which require OASAS to establish a new ambulatory care reimbursement methodology set forth in Public Health Law § 2807(2-a) for all outpatient treatment services. This represents a conversion of the current Medicaid outpatient threshold visit reimbursement system to the APG methodology. APGs disaggregate the current Medicaid threshold fees into discrete service categories and payment levels that more accurately define provided services and reflect the Medicaid reimbursable costs associated with delivering a particular service. This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. The proposed amendments contain the fee setting methodology, billing and related Medicaid requirements to accomplish this conversion. These regulatory amendments, combined with the proposed Part 822 regulations, will advance the goals of guaranteeing patients treatment in a manner that is cost effective and accountable and provide strong fiscal incentives for service providers to improve the quality of, and access to, outpatient chemical dependence treatment services.

Providers will benefit from implementation of the APG system by being able to develop more refined and individualized patient treatment plans; receiving payment for multiple services per day; and reimbursement for new services including Medication Management, Complex Care Coordination, Peer Services, Collateral Visits, and Outreach (pending approval from federal Centers for Medicare and Medicaid Services (CMS)).

4. Costs:

a. Costs to regulated parties.

Service providers are regulated parties. Providers' revenue from Medicaid reimbursements may be affected by APG implementation depending on the type of program and the array of services a provider offers. Currently a provider receives a threshold visit fee that is the same regardless of the amount or type of services provided in a visit. Under the APG methodology, a provider may bill for multiple services provided during a visit and will receive a fee for each service reflecting the resources utilized to provide the service. In addition, some dual-certified providers now receive an Article 28 reimbursement based on the Department of Health diagnosis and treatment center reimbursement methodology. Reimbursement for these providers' may be affected if their dual certification status changes because generally an Article 28 reimbursement fee is greater than the Article 32 OASAS clinic fee.

To reduce any negative impact of APG reimbursement OASAS will phase-in introduction of APG reimbursement over three 12-month periods by using a blend of the current fee structure (legacy payment) and the APG reimbursement methodology. During all phases of APG implementation, OASAS will be carefully monitoring the impact of the transition to APGs on not-for-profit providers' state aid funding.

Providers may incur some up-front administrative costs associated with the phased-in implementation of the APG billing methodology; however this should be balanced by reduced staff time in other areas such as processing individual and general regulatory waivers made unnecessary by the proposed regulatory revisions. In addition, extensive input and involvement of providers and regulatory staff prior to promulgation of the proposed Part 822 and these amendments means both providers and

agency staff have been anticipating the changes from APGs and other amendments for some time and have been preparing in advance for implementation. Because the proposed Part 822-5 was recently amended and promulgated as a new Part 828, OASAS had already modified the review instrument for Opioid Treatment Programs (OTP) and has begun providing additional technical assistance to OTPs.

b. Costs to the agency, state and local governments.

OASAS does not anticipate increased costs to the agency, state, counties, cities, towns or local districts as a result of these amendments.

5. Local Government Mandates

The proposed amendments do not impose any new local government mandates.

6. Paperwork

Providers who participate in the Medicaid Program must complete paperwork which is necessary to ensure that the services will be provided in a high quality manner and in compliance with federal and state regulatory requirements. There is no additional paperwork required of service providers as a result of these amendments.

7. Duplication

There are no duplications of other state or federal requirements.

8. Alternatives

These amendments are required by the provisions of Section 23 of part C of chapter 58 of the laws of 2009 and Public Health Law section 2807(2-a). Consequently, no alternatives were considered.

9. Federal Standards

Federal standards governing Medicaid requirements for these services are found at 42 Code of Federal Regulations Section 441.150 et seq. These requirements have been incorporated into Part 822 and Part 841. These amendments do not exceed any minimum standard of the federal government for the same or similar subject areas.

10. Compliance Schedule

These proposed Part 841 requirements relating to Part 822 services will become effective on July 1, 2011. All standards of Medical Assistance reimbursement applicable to chemical dependence outpatient and opioid treatment programs shall be contingent on approval the state plan amendment associated with APG's and Federal financial participation.

Regulatory Flexibility Analysis

Effect of Rule (Types / Numbers):

For purposes of this regulatory flexibility analysis, small businesses were considered to be chemical dependence outpatient and opioid treatment providers. The proposed amendments will impact approximately 481 certified providers of outpatient services and 115 certified providers of opioid treatment. Some of these providers are small businesses.

Compliance Requirements:

Regardless of program size, it is anticipated that there will be no new reporting or recordkeeping imposed on local governments or small businesses. There are no new mandates or administrative requirements placed on local governments.

Professional Services:

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

Compliance Costs:

Outpatient and opioid treatment providers' revenue from Medicaid reimbursements may be affected by Ambulatory Payment Group (APG) implementation depending on the type of program and the array of services a provider offers. Currently a provider receives a threshold visit fee that is the same regardless of the amount or type of services provided in a visit. Under the APG methodology, a provider may bill for multiple services provided during a visit and will receive a fee for each service reflecting the resources utilized to provide the service. In addition, some dual-certified providers now receive an Article 28 reimbursement based on the Department of Health diagnosis and treatment center reimbursement methodology. Reimbursement for these providers may be affected if their dual certification status changes because generally an Article 28 reimbursement fee is greater than the Article 32 OASAS clinic fee.

To reduce any negative impact of APG reimbursement OASAS will phase in introduction of APG reimbursement over three periods by using a blend of the current fee structure and the APG reimbursement methodology. During all phases of APG implementation, OASAS will be carefully monitoring any impact of the transition to APGs on not-for-profit providers' state aid funding.

Providers may incur some up-front administrative costs associated with the phased-in implementation of the APG billing methodology; however this may be balanced by reduced staff time in other areas such as processing individual and general regulatory waivers made unnecessary by the proposed regulatory revisions being made simultaneously to Part 822. In addition, extensive input and involvement of providers and regulatory personnel prior to promulgation of this regulation means both providers and agency staff have been anticipating the changes from APGs and other amendments for some time and have been preparing in advance for

implementation. OASAS had already been providing additional technical assistance to OTPs.

It is expected that over time all providers (regardless of size) will realize cost savings from more efficient delivery of services. Providers will not incur any additional costs for materials.

There will be no impact on costs of local governments.

Economic / Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule.

Minimizing Adverse Economic Impacts:

The proposed amendments apply to Medicaid reimbursement for treatment services furnished by outpatient and opioid treatment providers. The Office of Alcoholism and Substance Abuse Services considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the APG reimbursement system is mandated in statute. Potential adverse economic impact is minimized by the goals advanced by the concurrent promulgation of Part 822 which include: improving patient care, cost effectiveness and efficiency.

Small Business and Local Government Participation:

Local governments and small businesses were given initial notice of the necessity of this proposed regulation by its inclusion in the SFY 2008-09 enacted budget. Further, the lengthy process of amending and consolidating outpatient and opioid treatment into one regulation for all outpatient services (Part 822) together with the amendments to this proposed regulation necessary to effectuate the new APG reimbursement methodology has disseminated information among providers and involved numerous providers, including those in small businesses, in workgroups instrumental in the development of these regulations.

Rural Area Flexibility Analysis

Types / Numbers:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

The proposed amendments to Part 841 will impact approximately 481 certified providers of outpatient services and 115 certified providers of opioid treatment. Some of these providers may be located in rural areas although the vast majority of opioid treatment providers are located in urban areas.

Compliance Requirements:

There will be no new reporting or recordkeeping imposed on providers in rural areas as a result of these amendments.

Professional Services:

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

Compliance Costs:

Outpatient and opioid treatment providers' revenue from Medicaid reimbursements may be affected by Ambulatory Payment Group (APG)

implementation depending on the type of program and the array of services a provider offers. Currently a provider receives a threshold visit fee that is the same regardless of the amount or type of services provided in a visit. Under the APG methodology, a provider may bill for multiple services provided during a visit and will receive a fee for each service reflecting the resources utilized to provide the service. In addition, some dual-certified providers now receive an Article 28 reimbursement based on the Department of Health diagnosis and treatment center reimbursement methodology. Reimbursement for these providers may be affected if their dual certification status changes because generally an Article 28 reimbursement fee is greater than the Article 32 OASAS clinic fee.

To reduce any negative impact of APG reimbursement OASAS will phase in introduction of APG reimbursement over three periods by using a blend of the current fee structure and the APG reimbursement methodology. During all phases of APG implementation, OASAS will be carefully monitoring any impact of the transition to APGs on not-for-profit providers' state aid funding.

Providers may incur some up-front administrative costs associated with the phased-in implementation of the APG billing methodology; however this may be balanced by reduced staff time in other areas such as processing individual and general regulatory waivers made unnecessary by the proposed regulatory revisions being made simultaneously to Part 822. In addition, extensive input and involvement of providers and regulatory personnel prior to promulgation of this regulation means both providers and agency staff have been anticipating the changes from APGs and other amendments for some time and have been preparing in advance for implementation. OASAS had already been providing additional technical assistance to OTPs.

It is expected that over time all providers (regardless of location) will realize cost savings from more efficient delivery of services. Providers will not incur any additional costs for materials.

There will be no impact on costs of local governments.

Minimizing Adverse Economic Impacts:

The proposed amendments apply to Medicaid reimbursement for treatment services furnished by outpatient and opioid treatment providers. The Office of Alcoholism and Substance Abuse Services considered approaches specified in section 202-bb(2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the APG reimbursement system is mandated in statute. Potential adverse economic impact is minimized by the goals advanced by the concurrent promulgation of Part 822 which include: improving patient care, cost effectiveness and efficiency.

Opportunity for Rural Area Participation:

Providers in rural areas were given initial notice of the necessity of this proposed regulation by its inclusion in the SFY 2008-09 enacted budget. Further, the lengthy process of amending and consolidating outpatient and opioid treatment into one regulation for all outpatient services (Part 822) together with the amendments to this proposed regulation necessary to effectuate the new APG reimbursement methodology has disseminated information among providers and involved numerous providers, including those in small businesses, in workgroups instrumental in the development of these regulations.

Job Impact Statement

The proposed amendment to Part 841 should have no negative impact on jobs or economic opportunities in New York State. The proposal deals only with Medicaid reimbursement and procedures and would not require any additional staffing.

Department of Environmental Conservation

EMERGENCY RULE MAKING

New Source Review Requirements for Proposed New Major Facilities and Major Modifications to Existing Facilities

I.D. No. ENV-12-11-00004-E

Filing No. 302

Filing Date: 2011-03-28

Effective Date: 2011-03-28

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

Action taken: Amendment of Parts 200, 201 and Part 231 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103 and 71-2105; and Federal Clean Air Act, sections 160-169 and 171-193 (42 USC sections 7470-7479; 7501-7515)

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

Specific reasons underlying the finding of necessity: The Department's Division of Air Resources ("DAR") is amending 6 NYCRR Parts 200, 201 and 231. The revisions include two primary components, which are intended to incorporate: (1) key provisions of Environmental Protection Agency's ("EPA's") May 16, 2008 and October 20, 2010 NSR final rules for the regulation of particulate matter with an aerodynamic diameter less than or equal to 2.5 micro-meters ("PM-2.5"), 73 FR 28321 ("2008 NSR PM-2.5 final rule") and 75 FR 64864 ("2010 NSR PM-2.5 final rule"), respectively; and (2) key provisions of EPA's June 3, 2010 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FR 31514 ("GHG Tailoring Rule"). As set forth further below, failure to implement the 2008 and 2010 NSR PM-2.5 final rules would have adverse impacts on public health and general welfare in the State and necessitates the adoption of an emergency rule by the Department. Similarly, failure to adopt conforming provisions of the GHG Tailoring Rule as a matter of State law by January 2, 2011 would have adverse impacts on the State's general welfare, and necessitates the adoption of an emergency rule by the Department.

With regard to the first component of the instant action, NSR is a critical tool in meeting the Legislature's air quality objectives and ensuring that healthful air quality is preserved in areas of the State that meet the National Ambient Air Quality Standards ("NAAQS") for PM-2.5 and does not further degrade but actually improves in areas of the State which currently are not in attainment of the PM-2.5 NAAQS. Since the State of New York currently has areas that are designated nonattainment for PM-2.5, the Department must have a nonattainment NSR ("NNSR") program that meets the requirements of Part D of Title I of the Clean Air Act ("CAA") in order to adopt and implement permit programs for the construction, modification and operation of major stationary sources in nonattainment areas of the State.

Subsequent to the promulgation of NAAQS for PM-2.5, EPA designated the New York City metropolitan area as nonattainment for the PM-2.5 standard, 70 FR 944, January 5, 2005. NNSR is now required for new major facilities and major modifications to existing facilities that emit PM-2.5 in significant amounts in the PM-2.5 nonattainment area. NNSR requires that every new major facility and major modification at existing facilities in the PM-2.5 nonattainment area control emissions of direct PM-2.5 through the requirement that such sources achieve Lowest Achievable Emission Rate ("LAER") and obtain emission offsets. On May 16, 2008 and October 20, 2010, EPA published its final rules governing the implementation of the NSR program for PM-2.5. EPA's final rule requires, among other things, that permits address directly emitted PM-2.5 as well as pollutants responsible for secondary formation of PM-2.5, referred to as precursors.

With regard to the second component of the instant action, EPA has recently taken multiple actions regarding the regulation of greenhouse gases ("GHGs") under the CAA: (1) the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 FR 66496 (December 15, 2009) ("Endangerment Finding"); (2) the Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 FR 25324 (May 7, 2010) ("Tailpipe Rule"); and (3) the Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 FR 17004 (April 2, 2010) ("Trigger Rule"). Taken together, these three EPA actions and interpretations will result in GHGs being "subject to regulation" under the CAA as of January 2, 2011. On that date, because of EPA's actions, GHGs will need to be addressed as part of the CAA's Prevention of Significant Deterioration ("PSD") and Title V permitting programs.

Also, since EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule make GHGs subject to regulation under the CAA, and because current State law uses the same relevant language as federal law, GHGs will automatically become subject to regulation as a matter of State law on January 2, 2011. Therefore, it is necessary to clarify that GHGs are required to be addressed as a matter of federal law and as a result of EPA's actions, rather than as a result of this instant action. However, this action is necessary in order to clarify and conform State law to federal law as it relates to EPA's actions to address GHG regulation under its GHG Tailoring Rule, and therein revise the relevant State applicability thresholds for GHGs under the Department's PSD and Title V programs.

On June 3, 2010, EPA published its GHG Tailoring Rule in order to address impacts of GHGs becoming subject to regulation under the CAA as of January 2, 2011. According to EPA, the current statutory mass-based applicability thresholds in the CAA, of 100 or 250 tons per year (tpy), could subject a vast number of small GHG emission sources to PSD and Title V permitting program requirements. This would create a significant burden for smaller sources, many of which would be newly subject to PSD and Title V permitting requirements, as well as cause state and local permitting authorities to be inundated with permitting review. This impact is the result of the fact that the current applicability thresholds for those programs, while appropriate for traditional pollutants such as SO₂ and NO_x, are not necessarily feasible for GHGs since GHGs are emitted in much higher volumes than traditional pollutants. Because of this, EPA promulgated the GHG Tailoring Rule which 'tailors' the applicability thresholds for GHGs in order to exempt small sources from being newly subject to PSD or Title V permitting program requirements. As stated in the foregoing, since existing State regulations largely track the statutory text of the CAA in terms of the relevant applicability thresholds, smaller sources in New York will be similarly impacted. Thus, irrespective of whether GHG thresholds are tailored under the federal GHG Tailoring Rule, a vast number of small GHG emission sources in New York may likewise become subject to State PSD and Title V requirements as a matter of State law on January 2, 2011.

While the Department intends to follow EPA's approach under the federal GHG Tailoring Rule, the Department needs to immediately incorporate EPA's tailored applicability thresholds into State regulations before January 2, 2011. This is necessary in order to conform State regulations to federal law as it relates to EPA's GHG Tailoring Rule, and to make clear that small sources in the State with GHG emissions below the tailored thresholds of the GHG Tailoring Rule will not be newly subject to the PSD or Title V permitting programs. Without the GHG Tailoring Rule and this action, the State's PSD and Title V permitting program requirements may apply to all stationary sources that emit or have the potential to emit GHGs at or above the CAA statutory thresholds of 100 or 250 tpy on or after January 2, 2011. Absent a State GHG tailoring rule, numerous smaller sources in New York such as schools, restaurants, and small commercial facilities may be negatively impacted by EPA's actions to regulate GHGs.

ADVERSE IMPACTS ON PUBLIC HEALTH

Particulate matter is a generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes. EPA first established a NAAQS for PM in 1971 and has since conducted several periodic reviews and revisions to establish both health-based (primary) and welfare-based (secondary) standards.

The health effects associated with exposure to PM-2.5 are significant. Epidemiological studies have shown a significant correlation between elevated PM-2.5 levels and premature mortality. Particulate matter, especially fine particles, contains microscopic solids or liquid droplets that can lodge deep into the lungs and cause serious health problems. Numerous scientific studies have linked particle pollution exposure to a variety of respiratory and cardiovascular problems including: increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing, for example; decreased lung function; aggravated asthma; development of chronic bronchitis; irregular heartbeat; nonfatal heart attacks; and premature death in people with heart or lung disease. People with heart or lung diseases, children and older adults are the most likely to be affected by particle pollution exposure. However, even healthy people may experience temporary symptoms from exposure to elevated levels of particle pollution.

Based on the foregoing, the failure to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules may have far-reaching consequences that will adversely impact public health. Therefore, an emergency rulemaking to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules is necessary in order to preserve public health in New York State.

ADVERSE IMPACTS ON THE GENERAL WELFARE

In addition to the adverse public health impacts referenced above due to the State's failure to adopt and implement EPA's 2008 and 2010 NSR final rules incorporating health-based air quality standards for PM-2.5, there may also be significant impacts on the public welfare. New York currently has a PM-2.5 nonattainment area requiring the submittal of a State Implementation Plan ("SIP") revision in accordance with CAA requirements. As a result, the Department is required to submit to EPA a revised SIP incorporating the 2008 federal PM-2.5 NSR requirements prior to May 16, 2011. Since the CAA authorizes the EPA to impose significant sanctions for failure to submit a SIP or failure to implement a federal plan, including the withdrawal of federal highway funds and the imposition of two to one ("2:1") emission offset ratios to applicable new and modified sources in the State [CAA Section 179, 42 USC Section

7509], failure to submit a revised SIP by the May 16, 2011 deadline could have far reaching consequences which may negatively impact the public welfare. For example, the stricter emissions offset ratios will impose higher costs on State emission sources or, in some cases, possibly deter sources from commencing any new construction or essential modifications. These sanctions, along with the State's lack of authorization to issue permits for new and modified sources, could have a paralyzing effect on State commerce, significantly raising the cost of doing business and effectuating a virtual ban on construction in the State. In addition, the CAA authorizes EPA to withhold funding for certain state air pollution and planning control programs and take control of a state's air permitting programs under a Federal Implementation Plan (FIP).

Based on the foregoing, the failure to submit a revised SIP in accordance with the federal NSR rule for PM-2.5 may have far-reaching consequences that will adversely impact the general welfare. Therefore, an emergency rulemaking to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules, and by May 16, 2011 for purposes of the 2008 NSR final rule, is necessary in order to preserve the general welfare in New York State.

Similarly, the State's failure to implement, by January 2, 2011, revised applicability thresholds which conform to EPA's GHG Tailoring Rule would have significant adverse impacts on the general welfare. As stated in the foregoing, regardless of this action, as of January 2, 2011, the Department will be required to address GHG emissions in its PSD and Title V permitting programs as a result of EPA's actions to regulate GHGs. EPA's GHG Tailoring Rule, which tailors the applicability thresholds under the Title V and PSD programs, is aimed at reducing the anticipated impact on smaller sources and on state and local permitting authorities as a matter of federal law. This action is necessary to clarify and conform State regulations to federal law along with the relevant applicability thresholds as a matter of State law.

Without this action, the State's PSD and Title V permitting program requirements may apply to all stationary sources that emit more than 100 or 250 tpy of GHGs beginning on January 2, 2011. As stated in the foregoing, this is because the State's existing regulations largely track the statutory text in terms of the relevant applicability thresholds. This would result in significant adverse impacts on the general welfare for two primary reasons: (1) a vast number of small stationary sources of GHG emissions in the State would be newly required to comply with significant PSD and Title V operating permit requirements, imposing additional costs on such sources, and resulting in adverse economic impacts; and (2) the Department's PSD and Title V permitting programs would be overwhelmed by the anticipated administrative burden, severely impairing the administrative functioning of these programs, creating significant permitting delays, and resulting in significant adverse economic impact on all sources in the State that require operating permits.

If, as of January 2, 2011, the State's PSD and Title V permitting programs applied to GHGs at the current CAA statutory applicability thresholds, a significant burden would be placed on smaller sources of GHG emissions in the State to comply with PSD or Title V operating permit requirements which would have a significant adverse impact on the general welfare of the State. The statutory applicability thresholds would newly subject a vast number of small GHG emission sources, not traditionally regulated under the CAA, to these permitting program requirements. For purposes of PSD sources that fall within the 250 tpy source categories, the Department has determined that the following source types may be impacted by EPA's regulation of GHGs: gas-fired boilers over 485,000 Btu/hr; oil-fired boilers over 350,000 Btu/hr; and wood-fired boilers over 220,000 Btu/hr. For Title V sources and PSD sources that fall within the existing 100 tpy source categories, GHG regulation would impact: gas-fired boilers over 194,000 Btu/hr; oil-fired boilers over 143,000 Btu/hr; and wood-fired boilers over 89,000 Btu/hr. Based on these projections, most single family residences would not be affected. However, a significant number of facilities that emit GHGs in quantities greater than the existing thresholds, but have never before been subject to either PSD or Title V permitting requirements, would now have to address GHGs under the state's PSD or Title V permitting programs, including many schools, auto-body garages, churches, multi-family residential buildings or dwellings, warehouses, and shopping centers. These smaller sources may be unduly burdened by the cost of new regulatory requirements, particularly individualized technology control requirements under the PSD program and complex permitting review requirements under Title V. This substantial cost on a vast number of new smaller sources would have a significant adverse impact on the State's economy.

Also, if, as of January 2, 2011, the State's PSD and Title V permitting programs applied to GHGs at the current CAA statutory applicability thresholds, the administrative burden on the Department would be overwhelming. EPA estimates that under the current 100 and 250 tpy threshold levels, nearly 82,000 projects per year would become subject to PSD. 75 FR 31514 at 31538. This would result in an estimated \$1.5 billion

per year in PSD permitting cost, a 130 times increase in current annual burden hours for permitting authorities nationwide, and an increase in permit processing time from one to three years. *Id.* at 31539. For Title V purposes, EPA estimates that six million sources, under the current 100 tpy threshold level, would need Title V operating permits nationwide, representing for permitting authorities an additional 1.4 billion in work hours, an annual cost increase of \$21 billion, and an increase in permit processing time from six months to 10 years. *Id.* at 31539-31540. In addition, EPA notes that many permitting authorities will need up to two years to hire the necessary staff to handle a 10-fold increase in PSD permits, a 40-fold increase in Title V permits, and that 90 percent of staff would need additional training related to the permitting of GHG sources.

The federal requirement to review and issue a vast number of new CAA operating permits would represent a substantial administrative burden for the Department. This substantial increase would inevitably overwhelm the resources of the Department's permitting program. As a result, it would create a significant permitting backlog, resulting in extensive delays in permit issuance. Under such a scenario, new sources in the State would not be able to begin construction, nor would existing sources be able to make needed modifications, without the necessary PSD review and issuance of a Title V operating permit from the Department. Similarly, a source would not be able to operate in the State without a Title V permit from the Department. If the Department is unable to timely issue the necessary permits, many new projects may be halted for a significant period of time. Thus, particularly given the vast number of smaller sources that would be newly subject to these requirements, a substantial delay in permitting issuance would result in an adverse economic impact to the State.

Based on the foregoing, the failure to implement tailored applicability thresholds for GHGs under the State's PSD and Title V permitting programs as a matter of State law by January 2, 2011 would have significant adverse impacts on the State's permitting programs, numerous smaller sources, and the general economy. Therefore, an emergency rulemaking to incorporate key provisions of EPA's GHG Tailoring Rule prior to January 2, 2011 is necessary in order to preserve the general welfare in New York State.

CONCLUSIONS

The normal rulemaking process consists of several rulemaking requirements under SAPA. While the Department prefers to submit a rule through the normal State rulemaking process, compliance with the normal rulemaking requirements would be contrary to public interest since, as explained in the foregoing, the failure to implement the 2008 and 2010 federal NSR PM-2.5 final rules may unnecessarily increase the risk to public health in this State. Also, the failure to submit a revised SIP for purposes of the 2008 federal NSR PM-2.5 final rule prior to the federal deadline of May 16, 2011, and the failure to implement the GHG Tailoring Rule as a matter of State law by January 2, 2011 may have significant adverse impacts on the State's general welfare.

Subject: New Source Review requirements for proposed new major facilities and major modifications to existing facilities.

Purpose: To comply with 2008 and 2010 Federal NSR rules, correct typographical errors, and clarify existing rule language.

Substance of emergency rule: The Department of Environmental Conservation (Department) is proposing to amend Parts 200, 201, and 231 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, entitled "General Provisions," "Permits and Registrations" and "New Source Review for New and Modified Facilities" respectively.

The Part 200 amendments will revise the definitions of potential to emit and PM-2.5 and add definitions for greenhouse gases and CO₂ equivalent. The definition of potential to emit will now state that secondary emissions are not to be included when calculating an emissions source's potential to emit. The definition of PM-2.5 will no longer refer to Appendix L of Part 50 of the Code of Federal Regulations and will now state that PM-2.5 is the sum of filterable PM-2.5 and material that condenses after exiting the stack forming solid or liquid particulates. Greenhouse gases are defined as the aggregate group of carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The definition of CO₂ equivalent states that each of the six greenhouse gases are multiplied by their global warming potential and summed to obtain emissions in terms of CO₂ equivalents.

The Part 201 amendments revise the definition of major stationary source or major source or major facility to add a CO₂ equivalent based greenhouse gas emission threshold. In addition to the current mass based thresholds applicable to greenhouse gases, the proposed revisions establish a CO₂ equivalent threshold of 100,000 tons per year for the purposes of determining if a stationary source, source, or facility is major. The definition is also revised to state that 201-2.1(b)(21)(iii) is a "Source Category List" and removes municipal waste landfills from the list.

Existing Subpart 231-2 will be revised to insert "February 19, 2009" in place of "the effective date of Subparts 231-3 through 231-13" in the title of 231-2.

Existing Subpart 231-3 will be revised by changing the title of 231-3.2 and stating in sections 231-3.2 and 3.6 that "complete application" is referring to its definition under section 621.2. Section 231-3.3 will be removed and subsequent sections renumbered.

Existing Subpart 231-4 will be revised by adding the definition of calendar year and renumbering subsequent paragraphs, alphabetically. The definition of contemporaneous will be revised to state that it means different periods of time depending on attainment status of the location. The definitions of baseline area, major facility baseline date, and minor facility baseline date will be revised to include PM-2.5. The definition of nonattainment contaminant will be revised to include PM-2.5 precursors in the PM-2.5 nonattainment area.

Existing Subparts 231-5 and 231-6 will be revised to add regulation of PM-2.5 precursors. As a result, SO₂ will be regulated as a nonattainment contaminant in the PM-2.5 nonattainment area. Interpollutant trading ratios will also be added for PM-2.5 precursors so that direct emissions of PM-2.5 can be offset by reductions in PM-2.5 precursor emissions and PM-2.5 precursors can be offset by reductions in direct PM-2.5 emissions.

Existing Subpart 231-7 will be revised to reference Table 8 of 231-13 in 231-7.4(f)(6) for SO₂ variances.

Existing Subpart 231-8 will be revised to provide an example that shows only the same class of regulated NSR contaminant can be used for netting and reference Table 8 of 231-13 in 231-8.5(f)(6) for SO₂ variances.

Existing Subpart 231-9 will be revised to clarify language and allow CEMS to use performance specifications in 40 CFR 75.

Existing Subpart 231-10 will be revised to state that emission reduction credits (ERCs) must be the same type of regulated NSR contaminant for the purposes of netting. Subdivisions are added to allow interpollutant trading and to state that if a contaminant is regulated as a precursor under multiple programs only one set of offsets is required. The section titled mobile source and demand side management ERCs will be renamed to ERCs for emission sources not subject to Part 201.

Existing Subpart 231-11 will be revised to clarify sections in the 231-11.2 reasonable possibility provisions.

Existing Subpart 231-12 will be revised to include PSD increments for PM-2.5, significant impact levels for PM-2.5, significant monitoring concentration for PM-2.5, and reordering paragraphs 231-12.2(c)(2) and (3).

Existing Subpart 231-13, table 4, will be revised to include significant project thresholds, significant net emission increase thresholds, and offset ratios for PM-2.5 precursors. Table 5 of Subpart 231-13 will be revised to add greenhouse gases to the major facility thresholds for attainment and unclassified areas, and table 6 will be revised to add significant project thresholds and significant net emission increase thresholds for attainment and unclassified areas. The source category list will be removed and in its place will be a table listing global warming potential values.

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. ENV-12-11-00004-P, Issue of March 23, 2011. The emergency rule will expire May 26, 2011.

Text of rule and any required statements and analyses may be obtained from: Robert Stanton, P.E., NYSDEC Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 231nsr@gw.dec.state.ny.us

Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Parts 200, General Provisions, 201, Permits and Registrations and 231, New Source Review (NSR) for New and Modified Facilities. First, this proposed rule will incorporate the Environmental Protection Agency's (EPA's) May 16, 2008 NSR final rule for the regulation of particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5). The Department incorporated some of EPA's final PM-2.5 requirements in its February 19, 2009 revisions to its PSD and nonattainment NSR programs (6 NYCRR Part 231). This proposed rulemaking will incorporate the remaining provisions of the federal PM-2.5 final rule which were not previously included in the 2009 revision to Part 231. Second, this proposed rule will incorporate conforming provisions to EPA's June 3, 2010 NSR final rule for the regulation of Greenhouse Gases (GHGs) under its PSD and Title V programs, referred to as the Greenhouse Gas Tailoring Rule (GHG Tailoring Rule). The proposed rule will clarify the regulation of GHGs by establishing major source applicability threshold levels for GHG emissions and other conforming changes under the State's PSD and Title V programs. Third, this proposed rule will incorporate EPA's October 20, 2010 final rule which establishes the PM-2.5 increments, significant

impact levels, and significant monitoring concentration. This proposed rulemaking is not a mandate on local governments. It applies to any entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of this regulation.

1. STATUTORY AUTHORITY

The statutory authority for these regulations is found in the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103, and 71-2105, and in Sections 160-169 and 171-193 of the Federal Clean Air Act (42 USC Sections 7470-7479; 7501-7515) (Act or CAA).

2. LEGISLATIVE OBJECTIVES

The Act requires states to have a preconstruction program for new and modified major stationary sources, and an operating permit program for all major sources. This rulemaking is being undertaken to satisfy New York's obligations under the Act and also to meet the environmental quality objectives of the State. This Section discusses the legislative objectives of the rulemaking, including overview of relevant federal and State statutes and regulations.

Articles 1 and 3, of the ECL, set out the overall State policy goal of reducing air pollution and providing clean air for the citizens of New York and provide general authority to adopt and enforce measures to do so. In addition to the general powers and duties of the Department and Commissioner to prevent and control air pollution found in Articles 1 and 3, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air 'quality' of New York from pollution.

In 1970, Congress amended the Act "to provide for a more effective program to improve the quality of the Nation's air." The statute directed EPA to adopt National Ambient Air Quality Standards (NAAQS) and required states to develop implementation plans known as State Implementation Plans (SIPs) which prescribed the measures needed to attain the NAAQS.

On May 16, 2008, EPA published a final rule regarding the regulation of PM-2.5 in attainment and nonattainment areas ('see' 73 Fed Reg 28321 [2008 federal NSR rule]). The May 16, 2008 federal NSR rule included the following key provisions: PM-2.5 precursors, offset trading ratios, and a SIP submission requirement.

On October 20, 2010, EPA published a final rule regarding PM-2.5 increments, significant impact levels, and significant monitoring concentration ('see' 75 Fed Reg 64864 [October 20, 2010 federal NSR rule]). The October 20, 2010 federal NSR rule included the following key provisions: PM-2.5 increments, PM-2.5 significant impact levels, PM-2.5 significant monitoring concentration, and a SIP submission requirement.

On June 3, 2010, EPA published a final NSR rule tailoring the applicability criteria that determines which stationary sources and modification projects become subject to permitting requirements for GHG emissions under the PSD and Title V operating permit (Title V) programs of the CAA ('see' 75 Fed Reg 31514 [GHG Tailoring Rule]). The GHG Tailoring Rule included key provisions regarding the list of GHGs regulated, the permitting metric used, and the permitting applicability thresholds. In response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA has taken several actions that, taken together, will result in GHGs being "subject to regulation" under the Act as of January 2, 2011. This will occur regardless of the GHG Tailoring Rule or this rulemaking. The GHG component of this rulemaking is necessary because of a number of actions taken by EPA regarding the regulation of GHGs under the CAA. This rulemaking will clarify the applicability thresholds for GHGs under the State's PSD and Title V permitting programs, in order to conform such thresholds to those set forth in the federal GHG Tailoring Rule.

3. NEEDS AND BENEFITS

The Department is undertaking this rulemaking to comply with the May 16, 2008, the June 3, 2010, and the October 20, 2010 federal NSR rules promulgated by EPA, for the regulation of PM-2.5 and GHGs. The May 16, 2008 federal NSR rule modified both the nonattainment NSR and PSD regulations with respect to PM-2.5 at 40 CFR 51.165 and 52.21, respectively, and requires states with SIP approved NSR programs to revise their regulations in accordance with the May 16, 2008 federal NSR rule and submit the revisions to EPA for approval into the SIP. The GHG Tailoring Rule modified the PSD regulations with respect to GHGs at 51.166 and 52.21; the Title V regulations at 70.2, 70.12, 71.2 and 71.13; and requires states with SIP approved NSR programs to revise their regulations in accordance with the GHG Tailoring Rule and submit the revisions to EPA for approval into the SIP. The October 20, 2010 federal NSR rule modified both the nonattainment NSR and PSD regulations with respect to PM-2.5 at 40 CFR 51.165 and 52.21, respectively, and requires states with SIP approved NSR programs to revise their regulations in accordance with the October 20, 2010 federal NSR rule and submit the revisions to EPA for approval into the SIP.

On December 15, 2009, EPA published its Endangerment Finding stating that GHGs contribute to climate change and are a threat to public health

and the welfare of current and future generations. 'See', 74 Fed. Reg. 66,496. According to EPA, the combination of six well-mixed GHGs found in the Earth's atmosphere - carbon dioxide (CO₂); methane (CH₄); nitrous oxide (N₂O); hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulfur hexafluoride (SF₆) - form the "air pollutant" that may be subject to regulation under the CAA. 'Id'.

Following the Endangerment Finding, EPA finalized a rule establishing emission standards for GHGs from passenger cars and light-duty trucks, starting with model year 2012 vehicles. 'See' 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"). EPA also issued an interpretation that a pollutant is "subject to regulation" if it is subject to a CAA requirement establishing "actual control of emissions." 75 Fed. Reg. 17,004, 17,006 (April 2, 2010) ("Trigger Rule"). Taken together, the Endangerment Finding, Tailpipe Rule, and Trigger Rule will result in GHGs being "subject to regulation" under the CAA as of January 2, 2011. On that date, because of EPA's actions, GHGs will need to be addressed as part of the CAA's PSD and Title V permitting programs, regardless of this rulemaking.

Since many states, including New York, have incorporated identical or federally-conforming provisions into their state PSD and Title V programs, GHGs will also need to be addressed as a matter of State law. However, without this rulemaking, the literal application of the current thresholds under the State's PSD and Title V provisions will have the same adverse impact on State stationary sources and the State's permitting programs as described in the federal GHG Tailoring Rule. This means that, without this rulemaking to clarify and tailor the existing applicability thresholds in a similar manner as the federal GHG Tailoring Rule, a vast number of newly regulated facilities within the State would be required to comply with the State's existing PSD and Title V program requirements as of January 2, 2011.

Once GHGs become subject to regulation under the CAA, necessitating the review and processing of possibly thousands of new permits under the State's PSD or Title V permitting programs, the Department's ability to maintain these programs under the existing thresholds applicable to GHGs will be significantly impaired. This proposed rule incorporates and otherwise conforms to the key provisions of the federal GHG Tailoring Rule, including provisions to "tailor" the existing applicability thresholds under the PSD and Title V permitting programs, in order to reduce the anticipated burdens on newly regulated facilities in the state and to alleviate the projected impairment of the state's PSD and Title V programs.

The Part 200 amendments will revise the definitions of potential to emit and PM-2.5 as well as add definitions for GHG and CO₂ equivalent (CO₂e). The definition of potential to emit will be changed to specify that secondary emissions are not included in a facility's potential to emit. The definitions of PM-10 and PM-2.5 will now state that condensable emissions are included.

The definition of major stationary source or major source or major facility in Part 201 will be modified for GHGs to clearly establish its threshold at 100,000 tpy CO₂e in addition to maintaining the current mass based emission thresholds.

The Part 231 amendments will include the remaining provisions from EPA's May 16, 2008 PM-2.5 rule and include provisions for regulating GHGs under PSD. Precursors of PM-2.5, SO_x and NO_x, have been added as nonattainment contaminants in the PM-2.5 nonattainment area. New York State has determined that emissions of VOCs and ammonia should not be included as PM-2.5 precursors. Interpollutant trading ratios have been added for PM-2.5 precursors by which direct emissions of PM-2.5 can be offset by reductions of SO₂ and/or NO_x. For GHGs the major facility threshold and significant project/significant net emission increase threshold have been clearly established as 100,000 tpy CO₂e and 75,000 tpy CO₂e, respectively, while maintaining the current mass based thresholds. A table has been added to 231-13 that lists the global warming potential (GWP) of the six individual gases that comprise GHGs and references the table in the federal GHG Mandatory Reporting Rule. For PSD and Title V applicability, a source's GHG emissions must equal or exceed both the mass based and CO₂e based emission thresholds. In accordance with the October 20, 2010 federal NSR rule PM-2.5 increments, SILs, and SMC have been added to their respective tables in Part 231.

These amendments will also correct existing typographical errors identified after the previous rulemaking (February 19, 2009) was completed and clarify sections of existing Parts 200, 201, and 231.

4. COSTS

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed

revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 related to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO₂ and NO_x, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO₂ as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO_x as a precursor will be minimal. NO_x is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to 1 while the ratio is 1 to 1 from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO_x for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO_x would include the application of LAER at 40 tpy instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with inter-pollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO₂ or NO_x to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHG's "subject to regulation" as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule, which will result in GHGs becoming subject to regulation under the CAA on January 2, 2011. One of the primary purposes of the GHG component of this rulemaking is to alleviate any such new costs by conforming State regulations to the federal GHG Tailoring Rule.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA¹, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately 6 million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal. As stated previously, the costs associated with complying with PSD and Title V permitting requirements for GHGs are not directly attributable to these proposed amendments. Instead, any such costs are attributable to EPA's actions to regulate GHGs under the CAA.

5. PAPERWORK

The proposed amendments to Part 231 are not expected to entail any significant additional paperwork for the Department, industry, or State and local governments beyond that which is already required to comply with the Department's existing permitting program under Part 201-6 and existing NSR regulations under Part 231.

6. STATE AND LOCAL GOVERNMENT MANDATES

The adoption of the proposed amendments to Part 231 are not expected to result in any additional burdens on industry, State, or local governments beyond those currently incurred to comply with the requirements of the existing NSR process under Part 201-6, and Part 231. The proposed amendments do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of Part 231.

7. DUPLICATION

This proposal is not intended to duplicate any other federal or State regulations or statutes. The proposed amendments to Part 231 will ultimately conform the regulation to the CAA.

8. ALTERNATIVES

1. Take No Action.

The State would be in violation of federal law if no action is undertaken. New York State is required to have a SIP approved permitting program for PM-2.5 for NNSR by May 16, 2011. As for GHGs, absent the relief provided for GHG emission sources and state permitting authorities under the federal GHG Tailoring Rule, the permitting thresholds for GHGs would be set at 100 tpy and 250 tpy under the PSD program and 100 tpy under the Title V program. Under these thresholds, it is anticipated that a massive number of smaller sources, including farms, schools, and apartment buildings, would be required to comply with state PSD and Title V program requirements. Many of these sources have never had to address these types of requirements since most of these sources are too small to meet the applicability thresholds for the traditional pollutants, such as SO_x and NO_x, or have been considered exempted activities under current law. Also, as EPA recognized in its GHG Tailoring Rule, these newly subject sources of GHG emissions would undoubtedly inundate and overwhelm state permitting authorities and likely result in significant processing delays, as well as a substantial burden on the state's permitting system in general. While the existing Part 231 provisions allow for the regulation of GHGs consistent with the federal GHG Tailoring Rule, the proposed rulemaking will clarify the new Part 231 GHG requirements for the regulated community and conform Part 231 to the federal GHG Tailoring Rule in order to reduce the anticipated burden on newly subjected sources and the State's PSD and Title V permitting programs.

9. FEDERAL STANDARDS

The proposed amendments to Part 231 are consistent with federal NSR standards.

10. COMPLIANCE SCHEDULE

The proposed amendments do not involve the establishment of any compliance schedules. The regulation will take effect 30 days after publication in the State Register, anticipated to be in May 2011. Current permit renewal schedules for regulated industries will continue and provisions of this regulation will be incorporated at the time of permit renewal. Permits for new facilities and permit modifications for existing facilities will continue to be addressed upon submittal of a permit application by the facility, and subsequent review of such application by the Department.

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide. The proposed Part 231 greenhouse gas (GHG) applicability thresholds for facilities in New York State are high enough so that it is unlikely that any small business or local government that owns or operates a facility would be newly subject to the requirements of Part 231. The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule (75 Fed Reg 31514 [GHG Tailoring Rule]) modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. All of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO₂ and NO_x) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major fa-

cilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231.

COMPLIANCE REQUIREMENTS:

There are no specific requirements in this rulemaking which apply exclusively to small businesses or local governments. As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 51.165, 40 CFR 52.21, and 40 CFR 70. Accordingly, these requirements are not anticipated to place any undue burden of compliance on small businesses and local governments. This proposed rulemaking is not a mandate on local governments. It applies to any entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of this regulation.

PROFESSIONAL SERVICES:

The professional services for any small business or local government that is subject to Part 231 are not anticipated to significantly change from the type of services which are currently required to comply with NSR requirements. The need for consulting engineers to address NSR applicability and permitting requirements for any new major facility or major modification proposed by a small business or local government will continue to exist.

COMPLIANCE COSTS:

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 relating to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO₂ and NO_x, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO₂ as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO_x as a precursor will be minimal. NO_x is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to one while the ratio is one to one from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO_x for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO_x would include the application of LAER at 40 tons per year (tpy) instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO₂ or NO_x to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHGs "subject to regulation" under the Clean Air Act as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule ('See', Regulatory Impact Statement). One of the primary purposes of the proposed revisions to Part 231 regarding GHGs is to reduce the anticipated costs that would otherwise have been borne by facilities in New York when GHG emissions become regulated under federal law. This is accomplished by conforming State regulations to the federal GHG Tailoring Rule, and raising the applicability thresholds for GHGs under the federal PSD and Title V permitting programs. By tailoring the applicability thresholds for GHGs, and conforming such thresholds to those set forth in EPA's GHG Tailoring Rule, the proposed rule will ensure that only the largest sources of GHG emissions will be required to comply with new PSD and Title V permitting requirements.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted

and which gas or gases is of concern. Based on information collected by EPA¹, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately 6 million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal.

NSR requirements flow from the State's obligations under the CAA. Therefore, the proposed revisions to the NSR requirements of Part 231 do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates an emission source that proposes a project with emissions greater than the applicability thresholds of this regulation. No specific additional costs will be incurred by state and local governments.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on any small business or local government. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller facilities with respect to GHGs as a result of the increased permitting thresholds and it is not anticipated that many facilities will be newly subject to Title V and PSD as a result of the regulation of GHGs.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department plans on holding a stakeholder meeting in December 2010 to present the proposed changes to the public and regulated community. The Department will also hold public hearings during the public comment period at several locations throughout the State. Small businesses and local governments will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed revisions do not substantially alter the requirements for subject facilities as compared to those requirements that currently exist. The revisions leave intact the major NSR requirements for application of LAER or BACT as appropriate, modeling, and emission offsets. Therefore, the Department believes there are no additional economic or technological feasibility issues to be addressed by any small business or local government that may be subject to the proposed rulemaking.

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

Rural areas are defined as rural counties in New York State that have populations less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile and villages within those towns.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide and all rural areas of New York State will be affected.

The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. All of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into

their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO₂ and NO_x) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases (GHGs) will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231.

COMPLIANCE REQUIREMENTS:

There are no specific requirements in this rulemaking which apply exclusively to rural areas of the State. As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 51.165, 40 CFR 52.21, and 40 CFR 70. As such, the professional services that will be needed by any facility located in a rural area are not anticipated to significantly change from the type of services which are currently required to comply with NSR requirements.

COSTS:

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 relating to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO₂ and NO_x, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO₂ as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO_x as a precursor will be minimal. NO_x is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to one while the ratio is one to one from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO_x for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO_x would include the application of LAER at 40 tons per year (tpy) instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO₂ or NO_x to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHGs "subject to regulation" under the Clean Air Act as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule ("See", Regulatory Impact Statement). One of the primary purposes of the proposed revisions to Part 231 regarding GHGs is to reduce the anticipated costs that would otherwise have been borne by facilities in New York when GHG emissions become regulated under federal law. This is accomplished by conforming State regulations to the federal GHG Tailoring Rule, and raising the applicability thresholds for GHGs under the federal PSD and Title V permitting programs. By tailoring the applicability thresholds for GHGs, and conforming such thresholds to those set forth in EPA's GHG Tailoring Rule, the proposed rule will ensure

that only the largest sources of GHG emissions will be required to comply with new PSD and Title V permitting requirements.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA¹, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately six million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal.

NSR requirements flow from the State's obligations under the CAA. Therefore, the proposed revisions to the NSR requirements of Part 231 do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates an emission source that proposes a project with emissions greater than the applicability thresholds of this regulation. No specific additional costs will be incurred by rural areas of the State.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on rural areas. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller facilities with respect to GHGs as a result of the increased permitting thresholds. It is not anticipated that many facilities will be newly subject to Title V or PSD as a result of the regulation of GHGs.

RURAL AREA PARTICIPATION:

The Department plans on holding a stakeholder meeting in December 2010 to present the proposed changes to the public and regulated community. The Department will also hold public hearings during the public comment period at several locations throughout the State. Residents of rural areas of the State will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

¹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

Job Impact Statement

NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking revisions will apply statewide. The amendments to the regulations are not expected to negatively impact jobs and employment opportunities in New York State.

The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. Both of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate

matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO₂ and NO_x) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. PM-2.5 significant impact levels will be added, and greenhouse gases (GHGs) will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:

Due to the nature of the proposed amendments to Part 231, as discussed above, no measurable negative effect on the number of jobs or employment opportunities in any specific job category is anticipated. There may be some job opportunities for persons providing consulting services and/or manufacturers of pollution control technology in relation to the new requirements.

REGIONS OF ADVERSE IMPACT:

There are no regions of the State where the proposed revisions would have a disproportionate adverse impact on jobs or employment opportunities. The existing NSR requirements are not being substantially changed from those that currently exist.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing jobs or promote the development of any significant new employment opportunities. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors, increments, significant impact levels, significant monitoring concentration, and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller sources with respect to GHGs. The current statutory emission thresholds (mass based) for Title V applicability of 100 tons per year (tpy), and PSD applicability of 100 tpy and 250 tpy are "tailored" for GHG emissions under this rulemaking. For purposes of Title V applicability, in addition to the current mass based threshold, this rulemaking establishes a GHG carbon dioxide equivalent (CO₂e) threshold of 100,000 tpy. For purposes of PSD applicability, in addition to the current mass based thresholds, this rulemaking establishes a GHG CO₂e major facility threshold of 100,000 tpy and a CO₂e major modification threshold for existing major facilities of 75,000 tpy. As a result of the increased thresholds proposed in this rulemaking, it is not anticipated that many facilities will be newly subject to Title V and PSD program requirements as a result of EPA's actions to regulate GHGs under the Clean Air Act.

SELF-EMPLOYMENT OPPORTUNITIES:

The types of facilities affected by these regulatory changes are larger operations than what would typically be found in a self-employment situation. There may be an opportunity for self-employed consultants to advise facilities on how best to comply with the revised requirements. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

(3) Failure to participate in the introductory service coordination training sponsored or approved by the Department of Health may result in the disqualification as a provider of service coordination services in accordance with procedures set forth in Section 69-4.[17(i)]24.

Subdivision (a)(4)(viii)(c) of Section 69-4.5 is amended to read as follows:

(c) a professional or professionals who hold a license, certification, or registration in the type of service offered by the agency whose responsibilities include monitoring and overseeing implementation of the quality assurance plan for that service as developed by the agency in accordance with subparagraph (vii) of paragraph [(3)]4 of this subdivision.

Subdivision (g)(7) of Section 69-4.9 is amended to read as follows:

(7) Maintain records in accordance with section 69-4.[17(a)]26(b) of this subpart that document the performance of activities required to be completed by the provider on behalf of an eligible child and the child's family.

Subdivision (c)(1) of Section 69-4.17 is amended to read as follows:

(1) Personally identifiable data, information, or records pertaining to an eligible child shall not be disclosed by any officer or employee of the Department of Health, state early intervention service agencies, municipalities, evaluators, service providers or service coordinators, to any person other than the parent of such child, except in accordance with Title 34 of the Code of Federal Rules Part 99, [Sections 300.560 through 300.576 (with the modification specified in Section 303.5(b) of Title 34 of the Code of Federal Regulations)] *Part 300 Sections 300.500 through 300.536*, and Part 303 of Title 34 of the Code of Federal Regulations (Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 available from the Early Intervention Program, Room 208 Corning Tower Building, Empire State Plaza, Albany, New York 12237-0618), to preserve the confidentiality of records pertaining to children participating in the early intervention program.

Subdivision (c)(2) of Section 69-4.17 is amended to read as follows:

(2) Each municipality, evaluator, service provider and service coordinator shall adopt procedures comparable to those set forth in part 99 and Sections [300.560 through 300.576 (with the modifications specified in Section 303.5(b))] *300.500 through 300.536* of Title 34 of the Code of Federal Regulations (Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 available from the Early Intervention Program, Room 208 Corning Tower Building, Empire State Plaza, Albany, New York 12237-0618) to preserve the confidentiality of records pertaining to eligible children participating in the Early Intervention Program.

Subdivision (i)(5)(i) of Section 69-4.17 is amended to read as follows:

(i) Upon completion of a complaint resulting in substantiation of one or more allegations, the Department may require corrective action be taken by the subject of the investigation and, where the subject is an approved individual or agency, may take such other actions in accordance with [subdivision] *section 69-4.[5(a)]24* of this subpart.

Subdivision (b)(4) of Section 69-4.18 is amended to read as follows:

(4) lack of access to other sources of respite (e.g., Family Support Services under the auspices of the [Office of Mental Retardation and Developmental Disabilities] *Office for People with Developmental Disabilities* and respite provided through other State early intervention service agencies), due to barriers such as waiting lists, remote/inaccessible location of services, etc.;

Subdivision (b)(1) of Section 69-4.20 is amended to read as follows:

(1) The early intervention official shall ensure the parent is informed in accordance with procedures in subdivision 69-4.11(a)(10)(xiii) of this subpart of the opportunity to object to such notification prior to providing notice to the CPSE of the child's potential transmittal.

Subdivision (e)(3)(i) of Section 69-4.25 is amended to read as follows:

(i) Matriculation in a degree program specified in section 69-4.25[(d)](e)(1)(i)(b) may be used to meet this training requirement.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Early Intervention Program

I.D. No. HLT-15-11-00021-P

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

Proposed Action: Amendment of Subpart 69-4 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2559-b

Subject: Early Intervention Program.

Purpose: Revise reimbursement methodology for early intervention program.

Text of proposed rule: Subdivision (b)(3) of Section 69-4.4 is amended to read as follows:

Subdivision (a) of Section 69-4.26 is amended to read as follows:

(a) Municipalities shall maintain an early intervention record for each child referred to the program which documents the performance of all activities required to be completed by early intervention officials or their designees on behalf of eligible children under Article 25 of Title II-a of Public Health Law. The early intervention record shall be maintained in a confidential manner in accordance with subdivision [(b)](c) of section 69-4.17 of this subpart. The early intervention record shall include the following:

Subdivision (c)(1) of Section 69-4.30 is amended to read as follows:

(1) Screening as defined in section 69-4.1[(11)](am) of this Subpart and performed in accordance with section 69-4.8 of this Subpart. A provider shall submit one claim for a screening regardless of the number of visits required to perform and complete a screening. Reimbursement may be provided for up to two screenings of a child suspected of having a developmental delay in any twelve month period without prior approval of the Early Intervention Official. The Early Intervention Official shall approve any additional screenings provided to a child within the twelve month period. Reimbursement shall not be provided for screenings performed after a child has been found eligible for early intervention services.

Subdivision (c)(2) of Section 69-4.30 is amended to read as follows:

(2) Multidisciplinary evaluation as defined in section 69-4.1[(m)](ad) of this Subpart and performed in accordance with section 69-4.8 of this Subpart. Reimbursable evaluations shall include core evaluations and supplemental evaluations. A provider shall submit one claim for a core or supplemental evaluation regardless of the number of visits required to perform and complete the evaluation.

Subdivision (c)(2)(ii)(b) of Section 69-4.30 is amended to read as follows:

(b) Supplemental non-physician evaluation shall mean an additional evaluation for assessing the child's specific needs in one or more of the developmental domains in accordance with section 69-4.8(a)(4)(iv) of this Subpart. Information obtained from this evaluation shall provide direction as to the specific early intervention services that may be required for the child. Supplemental non-physician evaluations may be conducted only by qualified personnel as defined in section 69-4.1[(jj)](ak) of this Subpart.

Subdivision (c)(3) of Section 69-4.30 is amended to read as follows:

(3) Service coordination as defined in section 69-4.1[(k)](l)(2)(xi)(xii) of this Subpart. Service coordination shall be provided by appropriate qualified personnel and billed in 15 minute units that reflect the time spent providing services in accordance with sections 69-4.6 and 69-4.7 of this Subpart, or billed under a capitation or other rate methodology as may be established by the Commissioner subject to the approval of the Director of the Budget. *The rate methodology may be established per month and/or service component for providing service coordination services.* [When units of time are billed, the first unit shall reflect the initial five to fifteen minutes of service provided and each unit thereafter shall reflect up to an additional fifteen minutes of service provided.] Except for child/family interviews to make assessments and plans, contacts for service coordination need not be face-to-face encounters; they may include contacts with service providers or a child's parent, caregiver, daycare worker or other similar collateral contacts, in fulfillment of the child's IFSP.

Subdivision (c)(4) of Section 69-4.30 is amended to read as follows:

(4) Assistive technology as defined in section 69-4.1[(k)](l)(2)(ii)(i) of this Subpart;

Subdivision (c)(5) of Section 69-4.30 is amended to read as follows:

(5) Home and community-based individual/collateral visit. This shall mean the provision by appropriate qualified personnel of early intervention services to an eligible child and/or parent(s) or other designated caregiver at the child's home or other natural setting in which children under three years of age are typically found (including day care centers, other than those located at the same premises as the early intervention provider, and family day care homes). [Reimbursable home and community-based individual/collateral visits shall include basic and extended visits.

(i) A basic visit is less than one hour in duration. Up to three (3) such visits provided by appropriate qualified personnel within different disciplines per day may be billed for each eligible child as specified in an approved IFSP without prior approval of the Early Intervention Official.

(ii) An extended visit is one hour or more in duration. Up to three (3) such visits provided by appropriate qualified personnel within different disciplines per day may be billed for each eligible child as specified in an approved IFSP without prior approval of the Early Intervention Official.

(iii) Notwithstanding subparagraphs (i) and (ii) of this paragraph, no more than three (3) basic and extended visits combined per day may be billed for each eligible child as specified in an approved IFSP without prior approval of the Early Intervention Official.

(iv) A provider shall not bill for a basic and extended visit provided on the same day by appropriate qualified personnel within the same discipline without prior approval of the Early Intervention Official.]

(i) Home and community-based visits shall be billed per day and in increments of 15 minutes of direct contact time with the child and/or the parent or other designated caregiver up to the length of the visit as specified in the child's IFSP in accordance with section 69-4.11(a)(10)(v) of this subpart. In order to bill for the first 15 minute increment and any subsequent 15 minute increments, appropriate qualified personnel must provide a full 15 minutes of direct contact time with the child and/or the parent or other designated caregiver within the same visit.

(ii) Up to three (3) such visits provided by appropriate qualified personnel within different disciplines may be billed per day as specified in an approved IFSP without the prior approval of the Early Intervention Official.

Subdivision (c)(6) of Section 69-4.30 is amended to read as follows:

(6) Office/facility-based individual/collateral visit. This shall mean the provision by appropriate qualified personnel of early intervention services to an eligible child and/or parent(s) or other designated caregiver at an approved early intervention provider's site (including day care centers located at the same premises as the early intervention provider). [Up to one (1) visit per discipline and no more than three (3) office/facility-based visits per day may be billed for each eligible child as specified in an approved IFSP without prior approval of the Early Intervention Official].

(i) Office/facility-based visits shall be billed per day and in increments of 15 minutes of direct contact time with the child and/or the parent or designated caregiver up to the length of the visit as specified in the child's IFSP in accordance with section 69-4.11(a)(10)(v) of this subpart. In order to bill for the first 15 minute increment and any subsequent 15 minute increments, appropriate qualified personnel must provide a full 15 minutes of direct contact time with the child and/or the parent or other designated caregiver within the same visit.

(ii) Up to three (3) such visits provided by appropriate qualified personnel within different disciplines may be billed per day as specified in an approved IFSP without the prior approval of the Early Intervention Official.

Subdivisions (d)(3) and (4) of Section 69-4.30 are amended to read as follows:

(3) all supplies directly related to the provision of early intervention services, except as provided in subdivision [(g)](f) of this section; and

(4) administrative, personnel, business office, data processing, recordkeeping, housekeeping, charting and other documentation related to delivery of services, team meetings and other related provider overhead expenses.

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

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 early intervention program is established in Title II-A of Article 25 of public health law and Part C of the Individuals with Disabilities Education Act (IDEA). Section 2559-B authorizes the commissioner to adopt regulations necessary to carry out the provisions of the program.

Legislative Objectives:

The legislative objectives of Title II-A of article 25, as articulated in chapter 428 of the laws of 1992, are to establish a coordinated, comprehensive array of services, recognizing the essential role of families in meeting the developmental needs of their infants and toddlers; enhance the development of infants and toddlers with disabilities; enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; minimize the possibility that such infants and toddlers will be placed in institutions; enhance the capacity of state and local agencies and service providers to identify, evaluate, and meet the needs of historically underserved populations; and, reduce the costs to society by minimizing the need for special education services after infants and toddlers with disabilities become eligible for services under Part B of IDEA.

Needs and Benefits:

Revisions to 10 NYCRR 69-4 are needed to improve the State's capacity to ensure that early intervention services are delivered in a cost-effective manner and improve program quality and accountability. The proposed regulations will enhance program accountability by correcting erroneous reference citations in existing regulation. The proposed regulation will also clarify billing activities by specifying that charting and other documentation activities relating to the delivery of services, and team meetings are activities included in the prices established for a service visit.

In addition, the proposed regulations will modify existing descriptions of billing methodologies for program services to accommodate efficient and cost effective delivery of services. Service coordination will no longer be billed in 15 minute increments. Instead, the proposed regulation allows for a rate paid on a monthly and/or per service component for service coordination services. Home and community based services will no longer be billed as a basic or extended visit. Instead, home and community based services will be billed in full 15 minute increments. Office/facility based services will no longer be billed per visit. Instead, office/facility based services will be billed in full 15 minute increments. These changes will allow services to be provided and billed for in a cost effective manner.

The proposed regulation will change references to the Office of Mental Retardation and Developmental Disabilities to read the Office for People with Developmental Disabilities to conform to the recent name change of the Office.

Costs to Regulated Parties:

The proposed rule to allow for per month and/or service event billing for service coordination should result in a cost savings to regulated parties by reducing the administrative burden that was previously required to track billable service coordination activities.

The proposed change to home and community based services may require providers that are not currently offering 45 minutes for basic services and 75 minutes for extended services to lengthen their visits in order to maintain the same reimbursement rate. Other providers may experience an increased payment for services in 15 minute increments for visits that were not paid for due to failure to meet minimum time requirements. Providers of children requiring intensive therapy visits that often exceed 75 minutes will also experience an increased payment.

Providers that currently deliver a 45 minute basic visit and continue doing so are expected to receive similar payments under the revision. The change will remove the current incentive for providers to shorten visits and receive the same payment at the expense of children. Instead, providers will have an incentive to lengthen visits, as appropriate and as agreed to by IFSP teams, which is beneficial to children enrolled in the program. It is not the intent of the Department, however, for municipalities to authorize shorter visits for children, on average, in order to achieve a cost savings.

The proposed change to office/facility based services may require providers that are not currently conducting 30 minute visits to lengthen their visits in order to maintain the same reimbursement rate. Providers of children requiring intensive therapy visits that often exceed 30 minutes will experience increased payment.

Costs to the Agency, the State and Local Governments for the Implementation of and Continuing Compliance with the Rule:

The proposed rules will result in no costs for the agency or state and local governments for implementation and continuing compliance with the rules. Certain provisions included in the proposed rules are expected to yield a cost savings to state and local governments; \$900,000 in state savings for modification of reimbursement methodology for service coordination; and \$6.2 million in state and \$6.4 million in local savings for modification of reimbursement methodology for home/community based and office/facility based services when fully annualized in State Fiscal Year 2012-13.

Cost savings estimates are derived from actual program expenditure data for early intervention services and evaluations available from department child and claiming data sets for the program, including the Medicaid management information system.

Local Government Mandates:

The proposed rules do not impose any new duty upon any county, city, town, village, school district, fire district, or other special district. The proposed rule to modify the reimbursement methodology for service coordination may reduce the administrative burden on municipal agencies responsible for local administration of the program.

Paperwork:

Paperwork burden will be substantially reduced by revising service coordination reimbursement from a 15 minute increment to a fixed payment methodology. Providers will be required to report activities in order to receive payments, but in a manner that is considerably less onerous than the current system of tracking each minute spent.

Duplication:

The proposed rules do not duplicate, overlap, or conflict with relevant rules and other legal requirements of the state and federal government.

Alternatives:

The department has convened a Reimbursement Advisory Panel (RAP) which has conducted regular public meetings since February 2009. The RAP has discussed the current reimbursement methodology's strengths and weaknesses, and the impact of the current methodology on program goals. The RAP has also invited speakers to discuss reimbursement methodologies used in other state programs as well as programs outside of New York State. In September of 2010, the department convened a two day public meeting with the RAP and the Early Intervention Coordinating Council which included speakers from programs both within and outside of New York State. The purpose of this two day meeting was to examine possible methodologies for reimbursing providers of Early Intervention program services. The department has also contracted with Public Consulting Group (PCG) to provide research into alternative reimbursement methodologies based on national IDEA Part C programs and public programs that provide similar services. In addition to the current reimbursement methodology, methodologies involving fee-for-service, capitation, fixed price, and bundling of services have been presented to the department through the work of the RAP and PCG. The department has selected the proposed methodologies as best suited to achieve efficient and effective delivery of services while maintain the quality of the program.

The department presented the proposed regulations to the EICC on March 10, 2011 and no alternatives were suggested.

Federal Standards:

The proposed rules do not exceed any minimum standards of the federal government and will continue to keep the state in compliance with federal standards.

Compliance Schedule:

The department anticipates implementing the proposed reimbursement methodology for home/community based and office/facility based services to be effective on July 1, 2011; and the proposed reimbursement methodology for service coordination to be effective on October 1, 2011.

Regulatory Flexibility Analysis**Effect of Rule:**

The proposed rules will affect approximately 600 agency and 2,000 individual qualified personnel who are approved and under contract with municipal governments to deliver early intervention services. Approved agencies are incorporated entities, sole proprietorships, partnerships, and state operated facilities. Qualified personnel are individuals approved by the department in accordance with 10 NYCRR 69-4 to provide services in the Early Intervention Program and who have appropriate licensure, certification, or registration in the area in which they are providing services (including allied health professionals, physicians, special educators, psychologists, and vision specialists). The proposed rules also apply to 57 county public agencies (primarily local health units) and the New York City Department of Mental Health and Hygiene, all of which have responsibility for the local administration of the program.

Compliance Requirements:

The proposed rule to allow for per monthly and/or service event billing for service coordination services will reduce the administrative requirements under the current methodology and make it easier for small businesses and local governments to comply with the proposed regulations. The change to 15 minute increment billing for home/community based and office/facility based services may require some additional record keeping track of time in and time out for the provider conducting services with participants.

Professional Services:

It is not anticipated that early intervention agency and individual providers will require additional professional services to comply with proposed rules.

Compliance Costs:

There are no anticipated initial capital costs that will be incurred by a regulated business or industry or local government for compliance with the proposed rules.

Economic and Technological Feasibility:

There are no economically or technologically challenging aspects to the requirements of the proposed rulemaking that do not already exist in current requirements for the EIP. The New York Early Intervention System (NYEIS) is currently being implemented across the state for the provision and billing of program services. NYEIS is accessible to providers and local governments and will incorporate features necessary to calculate the information required for billing under the new rules. It is anticipated that NYEIS will be implemented in all counties by September 2011 and billing under the existing system will be phased out in the following years.

Minimizing Adverse Impact:

There will be no adverse impact of the proposed rulemaking on local governments. There would be an adverse impact on small businesses conducting home and community based services below the time assumptions built into the existing rates. These providers would be required to increase the time per visit to match the assumptions built into the rate to achieve the same level of revenue as under the existing methodology. This adverse effect is the same on all providers, regardless of their size. In order to minimize the adverse impact on small businesses the department considered differing compliance/reporting requirements or timetables that take into account available resources; use of performance rather than design standards; and whole or partial rule exemptions that do not endanger the public health, safety or general welfare.

Small Business and Local Government Participation:

A copy of this notice of proposed rulemaking will be posted on the DOH web site and submitted to the electronic mail listserv for the Early Intervention Program. These notices will invite public comments on the proposal and include instructions for anyone interested in submitting comments, including small businesses and local governments. The proposed changes have also been discussed at the Reimbursement Advisory Panel (RAP) which has representation from municipalities, providers and parents of program participants. The proposed rule changes were also discussed at the March 10, 2011 Early Intervention Coordinating Council (EICC) meeting. The EICC meeting was broadcast via the web and is available for viewing on the DOH web site for 60 days following the meeting.

Rural Area Flexibility Analysis**Types and Estimated Numbers of Rural Areas:**

This proposed rulemaking applies to all municipalities, providers and families in the Early Intervention Program, including all rural areas of the state.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

Municipalities and providers in the Early Intervention Program in the rural areas of the state will be positively impacted by the proposed rule to allow for per month and/or service event billing for service coordination services as the administrative burden of tracking billable time under the current methodology will be reduced. In many rural areas of the state the municipality is the provider of service coordination services. These small municipalities have limited administrative support that make tracking billable service coordination time burdensome. Under the proposed rule changes, service coordinators will be able to focus a larger portion of their time providing services directly to the participant.

Municipalities and providers in the Early Intervention Program in the rural areas of the state should not require additional reporting requirements with the proposed rule to change home/community based and office/facility based services from a per visit billing event to 15 minute billing increments, beyond the tracking of time in and time out of participant services provided. Tracking of time in and out is already required by 10 NYCRR 69-4.26 (c), and therefore this impact is minimal. In addition, tracking of time spent on service delivery is a required element of the New York Early Intervention System (NYEIS) currently being implemented across the state for the provision and billing of program services.

Costs:

Municipalities and providers in rural areas are estimated to fiscally benefit from the proposed rulemaking as a result of efficiencies achieved through implementation of the new billing methodologies.

Minimizing Adverse Impact:

It is not anticipated that the proposed rulemaking will result in any adverse impact in rural areas. It is likely that the proposed rule changes may differentially benefit rural areas of the state.

Rural Area Participation:

A copy of this notice of proposed rulemaking will be posted on the DOH web site and submitted to the electronic mail listserv for the Early Intervention Program. These notices will invite public comments on the proposal and include instructions for anyone interested in submitting comments, including public and private entities in rural areas.

The proposed changes have also been discussed at the Reimbursement Advisory Panel (RAP) which has representation from rural municipalities and providers. The proposed rule changes were also discussed at the March 10, 2011 Early Intervention Coordinating Council (EICC) meeting. The EICC meeting was broadcast via the web and is available for viewing on the DOH web site for 60 days following the meeting.

Job Impact Statement**Nature of Impact:**

Three aspects of the proposed revisions to Part 69 have the potential to have an impact on jobs and employment opportunities. The proposed rule to allow for per month and/or service event billing for service coordination services may result in minimal reduction of employment opportunities. The proposed rule to change reimbursement of home and community based services from visit based to 15 minute billable increments may result in minimal additional employment opportunities. Similarly, the proposed rule to change reimbursement of office/facility based services from visit based to 15 minute billable increments may also result in minimal additional employment opportunities.

The proposed rule to allow for per month and/or service event billing for service coordination services may result in minimal reduction of employment opportunities as the incentive for incurring billable units of time will be eliminated under the proposed rule. Fixed payments for service coordination will focus service coordinator efforts on meeting the needs of the family and adhering to meeting the regulatory requirements of the program. The result should be a more efficient service coordination model that maintains or increases the services to the participant while decreasing time spent by the provider on administrative functions.

The proposed rule change for home and community services to full 15 minute billing increments may result in a minimal increase of employment opportunities as providers will have to align time spent delivering services with the time assumptions used to establish the rates. It may also provide an employment opportunity for providers of children who receive intensive services to provide a higher level of services through longer visits without incurring the cost of travel to a participant's home. Previously these intensive services may not have been cost effective or feasible to provide under the existing payment structure.

The proposed rule change for office/facility based services to full 15 minute billing increments may result in a minimal increase of employment opportunities as providers will have the ability to create facility based visits that vary in length to meet the individualized needs of the participant. The result may be an increase to the amount of services that can be provided in an office/facility based environment as this service option can be authorized in a way that is economically feasible to the provider.

Categories and Numbers Affected:

Currently there are 23,474 approved providers in the program with approximately 2,000 of these agencies and the rest individual service providers. The providers impacted include, but are not limited to service coordinators, speech language pathologists, physical and occupational therapists, and special education teachers with various certifications. The type of business entities includes a mix of business corporations, professional corporations, professional limited liability corporations, not-for-profit organizations and local governmental agencies. Service coordination providers are at risk for a minimal reduction in employment opportunities while employment opportunities for therapists may be positively impacted by the proposed changes.

Regions of Adverse Impact:

Based on current practices it is anticipated that the New York City and surrounding metropolitan area may be the most heavily impacted by the proposed rule changes. Practice patterns within this area have shown a higher level of service coordination units billed and authorizations for visits for home and community based services that are below the levels used in the current rate assumptions for these services. When the rates for home and community based services are converted from a per visit to 15 minute billing increments the providers in this area may have to conduct longer visits to achieve the same level of revenue. When rates for service coordination are converted to per monthly and/or service event billed the service coordination providers in this area may focus on more efficient methods of delivering service, therefore decreasing the time spent on previously billable service coordination activities. It may also result in less administrative work whose time was previously billed to the program.

Minimizing Adverse Impact:

These proposed revisions were done in a manner that would minimize any changes to employment opportunities within the program. The goal of the changes is to promote cost-effective and efficient delivery of early intervention services given the limited resources of the program.

Self-Employment Opportunities:

The proposed regulatory changes are not expected to impact self employment opportunities. It is expected that existing self employed therapists will adjust their practice patterns to conform to the new billing regulations, resulting in a minimal impact to this section of the labor market.

Insurance Department

EMERGENCY RULE MAKING

Suitability in Annuity Transactions

I.D. No. INS-15-11-00004-E

Filing No. 300

Filing Date: 2011-03-25

Effective Date: 2011-03-25

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

Action taken: Addition of Part 224 (Regulation 187) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 308, 309, 2110, 2123, 2208, 3209, 4226, 4525; and art. 24

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

Specific reasons underlying the finding of necessity: This Part requires life insurance companies and fraternal benefit societies (“insurers”) to set standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of a transaction are appropriately addressed.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state’s most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. In an effort to provide incentives to states to adopt such regulations, the Act offers state agencies that promulgate such regulations federal grants of between \$100,000 and \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants for 2011, and the subsequent two years, a rule governing suitability, and another regarding senior-specific certifications and designations in the sale of life insurance and annuities, and another governing suitability had to be promulgated by December 31, 2010 and must be maintained in effect. Given the state’s fiscal crisis and the constraints on the Department’s budget, the federal grant money would fund critical efforts to protect consumers.

For the reasons stated above, emergency action is necessary for the general welfare.

Subject: Suitability in Annuity Transactions.

Purpose: Set forth standards and procedures for recommendations to consumers with respect to annuity contracts.

Text of emergency rule: Section 224.0 Purpose.

The purpose of this Part is to require insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. These standards and procedures are substantially similar to the National Association of Insurance Commissioners’ Suitability in Annuity Transactions Model Regulation (“NAIC Model”) for annuities, and the Financial Industry Regulatory Authority’s current National Association of Securities Dealers (“NASD”) Rule 2310 for securities. To date, more than 30 states have implemented the NAIC Model, while NASD Rule 2310 has applied nationwide for nearly 20 years. Accordingly, this Part intends to bring these national standards for annuity contract sales to New York.

Section 224.1 Applicability.

This Part shall apply to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer, where no insurance producer is involved, that results in the purchase or replacement recommended.

Section 224.2 Exemptions.

Unless otherwise specifically included, this Part shall not apply to transactions involving:

(a) a direct response solicitation where there is no recommendation made; or

(b) a contract used to fund:

(1) an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(2) a plan described by Internal Revenue Code sections 401(a), 401(k), 403(b), 408(k) or 408(p), as amended, if established or maintained by an employer;

(3) a government or church plan defined in Internal Revenue Code section 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Internal Revenue Code section 457;

(4) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(5) a settlement or assumption of liabilities associated with personal injury litigation or any dispute or claim resolution process.

Section 224.3 Definitions.

For the purposes of this Part:

(a) Consumer means the prospective purchaser of an annuity contract.

(b) Insurer means a life insurance company defined in Insurance Law section 107(a)(28), or a fraternal benefit society as defined in Insurance Law section 4501(a).

(c) Recommendation means advice provided by an insurance producer, or an insurer where no insurance producer is involved, to a consumer that results in a purchase or replacement of an annuity contract in accordance with that advice.

(d) Replace or Replacement means a transaction subject to Part 51 of this Title (Regulation 60) and involving an annuity contract.

(e) Suitability information means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:

(1) age;

(2) annual income;

(3) financial situation and needs, including the financial resources used for the funding of the annuity;

(4) financial experience;

(5) financial objectives;

(6) intended use of the annuity;

(7) financial time horizon;

(8) existing assets, including investment and life insurance holdings;

(9) liquidity needs;

(10) liquid net worth;

(11) risk tolerance; and

(12) tax status.

Section 224.4 Duties of Insurers and Insurance Producers.

(a) In recommending to a consumer the purchase or replacement of an annuity contract, the insurance producer, or the insurer where no insurance producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer’s investments and other insurance policies or contracts and as to the consumer’s financial situation and needs, including the consumer’s suitability information, and that there is a reasonable basis to believe all of the following:

(1) the consumer has been reasonably informed of various features of the annuity contract, such as the potential surrender period and surrender charge, availability of cash value, potential tax implications if the consumer sells, surrenders or annuitizes the annuity contract, death benefit, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, guaranteed interest rates, insurance and investment components, and market risk;

(2) the consumer would benefit from certain features of the annuity contract, such as tax-deferred growth, annuitization or death or living benefit;

(3) the particular annuity contract as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or replacement of the annuity contract, and riders and similar product enhancements, if any, are suitable (and in the case of a replacement, the transaction as a whole is suitable) for the particular consumer based on the consumer’s suitability information; and

(4) in the case of a replacement of an annuity contract, the replacement is suitable including taking into consideration whether:

(i) the consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), be subject to tax implications if the consumer surrenders or borrows from the annuity contract, or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

(ii) the consumer would benefit from annuity contract enhancements and improvements; and

(iii) the consumer has had another annuity replacement, in particular, a replacement within the preceding 36 months.

(b) Prior to the recommendation of a purchase or replacement of an

annuity contract, an insurance producer, or an insurer where no insurance producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.

(c) Except as provided under subdivision (d) of this section, an insurer shall not issue an annuity contract recommended to a consumer unless there is a reasonable basis to believe the annuity contract is suitable based on the consumer's suitability information.

(d)(1) Except as provided under paragraph (2) of this subdivision, neither an insurance producer, nor an insurer, shall have any obligation to a consumer under subdivision (a) or (c) of this section related to any annuity transaction if:

(i) no recommendation is made;

(ii) a recommendation was made and was later found to have been prepared based on materially inaccurate material information provided by the consumer;

(iii) a consumer refuses to provide relevant suitability information and the annuity purchase or replacement is not recommended; or

(iv) a consumer decides to enter into an annuity purchase or replacement that is not based on a recommendation of the insurer or the insurance producer.

(2) An insurer's issuance of an annuity contract subject to paragraph (1) of this subdivision shall be reasonable under all the circumstances actually known to the insurer at the time the annuity contract is issued.

(e) An insurance producer or an insurer, where no insurance producer is involved, shall at the time of purchase or replacement:

(1) document any recommendation subject to subdivision (a) of this section;

(2) document the consumer's refusal to provide suitability information, if any; and

(3) document that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

(f) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and insurance producers' compliance with this Part. An insurer may contract with a third party to establish and maintain a system of supervision with respect to insurance producers.

(g) An insurer shall be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

(h) No insurance producer shall make a recommendation to a consumer to purchase an annuity contract about which the insurance producer has inadequate knowledge.

(i) An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

(1) truthfully responding to an insurer's request for confirmation of suitability information;

(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

Section 224.5 Insurer Responsibility.

The insurer shall take appropriate corrective action for any consumer harmed by a violation of this Part by the insurer, the insurance producer, or any third party that the insurer contracts with pursuant to subdivision (f) of section 224.4 of this Part. In determining any penalty or other disciplinary action against the insurer, the superintendent may consider as mitigation any appropriate corrective action taken by the insurer, or whether the violation was part of a pattern or practice on the part of the insurer.

Section 224.6 Recordkeeping.

All records required or maintained under this Part, whether by an insurance producer, an insurer, or other person shall be maintained in accordance with Part 243 of this Title (Regulation 152).

Section 224.7 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, except where such act or practice shall be a defined violation, as defined in section 2402(b) of the Insurance Law, and in either such case shall be a violation of section 2403 of the Insurance Law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 22, 2011.

Text of rule and any required statements and analyses may be obtained from: David Neustadt, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: dneustad@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301 308, 309, 2110, 2123, 2208, 3209, 4226, 4525, and Article 24 of the Insurance Law.

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

Section 308 authorizes the Superintendent to address to any authorized insurer or its officers any inquiry relating to its transactions or condition or any matter connected therewith.

Section 309 authorizes the Superintendent to make examinations into the affairs of entities doing or authorized to do insurance business in this state as often as the Superintendent deems it expedient.

Section 2110 provides grounds for the Superintendent to refuse to renew, revoke or suspend the license of an insurance producer if, after notice and hearing the licensee has violated any insurance laws or regulations.

Section 2123 prohibits an agent or representative of an insurer from making misrepresentations, misleading statements and incomplete comparisons.

Section 2208 provides that an officer or employee of a licensed insurer or a savings bank who has been certified pursuant to Article 22 is subject to section 2123 of the Insurance Law.

Section 3209 mandates disclosure requirements in the sale of life insurance, annuities, and funding agreements.

Section 4226 prohibits an authorized life, or accident and health insurer from making misrepresentations, misleading statements, and incomplete comparisons.

Section 4525 applies Articles 2, 3, and 24 of the Insurance Law, and Insurance Law Section 2110(a), (b), and (d) through (f), and Sections 2123, 3209, and 4226 to authorized fraternal benefit societies.

Article 24 regulates trade practices in the insurance industry by prohibiting practices that constitute unfair methods of competition or unfair or deceptive acts or practices.

2. Legislative objectives: The Legislature has long been concerned with the issue of suitability in sales of life insurance and annuities. Chapter 616 of the Laws of 1997, which, in part, amended Insurance Law § 308, required the Superintendent to report to the Governor, Speaker of the Assembly, and the majority leader of the Senate on the advisability of adopting a law that would prohibit an agent from recommending the purchase or replacement of any individual life insurance policy, annuity contract or funding agreement without reasonable grounds to believe that the recommendation is not unsuitable for the applicant (the "Report"). The Legislature set forth four criteria that an agent would consider in selling products, including: a consumer's financial position, the consumer's need for new or additional insurance, the goal of the consumer and the value, benefits and costs of any existing insurance.

In drafting the Report, the Department considered the legislative changes set forth in Chapter 616 of the Laws of 1997, and the Department's subsequent regulatory requirements that were designed to improve the disclosure requirements to consumers that purchased or replaced life insurance policies and annuity products. It was the Department's determination in the Report that additional time was needed to assess the efficacy of those changes.

Since the Department's Report, the purchase of annuities have become complex financial transactions resulting in a greater need for consumers to rely on professional advice and assistance in understanding available annuities and making purchase decisions. While the Financial Industry Regulatory Authority ("FINRA") regulation and standards for the sale of certain variable annuities have existed nationwide for some time, the National Association of Insurance Commissioners ("NAIC") adopted, in 2003 (and further revised in 2010), the Suitability in Annuity Transactions Model Regulation (the "NAIC Model") for all annuity transactions. To date, more than 30 states have implemented the NAIC Model. Accordingly, this Part is intended to bring these national standards for annuity contract sales to New York. In addition, in light of a low interest rate environment that encourages unsuitable annuity sales, and federal incentives to impose suitability standards, the minimum suitability standards are critical.

3. Needs and benefits: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. It regulates the activities of insurers and producers who make recommendations to consumers to purchase or replace annuity contracts to ensure that insurers and producers make suitable recommendations based on relevant information obtained from the consumers.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions. In fact, the recently enacted Dodd-Frank Wall Street Reform

and Consumer Protection Act of 2010 (the “Act”) places such a high level of importance on state regulation of the suitability of annuities that, in an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products.

4. Costs: Section 224.4(f) of New York Comp. Codes R. & Reg., tit. 11, Part 224 (“Regulation 187”) requires an insurer to establish a supervision system designed to ensure an insurer’s and its insurance producers’ compliance with the provisions of Regulation 187. Additionally, § 224.4(g) requires an insurer to be responsible for ensuring that every insurance producer recommending the insurer’s annuity contracts is adequately trained to make the recommendation.

As previously stated, the standards and procedures required by this rule are substantially similar to the standards and procedures set forth in the NAIC Model and the NASD Rule 2310. Thus, insurers selling variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers who sell fixed annuities in states where the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers should incur minimal additional costs in order to comply with the requirements of this rule.

The rule does not impose additional costs to the Insurance Department or other state government agencies or local governments.

5. Local government mandates: The rule 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 rule requires an insurance producer or an insurer to document: any recommendation subject to § 224.4(a) of Regulation 187; the consumer’s refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer’s or insurer’s recommendation. Additionally, all records required or maintained in accordance with this rule must be maintained in accordance with Part 243 (Regulation 152).

The documentation required in this rule is substantially similar to the requirements of the aforementioned NAIC Model and NASD Rule 2310. As the NAIC Model has been implemented in many other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the similar provisions in other jurisdictions. As a result, minimal additional paperwork is expected to be required of most insurers in order to comply with the requirements of this rule.

7. Duplication: Sales of insurance products that are securities under federal law, such as variable annuities, are required to meet the suitability standards and procedures in the NASD Rule 2310. However, there currently exists no state or federal rule that specifically requires application of suitability standards in the sales of all annuities to New York consumers.

8. Alternatives: This rule is a modified version of the NAIC Model. NAIC Model provisions detailing the procedures and standards of the supervision system required to be established by an insurer and the insurance producer training requirements were not included in this rule.

In 2009, the Department held four public hearings throughout the state to gather information about suitability in order to ascertain whether additional oversight and regulation was needed to protect consumers when they are considering the purchase of life insurance and annuities in New York State and if so, the scope and form of such regulation. Testimony at the public hearings by the life insurance industry and agent trade associations supported adoption of a regulation setting forth standards and procedures for recommendations to consumers that was consistent with the NAIC Model.

An outreach draft of this regulation was posted on the Department’s website for public comment. In addition to submitted written comments, the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, met with Department representatives to discuss the draft. Some revisions were made to the draft based on these comments and discussions. NAIFA-New York State remains concerned about producer education and training provisions in the regulation and supports the NAIC Model provisions, which permit an insurance producer to rely on insurer-provided product-specific training standards and materials to comply with the regulation.

9. Federal standards: While NASD Rule 2310 requires suitability standards to be met in the sale of insurance products which are securities under federal law, there are no minimum federal standards for the sale of fixed annuity products.

10. Compliance schedule: The regulation applies to any recommenda-

tion to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 in order to provide insurers and producers adequate time to implement the standards and procedures to comply with the requirements of the rule.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

This rule is directed to insurers and insurance producers. Most of insurance producers are small businesses within the definition of “small business” set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

This rule should not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at the entities allowed to sell annuity contracts, none of which are local governments.

2. Compliance requirements: The affected parties are required to make suitable recommendations for the purchase or replacement of annuity contracts based on relevant information obtained from the consumers. The rule requires an insurance producer to document: any recommendation subject to Section 224.4(a) of this Part, the consumer’s refusal to provide suitability information, if any, and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer’s recommendation. Furthermore, all records required under this rule are to be maintained in accordance with Part 243 of this Title.

3. Professional services: None is required to meet the requirements of this rule.

4. Compliance costs: Minimum additional costs are anticipated to be incurred by regulated parties. While there may be costs associated with the compliance of this rule, these costs should be minimal.

5. Economic and technological feasibility: Although there may be minimal additional costs associated with the new rule, compliance is economically feasible for small businesses.

6. Minimizing adverse impact: There is little if no adverse economic impact on small businesses. The compliance, documentation and record-keeping requirements of this rule should have little impact on small businesses. Differing compliance or reporting requirements or timetables for small businesses were not necessary.

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Insurance Department last year and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers and insurance producers covered by this rule do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule requires an insurance producer or an insurer to document: any recommendation subject to section 224.4(a) of this Part; the consumer’s refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer’s or insurer’s recommendation.

All records required or maintained under this Part shall be maintained in accordance with Part 243 (Regulation 152).

3. Costs: The standards and procedures required by this rule are substantially similar to the National Association of Insurance Commissioners’ “Suitability in Annuity Transactions” Model Regulation (“NAIC Model”) for annuities, and the Financial Industry Regulatory Authority’s current National Association of Securities Dealers (“NASD”) Rule 2310 for securities. Accordingly, insurers that currently sell variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers that sell fixed annuities in states in which the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers will incur minimal additional costs in order to comply with the requirements of this rule.

4. Minimizing adverse impact: This rule applies to insurers and insurance producers that do business throughout New York State. As previously stated, the standards and procedures required by this rule are substantially similar to the NAIC Model for annuities and the NASD Rule 2310 for securities. Since the NAIC Model has been implemented in many

other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the provisions contained in this rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Insurance Department last year and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

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

EMERGENCY RULE MAKING

Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities

I.D. No. INS-15-11-00007-E

Filing No. 301

Filing Date: 2011-03-25

Effective Date: 2011-03-25

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

Action taken: Addition of Part 225 (Regulation 199) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2103, 2104, 2110, 2403 and 4525

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

Specific reasons underlying the finding of necessity: This Part requires life insurance companies and fraternal benefit societies ("insurers") to set standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of a transaction are appropriately addressed.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. In an effort to provide incentives to states to adopt such regulations, the Act offers state agencies that promulgate such regulations federal grants of between \$100,000 and \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants for 2011, and the subsequent two years, a rule governing suitability, and another regarding senior-specific certifications and designations in the sale of life insurance and annuities, and another governing suitability had to be promulgated by December 31, 2010 and must be maintained in effect. Given the state's fiscal crisis and the constraints on the Department's budget, the federal grant money would fund critical efforts to protect consumers.

For the reasons stated above, emergency action is necessary for the general welfare.

Subject: Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities.

Purpose: To protect consumers from misleading use of senior-specific certifications and designations in the sale of life insurance or annuities.

Text of emergency rule: Section 225.0 Purpose.

The purpose of this Part is to set forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract.

Section 225.1 Applicability.

This Part shall apply to any solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract by an insurance producer.

Section 225.2 Prohibited uses of senior-specific certifications and professional designations.

(a)(1) No insurance producer shall use a senior-specific certification or professional designation that indicates or implies in such a way as to mislead a purchaser or prospective purchaser that the insurance producer has special certification or training in advising or providing services to seniors in connection with the solicitation, sale or purchase of a life insurance policy or annuity contract or in the provision of advice as to the value of or the advisability of purchasing or selling a life insurance policy or annuity contract, either directly or indirectly through publications or writings, or by issuing or promulgating analyses or reports related to a life insurance policy or annuity contract.

(2) The prohibited use of senior-specific certifications or professional designations includes use of:

(i) a certification or professional designation by an insurance producer who has not actually earned or is otherwise ineligible to use such certification or designation;

(ii) a nonexistent or self-conferred certification or professional designation;

(iii) a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the insurance producer using the certification or designation does not have; and

(iv) a certification or professional designation that was obtained from a certifying or designating organization that:

(a) is primarily engaged in the business of instruction in sales or marketing;

(b) does not have reasonable standards or procedures for assuring the competency of its certificants or designees;

(c) does not have reasonable standards or procedures for monitoring and disciplining its certificants or designees for improper or unethical conduct; or

(d) does not have reasonable continuing education requirements for its certificants or designees in order to maintain the certificate or designation.

(b) There is a rebuttable presumption that a certifying or designating organization is not disqualified solely for purposes of subdivision (a)(2)(iv) of this section when the certification or designation issued from the organization does not primarily apply to sales or marketing and when the organization or the certification or designation in question has been accredited by:

(1) The American National Standards Institute (ANSI);

(2) The National Commission for Certifying Agencies; or

(3) any organization that is on the U.S. Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes."

(c) In determining whether a combination of words or an acronym standing for a combination of words constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or providing services to seniors, factors to be considered shall include:

(1) use of one or more words such as "senior," "retirement," "elder," or like words combined with one or more words such as "certified," "registered," "chartered," "advisor," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) the manner in which those words are combined.

(d)(1) For purposes of this Part, a job title held by an insurance producer within an organization or other entity that is licensed or registered by a state or federal financial services regulatory agency shall not be deemed a certification or professional designation, unless it is used in a manner that would confuse or mislead a reasonable consumer, when the job title:

(i) indicates seniority or standing within the organization or other entity; or

(ii) specifies an individual's area of specialization within the organization or other entity.

(2) For purposes of this subdivision, financial services regulatory agency includes an agency that regulates insurers, insurance producers, broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

Section 225.3 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law and shall be a violation of section 2403 of the Insurance Law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 22, 2011.

Text of rule and any required statements and analyses may be obtained from: David Neustadt, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: dneustad@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 2103, 2104, 2403, 2110, and 4525 the Insurance Law.

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

Sections 2103 and 2104 provide the Superintendent with licensing authority over insurance agents and brokers.

Section 2110 authorizes the Superintendent to investigate and discipline those licensees.

Section 2403 prohibits any person from engaging in this state in any trade practice constituting a defined violation or a determined violation as defined in Article 24.

Section 4525 specifically subjects fraternal benefit societies to certain provisions of Article 21, as well as to any other section that specifically applies to fraternal benefit societies.

2. Legislative objectives: Various sections of the Insurance Law address advertisements, statements and representations of licensees used in the solicitation of insurance. These sections seek to protect consumers and insurers in New York by establishing prohibitions and uniform standards governing the dissemination of such information to the public. Although this regulation is directed to certain practices involving the sale of life insurance and annuity contracts, many of the provisions of the law pursuant to which this regulation is promulgated apply equally to other kinds of insurers. In addition, certain other Insurance Law provisions and regulations promulgated thereunder may have corresponding applicability to other kinds of insurance. In any case, the focus of this regulation to life insurance and annuity contracts should not be construed to imply that similar prohibitions do not apply to, or that corrective action should not be implemented for, other types of insurers or other kinds of insurance.

Further, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Act") places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. To encourage state regulation, the Act offers those state agencies with such regulations in effect federal grants to fund specified regulatory activities that provide enhanced protection of seniors in connection with the sale and marketing of financial products.

This rule sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract. It prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into believing that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

3. Needs and benefits: Seniors are often misled and harmed by insurance producers' use of senior-specific certifications and designations, which wrongly imply the existence of expertise and knowledge of senior matters. Misleading certifications and professional designations such as "certified elder planning specialist" and "certified senior advisor" are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients by insurance producers who utilized misleading senior-specific certifications or designations, which resulted in the loss of seniors' savings. Federal and state legislators and regulators, in responding to such reports, have proposed and adopted prohibitions on the misleading use of senior-specific designations. In 2008, the National Association of Insurance Commissioners ("NAIC") adopted a new Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities ("the NAIC Model"). While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides a consumer protection that prohibits the misleading use of senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities. In recognition of the need to provide such

consumer protection, the Insurance Department is adopting the NAIC Model, with minimal modifications, as Part 225 to Title 11 NYCRR (Regulation 199).

4. Costs: Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

The rule does not impose additional costs on the Insurance Department or other state government agencies or local governments.

5. Local government mandates: The rule 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 rule does not impose any reporting or recordkeeping requirements on affected insurance producers.

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

8. Alternatives: The Insurance Department considered not implementing the NAIC Model and proceeding under the Department's more general enforcement authority under Article 24. However, because of the misleading and fraudulent marketing practices reported in recent years, the Department determined that a regulation would be the best way to address the situation.

An outreach draft of the regulation was posted on the Department's website on October 5, 2010 for a 14-day comment period. Interested parties, such as the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, supported the adoption of this Part in written comments and/or discussions with the Insurance Department.

9. Federal standards: There are no minimum standards imposed by the federal government for the same or similar subject area.

10. Compliance schedule: Insurance producers who currently make appropriate use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract should not need to change their sales practices. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

Regulatory Flexibility Analysis

1. Small businesses: The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting or recordkeeping requirements or compliance costs on small businesses.

This rule is substantially the same as the National Association of Insurance Commissioners' ("NAIC") Model regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities and is directed to licensed insurance producers within New York State. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations. The rule does not impose any additional compliance requirements on insurance producers.

2. Local governments: The Insurance Department finds that this rule will not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at insurance producers, none of which are local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurance producers covered by this rule do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule prohibits the misuse of senior-specific certifications and professional designations by insurance producers in connection with the solicitation, sale, or purchase of, or advice made in connection with, a life insurance policy or annuity contract.

The rule does not impose any reporting, recordkeeping, or professional services requirements on affected insurance producers.

3. Costs: Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited directly by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

4. Minimizing adverse impact: This rule should not result in an adverse impact on rural areas.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period that commenced on October 5, 2010.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This rule sets forth stan-

dards to protect consumers from misleading and fraudulent sales practices with respect to the use of senior-specific certifications and professional designations by insurance producers in the solicitation, sale, or purchase of, or advice made in connection with, life insurance policies and annuity contracts.

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

Office for People with Developmental Disabilities

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Changes in Methodology for Appeals

I.D. No. PDD-15-11-00022-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 686.13 of Title 14 NYCRR.

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

Subject: Changes in methodology for appeals.

Purpose: To increase appeal thresholds and to limit grounds for appeals.

Public hearing(s) will be held at: 11:00 a.m., May 31, 2011 at Capital District DDSO, Bldg. 3, Rm. 1, 500 Balltown Rd., Schenectady, NY; and 11:00 a.m., June 2, 2011 at 75 Morton St., New York, NY.

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

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

Text of proposed rule: Existing subdivision 686.13(h) is renumbered to be subdivision (g).

A new subdivision 686.13(h) is added as follows:

(h) *Price corrections for service periods beginning on or after July 1, 2011.*

(1) *The commissioner will correct prices in instances where there are material errors in the information submitted by the provider which OPWDD used to establish the price or where there are material errors in the price computation and only in instances which would result in an annual increase of \$5,000 or more in a provider's allowable costs.*

(2) *In order to request a price correction in accordance with paragraph (1) of this subdivision, the provider must send to OPWDD its request by certified mail, return receipt requested, within 90 days of the provider receiving the price computation or within 90 days of the first day of the price period in question, whichever is later.*

Subdivision 686.13(i) is amended as follows:

(i) Appeals to prices determined pursuant to sections 635-10.5 and 671.7 of this Title.

(1) *Threshold. For price periods before July 1, 2011, the [The] commissioner will consider only appeals for adjustment to the prices which would result in an annual increase of \$1,000 or more in [community residence's] the allowable costs of the program or service being appealed. [, and are:] For price periods beginning on or after July 1, 2011, the threshold is \$5000.*

(2) *The bases for appeals. For price periods before July 1, 2011, appeals that shall be considered are those that are:*

(i) *needed because of changes in the statistical information used to calculate [a] the [community residence's] staffing or utilization standards included in the program or service; or*

(ii) *appeals for adjustments needed because of material errors in the information submitted by the [community residence] provider which [OMRDD] OPWDD used to establish the price or material errors in the price computation; or*

(iii) *appeals for significant increases or decreases in the [a community residence's] overall operating costs of the program or service being appealed due to implementation of new programs, changes in staff or services, changes in the characteristics or number of individuals receiving services, changes in a lease agreement so as not to involve a related party,*

capital renovations, expansions or replacements; which have been either mandated or approved by the commissioner and, except in life-threatening situations, approved in advance[; or].

(3) *For all price periods, the bases for appeals shall also include:*

[(iv)] *(i) rent appeals for any month during the price period that an individual is unable to pay an amount, whether from SSI, other benefits or earnings, equal to the rent charged each individual and this affects the efficient and economical operation of the residence[. An appeal pursuant to this section shall be a rent appeal]; or*

[(v)] *(ii) board appeals for any month during the price period that a person is unable to pay an amount, whether from benefits, earnings or other assets, equal to the amount charged each person for food under section 686.17 of this Part and this affects the efficient and economical operation of the residence[.]; or*

(iii) vacancy appeals.

[(2)] *(4) Notification of first level appeal.*

(i) *In order to appeal a price in accordance with subparagraph [(1)(ii)] (2)(ii) of this subdivision, the [community residence] provider must send to [OMRDD] OPWDD a first level appeal application by certified mail, return receipt requested, within either 90 days of the [community residence] provider receiving the price computation or 90 days of the first day of the price period in question, whichever is later.*

(ii) *In order to appeal a price in accordance with subparagraphs [(1)(i), (iii), (iv) and (v)] (2)(i) and (iii) and (3)(i), (ii) and (iii) of this subdivision, the [community residence] provider must send to [OMRDD] OPWDD within one year of the close of the price period in question, a first level appeal application by certified mail, return receipt requested.*

[(3)] *(5) First level price appeal applications shall be made in writing to the commissioner.*

(i) *The application shall set forth the basis for the first level appeal and the issues of fact. Appropriate documentation shall accompany the application and [OMRDD] OPWDD may request such additional documentation as it deems necessary.*

(ii) *Actions on first level price appeal applications will be processed without unjustifiable delay.*

[(4)] *(6) The burden of proof on first level appeal shall be on the [community residence] provider to demonstrate that the price requested in the first level appeal is necessary to ensure efficient and economical operation of the program or service. In first level rent or board appeals, the burden of proof shall be on the [community residence] provider to demonstrate that an individual who has been admitted to the individualized residential alternative or community residence is not able to pay the rent or board charged him or her.*

[(5)] *(7) A price revised by [OMRDD] OPWDD pursuant to an appeal shall not be considered final unless and until approved by the State Division of the Budget.*

[(6)] *(8) At no point in the first level appeal process shall the [community residence] provider have a right to an interim report of any determinations made by any of the parties to the appeal. At the conclusion of the first level appeal process [OMRDD] OPWDD shall notify the [community residence] provider by certified mail, return receipt requested, of any proposed revised price, board or rent, or denial of same. [OMRDD] OPWDD shall inform the [community residence] provider that it may either accept the proposed revised price, board or rent or request a second level appeal in accordance with the provisions of section 602.9 of this Title, in the event that the proposed revised price, board or rent fails to grant some or all of the relief requested.*

[(7)] *(9) At the conclusion of the first level appeal process, [OMRDD] OPWDD shall notify the provider of any revised price or denial of the request. Once [OMRDD] OPWDD has informed the provider of the appeal outcome, a provider which submits a revised cost report for the period reviewed shall not be entitled to an increase in the award determination based on that resubmission.*

[(8)] *(10) If [OMRDD] OPWDD approves the revision to the price and the State Division of the Budget denies the revision, the [community residence] provider shall have no further right to administrative review pursuant to this section.*

[(9)] *(11) If at the conclusion of a first or second level rent appeal or board appeal, [OMRDD] OPWDD has revised the rent or board, and if the individual whose inability to pay [rent] was the basis for the appeal is subsequently able to pay the rent or board or other charges, the [community residence] provider shall pay [OMRDD] OPWDD the amount of additional payment [OMRDD] OPWDD made for such individual or the amount of rent or board or charges the individual was able to pay the [community residence] provider, whichever is less.*

[(10)] *(12) Any price revised in accordance with this subdivision shall be effective according to the dates indicated in the approval of the price appeal notification, and adjustments to subsequent period prices shall be made accordingly.*

[(11)] *(13) Any additional reimbursement received by the facility*

pursuant to a price revised in accordance with this subdivision shall be restricted to the specific purpose set forth in the first or second level appeal decision. If the provider does not spend such reimbursement on such specific purpose, [OMRDD] OPWDD shall be entitled to recover such reimbursement.

[(12)] (14) Second level appeals to prices.

(i) [OMRDD] OPWDD's denial of the first level appeal of any or all of the relief requested in the appeals provided for in paragraphs [(1)] (2) and (3) of this subdivision shall be final, unless the provider requests a second level appeal to the commissioner in writing within 30 days of service of notification of denial or proposed revised *price* [rate].

(ii) Second level appeals shall be brought and determined in accordance with the applicable provisions of Part 602 of this Title.

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

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory authority:

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

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments concern changes in methodologies for appeals.

3. Needs and benefits: New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such efficiency will be changes in price appeals in Home and Community Based Waiver services. The current appeals process will be changed to increase appeal thresholds and to limit grounds for appeals.

Appeals will be limited to vacancy appeals, rent appeals and board appeals and the loss threshold will increase from \$1000 to \$5000. In addition, if the provider resubmits its cost report for a price appeal period after OPWDD notified the provider of an appeal outcome, the provider will not be entitled to an increase in the appeal award based on the resubmitted cost data. The benefit of these changes is to more closely align the appeals process with the prospective price methodology and to increase efficiency for OPWDD by eliminating appeals for relatively small amounts of money.

These changes will assist in achieving Medicaid efficiency for New York State. OPWDD believes that the providers will be able to operate without being able to submit appeals for between \$1000 and \$5000, and will be able to operate with only being able to appeal for vacancies and loss of payments for rent or board, all without reducing supports or services or service quality.

4. Costs:

a. Costs to the Agency and to the State and its local governments:

The proposed amendments will generate savings in Medicaid, which would be shared by the State and Federal governments, by limiting the number of appeals that will be awarded. The amount of savings cannot be determined since the number of appeals that will be submitted and awarded in the future is unknown. In addition, the amendments will generate administrative savings to the State because less staff time will be necessary to process appeals.

There will be no savings to local governments as a result of these amendments because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. Concerning services not governed by Social Services Law sections 365 or 368-a, there are no savings to local governments as a result of these amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. Providers may incur reductions in revenue because fewer appeals will be awarded. The amount of reduction cannot be determined since the number of appeals that will be submitted and awarded in the future is unknown.

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

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers. Conversely, there may be less paperwork due to a reduction of appeals.

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

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the changes in the methodology for appeals that are proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

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

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

Regulatory Flexibility Analysis

1. Effect on small business: The proposed regulations apply to providers of Home and Community Based Services (HCBS) waiver services which are reimbursed through a price methodology. The proposed regulations apply to residential habilitation delivered in supervised and supportive Individualized Residential Alternative (IRAs) and Community Residences (CRs), day habilitation services, prevocational services, and respite services. OPWDD has determined, through a review of the certified cost reports, that most providers are non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are approximately 418 providers that will be affected by the proposed regulations. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments will change price appeals. These changes will assist in achieving Medicaid efficiency for New York State, by limiting the number of appeals that can be brought. Consequently, providers may incur reductions in revenue because fewer appeals will be awarded. The amount of reduction cannot be determined since the number of appeals that will be submitted and awarded in the future is unknown.

OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose the use of any new technological processes on regulated parties.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the methodology for price appeals in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could make such changes to encourage efficiencies in operation and still adequately reimburse providers. The proposed amendments represent OPWDD's best effort at making changes in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied related to compliance activities.

OPWDD determined that the changes in the methodology for price appeals proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were

discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses, and will be holding public hearings on the amendments.

Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The amendments concern changes in the methodology for price appeals. These changes will assist in achieving Medicaid efficiency for New York State, by limiting the number of appeals that may be submitted. Consequently, providers may incur reductions in revenue because fewer appeals may be awarded. The amount of reduction cannot be determined since the number of appeals that will be submitted and awarded in the future is unknown. While the reduction in funding may have an adverse fiscal impact on providers, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the methodology for price appeals in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could make such changes to encourage efficiencies in operation and still adequately reimburse providers. The proposed amendments represent OPWDD's best effort at making changes in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. OPWDD determined that the changes in the methodology for price appeals proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8, and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout New York State, including those in rural areas.

Job Impact Statement

OPWDD is not submitting a Job Impact Statement for this proposed rulemaking because the rulemaking will not have a substantial adverse impact on jobs or employment opportunities.

The proposed rule would change the process for Home and Community Based Services (HCBS) Waiver price appeals. The appeals process change will increase appeal thresholds and limit grounds for appeals. Appeals will

be limited to vacancy appeals, rent appeals and board appeals and the loss threshold will increase from \$1000 to \$5000. In addition, if the provider resubmits its cost report for a price appeal after OPWDD notified the provider of an appeal outcome, the provider will not be entitled to an increase in the appeal award based on the resubmitted cost data.

The changes regarding appeals should not result in a decrease of more than 100 full time annual jobs or employment opportunities. Because providers will no longer be able to submit appeals for unlimited reasons, they will no longer be able to simply spend more than their revenues and look to OPWDD for compensation. However, this will not impact existing jobs, because it will not affect existing revenue. It may limit new employment opportunities because providers cannot expect that OPWDD will reimburse them for any and all additional spending on staff. However, OPWDD estimates that providers would not have hired more than 100 full time annual employees if this unlimited right to appeal remained in place.

Increasing the loss threshold for appeals from \$1000 to \$5000 will only eliminate rate appeals for an annual increase in funding between \$1000 and \$5000, and these appeals would be for amounts insufficient to fund over 100 full-time annual jobs. Finally, the change preventing a price increase based on a cost report resubmitted after an appeal award determination will not result in a loss of jobs as the action involves the reconciliation of retroactive expenditures.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Efficiency Adjustment for HCBS Waiver Respite Services

I.D. No. PDD-15-11-00023-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 635-10.5 of Title 14 NYCRR.

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

Subject: Efficiency adjustment for HCBS waiver respite services.

Purpose: To implement an efficiency adjustment by modifying the price methodology for HCBS waiver respite services.

Public hearing(s) will be held at: 11:00 a.m., May 31, 2011 at Capital District DDSO, Bldg. 3, Rm. 1, 500 Balltown Rd., Schenectady, NY; and 11:00 a.m., June 2, 2011 at 75 Morton St., New York, NY.

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

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

Text of proposed rule: Subparagraph 635-10.5(h)(3)(iii) is amended as follows:

(iii) For operating prices:

(a) The unit of service shall be one hour equaling 60 minutes.

(b) The provider may claim reimbursement in 15-minute increments, as the service is documented.

(c) [OMRDD] OPWDD shall determine the price by dividing the [OMRDD] OPWDD approved total annual budgeted costs by the corresponding projected hours of utilization. [OMRDD] OPWDD shall approve budgeted costs if they are reasonable, related to respite services and consistent with efficiency, economy and quality of care. *The approved total annual budgeted costs established for newly certified sites after June 30, 2011, shall reflect a 2 percent reduction in operating costs as was implemented for providers on July 1, 2011, pursuant to clause (d) of this subparagraph.*

(d) *Effective July 1, 2011, prices shall be revised to reflect a 2 percent reduction to the price in effect on June 30, 2011.*

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

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory authority:

a. OPWDD has the statutory authority to adopt rules and regulations

necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments are necessary to make adjustments to the reimbursement methodology applicable to Home and Community Based Services (HCBS) waiver respite services.

3. Needs and benefits: New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such identified efficiency will be a reduction in HCBS waiver respite services funding. The current operating component of the HCBS waiver respite services price will be reduced by 2 percent for all providers.

Implementation of this decrease in prices will assist in achieving Medicaid efficiency for New York State. It is believed that service providers will be able to absorb this reduction while not reducing supports or services or service quality due to the payment of recent trend factor increases (3.06% for 2009 and 2.08% for 2010) and with the implementation of efficiency measures.

Additionally, OPWDD created a Fiscal Sustainability Team which included individuals, advocates, service providers and OPWDD staff. Although the purpose of the Team was not to discuss the option of reducing HCBS waiver respite services funding, there was discussion on approaches to efficiency that would allow support and service levels to be maintained in concert with funding reductions. OPWDD continues to explore various proposals that would offer providers greater mandate relief.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There is an approximate \$1.4 million savings in Medicaid that will be evenly shared by the State (approximately \$700,000) and the Federal (approximately \$700,000) Governments. There will be no savings to local governments as a result of these specific amendments. For the current State fiscal year, there are no costs to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$1.4 million in aggregate funding to providers of HCBS waiver respite services.

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

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

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

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the 2 percent operating reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

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

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

Regulatory Flexibility Analysis

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most HCBS waiver respite services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 266 agencies that provide HCBS waiver respite services. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately 1.4 million dollars in funding to providers of HCBS waiver respite services. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to revise the reimbursement methodologies for HCBS waiver respite services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for HCBS waiver respite services to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied.

OPWDD determined that the 2 percent operating reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses.

Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately 1.4 million dollars in funding to providers of HCBS waiver respite services for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of HCBS waiver respite services, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The proposed amendments revise the reimbursement methodologies for HCBS waiver respite services in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for respite services to encourage efficiencies in operation and still adequately reimburse providers of such services, including providers in rural areas. OPWDD determined that the 2 percent operating reduction proposed in

this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

Job Impact Statement

A job impact statement is not being submitted for these proposed amendments because OPWDD determined that they will not cause a loss of more than 100 full-time annual jobs State wide. The proposed amendments decrease the respite reimbursement prices by 2%. Based on conversations with providers and provider associations, OPWDD expects that any provider without sufficient surpluses to absorb all of the efficiency adjustment will adjust operations and spending in areas other than staffing, so as not to reduce supports or services or service quality. Moreover, the total state-wide impact of the efficiency adjustment is not at a level sufficient to effect a decrease of more than 100 full-time annual jobs. The total decrease in funding to all respite providers will be \$1.4 million, and the average staff salary in the respite program, including fringe benefits, is \$31,045. Even if, contrary to OPWDD and providers' expectations, every respite provider reduced staffing levels by 2%, there would be a total loss of 45.09 full-time annual jobs statewide.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Efficiency Adjustment for Residential Habilitation Services in Supportive IRAs and Supportive CRs

I.D. No. PDD-15-11-00024-P

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

Proposed Action: Amendment of sections 635-10.5(b) and 671.7(a) of Title 14 NYCRR.

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

Subject: Efficiency adjustment for residential habilitation services in supportive IRAs and supportive CRs.

Purpose: To implement an efficiency adjustment by modifying the IRA price methodology.

Public hearing(s) will be held at: 11:00 a.m., May 31, 2011 at Capital District DSO, Bldg. 3, Rm. 1, 500 Balltown Rd., Schenectady, NY; and 11:00 a.m., June 2, 2011 at 75 Morton St., New York, NY.

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

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

Text of proposed rule: Clause 635-10.5(b)(9)(ii)(c) is amended as follows:

(c) The total annual capital reimbursement levels updated pursuant to section 686.13(k)(1)(vi) of this Title for January 1, 2010 for all [supervised] *supportive* IRAs and pursuant to section 671.7(a)(7) of this Title for January 1, 2010 for all [supervised] *supportive* community residences, if any, shall be combined into an aggregate annual amount and added to the result in clause (b) of this subparagraph.

Subparagraph 635-10.5(b)(9)(iv) is amended as follows:

(iv) Newly certified sites. A newly certified site is an IRA whose reimbursable costs are not already included in the monthly price and at which a provider is initially approved to deliver services pursuant to an operating certificate issued by OPWDD. *The approved total annual budgeted costs established for newly certified supportive IRA sites after*

June 30, 2011 shall reflect a 2 percent reduction in operating costs as was implemented for providers on July 1, 2011 pursuant to subparagraph (18)(iii) of this subdivision. A newly certified site's...

(Note: rest of the subparagraph remains unchanged.)

Paragraph 635-10.5(b)(18) is amended by the addition of subparagraph (iii) as follows:

(iii) *Effective July 1, 2011, supportive IRA prices shall be revised to reflect a 2 percent reduction to the operating components of the price in effect on June 30, 2011. For the purposes of a vacancy price adjustment, the effects of this reduction shall not be construed as a basis for loss.*

Subdivision 671.7(a) is amended by the addition of a new paragraph (12) as follows:

(12) *Effective July 1, 2011, supportive IRA prices shall be revised to reflect a 2 percent reduction to the operating components of the price in effect on June 30, 2011. For the purposes of a vacancy price adjustment, the effects of this reduction shall not be construed as a basis for loss.*

Existing paragraphs 671.7(a)(12)-(13) are renumbered to be (15)-(16) and paragraphs (13) and (14) are reserved.

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

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory authority:

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

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments are necessary to make adjustments to the reimbursement methodology applicable to Home and Community Based Services (HCBS) waiver residential habilitation services provided in supportive Individualized Residential Alternatives (IRAs) and supportive Community Residences (CRs).

3. Needs and benefits: New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such identified efficiency will be a reduction in funding for supportive IRAs and supportive CRs. The operating component of current supportive IRA prices will be reduced by 2 percent for all providers.

Implementation of this decrease in prices will assist in achieving Medicaid efficiency for New York State. It is believed that service providers will be able to absorb this reduction while not reducing supports or services or service quality due to the payment of recent trend factor increases (3.06 percent for 2009 and 2.08% for 2010) and with the implementation of efficiency measures.

Additionally, OPWDD created a Fiscal Sustainability Team which included individuals, advocates, service providers and OPWDD staff. Although the purpose of the Team was not to discuss the option of reducing funding for supportive IRAs and CRs, there was discussion on approaches to efficiency that would allow support and service levels to be maintained in concert with funding reductions. OPWDD continues to explore various proposals that would offer providers greater mandate relief.

The proposal also corrects a minor error in language used for the calculation of IRA prices.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There is an approximate \$2 million savings in Medicaid that will be evenly shared by the State (approximately \$1 million) and the federal (approximately \$1 million) governments. There will be no savings to local governments as a result of these specific amendments because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$2 million in aggregate funding to providers of supportive IRAs and supportive CRs.

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

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

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

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the 2 percent operating reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

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

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

Regulatory Flexibility Analysis

1. Effect on small business: The OPWDD has determined, through a review of the certified cost reports, that most supportive IRAs and CRs are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 139 agencies that provide Home and Community Based Services (HCBS) waiver residential habilitation services in supportive IRAs or supportive CRs. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately 2 million dollars in funding to agencies which operate supportive IRAs and supportive CRs. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to revise the reimbursement methodologies for supportive IRAs and supportive CRs in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for HCBS waiver residential habilitation services provided in supportive IRAs and supportive CRs to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied.

OPWDD determined that the 2 percent operating reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including

providers that are small businesses, and will be holding public hearings on these proposed amendments.

Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately 2 million dollars in funding to providers of HCBS waiver residential habilitation services in supportive individualized residential alternatives (IRAs) and supportive community residences (CRs) for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of HCBS waiver residential habilitation services in supportive IRAs and supportive CRs, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The proposed amendments revise the reimbursement methodologies for HCBS waiver residential habilitation services in supportive IRAs and supportive CRs in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. Since the prices for residential habilitation in supportive IRAs and CRs are based on the budgeted costs of each site, the prices already take into account the costs of IRAs and CRs in rural areas, and there is no need to have a different method of calculating the reduction for IRAs and CRs in rural areas. OPWDD determined that it could adjust prices for residential habilitation in supportive IRAs and CRs to encourage efficiencies in operation and still adequately reimburse providers of such services, including providers in rural areas. OPWDD determined that the 2 percent operating reduction proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8 and March 16, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

Job Impact Statement

A job impact statement is not being submitted for these proposed amendments because OPWDD determined that they will not cause a loss of more than 100 full time annual jobs State wide. The proposed amendments decrease the supportive Individualized Residential Alternatives (IRAs) and supportive Community Residences (CRs) reimbursement prices by 2%. Based on conversations with providers and provider associations, OPWDD expects that any provider without sufficient surpluses to absorb all of the efficiency adjustment will adjust operations and spending in areas other than staffing, so as not to reduce supports or services or service quality. Moreover, the total state-wide impact of the efficiency adjustment is not at a level sufficient to effect a decrease of more than 100 full-time annual jobs. The total decrease in funding to all supportive IRA and CR

providers will be 2 million dollars, and the average staff salary in the supportive IRA and CR program, including fringe benefits, is \$43,430. Even if, contrary to OPWDD and providers' expectations, every supportive IRA and CR provider reduced staffing levels by 2%, there would be a total loss of 46.05 full time annual jobs statewide.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Reimbursement Methodology for Residential Habilitation Services Delivered in Supervised IRAs and Supervised CRs

I.D. No. PDD-15-11-00025-P

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

Proposed Action: Amendment of sections 635-10.5 and 671.7 of Title 14 NYCRR.

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

Subject: Reimbursement methodology for residential habilitation services delivered in supervised IRAs and supervised CRs.

Purpose: To modify reimbursement methodology for prices in these services effective July 1, 2011.

Public hearing(s) will be held at: 11:00 a.m., May 31, 2011 at Capital District DDSO, Bldg. 3, Rm. 1, 500 Balltown Rd., Schenectady, NY; and 11:00 a.m., June 2, 2011 at 75 Morton St., New York, NY.

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

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

Text of proposed rule: Subparagraph 635-10.5(b)(18)(iii) is reserved.

A new subparagraph 635-10.5(b)(18)(iv) is added as follows:

(iv) Effective July 1, 2011, supervised IRA prices shall be reduced according to the measures outlined in this subparagraph. There are two distinct actions to the price reductions. The personal services action addresses provider surpluses in funding for direct care, clinical and support staff and the associated fringe benefits. The administrative action addresses reimbursable administrative costs and holds reimbursement to a level of efficiency. Providers may be subject to only one action or to both actions or they may be exempt from both.

(a) Applicability. The price reductions will apply to all providers except for those which meet the criteria for exemption.

The first criterion, in order for any provider to be exempt from the impact of the reduction on any basis, is a cost report requirement. Region I providers must have filed a 2008-2009 cost report and Regions II and III providers must have filed a 2008 cost report before December 23, 2010, except that a provider may submit the cost report after December 23, 2010, if the cost report represents an original submission or a resubmission specifically requested by OPWDD due to identified inaccuracies or insufficiencies. Cost reports submitted after December 23, 2010, must be submitted by May 1, 2011, unless the Commissioner exercises or has exercised his or her discretion to extend the May 1, 2011, deadline. Providers with cost reports submitted in accordance with the deadlines in this clause (a) may qualify for exemption from the personal services surpluses action pursuant to subclause (1) of clause (b) of this subparagraph. Providers with cost reports submitted in accordance with the deadlines in this clause (a) may qualify for exemption from the administrative action pursuant to subclause (1) of clause (c) of this subparagraph. Providers which did not submit cost reports in accordance with the deadlines in this clause (a) shall be subject to price reductions pursuant to clause (d) of this subparagraph.

OPWDD shall employ data extracted from the most recent 2008/2008-2009 cost report submitted by a provider on or before December 23, 2010, except that data from a 2008/2008-2009 cost report submitted after December 23, 2010, representing an original submission or a resubmission specifically requested by OPWDD due to identified inaccuracies or insufficiencies and submitted by May 1, 2011, or a later deadline extended by the Commissioner shall also be utilized. For providers of supervised residential habilitation services which did not operate group day habilitation or supplemental group day habilitation programs for the cost reporting year 2008/2008-2009, the components subjected to analysis relate to the provider's supervised IRAs. For providers which did operate group day habilitation and/or supplemental group day habilitation programs for the cost reporting year 2008/2008-2009, the components subjected to

analysis relate to the combination of the provider's supervised IRAs, group day habilitation and/or supplemental group day habilitation services. Additionally, for providers which converted a residential program to a supervised IRA or a day program to a group or supplemental group day habilitation program subsequent to the 2008/2008-2009 cost report period, OPWDD incorporated the data included in the 2008/2008-2009 cost report(s) for the converted program(s) prior to conversion into its analyses.

(b) Personal Services Surpluses Action.

(1) Exemptions.

(i) Providers with FTE personal services losses and actual personal services fringe benefit percentages greater than the reimbursable percentages are exempt. To qualify for this exemption, a provider must meet each of the two criteria which follow.

(A) FTE personal services loss. OPWDD compared each provider's actual FTEs for direct care, clinical care and support as reported in its 2008/2008-2009 cost report to the maximum reimbursable FTEs designated for direct care, clinical care and support as reflected in the corresponding price(s). This analysis included the FTE equivalents for contracted services. OPWDD identified a subset of providers which demonstrated an excess of actual FTEs over reimbursable FTEs. They meet the first criterion for this exemption.

(B) Fringe benefit percentage. The fringe benefit percentage equals the total fringe benefits costs for direct care, clinical and support staff divided by the salary costs for direct care, clinical and support staff expressed as a percentage. For the providers which meet the criterion in subitem (A) of this item, OPWDD compared each provider's actual direct care, clinical and support services associated fringe benefit percentage as evidenced by its 2008/2008-2009 cost report data to the reimbursable direct care, clinical and support services associated fringe benefit percentage as reflected in the corresponding price(s). OPWDD identified a subset of providers with actual fringe benefit percentages that were higher than the fringe benefit percentage in the price(s). They are exempt.

(ii) Providers with a loss in personal services and associated fringe benefits combined are exempt. OPWDD examined 2008/2008-2009 cost reports for those providers not exempted by virtue of item (i) of this subclause. OPWDD compared each provider's actual expenses for direct care, clinical care and support and the associated fringe benefits to the total reimbursable costs reflected in the corresponding price(s) and designated for direct care, clinical care and support and the associated fringe benefits cost categories. This analysis included contracted services. OPWDD identified a subset of providers which demonstrated an excess of actual expenses for direct care, clinical care and support and the associated fringe benefits over reimbursable costs reflected in the corresponding price(s) and designated for direct care, clinical care and support and the associated fringe benefits. They are exempt.

(iii) Providers with aggregate unmodified surpluses. Providers not exempted by virtue of items (i) or (ii) of this subclause were identified as having aggregate unmodified surpluses equal to the amount by which the aggregated reimbursable costs as reflected in the prices and designated for direct care, clinical care and support and the associated fringe benefits exceeded the corresponding aggregated actual expenses for direct care, clinical care and support and the associated fringe benefits as reported in those providers' cost reports for reporting year 2008/2008-2009.

(iv) To/from transportation modification. For all providers with aggregate unmodified surpluses as defined in item (iii) of this subclause, OPWDD examined their 2008/2008-2009 cost reports. OPWDD compared the provider's aggregated actual expenses for to/from transportation to the aggregated total reimbursable costs reflected in the corresponding price(s) and designated for to/from transportation. If the aggregated total reimbursable costs exceeded aggregated actual expenses for to/from transportation, OPWDD added the amount of this excess to the aggregate unmodified surplus amount calculated pursuant to item (iii) of this subclause to yield the aggregate surplus. Conversely, if the aggregated actual expenses for to/from transportation exceeded the aggregated total reimbursable costs reflected in the corresponding price(s) for to/from transportation, OPWDD offset the unmodified surplus amount calculated pursuant to item (iii) of this subclause by this difference to derive the aggregate surplus. If, however, this calculation yielded a negative number for any provider, it is not considered a surplus and such provider is exempt.

(2) Providers subject to the personal services surpluses action are those providers which are not specifically exempted pursuant to subclause (1) of this clause.

(3) Untrended tentative aggregate gross reduction. A provider identified as having an aggregate surplus after the to/from transportation modification pursuant to the analysis conducted by OPWDD as described in item (iv) of subclause (1) of this clause shall be subject to a price reduction. This aggregate surplus is referred to as the untrended tentative aggregate gross reduction.

(4) Tentative aggregate gross reduction. The tentative aggregate

gross reduction equals the untrended tentative aggregate gross reduction pursuant to subclause (3) of this clause trended to June 30, 2011, dollars.

(c) Administrative action.

(1) Exemptions.

(i) Total agency revenue exemption. Providers with total agency gross revenues less than \$1.5 million dollars as reflected in the agency fiscal summaries of their 2008/2008-2009 cost reports are exempt.

(ii) Compensation exemption. For each provider not exempted by virtue of item (i) of this subclause, OPWDD extracted from the governing board and compensation summaries in its 2008/2008-2009 cost report, the total annualized compensation of all employees with agency administrative titles. Using this dollar value, OPWDD compared the total annualized compensation to the total agency revenue as described in item (i) of this subclause to establish a value that expressed the total annualized compensation as a percentage of total agency revenue. OPWDD identified a subset of providers with percentages equal to or less than one half of one percent. They are exempt.

(iii) Administrative expenses as a percent of operating expenses exemption. For providers not exempted by virtue of items (i) or (ii) of this subclause, total reimbursable administration (agency and program including fringe benefits) costs as reflected in the price(s) corresponding to the provider's 2008/2008-2009 reporting year were expressed as a percentage of the total reimbursable operating costs in that price (those prices). As a prerequisite to this calculation, when appropriate, respective amounts were adjusted for capacity changes that occurred throughout the year. OPWDD identified a subset of providers with percentages of less than 10 percent. They are exempt.

(2) Providers subject to the administrative action are those providers which are not specifically exempted pursuant to subclause (1) of this clause.

(3) Tentative aggregate gross reduction. For providers subject to the administrative action, OPWDD used the compensation data also used in item (ii) of subclause (1) of this clause and the reported number of FTEs corresponding to those administrative titles as reported in providers' 2008/2008-2009 cost reports. OPWDD computed a provider-specific average compensation per FTE for the administrative titles. Similarly, OPWDD computed a provider-specific average compensation per FTE for direct care, clinical and support staff using data from providers' 2008/2008-2009 cost reports. (Direct care, clinical and support staff collectively are referred to as direct support staff.) The compensation data for both administrative titles and direct support titles included fringe benefits. A ratio of average administrative compensation to average direct support compensation was determined for each provider. Providers' ratios were then ranked and separated into 5 graduated levels. A reduction percentage was established to correspond to each level of compensation ratios. The reduction percentage for a provider is dependent on a provider's positioning in the five levels. The following chart gives the explicit ranges for the compensation ratios and the applicable reduction percentage.

Compensation Ratios Administration to Direct Support	Reimbursable Administrative Costs Reduction Percentage
Equal to or greater than 10.0:1	9.0%
Equal to or greater than 6.0:1 but less than 10.0:1	7.5%
Equal to or greater than 4.0:1 but less than 6.0:1	6.0%
Equal to or greater than 3.0:1 but less than 4.0:1	4.0%
Less than 3.0:1	2.0%

The tentative aggregate gross reduction equals the reduction percentage determined by a provider's ranking in the compensation ratio comparisons applied to that provider's aggregate reimbursable administrative costs as reflected in the corresponding price(s) at June 30, 2011.

(d) Total impact limitation. Before OPWDD revises a provider's supervised IRA price, it shall assess the total impact on a provider of all the tentative gross reductions and tentative aggregate gross reductions pursuant to this subparagraph 635-10.5(b)(18)(iv) and sections 635-10.5(c)(16), 635-10.5(e)(6) and 671.7(a)(13) of this Title, combined with the final price and fee reductions pursuant to sections 635-10.5(b)(18)(iii), 635-10.5(d)(6), 635-10.5(h)(3)(iii)(d), 635-10.5(ab)(12)(iii)(b) and 671.7(a)(12) of this Title. The total impact to an individual provider shall be limited to an amount not to exceed 6.5 percent of the aggregated total gross reimbursable operating costs as reflected in a provider's June 30, 2011, prices and the aggregated total gross allowable reimbursement reflected in a provider's June 30, 2011, fees for the provider's programs and/or services subject to the price and fee revisions. The lesser of the amount of the total impact or the amount of the total impact as limited by

the 6.5 percent provision represents the final impact. For providers for which no 2008/2008-2009 cost reports were available because the conditions established in clause (a) of this subparagraph were not met, the total impact is calculated as follows: The aggregated total gross reimbursable operating costs as reflected in a provider's June 30, 2011, prices and the aggregated total gross allowable reimbursement as reflected in a provider's June 30, 2011, fees for the provider's programs and/or services subject to the price and fee revisions are summed. The total is multiplied by 6.5 percent. The product is the final impact for these providers.

(e) Allocation of final impact. Before allocation, the final impact on a provider shall be reduced by the final price and fee reductions pursuant to sections 635-10.5(b)(18)(iii), 635-10.5(d)(6), 635-10.5(h)(3)(iii)(d), 635-10.5(ab)(12)(iii)(b) and 671.7(a)(12) of this Title because those reductions are not subject to any further revisions. The remainder of the final impact on a provider shall be distributed equitably across the reimbursable operating costs in that provider's supervised residential habilitation, group day habilitation, supplemental group day habilitation and prevocational services in proportion to the amount of reduction each of these programs would have incurred had the reductions been calculated separately. OPWDD shall make an internal allocation within the price for providers subject to both the personal services surplus action and the administrative action pursuant to this subparagraph 635-10.5(b)(18)(iv).

(f) Final supervised IRA price reduction percentage. The allocation of the final impact to a provider's supervised residential habilitation services shall be expressed as a percentage of the total gross reimbursable operating costs reflected in the price in effect on June 30, 2011.

(g) The final supervised IRA price shall be the supervised IRA price in effect on June 30, 2011, reduced by the final supervised IRA price reduction percentage pursuant to clause (f) of this subparagraph applied to that price.

(h) For the purposes of requesting a price adjustment, the effects of this price reduction shall not be construed as a basis for loss. In processing a price adjustment, any revised price will be offset by the monetary impact, prorated as appropriate, of the price reduction as calculated pursuant to this clause.

(i) The commissioner, at his or her discretion, may waive all or a portion of this adjustment for a provider upon the provider demonstrating that the imposition of the reduction would jeopardize the continued operation of the residential habilitation services.

A new paragraph 635-10.5(b)(22) is added as follows:

(22) Revenues realized by providers from reimbursement attributable to components of the price other than the administrative component shall not be used to fund administrative expenses.

Paragraphs 671.7(a)(12)-(13) are renumbered to be paragraphs (15)-(16).

Existing paragraph 671.7(a)(12) is reserved.

Subdivision 671.7(a) is amended by the addition of a new paragraph (13) and (14) as follows

(13) Effective July 1, 2011, pursuant to subparagraph (b)(18)(iv) of section 635-10.5, providers shall be subject to the supervised IRA price reductions except for those providers specifically excluded by the exemptions described in that subparagraph.

(14) Revenues realized by providers from reimbursement attributable to components of the price other than the administrative component shall not be used to fund administrative expenses.

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

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory authority:

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

b. OPWDD has the statutory responsibility for setting Medicaid rates and fees for other services in facilities licensed or operated by OPWDD, as stated in section 43.02 of the Mental Hygiene Law.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments concern changes in the price methodology for residential habilitation services delivered in

supervised Individualized Residential Alternatives (IRAs) and supervised Community Residences (CRs).

3. Needs and benefits: New York State is seeking to achieve efficiencies in its Medicaid program including Medicaid funded services overseen by OPWDD. One such efficiency will change the price methodology for residential habilitation services delivered in supervised IRAs and supervised CRs. The new methodology is intended to align a provider's reimbursement for direct care, support, clinical, related fringe benefit costs and transportation with actual costs. Additionally, the new methodology reduces administrative reimbursement for most providers of supervised IRAs and CRs. In most cases, the new prices will be predicated on cost information from provider's reporting periods that ended either on December 31, 2008, or June 30, 2009, with those costs adjusted for inflationary factors. Additionally, providers will be constrained from utilizing reimbursement designated for operating cost components other than the administrative component to fund administrative expenses. The new methodology strives to more closely match reimbursements to costs and to institute efficiency standards. OPWDD proposes to revise the current prices on July 1, 2011.

These changes will assist in achieving Medicaid efficiency for New York State. Since the methodology change is structured in large part to eliminate operating surpluses, OPWDD believes that providers will be able to absorb this reduction while not reducing supports or services or service quality. Additionally, there is a limitation on the total impact to providers resulting from OPWDD's concurrent reimbursement actions. A provider's revenue reduction shall be held to an amount not to exceed 6.5 percent of that provider's June 30, 2011, aggregate operating revenue for services subject to price reductions which may include its supervised IRAs and CRs, Group and Supplemental Group Day Habilitation, Prevocational services, supportive IRAs and CRs, Community Habilitation, Waiver Supportive Employment and Waiver Respite. This limitation acts as a safety measure so that reductions will not jeopardize the quality of supports and services provided.

4. Costs:

a. Costs to the Agency and to the State and its local governments: Costs to the Agency and to the State and its local governments: There is an approximate \$49.3 million savings in Medicaid that will be evenly shared by the State (approximately \$24.6 million) and the federal (approximately \$24.6 million) governments. There will be no savings to local governments as a result of these specific amendments because pursuant to Social Services Law sections 365 and 368-a, either local governments incur no costs for these services or the State reimburses local governments for their share of the cost of Medicaid funded programs and services.

b. Costs to private regulated parties: There are neither initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The proposed amendments are expected to result in a decrease of approximately \$49.3 million in aggregate funding to providers of supervised IRAs and supervised CRs.

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

6. Paperwork: The proposed amendments do not require any additional paperwork to be completed by providers.

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

8. Alternatives: In developing this regulatory proposal, OPWDD consulted with representatives of provider associations and considered alternatives to achieve the desired efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that the changes in price methodology proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

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

10. Compliance schedule: OPWDD expects to finalize the proposed amendments effective July 1, 2011. There are no additional compliance activities associated with these amendments.

Regulatory Flexibility Analysis

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most supervised Individualized Residential Alternatives (IRAs) and Community Residences (CRs) are provided by agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 255 providers of Home and Community Based Services (HCBS) waiver residential habilitation services delivered in supervised IRAs and supervised CRs. OPWDD

is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. The proposed amendments are expected to result in a decrease of approximately \$49.3 million in funding to agencies which operate supervised IRAs and supervised CRs. OPWDD has determined that these amendments will not result in increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The proposed amendments do not impose any additional compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties, the use of any new technological processes.

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the price methodology for residential habilitation services delivered in supervised IRAs and supervised CRs in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for HCBS waiver residential habilitation services provided in supervised IRAs and supervised CRs to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible. In addition, the proposed amendments exempt providers with total gross revenues under \$1.5 million from any reduction in reimbursement for administrative expenses.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. Since these amendments require no specific compliance response of regulated parties, the approaches outlined cannot be effectively applied.

OPWDD determined that the changes in price methodology proposed in this amendment, in concert with other proposals, is the most optimal approach in achieving efficiencies without diminishing the quality of services provided to individuals and while minimizing any adverse impact on providers.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 8, March 16, March 21, March 22, and March 28, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. NYSACRA was part of the Fiscal Sustainability Team. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses, and will be holding public hearings on these proposed amendments.

Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauque, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in a decrease of approximately \$49.3 million in funding to providers of HCBS waiver residential habilitation services delivered in supervised individualized residential alternatives (IRAs) and supervised community residences (CRs) for all of New York State. While the reduction in funding will have an adverse fiscal impact on providers of HCBS waiver residential habilitation services in supervised IRAs and supervised CRs, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

2. Compliance requirements: The proposed amendments do not impose any additional reporting, recordkeeping or other compliance requirements on providers.

The amendments will have no effect on local governments.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no compliance costs since the proposed amendments will not impose any additional compliance requirements on providers or local governments.

5. Minimizing adverse economic impact: The purpose of these proposed amendments is to make changes in the price methodology for residential habilitation services delivered in supervised IRAs and supervised CRs in order to achieve efficiencies in the Medicaid funded services overseen by OPWDD. OPWDD determined that it could adjust prices for HCBS waiver residential habilitation services provided in supervised IRAs and supervised CRs to encourage efficiencies in operation and still adequately reimburse providers of such services. The proposed amendments represent OPWDD's best effort at adjusting reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and with the most equitable distribution possible.

OPWDD has also reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. Since these amendments impose no compliance requirements on regulated parties or local governments, the approaches outlined in section 202-bb(2)(b) cannot be effectively applied.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed at meetings with representatives of providers on March 8, March 16, March 21, and March 22, 2011. In addition, the proposed regulations were discussed at a meeting of the Fiscal Sustainability Team, also on March 8. The Fiscal Sustainability Team includes self-advocates, family members, and representatives of providers. Provider associations which were present, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, represent providers throughout NYS, including those in rural areas.

Job Impact Statement

The proposed amendments revise rules related to the price methodology for residential habilitation services delivered in supervised Individualized Residential Alternatives (IRAs) and supervised Community Residences (CRs.).

1. Nature of the impact the rule will have on jobs and employment opportunities: The proposed amendments may decrease the number of jobs and employment opportunities, particularly for administrative staff, in IRA and CR programs.

2. Categories of jobs or employment opportunities affected by the rule: The proposed amendments could affect all jobs but is structured to affect only administrative jobs.

3. Approximate number of jobs or employment opportunities affected: OPWDD estimates that the number of jobs or employment opportunities the proposed rule could affect State-wide, ranges from zero to 1,369. This estimate is based on the following: The total impact of the methodology change is a reduction of \$49.3 million. Assuming that providers make the decision to reduce jobs to absorb the entire amount of the reduction, even though we do not believe that they will, the State-wide job decrease is an estimate of the impact divided by an estimate of an average annual salary and fringe benefit level for an employee.

4. Region of the State where the rule would have a disproportionate adverse impact on jobs or employment opportunities: The proposed amendments would not have a disproportionate adverse impact on jobs or employment opportunities in any region of the State.

5. Measures taken to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities: With reference to the part of the action related to direct care, support and clinical costs, the methodology was specifically structured to only eliminate surpluses in those categories. That direction was taken to achieve a minimal impact on such jobs and supports and services and service quality. For those providers affected by the administrative component of the action, the largest impacts will be borne by those providers with the highest ratio of average agency administrative compensation to direct support compensation. Accordingly, OPWDD's expectation is that any job reductions related to this component of the action would be related to the most highly compensated individuals in the provider agency and that the typical provider response would be to reduce salary levels rather than to eliminate the jobs of those employees.

Additionally, the rules incorporate a maximum funding reduction per provider that equates to 6.5 percent of that provider's June 30, 2011, operating reimbursement for its supervised IRA and CR, Group and Supplemental Group Day Habilitation, Prevocational, supportive IRA and CR, Community Habilitation, Waiver Supported Employment and Waiver Respite services.

Power Authority of the State of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates for Production and Delivery Services

I.D. No. PAS-15-11-00020-P

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

Proposed Action: Redesign rates for production and delivery services charged to New York City Governmental Customers and Westchester County Governmental Customers.

Statutory authority: Public Authorities Law, section 1005(6) and (11)

Subject: Rates for production and delivery services.

Purpose: To properly align costs with rates.

Substance of proposed rule: The Power Authority of the State of New York (the "Authority") proposes to redesign its rates for both production and delivery services charged to its New York City Governmental Customers and its Westchester County Governmental Customers and to implement related tariff changes. The proposed rate redesigns are intended to align costs with rates and are revenue neutral to the Authority. The rate redesigns are proposed to become effective for the service period commencing July 2011 or as soon as practicable thereafter based on the completion of the rulemaking process.

Text of proposed rule and any required statements and analyses may be obtained from: Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8095, email: secretarys.office@nypa.gov

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

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

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

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

Public Service Commission

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Water Rate Filing

I.D. No. PSC-15-11-00015-P

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

Proposed Action: The Commission is considering a proposal filed by United Water Owego-Nichols, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Water Service - P.S.C. No. 1—Water.

Statutory authority: Public Service Law, section 89-c(1) and (10)

Subject: Major water rate filing.

Purpose: To consider a proposal to increase annual base rates by approximately \$642,000 or 45.90%.

Public hearing(s) will be held at: 10:00 a.m. (Evidentiary Hearing)*, Aug. 29, 2011 and continuing daily as needed at Department of Public Service, Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case No. 11-W-0082.

Interpreter Service: Interpreter services will be made available to hearing

impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

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

Substance of proposed rule: The Commission is considering a proposal filed by United Water Owego-Nichols, Inc. (UWON) which would increase its annual water base rates by approximately \$642,000 or 45.90% for the rate year ending January 31, 2013. The \$642,000 or 45.90% base rate increase includes the current capital improvement surcharge. Therefore, annual revenues would increase by \$624,000 or 43.00%. The statutory suspension period for the proposed filing runs through January 25, 2012. The Commission may adopt in whole or in part or reject terms set forth in UWON's proposal.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, 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.

(11-W-0082SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Availability of Telecommunications Services in New York State at Just and Reasonable Rates

I.D. No. PSC-15-11-00010-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 proposals for establishment of a State universal service high-cost fund to help ensure the availability of affordable telecommunications service throughout all parts of New York State.

Statutory authority: Public Service Law, sections 4, 5, 90, 91, 92, 94 and 96

Subject: Availability of telecommunications services in New York State at just and reasonable rates.

Purpose: Providing funding support to help ensure availability of affordable telecommunications service throughout New York.

Substance of proposed rule: By notice dated August 3, 2009, the Commission established a proceeding to examine issues related to the availability of modifications to the existing universal service funding regimes to support telecommunications services in New York in a rapidly changing industry. The existing regimes include a fund established to ease potential pressure on local telephone service rates of rural local exchange carriers affected by phase-out of intrastate access charge pooling. On July 16, 2010, the Commission issued an order in Phase I of the proceeding providing for extension of that fund through September 30, 2011. In the current Phase II of the proceeding, some parties have proposed establishment of a longer term State universal service high-cost fund to help support availability of affordable telecommunications service throughout New York State. The Commission may approve, reject, or modify the various proposals, in whole or in part, or adopt alternative measures to help ensure universal availability of affordable telecommunications service in New York.

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) 474-6530, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secre-

tary, 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.

(09-M-0527SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Pole Attachment Rates

I.D. No. PSC-15-11-00011-P

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

Proposed Action: The Commission is considering a proposed filing by Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 15—Electricity.

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

Subject: Pole Attachment Rates.

Purpose: To update pole attachment rates applicable to cable system operators and telecommunications carriers.

Substance of proposed rule: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson) to update pole attachment rates applicable to cable system operators and telecommunication carriers. The proposed filing has an effective date of July 1, 2011. The Commission may adopt in whole or in part, modify or reject Central Hudson's proposal, and may apply its decision to other utilities.

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) 474-6530, 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.

(11-E-0111SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Exemption of Reliability Reporting Statistics for the Purposes of the 2010 Service Reliability Performance

I.D. No. PSC-15-11-00012-P

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

Proposed Action: The Commission is considering a request for exemption of reliability reporting statistics from a July 19 & 20, 2010 weather related outage event by Orange and Rockland Utilities, Inc. for the purposes of the Service Reliability Performance Mechanism.

Statutory authority: Public Service Law, section 66

Subject: Exemption of reliability reporting statistics for the purposes of the 2010 Service Reliability Performance.

Purpose: Consideration of Orange and Rockland Utilities, Inc.'s request for exemption of the 2010 reliability reporting statistics.

Substance of proposed rule: In accordance with the New York Public Service Commission's Order Establishing Electric Rate Plan for Orange

and Rockland Utilities, Inc. issued July 23, 2010 in Case 07-E-0949, Orange and Rockland Utilities, Inc. (ORU) is subject to a Service Reliability Performance Mechanism. By petition dated March 16, 2011, ORU sought a Request for Exemption from Reliability Reporting for a storm event that occurred on July 19 and 20, 2010. Specifically, ORU is seeking the Commission's authorization to exclude from its 2010 service reliability reporting statistics, used for purposes of the Service Reliability Performance Mechanism, the outage statistics relating to this storm event. The Commission is considering whether to grant, deny or modify, in whole or in part, approval of the exception as requested.

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. Brilling, 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-E-0949SP5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mobile Stray Voltage Testing

I.D. No. PSC-15-11-00013-P

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

Proposed Action: The Commission is considering whether to order the continuation or modification of the frequency of mobile stray voltage testing as directed in its order issued July 21, 2010 in case 10-E-0271.

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

Subject: Mobile stray voltage testing.

Purpose: To safeguard the public from exposure to stray voltage hazards.

Substance of proposed rule: In an order in Case 04-M-0159, issued December 15, 2008, the Commission ordered all utilities, with the exception of Consolidated Edison Company of New York, Inc., (Con Edison) to complete an initial mobile stray voltage detection survey of their underground electric distribution systems, in appropriate areas of cities with a population of at least 50,000 (based on the results of the 2000 census), during calendar year 2009 to positively identify those areas that can be effectively surveyed, and annually thereafter until further Commission action. An assessment by the companies indicated that the following cities were to be surveyed under the requirements detailed in the order: Buffalo, Syracuse, Utica, Albany, Schenectady, Niagara Falls (National Grid); Yonkers, White Plains, New Rochelle, Mount Vernon (Con Edison); and Rochester (Rochester Gas & Electric Corporation). A contractor was retained by the affected utilities and the work was completed as required by the end of 2009, and reports were submitted to Department Staff compiling the testing results.

Staff reviewed and analyzed the results of that testing and recommended that one system scan be completed in calendar year 2010 for Yonkers, White Plains, Albany, Niagara Falls, Rochester, and New Rochelle, and that two system scans be completed in Buffalo. That determination was based on the detection rates in these areas relative to that of the historic rate encountered in New York City, which is tested 12 times per year per Commission order. In an order issued and effective July 21, 2010 (Case 10-E-0271), the Commission adopted Staff's recommendation, directing the utilities to complete the testing in 2010, and ordering that the testing requirements remain in effect unless modified by subsequent order.

On February 23, 2011, the New York State Consumer Protection Board (CPB) filed a motion recommending modification of the testing requirements, specifically for National Grid in the city of Buffalo. CPB is proposing that, based on mobile testing results from 2009 and 2010, the frequency of annual system scans in the city of Buffalo should be increased from two to six.

The Commission may accept, reject or modify the request made by CPB in its motion.

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. Brilling, 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-0271SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Underground Line Extensions

I.D. No. PSC-15-11-00016-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 proposed filing by Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 15—Electricity.

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

Subject: Underground Line Extensions.

Purpose: To update underground line extension rates and establish a statement with such rates.

Substance of proposed rule: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson) to update rates for underground extensions in new subdivisions, the trenching credit and the incremental charge for three-phase line, and to establish a new statement with such rates. The proposed filing has an effective date of July 1, 2011. The Commission may adopt in whole or in part, modify or reject Central Hudson's proposal, and may apply its decision to other utilities.

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. Brilling, 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.

(11-E-0112SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-15-11-00017-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 grant, deny or modify, in whole or part, the petition filed by 405 West 53rd Development Group, LLC to submeter electricity at 405 West 53rd Street, New York, NY.

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 405 West 53rd Development Group, LLC to submeter electricity at 405 West 53rd Street, New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 405 West 53rd Street Development Group, LLC to submeter electricity at 405 West 53rd Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: 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.

(11-E-0110SP1)

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

Remedying Erroneous LAUF Incentive Payments to the Company and Correcting Current Targets

I.D. No. PSC-15-11-00018-P

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

Proposed Action: The Commission is considering a proposal by Consolidated Edison Company of New York, Inc. to remedy miscalculations in its historical lost and unaccounted for gas calculations for September 2004 through August 2010 and the effect on current LAUF targets.

Statutory authority: Public Service Law, sections 4(1), 65 and 66(1)

Subject: Remedying erroneous LAUF incentive payments to the Company and correcting current targets.

Purpose: Consideration of a remedy for erroneous LAUF incentive payments to the Company and correcting current targets.

Substance of proposed rule: By filing dated March 21, 2011, Consolidated Edison Company of New York, Inc. (company) informed the Commission of the results of its investigation into the Company's miscalculation of its historic lost and unaccounted for (LAUF) gas and the resulting incentives the company received from such miscalculations September 2004 through August 2010. In its March 21, 2011 filing, the Company proposed a remedy to correct the previous miscalculations and incentives, as well as to correct current targets. The Commission is considering whether to grant, deny or modify, in whole or in part, approval of the Company's proposed remedy.

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-G-0643SP1)

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

Provisions for Reactive Demand

I.D. No. PSC-15-11-00019-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 proposed filing by Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 15—Electricity.

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

Subject: Provisions for Reactive Demand.

Purpose: To clarify the provisions for reactive demand applicable to customers operating on-site induction generators.

Substance of proposed rule: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson) to clarify the provisions for reactive demand applicable to customers operating on-site induction generators. The proposed filing has an effective date of July 1, 2011. The Commission may adopt in whole or in part, modify or reject Central Hudson's proposal, and may apply its decision to other utilities.

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.

(11-E-0109SP1)

State University of New York

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

Proposed Amendment to the Regulations of the Board of Trustees Relating to the Public Access to Records

I.D. No. SUN-15-11-00001-P

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

Proposed Action: This is a consensus rule making to amend Part 311 of Title 8 NYCRR.

Statutory authority: Education Law, sections 355(2)(b), (p) and 356(3)(g)

Subject: Proposed amendment to the regulations of the Board of Trustees relating to the Public Access to Records.

Purpose: Amend 8 NYCRR 311 to conform the University's regulations with changes made to Article 6 of New York Public Officers Law.

Text of proposed rule: Amendments to Part 311 of Title 8 NYCRR § 311.1 Designation of records access officer.

(a) The chancellor for [the central] system administration of the university and the chief administrative officer of each State-operated institution are responsible for insuring compliance with the regulations herein. For the purposes of [central] system administration of the university, the Senior Vice Chancellor and Secretary of the University, or designee, State University Plaza, Albany, NY 12246, FOIL@suny.edu, shall serve as records access officer. A records access officer shall be designated by the chief administrative officer of each campus. For State-

operated institutions, the name, title, business address and email address of the records access officer may be obtained from the office of the chief administrative officer of each campus.

(b) Records access officers are responsible for insuring appropriate agency response to public requests for access to records. The designation of records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so. Records access officers shall insure that personnel:

(1) maintain an up-to-date subject matter list;
 (2) assist the requester in identifying requested records, if necessary;
 (3) [upon locating the records, take one of the following actions:
 (i) make records available for inspection; or
 (ii) deny access to the records in whole or in part and explain in writing the reasons therefore] *contact persons seeking records when a request is voluminous or when locating the records involves substantial effort, so that personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of records requested;*

(4) [upon request for copies of records, make a copy available upon payment of 25 cents per page] *upon locating the records, take one of the following actions:*

(i) *make records available for inspection; or*
 (ii) *deny access to the records in whole or in part and explain in writing the reasons therefore;*

(5) [upon request, certify that a record is a true copy] *upon request for copies of records, make a copy available upon payment of established fees, if any, in accordance with Section 311.8.*

(6) [upon failure to locate records, certify that:
 (i) the university or campus is not the custodian for such records;

or
 (ii) the records of which the university or campus is a custodian cannot be found after diligent search.] *upon request, certify that a record is a true copy; and*

(7) *upon failure to locate records, certify that:*
 (i) *the university or campus is not the custodian for such records;*

or
 (ii) *the records of which the university or campus is a custodian cannot be found after diligent search.*

§ 311.2 Location.

Records shall be available for public inspection and copying at the records access office or at the location at which they are maintained.

§ 311.3 Hours for public inspection.

Requests for public access to records shall be accepted and records produced during all regular business hours.

§ 311.4 Requests for public access to records.

(a) A written request may be required, but oral requests may be accepted [when records are readily available] *in the discretion of the records access officer.*

(b) [A response shall be given, regarding any request reasonably describing the records or records sought, within five business days of receipt of the request.] *The records access officer shall accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, provided that the written requests do not seek a response in some other form.*

(c) A request shall reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.

(d) [Within five business days of the receipt of a written request for a record reasonable described, the records access officer shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied. If the records access officer determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within 20 business days from the date of the acknowledgment of the receipt of the request, the records access officer shall state, in writing, both the reason for the inability to grant the request within 20 business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.] *If agency records are maintained on the internet, the requester shall be informed that the records are accessible via the internet and in printed form either on paper or other information storage medium.*

(e) [The records access officer shall accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, provided that the written requests do not seek a response in some other form.] *A response shall be given within five business days of receipt of a request by:*

(1) *informing the requester that the request or portion of the request*

does not reasonably describe the records sought, including direction, to the extent possible, that would enable the requester to request records reasonably described;

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

(3) *acknowledging the receipt of a request in writing, 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 shall not be more than twenty business days after the date of the acknowledgment, or if it is known that circumstances prevent disclosure within twenty business days from the date of such acknowledgment, providing a statement in writing indicating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part; or*

(4) *if the receipt of request was acknowledged in writing and included an approximate date when the request would be granted in whole or in part within twenty business days of such acknowledgment, but circumstances prevent disclosure within that time, providing a statement in writing within twenty business days of such acknowledgment specifying the reason for the inability to do so and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part.*

(f) *In determining a reasonable time for granting or denying a request under the circumstances of a request, records access officers shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the campus or system administration, and similar factors that bear on the ability to grant access to records promptly and within a reasonable time.*

(g) [(f)] Failure by the records access officer to comply with the time limitations described herein shall constitute a denial of access.

§ 311.5 Subject matter list.

(a) Each records access officer shall maintain a reasonably detailed current list, by subject matter, of all records in his or her possession, whether or not records are available pursuant to subdivision 2 of section 87 of the Public Officers Law (Freedom of Information Law).

(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.

(c) The subject matter list shall be updated [not less than twice per year.] *annually.* The date of the most recent update shall appear on the first page of the subject matter list.

§ 311.6 Records containing trade secrets.

(a) Any person who submits records to the university may *at the time of submission* request that the university except such records or parts of such records from disclosure as trade secrets pursuant to sections 87(2)(d) and 89(5) of the Public Officers Law. The request for an exception shall be made in writing to the records access officer at the campus where the records have been submitted and shall state the reasons why the records should be excepted from disclosure. Such records shall be excepted from disclosure and maintained apart from all other records until 15 days after the entitlement to such exception has been finally determined *or such further time as ordered by a court of competent jurisdiction.* *Where the request for exception itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.*

(b) The records access officer shall, at any time, or upon receipt of a request for access to such records, determine whether the request for exception will be granted, continued, terminated or denied. Before [doing so] *making such determination*, the records access officer shall:

(1) notify the person who requested the exception that a determination is to be made whether such exception should be granted or continued; and

(2) permit the person who requested the exception, within [10] *ten* business days of receipt of such notification, to submit a written statement of the necessity for granting or continuing such exception.

(c) Within seven business days of receipt of such statement or *within seven business days* of the expiration of the period prescribed for submission of such statement, the records access officer shall issue a written determination granting, continuing, terminating or denying the exception and stating the reasons therefor. Copies of such determination shall be transmitted to the person, if any, requesting the records, the person who requested the exception and the Committee on Open Government.

(d) A denial of an exception from disclosure may be appealed by the person submitting the records and a denial of access to the records may be appealed by the person requesting the records. The following person shall [hear] *determine* such appeals:

Chief Operating Officer [Vice Chancellor for Governmental and University Relations], or Designee
 State University of New York

State University Plaza
Albany, NY 12246
Telephone: (518) [443-5148] 320-1400

The appeal shall be in writing and shall be made within seven business days of receipt of a denial. The appeal shall be determined within [10] ten business days of receipt of the appeal. Written notice of the determination and a statement of reasons for the determination shall be served upon the person, if any, requesting the records, the person who requested the exception and the Committee on Open Government.

(e) *A proceeding to review a denial of an exemption from disclosure or a denial of access to the records may be brought under Article 78 of the New York Civil Practice Law and Rules by the person submitting the records or the person requesting the records, within 15 days of service of the denial.*

(f) [(e)] Records or parts of records identified as trade secrets shall be maintained in a safe and secure manner and shall be charged to the custody of the head of the department or office in which the records are filed. That individual shall specify which persons subject to his or her supervision may inspect such records. The records access officer, the *Senior Vice Chancellor and Secretary of the University* [Executive Director, Central Administration Services], or designee, and the *Chief Operating Officer* [Vice Chancellor for Governmental and University Relations], or designee, shall have the right to inspect such records.

§ 311.7 Denial of access to records.

(a) This section shall not apply to records or parts of records alleged to contain trade secrets.

(b) Denial of access to records shall be in writing, stating the reason therefor and advising the requester of the right to appeal to the [individual or body established to hear appeals.] FOIL Appeals Officer, *who shall be identified by name, title, business address and business telephone number.*

(c) If requested records are not provided promptly, as required in Section 311.4 [of this Part], such failure shall also be deemed a denial of access.

(d) The following person shall [hear] *determine* appeals for denial of access to records under the Freedom of Information Law:

Chief Operating Officer [Vice Chancellor for Governmental and University Relations], or Designee
State University of New York
State University of Plaza
Albany, NY 12246
Telephone: (518) [443-5148] 320-1400

(e) *Any person denied access to records may appeal within thirty days of a denial.*

(f) [(e)] The time for deciding an appeal by the individual designated to [hear] *determine* appeals shall commence upon receipt of a written appeal identifying:

(1) [the date of the appeal] *the date and the location of the requests for records;*

(2) [the date and location of the requests for records] *a description, to the extent possible, of the records to which the requester was denied access; and*

(3) [the records to which the requester was denied access] *the name and return address of the person denied access.*

[(4) whether the denial of access was in writing or due to failure to provide records promptly as required by section 311.4(d) of this Part; and
(5) the name and return address of the requester.]

(g) *A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.*

[(f) The individual or body designated to hear appeals shall inform the requester of its decision in writing within 10 business days of receipt of an appeal.]

(h) [(g)] The person or body designated to [hear] *determine* appeals shall transmit to the Committee on Open Government copies of all appeals upon receipt of appeals. Such copies shall be addressed to:

Committee on Open Government
Department of State
One Commerce Plaza, Suite 650
99 [162] Washington Avenue
Albany, NY 12231

(i) [(h)] The person or body designated to [hear] *determine* appeals shall inform the appellant and the Committee on Open Government of its determination in writing within [seven] *ten* business days of receipt of an appeal. The determination shall be transmitted to the Committee on Open Government in the same manner as set forth in subdivision [(f)] (h) of this section.

§ 311.8 Fees.

(a) There shall be no fee charged for:

(1) inspection of records *for which no redaction is permitted;*

(2) search for, *the administrative costs of, or employee time to prepare photocopies of* records; or

(3) *review of the content of requested records to determine the extent to which records must be disclosed or may be withheld; or*

(4) [(3)] any certification pursuant to this Part.

(b) [Copies of records shall be provided upon payment of 25 cents per page.] *Fees for photocopies of records may be charged, provided that:*

(1) *the fee shall not exceed 25 cents per page for photocopies not larger than 9 by 14 inches; and*

(2) *the fee for photocopies of records in excess of 9 by 14 inches shall not exceed the actual cost of reproduction.*

(c) *Fees for other records may be charged based on the actual cost of reproduction of a record, which may include only the following:*

(1) *an amount equal to the hourly salary attributed to the lowest paid employee who has the requisite skill to prepare a copy of the requested record, but only when more than two hours of the employee's time is necessary to do so; and*

(2) *the actual cost of the storage devices or media provided to the requester in complying with the request; or*

(3) *the actual cost to engage an outside professional service to prepare a copy of a record, but only when system administration or campus is unable, due to technological limitations, to prepare a copy of the record and if such service is used to prepare the copy;*

(d) *When system administration or the campus has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, or when doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the retrieval or extraction of such record or data must be accomplished electronically. In such case, a fee may be charged in accordance with paragraph (c)(1) and (2) above.*

(e) *The requester shall be informed of the estimated cost of preparing a copy of a record if more than two hours of an employee's time is needed, or if it is necessary to retain an outside professional service to prepare a copy of the record.*

(f) *System administration or the campus may require that the fee for copying or reproducing a record be paid in advance of the preparation of such copy.*

§ 311.9 Public notice.

A notice containing the title or name and business address of the records access officer and appeals person or body and the location where records can be seen or copied shall be posted in a conspicuous location wherever records are kept.

§ 311.10 Severability.

If any provision of this Part or the application thereof to any person or circumstance is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons and circumstances.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa S. Campo, State University of New York, State University Plaza, S-325, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

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

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

Consensus Rule Making Determination

The proposed rule will amend provisions of the Policies of the Board of Trustees of State University of New York to update the regulations surrounding public access to records. No person is likely to object to the adoption of the rule as written because the proposed amendment implements the non-discretionary statutory provisions of Article 6 of New York Public Officers Law (Freedom of Information Law).

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment.

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

State University of New York University Officers

I.D. No. SUN-15-11-00002-P

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

Proposed Action: This is a consensus rule making to amend Part 328 of Title 8 NYCRR.

Statutory authority: Education Law, section 355(2)(b) and (h)

Subject: State University of New York University Officers.

Purpose: Delete references to outdated titles and descriptions; change appointment authority of Board and/or Chancellor.

Text of proposed rule: Amendments to Part 328 of Title 8 NYCRR

TITLE A—CHANCELLOR

§ 328.1 Appointment.

(a) The chancellor shall be appointed by the board of trustees and shall serve at the pleasure of the board of trustees.

(b) At any time during the period of appointment, the board of trustees may evaluate the services of the chancellor.

(c) The chancellor, upon appointment, shall be appointed to the faculty of the university in a position of academic rank with continuing appointment.

§ 328.2 Chief executive officer.

The chancellor shall be the chief executive officer of the university. The chancellor shall execute and enforce these policies and shall perform such other duties as may be assigned by the board of trustees. The chancellor shall make all appointments of employees, other than officers, to positions in the central office of the university in the classified service of the civil service of the State.

§ 328.3 Assignment of powers and duties.

The chancellor may assign to the officers, faculty and staff of the university powers, duties and responsibilities, and they shall be responsible to the chancellor and the board of trustees for the performance thereof, as well as for those powers, duties and responsibilities specifically vested in them by these policies.

§ 328.4 Committees.

The chancellor may establish and appoint such ad hoc university committees as the chancellor may deem advisable to assist in the development of specific programs and policies in the administration of the university. The chancellor shall be a member, ex officio, of all such committees.

§ 328.5 Annual report.

On or before December 1 of each year, the chancellor shall make an annual report to the board of trustees for the previous year, concerning the affairs of the university and recommendations with respect thereto.

TITLE B—SECRETARY OF THE STATE UNIVERSITY

§ 328.6 Appointment.

The secretary of the State University shall be appointed by the board of trustees and shall serve at its pleasure.

§ 328.7 Responsibilities.

The secretary of the State University shall serve as secretary of the board and its committees, shall keep records of their proceedings and shall furnish minutes of such proceedings to the members of the board and its committees, respectively. The secretary shall be the custodian of the university seal and shall maintain a complete file of all reports of the board and its committees and perform such other duties as may be assigned by the board or any of its committees. The secretary shall perform such other powers and duties and have such other responsibilities, not inconsistent with responsibilities to the board of trustees, as may be assigned by the chancellor.

TITLE C—OTHER SENIOR OFFICERS

§ 328.8 Other senior officers.

In addition to the chancellor and secretary, the senior officers of the State University shall include such other titles and officers at the level of vice chancellor or above as are recommended by the chancellor and approved and appointed by the board of trustees, all of whom shall serve at the pleasure of the board. Other than the chancellor, an individual may hold more than one senior officer title. Senior officers shall perform such duties as may be assigned from time to time by the board of trustees or the chancellor.

[TITLE C—STATE UNIVERSITY COUNSEL

§ 328.8 Appointment.

The State University counsel shall be appointed by the board of trustees upon recommendation of the chancellor and shall serve at the pleasure of the board.

§ 328.9 Responsibilities.

The State University counsel shall be the legal adviser to the university. The university counsel shall provide legal advice and opinions for the board of trustees and officers of the university on matters concerning university affairs. When requested by the board of trustees or the chancellor, the university counsel shall conduct negotiations and prepare legal documents for the university, and represent the university in legal actions.

TITLE D—EXECUTIVE VICE CHANCELLOR

§ 328.10 Appointment.

The executive vice chancellor shall be appointed by the board of trustees upon recommendation of the chancellor and shall serve at the pleasure of the board.

§ 328.11 Responsibilities.

The executive vice chancellor shall, in the absence of the chancellor, perform the duties of the chancellor, and when so acting shall have all the powers of that office. The executive vice chancellor shall perform such other duties as from time to time may be assigned by the board of trustees or the chancellor.

TITLE E—SENIOR VICE CHANCELLOR

§ 328.12 Appointment.

The senior vice chancellor shall be appointed by the board of trustees upon recommendation of the chancellor and shall serve at the pleasure of the board.

§ 328.13 Responsibilities.

The senior vice chancellor shall be responsible for the development and maintenance of the financial management system for the university and shall have such other powers and duties, including responsibilities with respect to the management of university endowment funds, as may be assigned by the board of trustees or the chancellor.]

TITLE [F] D—OTHER OFFICERS AND PROFESSIONAL STAFF

[§ 328.14] § 328.9 Designation.

There shall be other executive and administrative officers as shall be designated by the chancellor [with the consent of the board of trustees].

[§ 328.15] § 328.10 Appointment.

Vice chancellors[, associate chancellors, associate vice chancellors] and deputies to the chancellor[, or their equivalents,] shall be appointed by the board of trustees after receiving the recommendation of the chancellor; such officers shall serve at the pleasure of the board of trustees. All other executive and administrative officers shall be appointed by and serve at the pleasure of the chancellor or [his] designee.

[§ 328.16] § 328.11 Responsibilities.

Executive and administrative officers shall have such powers, duties and responsibilities as may be assigned by the board of trustees or by the chancellor.

[§ 328.17] § 328.12 Appointment of other professional staff.

Professional staff not in the negotiating unit established pursuant to article 14 of the Civil Service Law in the central administration of the university, other than executive and administrative officers, shall be appointed by and serve at the pleasure of the chancellor, or designee. Professional employees in the central administration shall be appointed by the chancellor, or designee, in accordance with the provisions of Part 335 of this Subchapter, which shall also govern the terms and conditions of service of such employees.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa S. Campo, Senior Paralegal, State University of New York, State University Plaza, 353 Broadway, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

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

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

Consensus Rule Making Determination

The proposed rule will amend provisions of the regulations of the Board of Trustees of State University of New York to (i) delete references to outdated titles and descriptions of the senior officers of the State University, (ii) confirm but make more flexible the Board's appointment authority for senior officers at the rank of Vice Chancellor or above, and (iii) delegate to the Chancellor, or designee, authority to appoint all executive officers other than Vice Chancellors and deputies to the Chancellor. No person is likely to object to the adoption of the rule as written because the proposed amendment makes technical changes and is otherwise non-controversial.

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs appointment of officers for State University of New York and will not have any adverse impact on the number of jobs or employment.

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

State University of New York Student Assembly

I.D. No. SUN-15-11-00003-P

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

Proposed Action: This is a consensus rule making to amend sections 341.4 and 341.18 of Title 8 NYCRR.

Statutory authority: Education Law, section 355(2)(b) and (h)

Subject: State University of New York Student Assembly.

Purpose: To grant representation and the ability to vote to additional graduate student governments and to update terminology used.

Text of proposed rule: Amendment to sections 341.4 and 341.18 of Part 341 of Title 8 NYCRR

341.4 Member institutions.

Each campus of the State University shall be a member institution according to the following: the graduate division [of each university center]at each of the doctoral degree granting institutions; the undergraduate division [of each university center]at each of the doctoral degree granting institutions; each of the other State-operated campuses; each community college; New York State College of Ceramics at Alfred University; and one from the four statutory colleges at Cornell University.

341.18 Executive committee.

(a) There shall be an executive committee of the student assembly to conduct necessary business between meetings of the student assembly and other matters as prescribed by this Part or the bylaws. The executive committee shall include the officers of the student assembly and the designated number of representatives from the following: [two]three representatives from the [university centers]doctoral degree granting institutions (undergraduate division); three representatives from the university colleges; [one representative from the health science centers;] two representatives from the Colleges of Technology, Agriculture and Technology, and [Specialized/]Statutory Colleges; [one]two representatives from the [university centers (]graduate division of the doctoral degree granting institutions[]]; six representatives from the community colleges and one nonvoting student representative from each standing committee. In order to serve as a member of the executive committee, an individual must be a student at a State University of New York campus and must maintain a cumulative GPA of 2.0 or higher.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa S. Campo, State University of New York, State University Plaza, S-325, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

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

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

Consensus Rule Making Determination

The proposed rule will amend the Student Assembly Articles of Organization to grant representation and the ability to vote on issues affecting SUNY to additional graduate student governments. Under existing rules, separate graduate student representation is limited to the graduate divisions of the University Centers. This amendment will also update the terminology used to identify campus sectors by referring to doctoral degree granting institutions rather than University Centers. In this way, separate graduate student representation will be provided for an additional set of campuses. No person is likely to object to the adoption of the rule as written because the proposed amendment makes technical changes and is otherwise non-controversial.

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs tuition charges for State University of New York and will not have any adverse impact on the number of jobs or employment.

**Department of Taxation and
Finance**

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

City of Yonkers Withholding Tables and Other Methods

I.D. No. TAF-15-11-00008-EP

Filing No. 303

Filing Date: 2011-03-28

Effective Date: 2011-03-28

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

Proposed Action: Repeal of Appendix 10-A and addition of new Appendix 10-A; and amendment of section 251.1 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 671(a)(1), 697(a), 1321, 1329(a) and 1332(a); Code of the City of Yonkers, sections 15-105, 15-108(a) and 15-111; City of Yonkers Local Law No. 3-2011

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

Specific reasons underlying the finding of necessity: Amendments to the Code of the City of Yonkers enacted by Local Law No. 3-2011 on February 24, 2011, under the authority of Tax Law section 1321, increased the rate of the city income tax surcharge from 10 percent of net state income tax to 15 percent of that amount, effective January 1, 2011. The increase necessitates adjustments to the withholding tables and other methods in Appendix 10-A of 20 NYCRR, and amendments to section 251.1 of 20 NYCRR. Sections 1309, 671(a), and other comparable sections of the Tax Law require that employers withhold from employee wages amounts that are substantially equivalent to the tax reasonably estimated to be due for the taxable year. To that end, the withholding rates for the remainder of tax year 2011 reflect the full amount of tax liability for tax year 2011. This rule is being adopted on an emergency basis in order to assure that the new withholding tables and other methods can apply beginning on May 1, 2011 and that the information can be disseminated to employers as soon as possible to allow them sufficient time to make the requisite changes to their payroll systems. Expedient implementation of the new withholding tables on May 1, 2011 will allow taxpayers to pay the increased income tax surcharge in as many increments as possible. The City of Yonkers has advised that it is necessary that the withholding tables be effective May 1 for its Budget to be in compliance and for the City's fiscal health.

Subject: City of Yonkers withholding tables and other methods.

Purpose: To provide current City of Yonkers withholding tables and other methods.

Substance of emergency/proposed rule (Full text is posted at the following State website:www.tax.ny.gov): Sections 671(a)(1) and section 1329(a) of the Tax Law and section 15-105 of the Code of the City of Yonkers require that employers withhold from employee wages amounts that are substantially equivalent to the amount of City of Yonkers income tax surcharge reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule repeals Appendix 10-A of Title 20 NYCRR and adds a new Appendix 10-A to provide new City of Yonkers withholding tables and other methods. The new tables and other methods reflect amendments to the Code of the City of Yonkers enacted by Local Law No. 3-2011 pursuant to Tax Law section 1321 that increased the rate of the city income tax surcharge from 10 percent of net state income tax to 15 percent of that amount, effective January 1, 2011. This rule also reflects the increase in the City of Yonkers supplemental withholding tax rate to be applied to supplemental wage payments. The rule applies to wages and other compensation subject to withholding paid on or after May 1, 2011. Accordingly, withholding rates reflect the full amount of liability for 2011 applied to an 8-month period.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire June 25, 2011.

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. Harri-

man Campus, Albany, NY 12227, (518) 457-2254, email: tax.regulations@tax.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations as are necessary to enforce the personal income tax; section 1329(a) of the Tax Law and section 15-105 of the Code of the City of Yonkers provide that the City of Yonkers income tax surcharge shall be withheld in the same manner and form as that required for State income tax; section 1332(a) of the Tax Law and section 15-108(a) of the Code of the City of Yonkers provide that the income tax surcharge shall be administered and collected by the Commissioner in the same manner as the tax imposed by Article 22 of the Tax Law. Section 1321 of the Tax Law authorizes the City of Yonkers to adopt and amend local laws imposing a city income tax surcharge to be administered, collected and distributed by the Commissioner. Local Law No. 3-2011 amended section 15-111 of the Code of the City of Yonkers to increase the city income tax surcharge from 10 to 15 percent of net state income tax.

2. Legislative objectives: New Appendix 10-A of Title 20 NYCRR contains the revised City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after May 1, 2011. The amendments reflect the increase in the City of Yonkers income tax surcharge from 10 to 15 percent of net state income tax, pursuant to amendments to section 15-111 of the code of the City of Yonkers made by Local Law No. 3-2011 of the City of Yonkers, which was enacted under the authority of Section 1321 of the Tax Law. The rule also reflects this increase in the City of Yonkers supplemental withholding rate to be applied to supplemental wage payments.

3. Needs and benefits: This rule sets forth City of Yonkers withholding tables and other methods, applicable to wages and other compensation paid on or after May 1, 2011, reflecting the increase in the City of Yonkers income tax surcharge from 10 percent of net state income tax to 15 percent of that amount. This rule benefits taxpayers by providing City of Yonkers withholding rates that reflect the current income tax rates. If this rule is not promulgated, the use of the existing withholding tables would cause some under-withholding for some taxpayers and impede the City of Yonkers' revenue.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Code of the City of Yonkers already mandate withholding in amounts that are substantially equivalent to the amount of City of Yonkers income tax surcharge on residents reasonably estimated to be due for the taxable year, and (ii) this rule merely conforms Appendix 10-A of Title 20 NYCRR to the rates of the City of Yonkers income tax surcharge on residents, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to revise the City of Yonkers income tax surcharge on residents withholding tables and other methods arises due to the statutory change in the rate of the City of Yonkers income tax surcharge, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis Bureau of Tax and Fiscal Studies, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

5. Local government mandates: Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers will be notified of the changed tables and other methods and directed to the Department's Web site for the new tables and other methods.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: Since sections 671(a) and 1329(a) of the Tax Law and section 15-105 of the Code of the City of Yonkers require that City of Yonkers withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods.

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

10. Compliance schedule: Affected employers will be receiving the required information in sufficient time to implement the revised City of Yonkers withholding tables and other methods for wages and other compensation paid on or after May 1, 2011.

Regulatory Flexibility Analysis

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, that are currently subject to the City of Yonkers withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the City of Yonkers withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised City of Yonkers withholding tables and other methods. The promulgation of this rule will not require small business or local governments to submit any new information, forms, or paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of such services.

4. Compliance costs: Small businesses and local governments are already subject to the City of Yonkers withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Section 671(a)(1) of the Tax Law requires that New York State withholding tables and other methods be promulgated. Section 1329(a) of the Tax Law requires that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local government with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations were given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of the New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. In addition, the City of Yonkers was consulted.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Every employer that is currently subject to the City of Yonkers withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. The effect on employers in rural areas is limited because the changes relate to the City of Yonkers income tax surcharge on residents withholding requirements. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms, or other paperwork.

Further, many employers currently utilize bookkeepers, accountants, and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the New York State, New York City and City of Yonkers withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these City of Yonkers changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Section 671(a)(1) of the Tax Law requires that New York State withholding tables and other methods be promulgated. Section 1329(a) of the Tax Law requires that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. The effect on employers in rural areas is limited because the changes relate to the City of Yonkers income tax surcharge on residents withholding requirements.

5. Rural area participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores.

Job Impact Statement

A Job Impact Exemption is not being submitted with this rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities. The purpose of the rule is to provide City of Yonkers withholding tables and other methods, applicable for compensation paid on or after May 1, 2011, which reflect the revision of the tax tables in keeping with the increase in the income tax surcharge from 10 to 15 percent of net state income tax pursuant to City of Yonkers Local Law No. 3-2011, enacted under the authority of section 1321 of the Tax Law. The rule also reflects the increase in the City of Yonkers supplemental withholding rates applied to supplemental wage payments.

NOTICE OF ADOPTION

Discretionary Adjustments to the Method of Allocation

I.D. No. TAF-49-10-00003-A

Filing No. 305

Filing Date: 2011-03-28

Effective Date: 2011-04-13

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

Action taken: Amendment of sections 4-6.1 and 19-8.4 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 210(8), 1096(a) and 1454(a)(6)

Subject: Discretionary adjustments to the method of allocation.

Purpose: Update the administrative procedures concerning taxpayer requests for discretionary adjustments to the method of allocation.

Text or summary was published in the December 8, 2010 issue of the Register, I.D. No. TAF-49-10-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: 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.ny.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Assistance Program to Encourage Local Governments to Reassess on a Cyclical Basis

I.D. No. TAF-02-11-00011-A

Filing No. 304

Filing Date: 2011-03-28

Effective Date: 2011-04-13

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

Action taken: Addition of Subpart 201-3 to Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 201(1), 202(1)(k), and 1573(1)(a); and L. 2010, ch. 56, parts W and Y

Subject: Assistance Program to encourage local governments to reassess on a cyclical basis.

Purpose: To provide rules to implement the statutory authorized assistance to local governments to encourage a cycle of reassessments.

Text or summary was published in the January 12, 2011 issue of the Register, I.D. No. TAF-02-11-00011-EP.

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

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax.regulations@tax.ny.gov

Assessment of Public Comment

Section 1573 of the Real Property Tax Law was amended by Chapter 56 of the Laws of 2010 to provide a new assistance program to local governments to encourage reassessments. Participation in the assistance program is purely voluntary; no local government is required to conduct a reassessment or to apply for the assistance. The rule is the administrative structure to implement the statutorily authorized assistance program.

Written comments were received regarding proposal TAF-02-11-00011-EP from Jim Tyger, the Assessor for the Town of Washington in Dutchess County, on behalf of the Dutchess County Assessor's Association and Brad Brennan, CRA, SCAA, assessor for the towns of Salina and Cicero in Onondaga County.

These comments were addressed as part of the second readoption filed with the Secretary of State on February 16, 2011, notice of the emergency adoption, including the Assessment of Public Comment, having been published in the *State Register* on March 9, 2011. (TAF-02-11-00011-E) No further comments were received.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Obsolete Forms

I.D. No. TAF-15-11-00009-P

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

Proposed Action: This is a consensus rule making to amend Parts 3, 6 and 21 of Title 20 NYCRR.

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

Subject: Obsolete Forms.

Purpose: To eliminate references to obsolete forms.

Text of proposed rule:

Section 1. Section 3-7.5 of such regulations is amended to read as follows:

A taxpayer [which] *that* claims a capital loss carry back or carry forward must submit a copy of its Federal schedule of capital gains and losses for the loss year and for any year or years to which the loss is being carried. A claim for refund based on a capital loss carry back must [also be accompanied by the documents required by section 3-8.9 of this Part] *be filed on the forms and in the manner prescribed by the commissioner.*

Section 2. Subdivisions (b), (c) and (d) of section 3-8.9 of such regulations are repealed and subdivision (a) is amended to read as follows:

[(a)] A taxpayer claiming a credit or refund of franchise tax paid under article 9-A for a year to which a net operating loss is carried back as a deduction must file [an application for credit or refund of the tax paid. The taxpayer must:

(1) file its claim on forms prescribed by the Tax Commission (see: section 6-3.3 of this Title - Forms to be used);] *an amended return for the tax year for which a credit or refund is claimed*

[(2) file its claim] within the period of limitations on credit or refund pursuant to [Subpart 8-2 of this Title] *section 1087 of the Tax Law*;

(3) submit a copy of its claim filed with Internal Revenue Service requesting refund or credit of Federal income tax;

(4) submit a copy of the document sent to the taxpayer by the Internal Revenue Service indicating approval of refund or credit of Federal income tax for the carry back year or years. If the document is not filed within 90 days of the date of its issuance, interest will not be paid after the 90th day].

Section 3. Subdivision (a) of section 6-1.3 of such regulations is amended to read as follows:

(a) General. If the amount of the taxable income of any taxpayer or of

any shareholder of any taxpayer[, which] *that* has elected to be taxed under subchapter S of chapter one of the Internal Revenue Code, as reported for Federal income tax purposes, is changed or corrected by a final determination of the Commissioner of Internal Revenue or other officer of the United States, or other competent authority, or if a renegotiation of a contract or subcontract with the United States results in a change in taxable income, the taxpayer is required to report such changed or corrected taxable income or the results of such renegotiation within 90 days, *or 120 days in the case of a taxpayer making a combined report for the taxable year affected*, after the final determination. The taxpayer must concede the accuracy of such determination or state wherein it is erroneous.

Section 4. Section 6-1.4 of such regulations is amended to read as follows:

Any taxpayer [which] *that* files an amended return with the Internal Revenue Service must, within 90 days thereafter, file an amended report with the [Tax Commission] *commissioner*.

Section 5. Subdivision (g) of section 6-3.1 of such regulations is repealed, the title, and subdivisions (a), (b), (d), and (e) are amended to read as follows:

Section 6-3.1 Form of reports. (Tax Law, Section 211(1), (2) [and], (2-a), and (3); Section 1085(n))

(a) Reports are required to be filed on *the forms and in the manner* prescribed by the Commissioner of Taxation and Finance. [All taxpayers are required to file either the long form (CT-3) or the short form (CT-4), as prescribed by the commissioner. A subchapter S corporation must submit a copy of its Federal form 1120S "U.S. Small Business Corporation Income Tax Return" with its report] *The forms and instructions are available from the department and may be downloaded from the department's website.*

(b) [A taxpayer filing its report on long form (CT-3) must submit with such report a copy of its Federal form 1120 with the following schedules:

- (1) cost of goods sold;
- (2) dividends;
- (3) capital gains and losses;
- (4) taxes;
- (5) other deductions; and
- (6) any other necessary schedules.

A corporate stockholder of a tax exempt DISC must file a copy of form CT-3B submitted by the DISC (see subdivision (c) of this section) and consolidated report form CT-3C. A change in Federal taxable income must be reported on form CT-3360. Form CT-3360 must be accompanied by a copy of the revenue agent's report and copies of all other pertinent information] *A change in Federal taxable income must be reported on an amended New York State return and must be accompanied by a copy of the Federal amended return or the Federal revenue agent's report, and copies of all other related information. For information relating to the time for filing changes in Federal taxable income, see section 6-4.2 of this Part.*

(d) A foreign corporation which is not a taxpayer, but has an employee, including any officer, within New York State, is required to file an information report [on form CT-245]. A DISC exempt from tax imposed by article 9-A is required to file an information report [on form CT-3B].

(e) Every taxpayer must submit such other reports and other information which the [Commissioner of Taxation and Finance] *commissioner* may require in the administration of article 9-A.

Section 6. Subdivision (b) of section 6-3.3 is of such regulations is repealed and the title and subdivision (a) are amended to read as follows:

Section 6-3.3 Forms [to be used].

[(a) Report forms may be obtained from the Department of Taxation and Finance, Taxpayer Assistance Bureau, Forms Control Unit, W. Averell Harriman State Office Campus, Albany, NY 12227] *The forms and instructions are available from the department and may be downloaded from the department's website.*

Section 7. Section 6-4.2 of such regulations is amended to read as follows:

Any change in Federal taxable income must be reported within 90 days, *or 120 days in the case of a taxpayer making a combined report for the taxable year affected*, after the date of final determination by the Commissioner of Internal Revenue or other officer of the United States, or other competent authority. For a description of change in Federal taxable income and final determination, see section 6-1.3 of this Title.

Section 8. Subdivision (a) of section 21-1.3 of such regulations is amended to read as follows:

(a) If the amount of the taxable income for any year of any taxpayer as reported for Federal income tax purposes is changed or corrected by a final determination of the Commissioner of Internal Revenue or other officer of the United States or other competent authority, the taxpayer is required to report to the [Tax Commission] *commissioner* such changed or

corrected taxable income within 90 days, *or 120 days in the case of a taxpayer making a combined return for the year affected*, after the final determination. The taxpayer must concede the accuracy of such determination, or state wherein it is erroneous.

Section 9. Section 21-1.4 of such regulations is amended to read as follows:

Any taxpayer [which] *that* files an amended return with the Internal Revenue Service must file an amended return within 90 days, *or 120 days in the case of a taxpayer making a combined return for the year being amended*, thereafter with the [Tax Commission] *commissioner*.

Section 10. Section 21-3.1 of such regulations is amended to read as follows:

(a) Returns are required to be filed on [forms prescribed by the Tax Commission. All taxpayers are required to file form CT-32. A taxpayer must submit with such return a copy of its actual Federal form 1120 or 1120F and all attachments. In addition, it must submit the following information:

- (1) payor and amount of each dividend;
- (2) payor and amount of each item of gross interest income described in paragraph (b)(12) of section 18-2.4 of this Title;
- (3) description and amount of each item of other income;
- (4) the amount and type of taxes paid to each jurisdiction; and
- (5) a schedule showing all computations pertaining to an IBF] *the forms and in the manner prescribed by the Commissioner of Taxation and Finance. The forms and instructions are available from the department and may be downloaded from the department's website.*

(b) [When a consolidated return is filed for Federal income tax purposes, the taxpayer must also submit with its form CT-32 a copy of the consolidating spreadsheets and supporting schedules required for Federal income tax purposes.

(c) [A change in Federal taxable income must be reported on an amended return and must be accompanied by a copy of the amended Federal return or the Federal revenue agent's report, and copies of all other related information. *For information relating to the time for filing changes in Federal taxable income, see section 21-4.2 of this Part.*

[(d)] (c) Any banking corporation [which] *that* is not a taxpayer, but [which] *that* has one or more employees or officers within New York State, is required to file an information report [on form CT-245].

[(e)] (d) Every taxpayer must submit such other returns and other information which the [Tax Commission] *commissioner* may require in the administration of article 32 of the Tax Law.

[(f)] (e) Every return must have annexed to it a certification that the statements in the return are true. The certification must be made by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer of the taxpayer authorized to act in that capacity. The fact that an individual's name is signed on the certification of the return shall be prima facie evidence that such individual is authorized to sign and to certify the return on behalf of the corporation.

[(g) Annual return forms are supplied by the Tax Commission. Copies of the prescribed forms will, upon request, be furnished by the Tax Commission. Failure to receive a blank form does not excuse failure to file the return.]

Section 11. Subdivision (b) of section 21-3.3 of such regulations is repealed and the title and subdivision (a) are amended to read as follows:

Section 21-3.3 Forms [to be used].

[(a) Return forms may be obtained from the Department of Taxation and Finance, Taxpayer Assistance Bureau, Forms Control Unit, W. Averell Harriman State Office Campus, Albany, NY 12227] *The forms and instructions are available from the department and may be downloaded from the department's website.*

Section 12. Section 21-4.2 of such regulations is amended to read as follows:

Any change in Federal taxable income must be reported within 90 days, *or 120 days in the case of a taxpayer making a combined return for the year affected*, after the date of final determination by the Commissioner of Internal Revenue or other officer of the United States, or other competent authority. For a description of change in Federal taxable income and final determination, see section 21-1.3 of this Part.

Text of proposed rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax.regulations@tax.ny.gov

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

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

Consensus Rule Making Determination

The Department of Taxation and Finance has determined that no person is likely to object to the rule as written because it merely eliminates references to obsolete forms, conforms to statutory provisions, and makes other technical and clarifying amendments. Specifically the rule eliminates references to forms CT-8, Claim for Credit or Refund of Corporation Tax Paid, CT-9, Claim for Tentative Refund Based upon Carryback of Net Operating Loss, and CT-3360, Federal Changes to Corporate Taxable Income. Use of forms CT-8 and CT-9 was discontinued effective January 1, 2009. Form CT-3360 was discontinued effective January 1, 2010. The rule conforms to a legislative change to allow a change in federal taxable income to be reported within 120 days, instead of 90 days, in the case of a taxpayer making a combined report. The amendments are not controversial in nature.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it will have no impact on jobs and employment opportunities. The purpose of the rule is to eliminate references to obsolete forms, to reflect legislative changes and to make technical and clarifying amendments.