

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Sale of Sliced Cheese at Farmers' Markets

**I.D. No.** AAM-42-11-00007-E

**Filing No.** 864

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

**Action taken:** Relettering of section 276.4(d), (e) to section 276.4(e), (f); and addition of new section 276.4(d) to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18, 214-b, 251-z-4 and 251-z-9

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

**Specific reasons underlying the finding of necessity:** The rule exempts persons who slice cheese at farmers' markets from the requirement to obtain a food processing license, as set forth in Agriculture and Markets Law Article 20-C, subject to specified food safety conditions. It is necessary to adopt the rule as an emergency measure in order to eliminate a financial and regulatory burden upon sellers of cheese in farmers' markets, benefit farmers' markets patrons who wish to purchase cheese that has not been pre-packaged, expand local food purchasing options during the farmers' market season, and spur additional and needed economic activity in the State.

**Subject:** Sale of sliced cheese at farmers' markets.

**Purpose:** To exempt persons who slice cheese at a farmers' market for sale to consumers from having to obtain a food processing license.

**Text of emergency rule:** Subdivisions (d) and (e) of section 276.4 of 1 NYCRR are relettered to be subdivisions (e) and (f), respectively.

Section 276.4 of 1 NYCRR is amended by adding thereto a new subdivision (d), to read as follows:

(d) *Slicing and packaging of cheese at farmers' markets.*

(1) *Definitions. As used this subdivision:*

(i) *person means a natural person, partnership, corporation, association, limited liability company or other legal entity that slices cheese that it has manufactured in its own milk plant.*

(ii) *farmers' market means as defined in Agriculture and Markets Law section 260(1). An open-air farmers' market is a farmers' market that does not operate in or under a permanent structure.*

(2) *Any person who slices and packages cheese for sale to consumers at a farmers' market shall be exempt from the licensing requirements of Article 20-C of the Agriculture and Markets Law, provided that:*

(i) *the premises where the cheese is sliced and packaged is maintained in a sanitary condition and in compliance with the provisions of Part 271 of this Title, except that sections 271-6.1, 271-6.6, 271-6.12 through 271-6.17, 271-6.24, 271-7.1 through 271-7.14, and 271-7.16 through 271-7.29 shall not apply to such premises located in an open-air farmers' market; and*

(ii) *no other food processing operations for which licensing under Article 20-C of the Agriculture and Markets Law is required is being conducted at the premises; and*

(iii) *the standardized name of each cheese offered for sale if the cheese meets a standard of identity, or the common or usual name of each cheese offered for sale if the cheese does not meet a standard of identity, is*

*a. affixed or in close proximity to the slice of cheese to be sold to consumers; or*

*b. affixed or in close proximity to the "wheel" of cheese from which a slice thereof is obtained, and the consumer is accurately and adequately informed as to the identity of the "wheel" of cheese from which such slice was obtained.*

(iv) *the price per pound of each cheese offered for sale is prominently displayed so as to be readily observable by consumers, and the price and weight of each slice of cheese sold or offered for sale to consumers is prominently displayed or is clearly disclosed; and*

(v) *the cheese and each slice thereof is transported, maintained, held, handled, processed, and packaged under sanitary conditions.*

**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 December 27, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Stephen D. Stich, Director, Food Safety and Inspection, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-4492, email: stephen.stich@agmkt.state.ny.us

#### **Regulatory Impact Statement**

1. **Statutory authority:**

Section 16(1) of the Agriculture and Markets Law (AML) authorizes the Commissioner of Agriculture and Markets (Commissioner) to execute and carry into effect the laws of the State and the rules of the Department of Agriculture and Markets (Department), relative to, among other things, the production, transportation, storage, marketing and distribution of food.

AML Section 18(2) authorizes the Commissioner to enact, amend and repeal necessary rules to provide for carrying into effect the provisions of this chapter and of the laws of the State with respect to food.

AML Section 18(6) authorizes the Commissioner to provide generally for the exercise of the powers and performances of the duties of the Department as prescribed in the Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules enacted as therein provided.

AML Section 214-b authorizes the Commissioner to promulgate regulations for the efficient enforcement of AML Article 17 relating to the adulteration, packing and branding of food and food products.

AML Section 251-z-4 authorizes the Commissioner to provide by regulation exemption from licensing of small food processing establishments when he finds that such exemptions would avoid unnecessary regulation and assist in the administration of Article 20-C (Licensing and Food Processing Establishments) without impairing its purposes.

AML Section 251-z-9 authorizes the Commissioner to promulgate and issue rules and regulations to implement the provisions of Article 20-C of the AML.

2. Legislative objectives:

AML Article 20-C generally requires each establishment that processes food to obtain a food processing license (license). In enacting Article 20-C, the Legislature intended to assure that foods processed for sale are safe for human consumption, and that the establishments that process food are maintained under sanitary conditions. The Legislature also provided, however, that the Commissioner of Agriculture and Markets could exempt certain small food processing establishments from having to obtain licenses if the public health would not be jeopardized and if other statutory objectives would be promoted.

The Commissioner has, on an emergency basis, adopted a rule that exempts cheese makers who slice and package cheese for sale to consumers at farmers' markets from the requirement that they obtain licenses. The Commissioner has determined that the rule would not jeopardize the public health because cheese makers would, pursuant to the rule, be required to comply with all appropriate food safety requirements set forth in 1 NYCRR Part 271. The Commissioner also determined that exempting cheese makers from the requirement to obtain food processing licenses would be consistent with the Legislature's objectives of promoting farmers' markets (AML Article 22) and promoting and developing the agricultural resources of the State (AML section 16(2), AML Article 25).

3. Needs and benefits:

The proposed rule is needed by and will benefit New York's cheese industry, farmers' markets, and New York consumers. The proposal would eliminate a regulatory burden upon cheese makers by exempting them from having to obtain licenses and having to pay the biennial license fee of \$400.00. Cheese makers will, therefore, be more likely to offer their cheese for sale at farmers' markets, which will make such cheese more accessible and could result in an increase in sales and an increase in employment opportunities in the cheese industry specifically and in the dairy industry in general.

The proposed rule would also benefit farmers' markets. Farmers' markets have become increasingly popular and cheese is one of the most popular items offered for sale at such markets. Because the proposed rule will make it more likely that cheese makers will offer their cheese for sale at such venues, the proposed rule would make it more likely that additional consumers will visit farmers' markets and spend their food dollars there.

Finally, the proposed rule would benefit consumers who want to buy non-prepackaged cheese. Many consumers prefer cheese that has been cut "fresh from the wheel," and this purchasing option will likely be more available to them.

4. Costs:

The proposed rule would impose no costs upon regulated parties, the Department, or upon state or local governments to implement and to continue to comply therewith.

5. Paperwork:

None.

6. Local government mandates:

None.

7. Duplication:

There are no laws, rules or other legal requirements that duplicate, overlap, or conflict with the rule.

8. Alternatives:

The Department considered several alternatives during the development of this proposal. The Department considered not exempting cheese makers who slice and package cheese for sale at farmers' markets from having to obtain licenses. The Department rejected this alternative because it felt that its duty to protect the public health could be met even if cheese makers were relieved of the regulatory burden of having to be licensed.

The Department also considered not requiring cheese makers to comply with specific applicable provisions of sanitary requirements for retail food stores set forth in 1 NYCRR Part 271 but, rather, requiring them to, generally, operate "under sanitary conditions". The Department rejected this alternative because it would not have given adequate notice to cheese makers as to the specific sanitation practices that they must follow, to ensure that the cheese that they slice and package for sale is safe for human consumption.

9. Federal standards:

There are no federal standards that relate or refer to the proposed rule.

10. Compliance schedule:

Since the proposed rule removes a regulatory burden upon cheese makers, there is no compliance schedule.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The proposed rule, which has been adopted on an emergency basis, exempts cheese makers who slice and package their own cheese for sale at farmers' markets (cheese makers) from the requirement that they obtain food processing licenses (licenses) as otherwise required pursuant to Agriculture and Markets Law (AML) Article 20-C.

The proposed rule will relieve a regulatory burden upon cheese makers while benefiting farmers' market patrons who wish to purchase non-prepackaged cheese. Furthermore, the proposed rule could spur additional opportunities for cheese makers, thereby benefiting the State's dairy industry as a whole.

There are approximately eighty cheese makers in the state who meet the definition of "cheese makers," set forth above. All of these cheese makers are small businesses who will be affected by the proposed rule. No local governments will be affected by the proposal.

2. Compliance requirements:

The proposed rule relieves a regulatory burden upon cheese makers; no compliance requirements have, therefore, been imposed.

3. Professional services:

None.

4. Compliance costs:

None.

5. Economic and technological feasibility:

The proposed rule allows but does not require cheese makers to slice and package cheese offered for sale at farmers' markets without having to obtain licenses. As such, the proposed rule does not require cheese makers to purchase knives or any other equipment that can be used to slice cheese.

There are no economic or technological issues that will be encountered by local governments because the proposed rule does not affect them.

6. Minimizing adverse impacts:

The Department anticipates that the proposed rule will have no adverse impact upon regulated parties.

7. Small business and local government participation:

On June 30, 2011, Department personnel conducted an outreach meeting with the President of the New York State Farmstead and Artisan Cheese Makers' Guild, an association that has, as part of its membership, a large number of the State's cheese makers. Department personnel informed the representative as to the substance of the proposal and requested input. The representative approved the intent of the proposed rule and made comments which were considered in the drafting of the proposal.

Because this proposed rule has no impact upon local governments, the Department did not conduct outreach with such entities.

**Rural Area Flexibility Analysis**

The Commissioner of Agriculture and Markets has adopted, on an emergency basis, a rule exempting cheese makers who slice and package their own cheese for sale at farmers' markets from the requirement that they obtain food processing licenses, otherwise required pursuant to Agriculture and Markets Law Article 20-C. Because this proposal does not impose an adverse impact upon rural areas and because it imposes no reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, no rural area flexibility has been prepared in connection with the proposed rule, pursuant to SAPA section 202-bb(4)(a).

**Job Impact Statement**

The proposed rule will exempt persons who slice cheese at farmers' markets for sale to consumers from having to obtain food processing licenses, pursuant to Agriculture and Markets Law Article 20-C. The rule will eliminate a regulatory burden upon persons who slice cheese for sale to consumers at farmers' markets and, furthermore, will benefit farmers' market patrons who wish to purchase cheese that has not been pre-packaged.

The proposed rule is expected to have a positive impact upon jobs and employment opportunities in the State's cheese industry and at its farmers' markets.

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Sale of Sliced Cheese at Farmers' Markets**

**I.D. No.** AAM-42-11-00024-P

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

**Proposed Action:** Amendment of section 276.4 of Title 1 NYCRR.  
**Statutory authority:** Agriculture and Markets Law, sections 16, 18, 214-b, 251-z-4 and 251-z-9

**Subject:** Sale of sliced cheese at farmers' markets.

**Purpose:** To exempt persons who slice cheese at farmers' markets for sale to consumers from having to obtain a food processing license.

**Public hearing(s) will be held at:** 11:00 a.m., December 13, 2011 at Department of Agriculture and Markets, 10B Airline Dr., Albany, NY.

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

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

**Text of proposed rule:** Subdivisions (d) and (e) of section 276.4 of 1 NYCRR are relettered to be subdivisions (e) and (f), respectively.

Section 276.4 of 1 NYCRR is amended by adding thereto a new subdivision (d), to read as follows:

(d) *Slicing and packaging of cheese at farmers' markets.*

(1) *Definitions. As used this subdivision:*

(i) *person means a natural person, partnership, corporation, association, limited liability company or other legal entity that slices cheese which it has manufactured in its own milk plant.*

(ii) *farmers' market means a premises as defined in Agriculture and Markets Law section 260(1). An open-air farmers' market is a farmers' market that does not operate in or under a permanent structure.*

(2) *Any person who slices and packages cheese for sale to consumers at a farmers' market shall be exempt from the licensing requirements of Article 20-C of the Agriculture and Markets Law, provided that:*

(i) *the premises where the cheese is sliced and packaged is maintained in a sanitary condition and in compliance with the provisions of Part 271 of this Title, except that sections 271-6.1, 271-6.6, 271-6.12 through 271-6.17, 271-6.24, 271-7.1 through 271-7.14, and 271-7.16 through 271-7.29 shall not apply to such premises located in an open-air farmers' market; and*

(ii) *no other food processing operations for which licensing under Article 20-C of the Agriculture and Markets Law is required is being conducted at the premises; and*

(iii) *the standardized name of each cheese offered for sale if the cheese meets a standard of identity, or the common or usual name of each cheese offered for sale if the cheese does not meet a standard of identity, is*

a. *affixed or in close proximity to the slice of cheese to be sold to consumers; or*

b. *affixed or in close proximity to the "wheel" of cheese from which a slice thereof is obtained, and the consumer is accurately and adequately informed as to the identity of the "wheel" of cheese from which such slice was obtained.*

(iv) *the price per pound of each cheese offered for sale is prominently displayed so as to be readily observable by consumers, and the price and weight of each slice of cheese sold or offered for sale to consumers is prominently displayed or is clearly disclosed; and*

(v) *the cheese and each slice thereof is transported, maintained, held, handled, processed, and packaged under sanitary conditions.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Stephen D. Stich, Director, Food Safety and Inspection, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-4492, email: stephen.stich@agmkt.state.ny.us

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

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

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

**Regulatory Impact Statement**

1. **Statutory authority:**

Section 16(1) of the Agriculture and Markets Law (AML) autho-

rizes the Commissioner of Agriculture and Markets (Commissioner) to execute and carry into effect the laws of the State and the rules of the Department of Agriculture and Markets (Department), relative to, among other things, the production, transportation, storage, marketing and distribution of food.

AML Section 18(2) authorizes the Commissioner to enact, amend and repeal necessary rules to provide for carrying into effect the provisions of this chapter and of the laws of the State with respect to food.

AML Section 18(6) authorizes the Commissioner to provide generally for the exercise of the powers and performances of the duties of the Department as prescribed in the Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules enacted as therein provided.

AML Section 214-b authorizes the Commissioner to promulgate regulations for the efficient enforcement of AML Article 17 relating to the adulteration, packing and branding of food and food products.

AML Section 251-z-4 authorizes the Commissioner to provide by regulation exemption from licensing of small food processing establishments when he finds that such exemptions would avoid unnecessary regulation and assist in the administration of Article 20-C (Licensing and Food Processing Establishments) without impairing its purposes.

AML Section 251-z-9 authorizes the Commissioner to promulgate and issue rules and regulations to implement the provisions of Article 20-C of the AML.

2. **Legislative objectives:**

AML Article 20-C generally requires each establishment that processes food to obtain a food processing license (license). In enacting Article 20-C, the Legislature intended to assure that foods processed for sale are safe for human consumption, and that the establishments that process food are maintained under sanitary conditions. The Legislature also provided, however, that the Commissioner of Agriculture and Markets could exempt certain small food processing establishments from having to obtain licenses if the public health would not be jeopardized and if other statutory objectives would be promoted.

The Commissioner has, on an emergency basis, adopted a rule that exempts cheese makers who slice and package cheese for sale to consumers at farmers' markets from the requirement that they obtain licenses. The Commissioner has determined that the rule would not jeopardize the public health because cheese makers would, pursuant to the rule, be required to comply with all appropriate food safety requirements set forth in 1 NYCRR Part 271. The Commissioner also determined that exempting cheese makers from the requirement to obtain food processing licenses would be consistent with the Legislature's objectives of promoting farmers' markets (AML Article 22) and promoting and developing the agricultural resources of the State (AML section 16(2), AML Article 25).

3. **Needs and benefits:**

The proposed rule is needed by and will benefit New York's cheese industry, farmers' markets, and New York consumers. The proposal would eliminate a regulatory burden upon cheese makers by exempting them from having to obtain licenses and having to pay the biennial license fee of \$400.00. Cheese makers will, therefore, be more likely to offer their cheese for sale at farmers' markets, which will make such cheese more accessible and could result in an increase in sales and an increase in employment opportunities in the cheese industry specifically and in the dairy industry in general.

The proposed rule would also benefit farmers' markets. Farmers' markets have become increasingly popular and cheese is one of the most popular items offered for sale at such markets. Because the proposed rule will make it more likely that cheese makers will offer their cheese for sale at such venues, the proposed rule would make it more likely that additional consumers will visit farmers' markets and spend their food dollars there.

Finally, the proposed rule would benefit consumers who want to buy non-prepackaged cheese. Many consumers prefer cheese that has been cut "fresh from the wheel," and this purchasing option will likely be more available to them.

## 4. Costs:

The proposed rule would impose no costs upon regulated parties, the Department, or upon state or local governments to implement and to continue to comply therewith.

## 5. Paperwork:

None.

## 6. Local government mandates:

None.

## 7. Duplication:

There are no laws, rules or other legal requirements that duplicate, overlap, or conflict with the rule.

## 8. Alternatives:

The Department considered several alternatives during the development of this proposal. The Department considered not exempting cheese makers who slice and package cheese for sale at farmers' markets from having to obtain licenses. The Department rejected this alternative because it felt that its duty to protect the public health could be met even if cheese makers were relieved of the regulatory burden of having to be licensed.

The Department also considered not requiring cheese makers to comply with specific applicable provisions of sanitary requirements for retail food stores set forth in 1 NYCRR Part 271 but, rather, requiring them to, generally, operate "under sanitary conditions". The Department rejected this alternative because it would not have given adequate notice to cheese makers as to the specific sanitation practices that they must follow, to ensure that the cheese that they slice and package for sale is safe for human consumption.

## 9. Federal standards:

There are no federal standards that relate or refer to the proposed rule.

## 10. Compliance schedule:

Since the proposed rule removes a regulatory burden upon cheese makers, there is no compliance schedule.

**Regulatory Flexibility Analysis**

## 1. Effect of rule:

The proposed rule, which has been adopted on an emergency basis, exempts cheese makers who slice and package their own cheese for sale at farmers' markets (cheese makers) from the requirement that they obtain food processing licenses (licenses) as otherwise required pursuant to Agriculture and Markets Law (AML) Article 20-C.

The proposed rule will relieve a regulatory burden upon cheese makers while benefiting farmers' market patrons who wish to purchase non-prepackaged cheese. Furthermore, the proposed rule could spur additional opportunities for cheese makers, thereby benefiting the State's dairy industry as a whole.

There are approximately eighty cheese makers in the state who meet the definition of "cheese makers," set forth above. All of these cheese makers are small businesses who will be affected by the proposed rule. No local governments will be affected by the proposal.

## 2. Compliance requirements:

The proposed rule relieves a regulatory burden upon cheese makers; no compliance requirements have, therefore, been imposed.

## 3. Professional services:

None.

## 4. Compliance costs:

None.

## 5. Economic and technological feasibility:

The proposed rule allows but does not require cheese makers to slice and package cheese offered for sale at farmers' markets without having to obtain licenses. As such, the proposed rule does not require cheese makers to purchase knives or any other equipment that can be used to slice cheese.

There are no economic or technological issues that will be encountered by local governments because the proposed rule does not affect them.

## 6. Minimizing adverse impacts:

The Department anticipates that the proposed rule will have no adverse impact upon regulated parties.

## 7. Small business and local government participation:

On June 30, 2011, Department personnel conducted an outreach meeting with the President of the New York State Farmstead and Artisan Cheese Makers' Guild, an association that has, as part of its membership, a large number of the State's cheese makers. Department personnel informed the representative as to the substance of the proposal and requested input. The representative approved the intent of the proposed rule and made comments which were considered in the drafting of the proposal.

Because this proposed rule has no impact upon local governments, the Department did not conduct outreach with such entities.

**Rural Area Flexibility Analysis**

The Commissioner of Agriculture and Markets has adopted, on an emergency basis, a rule exempting cheese makers who slice and package their own cheese for sale at farmers' markets from the requirement that they obtain food processing licenses, otherwise required pursuant to Agriculture and Markets Law Article 20-C. Because this proposal does not impose an adverse impact upon rural areas and because it imposes no reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, no rural area flexibility has been prepared in connection with the proposed rule, pursuant to SAPA section 202-bb(4)(a).

**Job Impact Statement**

The proposed rule would exempt persons who slice cheese at farmers' markets for sale to consumers from having to obtain food processing licenses, pursuant to Agriculture and Markets Law Article 20-C. The proposed rule would eliminate a regulatory burden upon persons who slice cheese for sale to consumers at farmers' markets and, furthermore, would benefit farmers' markets patrons who wish to purchase cheese that has not been pre-packaged.

The proposed rule is expected to have a positive impact upon jobs and employment opportunities in the State's cheese industry and at its farmers' markets.

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## Department of Civil Service

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### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-47-10-00005-A

**Filing No.** 941

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

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

**Text or summary was published** in the November 24, 2010 issue of the Register, I.D. No. CVS-47-10-00005-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-51-10-00002-A**Filing No.** 937**Filing Date:** 2011-10-04**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** To classify a position in the exempt class.**Text or summary was published in** the December 22, 2010 issue of the Register, I.D. No. CVS-51-10-00002-P.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-51-10-00003-A**Filing No.** 935**Filing Date:** 2011-10-04**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** To add a subheading and classify positions in the non-competitive class.**Text or summary was published in** the December 22, 2010 issue of the Register, I.D. No. CVS-51-10-00003-P.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-51-10-00004-A**Filing No.** 936**Filing Date:** 2011-10-04**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** Substitute a subheading and classify and delete positions in the exempt and non-competitive classes.**Text or summary was published in** the December 22, 2010 issue of the Register, I.D. No. CVS-51-10-00004-P.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-03-11-00001-A**Filing No.** 938**Filing Date:** 2011-10-04**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** To delete a position from the exempt class.**Text or summary was published in** the January 19, 2011 issue of the Register, I.D. No. CVS-03-11-00001-P.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-03-11-00002-A**Filing No.** 934**Filing Date:** 2011-10-04**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** To classify positions in the non-competitive class.**Text or summary was published in** the January 19, 2011 issue of the Register, I.D. No. CVS-03-11-00002-P.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-03-11-00004-A**Filing No.** 939**Filing Date:** 2011-10-04**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** To delete a position from and classify a position in the non-competitive class.**Text or summary was published in** the January 19, 2011 issue of the Register, I.D. No. CVS-03-11-00004-P.**Final rule as compared with last published rule:** No changes.**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Jurisdictional Classification**

**I.D. No.** CVS-07-11-00010-A

**Filing No.** 940

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text or summary was published** in the February 16, 2011 issue of the Register, I.D. No. CVS-07-11-00010-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Jurisdictional Classification**

**I.D. No.** CVS-12-11-00013-A

**Filing No.** 942

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text or summary was published** in the March 23, 2011 issue of the Register, I.D. No. CVS-12-11-00013-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Jurisdictional Classification**

**I.D. No.** CVS-12-11-00014-A

**Filing No.** 944

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from the non-competitive class.

**Text or summary was published** in the March 23, 2011 issue of the Register, I.D. No. CVS-12-11-00014-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Jurisdictional Classification**

**I.D. No.** CVS-12-11-00015-A

**Filing No.** 943

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from the non-competitive class.

**Text or summary was published** in the March 23, 2011 issue of the Register, I.D. No. CVS-12-11-00015-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Jurisdictional Classification**

**I.D. No.** CVS-12-11-00016-A

**Filing No.** 945

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

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

**Text or summary was published** in the March 23, 2011 issue of the Register, I.D. No. CVS-12-11-00016-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION****Jurisdictional Classification**

**I.D. No.** CVS-12-11-00017-A

**Filing No.** 946

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class.

**Text or summary was published** in the March 23, 2011 issue of the Register, I.D. No. CVS-12-11-00017-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

## Education Department

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

#### Random Selection Process for Charter School Student Admissions

**I.D. No.** EDU-42-11-00016-P

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

**Proposed Action:** Addition of section 119.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 206(not subdivided), 207(not subdivided), 305(1), (2), (20) and 2854(2); and L. 2010, ch. 101

**Subject:** Random selection process for Charter School student admissions.

**Purpose:** To establish procedures for the random selection process required under Education Law 2854(2).

**Text of proposed rule:** Section 119.5 of the Regulations of the Commissioner of Education is added, effective January 4, 2012, as follows:

§ 119.5 *Random Selection Process for Charter School Student Applicants.* If the number of timely submitted applications of eligible students for admission to a charter school exceeds the capacity of the grade level of a charter school (or building if the school does not distinguish between grades), students shall be accepted for admission from among such applicants by a random selection process (lottery) pursuant to the requirements of this section.

(a) *Preferences.* (1) Notwithstanding the provisions of this section, a charter school shall provide an enrollment preference to:

(i) pupils returning to the charter school in the second or any subsequent year of operation;

(ii) pupils residing in the school district in which the charter school is located, or in the case of the City School District of the City of New York, pupils residing in the community school district in which the charter school is located; and

(iii) siblings of pupils already enrolled in the charter school.

(2) *Establishment of specific school design.* Consistent with the school design described in the school's charter, a charter school may also establish a single-sex charter school and/or establish enrollment preferences for students at-risk of academic failure, students with disabilities and English language learners.

(b) *Notice.* The charter school shall provide public notice of the date, time and place of the lottery, consistent with Public Officers Law section 104.

(c) *Procedures for conducting lottery.*

(1) The person(s) conducting the selection of lottery applicants or acting as an impartial observer of the selection of lottery applicants shall not be a board member or employee of the school, or a parent, person in parental relationship, grandparent, sibling, aunt, uncle or first cousin of any applicant to the school or of any pupil enrolled in the school.

(2) The lottery shall be held in a space that is open and accessible to the public and capable of accommodating the anticipated number of attendees. If anticipated attendance exceeds capacity, separate grade level lotteries may be held in separate locations provided that each lottery is publicized in a manner consistent with the requirements of Public Officers Law section 104. Nothing herein shall be construed to require or exclude attendance at the lottery by parents, persons in parental relationships, guardians and/or students participating in the admissions process.

(3) A charter school may structure the actual lottery process in any manner consistent with its approved admissions policy.

(4) The random process used in the lottery may be generated by any traditional lottery ball system, technology-based software, paper ticket process or other methodology which generates random results.

(d) *Records.* The charter school shall document the lottery process, and make such records available to the Department and/or the charter authorizing entity upon request. Records shall be sufficiently detailed to enable the reviewer to identify the process used, compare the process used

to the lottery procedures contained in the charter school's charter, and determine that the procedures used were consistent with those set forth in the charter.

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

**Data, views or arguments may be submitted to:** Kenneth Slentz, Deputy Comm. P-12 Education, State Education Department, Office of P-12 Education, State Education Building, Room 125, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

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

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

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

Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010, provides that if the number of timely submitted applications of eligible students for admission to a charter school exceeds the capacity of the grade level or building of a charter school, students shall be accepted for admission from among such applicants by a random selection process, and directs the Commissioner to establish regulations to require that the random selection process be performed in a transparent and equitable manner and to require that the time and place of the random selection process be publicized consistent with Public Officers Law section 104.

##### 2. LEGISLATIVE OBJECTIVES:

Consistent with the statutory authority set forth above, the proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010.

##### 3. NEEDS AND BENEFITS:

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010, and to ensure that the process is performed in a transparent and equitable manner, consistent with the requirements of the statute.

##### 4. COSTS:

(a) Costs to State government: none.

(b) Costs to local government: The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010, and generally will not impose any additional costs on local governments beyond those inherent in the statute. There may be some costs associated with a charter school maintaining records to document the lottery process. It is anticipated that these costs will be minimal and capable of being absorbed using existing staff and resources.

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

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

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the

Laws of 2010, and will not impose any additional costs on the State or State Education Department beyond those inherent in the statute.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. Consistent with Education Law section 2854(2), the proposed rule:

1. requires charter schools to provide an enrollment preference to: (i) pupils returning to the charter school in the second or any subsequent year of operation; (ii) pupils residing in the school district in which the charter school is located or, in the case of the City School District of the City of New York, pupils residing in the community school district in which the charter school is located; and/or (iii) siblings of pupils already enrolled in the charter school. A charter school may also establish a single-sex charter school and/or establish enrollment preferences for students at-risk of academic failure, students with disabilities and English language learners;

2. requires charter schools to provide public notice of the date, time and place of the lottery, consistent with Public Officers Law section 104;

3. requires that:

- person(s) conducting the selection of lottery applicants or acting as an impartial observer of such selection shall not be a board member or employee of the school, or a parent, person in parental relationship, grandparent, sibling, aunt, uncle or first cousin of any applicant to the school or of any pupil enrolled in the school;

- the lottery be held in a space that is open and accessible to the public and capable of accommodating the anticipated number of attendees. If anticipated attendance exceeds capacity, separate grade level lotteries may be held in separate locations provided that each lottery is publicized in a manner consistent with the requirements of Public Officers Law section 104;

4. permits a charter school to structure the actual lottery process in any manner consistent with its approved admissions policy; and

5. permits the random process used in the lottery to be generated by any traditional lottery ball system, technology-based software, paper ticket process or other methodology which generates random results.

#### 6. PAPERWORK:

Charter schools must document the lottery process, and make such records available to the Department and/or the charter authorizing entity upon request. Records shall be sufficiently detailed to enable the reviewer to identify the process used, compare the process used to the lottery procedures contained in the charter school's charter, and determine that the procedures used were consistent with those set forth in the charter.

#### 7. DUPLICATION:

The proposed rule does not duplicate any existing State or Federal requirements, and is necessary to establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010.

#### 8. ALTERNATIVES:

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. Consideration was given to prescribing more specific criteria for the lottery selection process, including requiring: (i) a specific date by which the lottery must be held, (ii) certification from the person conducting the lottery that the student selection process was authentic, random and fair; (iii) specified notice to parents of students selected in the lottery; (iv) establishment of a waitlist for students who were not selected; (v) that the charter school admissions policy include specified criteria concerning the process by which mid-year vacancies will be filled. It was subsequently decided that such criteria are best left to each charter school to determine in accordance with its approved admissions policy.

#### 9. FEDERAL STANDARDS:

There are no applicable Federal standards.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed rule by its effective date.

### **Regulatory Flexibility Analysis**

#### Small Businesses:

The proposed rule applies to charter schools, and will establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. The proposed rule does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

#### Local Governments:

#### EFFECT OF RULE:

The proposed rule applies to all charter schools in the State. There are currently 217 approved charter schools.

#### COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. Consistent with Education Law section 2854(2), the proposed rule:

1. requires charter schools to provide an enrollment preference to: (i) pupils returning to the charter school in the second or any subsequent year of operation; (ii) pupils residing in the school district in which the charter school is located or, in the case of the City School District of the City of New York, pupils residing in the community school district in which the charter school is located; and/or (iii) siblings of pupils already enrolled in the charter school. A charter school may also establish a single-sex charter school and/or establish enrollment preferences for students at-risk of academic failure, students with disabilities and English language learners;

2. requires charter schools to provide public notice of the date, time and place of the lottery, consistent with Public Officers Law section 104;

3. requires that:

- person(s) conducting the selection of lottery applicants or acting as an impartial observer of such selection shall not be a board member or employee of the school, or a parent, person in parental relationship, grandparent, sibling, aunt, uncle or first cousin of any applicant to the school or of any pupil enrolled in the school;

- the lottery be held in a space that is open and accessible to the public and capable of accommodating the anticipated number of attendees. If anticipated attendance exceeds capacity, separate grade level lotteries may be held in separate locations provided that each lottery is publicized in a manner consistent with the requirements of Public Officers Law section 104;

4. permits a charter school to structure the actual lottery process in any manner consistent with its approved admissions policy;

5. permits the random process used in the lottery to be generated by any traditional lottery ball system, technology-based software, paper ticket process or other methodology which generates random results; and

6. requires charter schools to document the lottery process, and make such records available to the Department and/or the charter authorizing entity upon request. Records shall be sufficiently detailed to enable the reviewer to identify the process used, compare the process used to the lottery procedures contained in the charter school's charter, and determine that the procedures used were consistent with those set forth in the charter.

#### PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on charter schools.

#### COMPLIANCE COSTS:

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010, and will not impose any additional costs on charter schools beyond those inherent in the statute. There may be some costs associated with a charter school maintaining records to document the lottery process. It is anticipated that these costs will be minimal and capable of being absorbed using existing staff and resources.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any additional technological requirements on school districts or charter schools. Economic feasibility is addressed under compliance costs above.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt charter schools from coverage by the rule. The proposed rule has been carefully drafted to meet statutory requirements while minimizing the impact on charter schools.

Consideration was given to prescribing more specific criteria for the lottery selection process, including requiring: (i) a specific date by which the lottery must be held, (ii) certification from the person conducting the lottery that the student selection process was authentic, random and fair; (iii) specified notice to parents of students selected in the lottery; (iv) establishment of a waitlist for students who were not selected; (v) that the charter school admissions policy include specified criteria concerning the process by which mid-year vacancies will be filled. It was subsequently decided that such criteria are best left to each charter school to determine in accordance with its approved admissions policy.

**LOCAL GOVERNMENT PARTICIPATION:**

Copies of the proposed rule were provided to other charter school authorizers (the Board of Trustees of the State University of New York and the Chancellor of the NYC School District) and charter school organizations and their comments were considered in the development of the proposed rule. In addition, prior to developing the proposed rule, the issue was discussed with representatives of many individual charter schools and their comments were also considered.

**Rural Area Flexibility Analysis**

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

The proposed amendment applies to all 217 approved charter schools within the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At present, there is one charter school in a rural area.

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

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. Consistent with Education Law section 2854(2), the proposed rule:

1. requires charter schools to provide an enrollment preference to: (i) pupils returning to the charter school in the second or any subsequent year of operation; (ii) pupils residing in the school district in which the charter school is located or, in the case of the City School District of the City of New York, pupils residing in the community school district in which the charter school is located; and/or (iii) siblings of pupils already enrolled in the charter school. A charter school may also establish a single-sex charter school and/or establish enrollment preferences for students at-risk of academic failure, students with disabilities and English language learners;
2. requires charter schools to provide public notice of the date, time and place of the lottery, consistent with Public Officers Law section 104;
3. requires that:
  - person(s) conducting the selection of lottery applicants or acting as an impartial observer of such selection shall not be a board member or employee of the school, or a parent, person in parental relationship, grandparent, sibling, aunt, uncle or first cousin of any applicant to the school or of any pupil enrolled in the school;
  - the lottery be held in a space that is open and accessible to the public and capable of accommodating the anticipated number of attendees. If anticipated attendance exceeds capacity, separate grade level lotteries may be held in separate locations provided that each lottery is publicized in a manner consistent with the requirements of Public Officers Law section 104;
4. permits a charter school to structure the actual lottery process in any manner consistent with its approved admissions policy;
5. permits the random process used in the lottery to be generated by any traditional lottery ball system, technology-based software, paper ticket process or other methodology which generates random results; and
6. requires charter schools to document the lottery process, and make such records available to the Department and/or the charter authorizing entity upon request. Records shall be sufficiently detailed to enable the reviewer to identify the process used, compare the process used to the lottery procedures contained in the charter school's charter, and determine that the procedures used were consistent with those set forth in the charter.

The proposed rule does not impose any additional professional services requirements on charter schools.

**COSTS:**

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010, and will not impose any additional costs on charter schools in rural areas beyond those inherent in the statute. There may be some costs associated with a charter school maintaining records to document the lottery process. It is anticipated that these costs will be minimal and capable of being absorbed using existing staff and resources.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt charter schools in rural areas from coverage by the rule, or impose a lesser standard on such schools. The proposed rule has been carefully drafted to meet statutory requirements while minimizing the impact on charter schools.

Consideration was given to prescribing more specific criteria for the lottery selection process, including requiring: (i) a specific date by which the lottery must be held, (ii) certification from the person conducting the

lottery that the student selection process was authentic, random and fair; (iii) specified notice to parents of students selected in the lottery; (iv) establishment of a waitlist for students who were not selected; (v) that the charter school admissions policy include specified criteria concerning the process by which mid-year vacancies will be filled. It was subsequently decided that such criteria are best left to each charter school to determine in accordance with its approved admissions policy.

**RURAL AREA PARTICIPATION:**

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee. In addition, copies of the proposed rule were provided to other charter school authorizers (the Board of Trustees of the State University of New York and the Chancellor of the NYC School District) and charter school organizations and their comments were considered in the development of the proposed rule. In addition, prior to developing the proposed rule, the issue was discussed with representatives of many individual charter schools and their comments were also considered.

**Job Impact Statement**

The proposed rule applies to charter schools, and will establish procedures for the conduct of the random selection process for charter school admissions, as required under Education Law section 2854(2), as amended by Chapter 101 of the Laws of 2010. The proposed rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

**Mandatory Continuing Education for Veterinarians and Veterinary Technicians**

**I.D. No.** EDU-42-11-00025-P

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

**Proposed Action:** Addition of section 62.8 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 6504, 6506, 6507(2)(a), 6704-a and 6711-b; and L. 2010, ch. 328

**Subject:** Mandatory continuing education for veterinarians and veterinary technicians.

**Purpose:** To implement statutory authority requiring continuing education for licensed veterinarians and veterinary technicians.

**Substance of proposed rule (Full text is posted at the following State website: [www.op.nysed.gov](http://www.op.nysed.gov)):** Continuing education for the practice of veterinary medicine

A new section 62.8 is added to the Regulations of the Commissioner of Education to implement continuing education requirements to practice as a licensed veterinarian and to practice as a veterinary technician, as prescribed pursuant to Education Law §§ 6704-a and 6711-b, which were recently enacted pursuant to Chapter 328 of the Laws of 2010. Under new section 62.8 of the Commissioner's regulations, a licensed veterinarian in this State would be required to complete 45 hours of continuing education per each triennial registration period, excluding the initial registration period, a maximum of 22 and one-half of which may be self-instruction, and a licensed veterinary technician in this State would be required to complete 24 hours of such education for each triennial registration period, excluding the initial, a maximum of 12 of which may be self-instruction. The proposed rule would provide that a licensee of either profession would be authorized to complete self-instructional study to meet these continuing education requirements.

The proposed rule would describe acceptable formal continuing education and would identify types of learning activities that would be acceptable as continuing education. The proposed rule would also set forth requirements for approval as a sponsor of such continuing education. The proposed rule would also provide limited grounds for a licensee's exemption to these requirements and would provide for a conditional registration, in which a licensee may complete the requirements. Additionally, the rule would provide for the pro-rata of the continuing education requirements for individuals whose next registration date will occur after January 1, 2011 but less than three years from such date.

New section 62.8 of the Commissioner's regulations would also provide that veterinarians and veterinary technicians must maintain adequate documentation verifying that they have met these continuing education requirements. This proposed rule would also require each licensed veteri-

narian and veterinary technician to pay a continuing education fee of \$45.00 in addition to the triennial registration fee. A fee would also be established for entities seeking approval as a sponsor of such continuing education.

Full text is posted at the following State website: [www.op.nysed.gov](http://www.op.nysed.gov)

**Text of proposed rule and any required statements and analyses may be obtained from:** Chris Moore, State Education Department, Office of Counsel, State Education Bldg., Room 148, 89 Washington Avenue; Albany, New York 12234, (518) 474-3862, email: [legal@mail.nysed.gov](mailto:legal@mail.nysed.gov)

**Data, views or arguments may be submitted to:** Seth Rockmuller, Esq., State Education Department, Office of Professions, State Education Building, 2M, 89 Washington Ave., Albany, New York 12234, (518) 474-1941, email: [opdepcom@mail.nysed.gov](mailto:opdepcom@mail.nysed.gov)

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

### Regulatory Impact Statement

#### 1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule-making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and the practice of the professions.

Section 6506 of the Education Law authorizes the Board of Regents to supervise the admission to and practice of the profession and in doing so, to promulgate rules including those establishing educational qualifications required for licensing.

Section 6704-a of the Education Law imposes mandatory continuing education requirements on licensed veterinarians in the State and authorizes the State Education Department to implement these statutory requirements, including setting standards of acceptable continuing education, approving sponsors of veterinary continuing education, and enforcing compliance with these mandated continuing education requirements. Education Law § 6704-a also authorizes the Department to establish the mandatory continuing education fee for veterinarians and to issue a conditional registration to a licensee who fails to meet the continuing education requirements and to establish the duration for such registration period.

Section 6711-b of the Education Law imposes mandatory continuing education requirements on licensed veterinary technicians in the State and authorizes the Department to implement these statutory requirements, including setting standards of acceptable continuing education, approving sponsors of veterinary continuing education, and enforcing compliance with these mandated continuing education requirements. Education Law § 6711-b also authorizes the Department to establish the mandatory continuing education fee for veterinarians and to issue a conditional registration to a licensee who fails to meet the continuing education requirements and to establish the duration for such registration period.

Chapter 328 of the Laws of 2010 added sections 6704-a and 6711-b to the Education Law, effective January 1, 2011.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the intent of the aforementioned statutes by establishing standards and procedures for acceptable formal continuing education requirements in the profession of veterinary medicine.

#### 3. NEEDS AND BENEFITS:

The proposed rule implements sections 6704-a and 6711-b of the Education Law, recently enacted by Chapter 328 of the Laws of 2010, which established mandatory continuing education requirements for veterinarians and veterinary technicians licensed in this State. The proposed rule is necessary to implement these statutorily mandated continuing education requirements.

In accordance with this statutory authority, this rule requires that within each three-year registration period, excluding the initial registration period, a licensed veterinarian must complete 45 hours of formal continuing education, 22 and one-half of which may be self-instruction, and a licensed veterinary technician must complete 24 hours of such education, 12 of which may be self-instruction. The proposed rule would identify acceptable coursework and activities through which a licensee may meet the mandatory continuing education requirements. Acceptable coursework would include self-instructional coursework provided by a sponsor approved by the Department. During each triennial registration period, at least two hours of the required continuing education credits would be required to focus on the use, misuse, documentation, safeguarding and prescribing of controlled substances.

The proposed rule would also include provisions relating to the applicability of the continuing education requirements, including the grounds for granting an exemption to the requirements, such as the veterinarian's

full-time engagement as a teacher of veterinary medicine at a veterinary education program registered by the Department, the grounds for an adjustment, such as poor health certified by a physician, and the requirements to obtain a conditional registration for up to one year to enable a licensee who was unable to complete the requirements to complete them within one year from the date of issuance of such registration. This rule would also provide the requirements for approval of sponsors of the continuing education by the Department.

#### 4. COSTS:

(a) Costs to State Government: The amendment will impose the cost of reviewing and approving sponsors of continuing education, the cost of auditing the applications for the renewal of registration for licensees and the cost of implementing and administering this process. Additionally, the rule will impose costs on the Department to investigate and enforce, including prosecute, the willful refusal of a licensee to comply with the requirements or to practice unlawfully. Some of this cost will be offset by the additional continuing education fee of \$45 paid by a licensee upon each triennial registration period and by the application fee paid by an entity seeking approval as a sponsor of the continuing education. It is anticipated that existing staff and resources will be utilized to complete these tasks.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None. The proposed rule will not impose any additional cost on private regulated parties beyond those inherent in the statute.

(d) Cost to the regulatory agency: As stated above in Costs to State Government, the proposed rule will impose costs on the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any program, service, duty or responsibility upon local governments.

#### 6. PAPERWORK:

Each licensee would be required to maintain, or ensure access by the Department to, a record of completed continuing education, which includes: the title of the course if a course, the type of educational activity if an educational activity, the subject of the continuing education, the number of hours of continuing education completed, the sponsor's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, a copy of any article or book for which continuing education credit is claimed with proof of publication, and the date and location of the continuing education. Such records must be retained for at least six years from the date of completion of the continuing education and must be made available for review by the Department in the administration of the requirements of this section.

Continuing education sponsors would also be required to maintain records for at least six years from the date of completion of coursework. Those records would include the name and curriculum vitae of the faculty, a record of attendance of licensees in the course, if a course, a record of participation of licensees in the self-instructional coursework, if self-instructional coursework, an outline of the course, date and location of the course, and the number of hours for completion of the course. In the event an approved sponsor discontinues operation, the governing body of such sponsor would be required to notify the department and to transfer all records as directed by the Department.

#### 7. DUPLICATION:

The proposed rule does not duplicate other existing State or Federal requirements.

#### 8. ALTERNATIVES:

There are no viable alternatives to the proposed rule, and none were considered.

#### 9. FEDERAL STANDARDS:

There are no Federal standards in the subject matter of the proposed rule.

#### 10. COMPLIANCE SCHEDULE:

The proposed rule must be complied with by its effective date. No additional period of time is necessary to enable regulated parties to comply.

#### Regulatory Flexibility Analysis

The proposed rule sets forth the mandatory continuing education requirements applicable to individuals engaged in the practice of veterinary medicine.

The proposed rule does not regulate small businesses or local governments. They establish requirements applicable to individuals who are licensed professionals.

Because it is evident from the nature of the proposed rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

#### Rural Area Flexibility Analysis

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule will apply to the 44 rural counties with fewer than

200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. All licensed veterinarians and veterinary technicians who are registered to practice in New York State will be subject to the requirements of the proposed rule. Of these individuals, 2,898 licensees have reported that their permanent address of record is in a rural county.

#### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed rule will implement two recently enacted statutes requiring licensed veterinarians to complete 45 hours of formal continuing education and licensed veterinary technicians to complete 24 hours of such education, during each triennial registration period, excluding the initial registration period. This rule identifies the subject matter of the course content and the types of learning activities and other educational activities that will meet the formal continuing education requirements.

The proposed rule provides means for residents located in all counties of the State to complete the continuing education requirements. The rule provides for licensees to complete self-instructional study, including audio, online and other distance learning formats. Veterinarians are authorized to take up to 22 and one-half hours of self-instruction and veterinary technicians are authorized to take up to 12. The proposed rule also provides the opportunity for approved sponsors to offer such activities in a wide range of settings, including workshops, conferences, and colleges.

The proposed rule does not impose a need for professional services but does impose certain minimal recordkeeping requirements on individual licensees and sponsors of the continuing education. Specifically, each licensee would be required to maintain, or ensure access by the Department to, a record of completed continuing education, which would be required to include: the title of the course if a course, the type of educational activity if an educational activity, the subject of the continuing education, the number of hours of continuing education completed, the sponsor's name and any identifying number (if applicable), attendance verification if a course, participation verification if another educational activity, a copy of any article or book for which continuing education credit is claimed with proof of publication, and the date and location of the continuing education. A licensee would be required to retain his or her records for at least six years from the date of completion of the continuing education and must make such records available for review by the Department.

Continuing education sponsors would also be required to maintain records for at least six years from the date of completion of coursework. These records would be required to include the name and curriculum vitae of the faculty, a record of attendance of licensees, a record of participation of licensees in the self-instructional coursework, if self-instructional coursework, an outline of the course, date and location of the course, and the number of hours for completion of the course.

#### 3. COSTS:

Beyond the costs inherent in the statute, the proposed regulations do not impose additional costs on licensees or continuing education sponsors, including those located in rural areas of New York State.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed rule implements sections 6704-a and 6711-b of the Education Law, which establish mandatory continuing education requirements for veterinarians and veterinary technicians. The proposed rule is necessary to implement these statutorily mandated continuing education requirements. The proposed rule will provide broad flexibility in the types of activities in which such professionals may engage in order to satisfy their continuing education requirements. Because the proposed rule establishes requirements designed to ensure the competent practice of veterinary medicine in New York State, the Department has determined that these requirements should apply to all licensed veterinarians and veterinary technicians regardless of their geographic location. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

#### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from statewide organizations representing all parties having an interest in the practice of veterinary medicine. Included in this group were the State Board for Veterinary Medicine and professional associations representing the profession of veterinary medicine. These groups have members who live or work in rural areas.

#### **Job Impact Statement**

The proposed rule sets forth the mandatory continuing education requirements applicable to individuals engaged in the practice of veterinary medicine. It establishes continuing education standards in accordance with statutory directives, specifying acceptable continuing education that would meet the statutorily prescribed mandatory continuing education requirements. The proposed amendments will have no effect on the number of jobs and employment opportunities in these professions or any other field.

Because it is evident from the nature of the proposed rule that it will

have no impact on jobs and employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### **Mechanically Propelled Vessel Use Restrictions on Thirteenth Lake**

**I.D. No.** ENV-20-11-00003-A

**Filing No.** 933

**Filing Date:** 2011-10-04

**Effective Date:** 2012-01-01

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

**Action taken:** Amendment of section 196.5 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (2)(m) and 9-0105(1); Executive Law, section 816(3); and New York State Constitution, art. XIV, section 1

**Subject:** Mechanically propelled vessel use restrictions on Thirteenth Lake.

**Purpose:** To prohibit the use of mechanically propelled vessels, other than electric powered vessels on Thirteenth Lake.

**Text or summary was published** in the May 18, 2011 issue of the Register, I.D. No. ENV-20-11-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Peter Frank, Bureau Chief, Forest Preserve Management, NYS DEC, 625 Broadway, Albany, New York 12233, (518) 473-9518, email: pjfran@gw.dec.state.ny.us

**Additional matter required by statute:** This regulatory action is included in the Siamese Ponds Wilderness UMP/EIS completed in May 2005 which is in compliance with Article 8 of the Environmental Conservation Law.

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

**Comment:** Several comments were received about a regulation not being needed because the area is gated, limiting it to only small boats and motors that can be carried in.

**Response:** Limiting access to the largest boat and motor that people can carry is not good management. People could use carts or other means to haul in large boats and motors. It is better to set the limit based on what is appropriate for the area.

**Comment:** Several comments said that the orientation of Thirteenth Lake can make it a difficult lake to cross without a gas powered motor when the weather turns bad. Several letters gave examples of personal experiences on the lake during windy conditions with white caps and strong head winds. These people felt that a gas motor was needed for safety.

**Response:** Whenever boaters go on the water they should check the weather reports before leaving and keep watching the weather for changing conditions. Part of being a sportsman/outdoorsman is reading the weather and being prepared for changing conditions.

**Comment:** Comments were received both stating that gas motors did affect air and water quality and that they did not affect air and water quality.

**Response:** Newer, properly maintained 4 stroke boat motors are more efficient and pollute less than older 2 stroke motors. However, whenever gasoline is used near water there is the potential risk of spillage or leaking of fuel into the water.

**Comments:** Compared to electric motors, gas powered motors do not have an increased negative impact on loons. Electric motors create more of a wake than gas motors.

**Response:** There are many factors that determine the size of the wake produced by a boat including size and shape of the hull, and

speed. Gas motors have the ability to power larger boats and travel faster producing a larger wake. Even a small increase in wake size has an increased impact on shorelines and nesting shore birds including loons. Outboard motors also increase turbidity, noise and have the potential to leak petroleum based pollutants into the aquatic system.

Comment: Impact on Small Business.

Response: It is not expected that there will be an effect on small business since there will still be boaters using the lake. In addition, there are many other users in the area including, white water rafters, hikers and anglers frequenting local businesses.

Comments: This is another restriction on campers, anglers, hunters, trappers and other traditional users to favor environmental groups.

Response: This regulation was proposed through the UMP process. It is a compromise from the original proposal to ban all motors on Thirteenth Lake. After soliciting public input the plan was drafted to allow electric motors rather than ban them as originally proposed. It is not intended to be a burden on any one group in favor of another user group.

Comment: Allow use of small outboard motors. Impose a horsepower limit.

Response: This alternative was considered in the UMP. Although it would reduce air, water and noise pollution, it would not eliminate it completely, therefore, the alternative to limit motors to electric was chosen as the preferred alternative.

Comment: Classify the bed and bank of Thirteenth Lake Wilderness.

Response: Classification is beyond the scope of this regulation. Lands are classified by the Adirondack Park Agency.

Comment: Restriction on motors will limit the elderly and people with disabilities from accessing Thirteenth Lake. Batteries are heavy and they do not last long. Restricts access to physically able.

Response: Electric motors were chosen as the preferred alternative in the UMP because they had less environmental impact, they were quiet, and they would still allow motorized access for people that required mechanical assistance. Allowing the continued use of electric motors is a compromise from the original proposal to ban all motors on Thirteenth Lake. After listening to public input the plan was revised to allow electric motors rather than ban all motors as originally proposed. It is not intended to be a burden on any one group in favor of another user group.

Comment: Thirteenth Lake is subject to UMP provisions of Wilderness Areas when only a portion of the water body is within the Wilderness Area Boundary. Banning gas motors will set a precedent that will expand to other lakes that border other wilderness areas.

Response: This regulation does not set a precedent, it is a unique situation. The lake is surrounded by wilderness except for a small in-holding. These property owners have already voluntarily restricted their use to electric motors. The launch site is within the wilderness area, it is not an intensive use boat launch or wild forest water-way access site.

Comment: Prohibit all use of motors on Thirteenth Lake.

Response: This alternative was considered in the UMP. The alternative to limit motors to electric was chosen as the preferred alternative since it would reduce pollution and allow for use of an electric motor in situations where they may be warranted. Use of electric motors on this lake is feasible since they provide sufficient power to traverse the lake, which is relatively small.

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

#### To Amend Part 189 Related to the Discovery of Chronic Wasting Disease in Deer in Maryland

I.D. No. ENV-42-11-00023-P

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

**Proposed Action:** Amendment of Part 189 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 11-0325, 11-1905 and 27-0703

**Subject:** To amend Part 189 related to the discovery of chronic wasting disease in deer in Maryland.

**Purpose:** To prevent importation chronic wasting disease infectious material from the State of Maryland into New York.

**Text of proposed rule:** Subparagraph 189.3 (e)(1)(i) is amended to read as follows:

(i) United States: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, [Maryland,] Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont.

**Text of proposed rule and any required statements and analyses may be obtained from:** Patrick Martin, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4750, (518) 402-9001, email: pxmartin@gw.dec.state.ny.us

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

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

**Additional matter required by statute:** A negative declaration has been prepared pursuant to Article 8 of the Environmental Conservation Law and is on file with the department.

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

#### Regulatory Impact Statement

Statutory authority:

The Commissioner of the Department of Environmental Conservation (department), pursuant to Environmental Conservation Law (ECL) section 3-0301, has authority to protect the wildlife resources of New York State.

ECL section 11-0325 provides the authority to take action necessary to protect fish and wildlife from dangerous diseases. Where a disease is a threat to livestock, as well as to the fish and wildlife populations of the State, ECL section 11-0325 requires the department consult the Department of Agriculture and Markets. If the department and the Department of Agriculture and Markets jointly determine that a disease, which endangers the health and welfare of fish or wildlife populations, or of domestic livestock, exists in any area of the state or is in imminent danger of being introduced into the state, the department is authorized to adopt measures or regulations necessary to prevent the introduction or spread of such disease.

ECL section 11-1905 provides the department with authority to regulate the possession, propagation, transportation and sale of captive-bred white-tailed deer.

ECL section 27-0703 provides the department with authority to regulate the disposal of solid waste.

Legislative objectives:

The legislative objective of ECL section 3-0301 is to grant the Commissioner the powers necessary for the department to protect New York's natural resources, including wildlife, in accordance with the environmental policy of the State.

The legislative objective of ECL section 11-0325 is to provide the department with broad authority to respond to the presence or threat of a disease that endangers the health or welfare of fish or wildlife populations. In addition, this section provides for collaboration between the Department and the Department of Agriculture and Markets when such disease also poses a threat to livestock.

The legislative objective of ECL section 11-1905 is to provide the department with authority to regulate the captive-bred white-tailed deer population in New York.

The legislative objective of ECL section 27-0703 is to provide the department with authority to regulate the disposal of solid waste.

Needs and benefits:

This rule making is in response to the recent discovery of chronic wasting disease (CWD) in white-tailed deer in Maryland. CWD is an infectious neurological disease of cervids, the family which includes deer, elk and moose. CWD is a transmissible spongiform encephalopathy, and is a progressively fatal disease with no known immunity, vaccine or treatment. Management of CWD is further complicated by the fact that it is a poorly understood disease with clinical signs not apparent for at least 18 months following exposure and an unknown mode of transmission.

This rule making is necessary to protect New York's white-tailed deer herd from CWD by preventing the importation of CWD infectious materials into New York from newly identified sources. Prior to the recent discovery of CWD in Maryland, CWD regulations were adopted by the department and the Department of Agriculture and Markets in an effort to prevent CWD from entering the State from outside sources, but those regulations did not include Maryland because this state was not a known source of CWD at that time. With the discovery of CWD in white-tailed deer in Maryland, amendment of 6 NYCRR Part 189 is necessary to prevent importation of CWD infectious materials from this new source.

The rule making will place restrictions on the importation of wild deer carcasses and parts from Maryland.

The white-tailed deer herd in New York is estimated to be approximately 900,000 animals. In 2010, over 560,000 licenses were sold to hunt white-tailed deer in New York, resulting in expenditures by hunters and for hunting related activities of approximately \$8,000,000 dollars.

#### Costs:

This rule making could result in additional costs to hunters who must process deer taken in Maryland prior to importing it into New York.

#### Local government mandates:

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

#### Paperwork:

The proposed rule does not impose any additional record keeping.

#### Duplication:

The proposed amendment does not duplicate any state or federal requirement.

#### Alternatives:

**No Action:** The department has rejected this option. Failing to act to prevent the importation of CWD infectious material could allow the disease to become established in New York State. CWD has not been found in New York for over five years. The spread of CWD could compromise the health of New York's white-tailed deer herd and could have significant economic impacts on commercial and recreational activities associated with white-tailed deer.

#### Federal standards:

The United States Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) developed an Environmental Assessment (EA) in 2002. The EA outlined the role of the federal government in CWD management. This role included providing coordination and assistance with research, surveillance, disease management, diagnostic testing, technology, communications, information dissemination, education and funding for State CWD Programs. At this time, there are no federal standards governing management of deer, moose or elk.

#### Compliance schedule:

Compliance will be required upon adoption of the final rule.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The proposed regulation is necessary to protect the white-tailed deer population in New York State from Chronic Wasting Disease (CWD). The white-tailed deer is a very important natural resource to small businesses and local governments in New York. The purpose of the new regulation is to protect this resource so that New Yorkers may continue to enjoy viewing deer, and benefit from deer hunting, and the positive economic and social effects of deer and deer hunting.

Under the proposed regulations, Maryland will be dropped from the list of states exempt for the importation restrictions. All CWD positive states are subject to the same importation restrictions. Although this will impact New York residents who may hunt in Maryland and plan to return to New York with whole carcasses of the deer they harvest, it is anticipated that this will effect relatively few hunters and, with some advanced planning, hunters can easily comply with these regulations without losing hunting opportunity.

No local governments will be affected by this rule.

#### 2. Compliance Requirements:

Resident hunters who harvest a deer in Maryland will be required to remove specific parts from the animal before bringing it into New York.

#### 3. Professional Services:

The rule will not require local governments or small businesses to engage professional services to comply with this rule.

#### 4. Compliance Costs:

Some successful hunters will be required to pay for the processing of their harvested deer before returning to the State. Most hunters who hunt in the CWD restricted states have their harvested game processed before they return as a matter of course.

#### 5. Economic and Technological Feasibility:

There is no economic or technological affect on local governments or small businesses. The rule will not require any technological changes or capital expenditures to comply with the new regulation.

#### 6. Minimizing Adverse Impact:

As the serious nature of CWD is explained to the public, the new restrictions are likely to be accepted as reasonable and balanced. The Department of Environmental Conservation (department) strongly supports continued research on CWD to understand the modes of transmission, and associated risk variables. As new information becomes available, the department will adjust regulations in response to new data or findings.

#### 7. Small Business and Local Government Participation:

When CWD was first confirmed, the department held public meetings to explain the nature of the disease and the department's initial response. Since early April 2005, the department has issued press releases to continue to inform the public of developments and findings relative to the CWD monitoring program. Similarly, as the department establishes appropriate and necessary regulations to contain the disease outreach to affected stakeholders (businesses and local governments) will be done so that the importance of the new regulations is understood.

### **Rural Area Flexibility Analysis**

This rule making is in response to the recent discovery of chronic wasting disease (CWD) in white-tailed deer in Maryland. CWD is an infectious neurological disease of cervids, the family which includes deer, elk and moose. CWD is a transmissible spongiform encephalopathy, and is a progressively fatal disease with no known immunity, vaccine or treatment. Management of CWD is further complicated by the fact that it is a poorly understood disease with clinical signs not apparent for at least 18 months following exposure and an unknown mode of transmission.

This rule making is necessary to protect New York State's white-tailed deer herd from CWD by preventing the importation of CWD infectious materials into New York from newly identified sources. Prior to the recent discoveries of CWD in white-tailed deer in Maryland, CWD regulations were adopted by the Department of Environmental Conservation (department) and the Department of Agriculture and Markets in an effort to prevent CWD from entering the state from outside sources, but those regulations did not include Maryland because CWD was not found in Maryland. With the discovery of CWD in white-tailed deer in Maryland, amendment of 6 NYCRR Part 189 is necessary to prevent importation of potentially infectious materials from this new sources.

This rule making is directed at the importation of certain animal parts into New York from the State of Maryland. It does not have any direct impacts on rural areas or entities therein. Therefore, the department has determined that this rule making will not have any adverse impacts on rural areas. In fact, the rule making will have a positive impact on rural areas by preventing the importation of CWD infectious materials and the introduction of CWD to new areas of the state. The department has further determined that this rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Therefore, a rural area flexibility analysis is not required for this rule making.

### **Job Impact Statement**

This rule making is necessary to protect New York States's white-tailed deer herd from Chronic Wasting Disease (CWD) by preventing

the importation of CWD infectious materials into New York from the State of Maryland. In 2011, CWD was found in white-tailed deer in the State of Maryland.

The Department of Environmental Conservation (department) has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting the New York State white-tailed deer resource), the proposed rule will protect jobs and employment opportunities. Therefore, the department has determined that a job impact statement is not required.

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

#### Otter Creek Trail System Assembly Area

I.D. No. ENV-22-11-00003-RP

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

**Proposed Action:** Addition of section 190.32 to Title 6 NYCRR.

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

**Subject:** Otter Creek Trail System Assembly Area.

**Purpose:** To protect natural resources and public safety.

**Text of revised rule:** A new section 190.32 is added to 6 NYCRR to read as follows:

#### 190.32 Otter Creek Trail System Assembly Area

(a) *Description.* For purposes of this section, Otter Creek Trail System Assembly Area means those State lands located in Independence River State Forest (Lewis Reforestation Area 35) lying east of the Erie Canal Road (Chase's Lake Road) and west of the Adirondack park boundary. Said Otter Creek Trail System Assembly Area shall be hereinafter referred to as the "Assembly Area". In addition to other applicable general provisions of this Part, the following provisions apply to the Assembly Area. In the event of a conflict, these specific provisions shall control.

#### (b) Camping.

(1) Immediately upon arrival at the Assembly Area each camping party shall complete all required information on a self-issuing camping permit. The Department portion of the camping permit shall be placed in the provided drop box. The camping party's portion of the camping permit shall be displayed on the dashboard of the vehicle identified on the camping permit at all times.

(2) Each camping party is limited to a maximum of nine persons. All members of the camping party shall be listed on the camping permit and shall occupy a single site.

(3) Camping permits are valid for a maximum of 14 consecutive nights after which all members of the camping party shall vacate the facility for a minimum of five calendar days.

(4) Camping sites shall be occupied by at least one or more members of the registered camping party every night during the duration of the permit.

(5) Camping in the overflow area of the Assembly Area (hereinafter referred to as "overflow area") is limited to no more than three consecutive nights.

(6) Any use of the Assembly Area by any person who is not a member of a registered camping party is considered day-use. Day-use shall be from sunrise to 10:00 p.m. unless otherwise posted. No day-users are allowed in the facility after 10:00 p.m. and before sunrise.

(c) *Horses and Llamas. Definition.* For the purpose of this section, horse(s) shall mean the entire family of equidae and llama(s) shall mean all new world camelids, llamas, alpacas, guanacos, and vicunas.

(1) All horses entering the Assembly Area shall have documentation of a currently valid Coggins test performed in the current or previous calendar year and shall have been found negative for Equine Infectious Anemia. Out of state horses shall also have a valid 30 day Certificate of Health. All horses will have proof of a current rabies vaccination.

(2) All llamas entering the Assembly Area are required to have a valid Certificate of Veterinary Inspection, with the animals individually identified and proof of a current rabies vaccination.

(3) Any horse or llama remaining in the Assembly Area overnight, with the exception of the overflow area, shall be harbored in a DEC covered tie stall or, in the case of a stallion, in a stud stall.

(4) Stud stalls shall only be occupied by stallions.

(5) Horses or llamas shall not be tethered to trees anywhere in the Assembly Area.

(6) Horses or llamas shall not be run, galloped or cantered in the Assembly Area.

(7) Horses or llamas in the overflow area shall be harbored in, or tethered to their trailer or in a temporary corral.

(8) The use of temporary corrals is restricted to the cleared section of the overflow area.

(9) No person shall fail to maintain an orderly camp, including horse stalls. All manure shall be removed or deposited into designated manure pits.

(10) Washing of horses or llamas within the Assembly Area is prohibited.

#### (d) Animals and Household Pets

(1) All animals, except household pets, horses and llamas, are prohibited.

(2) All household pets shall be confined on a leash or otherwise confined to restrict them to the campsite area of their owner.

(3) Dogs may be walked on a leash no more than six feet long provided they are under control at all times.

(4) No household pets shall be left unattended in the Assembly Area at any time unless securely confined in a camper or enclosed trailer.

(5) All household pets in the Assembly Area shall have proof of a current rabies vaccination.

(6) Household pet owners shall properly dispose of their pet's excrement in the designated manure pits.

(7) Disruptive or vicious animals and household pets shall be removed by their owner from the area whenever requested by Department or law enforcement personnel.

#### (e) General Provisions.

(1) No person shall possess alcoholic beverages in any container with a capacity greater than seven gallons at any time.

(2) Fires are only permitted in fire rings or fireplaces provided by the Department.

(3) Quiet hours shall be observed between 10:00 p.m. and 7:00 a.m.

(4) Generators may only be operated from 8:00 a.m. to 10:00 a.m. and from 4:00 p.m. to 8:00 p.m.

(5) The possession or use of fireworks of any nature is prohibited.

(6) No person shall remove water from the Assembly Area.

#### (f) Enforcement

(1) No person shall fail to comply with a lawful instruction of an employee of the Department or law enforcement personnel.

(2) Violation of any provision of this Part shall be grounds to revoke the camping permit which includes the violator as a member of the camping party, removal of the violator from the Assembly Area and denial of any use of the Assembly Area by the violator for a period of seven days.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 190.32(b)(6), (e)(6) and (d)(4).

**Text of revised proposed rule and any required statements and analyses may be obtained from** NYSDEC, 625 Broadway, Albany, NY 12233-4255, (518) 402-9428, email: [rwmesen@gw.dec.state.ny.us](mailto:rwmesen@gw.dec.state.ny.us)

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

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

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

#### Revised Regulatory Impact Statement

##### 1. Statutory authority

Environmental Conservation Law ("ECL") section 1-0101(3)(b) directs the Department to guarantee "that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences." ECL section 3-0301(1)(b) gives the Department the responsibility to "promote and coordinate management of...land resources to assure their protection...and take into account the cumulative impact upon all such resources in...promulgating any impact upon all such resources...in promulgating any rule or regulation." ECL section 9-0105(1) authorizes the Department of Environmental Conservation to "exercise care, custody, and control" of State lands. ECL section 3-0301(2)(m) authorizes the Department of Environmental Conservation (DEC) to adopt rules and regulations "as may be necessary, convenient or desirable to effectuate the purposes of (the ECL)," and ECL 9-0105(3) authorizes DEC to "make necessary rules and regulations to secure proper enforcement of (ECL section 9)."

##### 2. Legislative objectives

In adopting various articles of the ECL, the legislature has established forest, fish, and wildlife conservation to be policies of the State and has empowered DEC to exercise Acare, custody, and control@ over certain State lands and other real property. Consistent with these statutory interests, the proposed regulations will protect natural resources and the safety and welfare of those who engage in recreational activities on the Otter Creek Trail System Assembly Area. The Department also has been

provided authority by the Legislature to manage State owned lands (see ECL section 9-0105(1), and to promulgate rules and regulations for the use of such lands (see ECL section 3-0301(2)(m) and ECL section 9-0105(3)).

The proposed regulations will protect natural resources by requiring campers to complete a self-issuing permit, as well as requiring horses and llamas to remain in the Assembly Area overnight. Additional provisions of the regulation will control the use of alcoholic beverages and generators as well as household pets using the area. A Unit Management Plan (UMP) for this area will be completed in the future. During the planning process, revisions to the proposed regulations might be made. This would depend upon the need, for instance if management of the area can be improved as evidenced by use or as a result of public input.

### 3. Needs and benefits

The Otter Creek Trail System Assembly Area serves as the major trailhead for approximately a seventy mile complex of recreational trails designated for use by horses, mountain bikers and hikers. The trail system is located on two State reforestation areas as well as the adjoining Independence River Wild Forest. The Assembly Area also provides camping and equestrian related facilities. Because of unregulated use of this facility during peak periods, degradation of natural resources, particularly damage to vegetation and trees has occurred. In addition, social impacts, including overcrowding, boisterous behavior and pets, particularly dogs disturbing other users, must be controlled. The major provisions of the proposed regulations that will control use on the Assembly Area include: requiring campers to complete a self-issuing permit; limiting the size of camping parties to groups of nine; requiring horses and llamas to remain in the Assembly Area overnight to be tethered in a DEC-provided covered tie stall or, in the case of a stallion, in a stud stall; tethering of horses and llamas in the Overflow Area to a trailer or to a temporary corral; restrictions on alcoholic beverages and household pets and allowing the operation of generators from 8:00 a.m. to 10:00 a.m. and from 4:00 p.m. to 8:00 p.m.

Additional regulations that may apply to the Assembly Area are covered under 6 NYCRR Part 190, Use of State Lands.

The proposed regulations relating to the self-issuing permit system provides a mechanism to limit the amount of use within the Assembly Area to a level within the area's capacity to withstand that use. In addition, it would provide the Department with valuable user data for the area. Limiting the size of camping groups to nine would lessen the potential for environmental damage to the area as well as limiting the potential for social impacts, such as inappropriate behavior causing disturbance to other users. The proposed regulations require horses and llamas remaining in the Assembly Area overnight to be tethered in a covered tie stall or horses in a stud stall as well as requiring horses and llamas in the Overflow Area be tethered to a trailer or to a temporary corral. This will provide protection to vegetation and trees in the Assembly Area by prohibiting tethering of horses and llamas to trees which can cause damage to bark. This is a potential problem, particularly during high peak use periods.

The proposed regulations will extend hours to allow generator use to accommodate users who are on the trails late in the day. The seven gallon container restriction on alcohol is necessary so that excessive drinking can be minimized. A 1/4 keg (7.75 gallons) is popular on this area among young adults, thus restricting the limit to seven gallons would not allow the 1/4 kegs. The regulation on household pets is necessary, particularly to control dogs in the Assembly Area.

A revision to subdivision (b), paragraph (6) relating to day-use has been made in response to public comment. Day-use shall be from sunrise to 10:00 p.m. instead of 7:00 a.m. to 10:00 p.m. unless otherwise posted. In addition, no day users are allowed in the facility after 10:00 p.m. and before sunrise. This revision was made so that individuals that want to ride early in the morning to avoid the heat and insects can do so.

In addition, a revision has been made to subdivision (d), paragraph (4) relating to household pets in response to public comment. The following has been added to the proposed rule which states, "no household pets shall be left unattended in the Assembly Area at any time," " unless securely confined in a camper or enclosed trailer." This revision was made to accommodate users with small or older household pets, particularly dogs, that cannot be taken on the trail.

An addition has been made to subdivision (e) of 6 NYCRR section 190.32 revising the rulemaking to make it illegal for users of the Otter Creek Trail System Assembly Area to remove water from the facility. This revision is necessary, since several users of the Otter Creek trails have been removing large quantities of water for their personal use off-site.

Water for the Assembly Area is supplied from a well designed to service the area. Withdrawing large quantities of water for off-site personal use will likely overtax the pumps and other parts of the system resulting in the well possibly running dry and rendering the Assembly Area non-functional due to a lack of rest room facilities and water for horses. This regulatory revision is necessary to protect the water resource at the Otter Creek Trail Assembly Area, ensuring an adequate water supply for users.

The Department went beyond its initial responsibility regarding outreach. The following groups, as well as users, had the opportunity to review the draft regulations. As a result, further staff review along with public input resulted in some revisions to the regulations. These included establishing a self-issuing permit system, rather than the designation of campsites, eliminating the restriction on glass containers and changing the seven gallon container to only cover alcoholic beverages, allowing extended hours for generator use, allowing overnight camping in the Overflow Area for up to three nights, permitting the use of temporary corrals in the Overflow Area, and removing the requirement that stallions in stud stalls also have a tie stall assigned to them.

Individual members of the New York State Trails Council, New York State Horse Council, Upper Canada Equestrian Association, Ride New York and the Leatherstocking Riding Club received an announcement of the DEC's intent to propose this regulation, along with a request for preliminary comments. The proposed regulations were also posted at the facility with contact information to allow individual users of the facility the opportunity to comment.

### 4. Costs

There will be no increased staffing, construction or compliance costs projected for State or local governments or to private regulated parties as a result of this rulemaking. Costs to the Department would be minimal, approximately \$300 for the necessary signage and printing costs for self-issuing permits.

### 5. Local government mandates

This proposal will not impose any program, service, duty nor responsibility upon any county, city, town, village, school district or fire district.

### 6. Paperwork

Self-issuing permits will be required for overnight campers, however, this will not result in an increase in paperwork since these permits will replace the existing trail register system. It is possible there will be a slight increase in the number of citations issued by the Department during the first few months after the regulation takes effect, however this should also not result in an increase in paperwork and may offset some of the cost of new or additional signage. The regulations will not impose any additional reporting requirements or other paperwork on any private or public entity.

### 7. Duplication

There is no duplication, conflict, or overlap with State or Federal regulations.

### 8. Alternative approaches

Several alternatives were considered to determine which management strategies would best protect the resource and best serve the public using this facility. The "No Action" alternative would continue to allow unregulated use of the facility and the adjoining trail system and would do nothing to provide protection to the natural resources of the area or the experience of visitors.

There were many variations of the proposed regulations considered. Staff considered additional regulations to control every aspect of use in the area but felt that the proposed regulations represented the "minimal tool" necessary for the management of this facility. Consideration was given to requiring users to obtain permits from the Lowville DEC Office prior to arrival, however, it was felt this would not only place an additional burden on users, but also on Department staff.

### 9. Federal standard

There is no relevant Federal standard governing the use of State lands.

### 10. Compliance schedule

The proposed rule with respect to the Otter Creek Trail System Assembly Area will become effective on the date of publication of the rulemaking in the New York State Register. No time is needed for regulated persons to achieve compliance with the regulations. Once the regulations are adopted, they are effective immediately.

### **Revised Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with these regulations because the proposal will not impose any reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Since there are no identified cost impacts for compliance with the proposed regulations on the part of small businesses and local governments, they would bear no economic impact as a result of this proposal. The proposed regulation relates solely to protecting the natural resources and the public safety on the Otter Creek Trail System Assembly Area.

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

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, record-keeping or other compliance requirements on rural areas. The proposed regulation relates solely to protecting the natural resources and the public safety on the Otter Creek Trail System Assembly Area.

### **Revised Job Impact Statement**

A Job Impact Statement is not submitted with this proposal because the proposal will have no substantial adverse impact on existing or future jobs

and employment opportunities. The proposed regulation relates solely to protecting natural resources and the public safety on the Otter Creek Trail Assembly Area.

#### Assessment of Public Comment

##### 1. Comment: (1)

Commenter is concerned about people running their generators for hours and unhappy about the hours of operation being extended from the original proposed regulations.

##### Response:

The final proposed generator hours of operation was a compromise between generator operators who would have preferred no restrictions and those whose experience is diminished by having to listen to generators operate at any time. The evening operating hours of 4 to 8pm were expanded to allow for more flexibility for users coming back from their trail ride.

##### 2. Comment: (1)

Commenter is concerned about barking dogs.

##### Response:

Complaints about dogs running loose and constantly barking dogs is probably the number one complaint we receive from users of the facility. The regulations require that dogs be kept confined to their owner's campsite at all times and give Department staff the ability to have disruptive or vicious animals removed from the facility.

##### 3. Comment: (1)

Commenter would like the ability to tether their horses using high lines instead of provided tie stalls.

##### Response:

The restriction against tethering animals to trees in the Assembly Area is to protect the trees from damage and also to help keep the number of users of the facility from exceeding the room available at the facility. The trees are very important in providing shade for users and the horses. They are susceptible to soil compaction and bark damage caused by horses. Requiring the use of tie stalls keeps damage to trees from occurring and also helps to keep the number of users within the limits of the facility.

##### 4. Comment: (1)

Commenter would like to be able to have day use of the Overflow Area start at 5:00 am or 5:30 am instead of 7:00am to avoid hot weather and bugs.

##### Response:

##### Subdivision (b) paragraph (6)

The regulation will be amended to state "Any use of the Assembly Area by any person who is not a member of a registered camping party is considered day-use. Day-use shall be from sunrise to 10:00 pm unless otherwise posted. No day-users are allowed in the facility after 10:00 pm and before sunrise.

##### 5. Comment: (1)

Commenter feels that the requirements for dogs are overly restrictive and that they should be allowed to be left unattended in the Assembly Area if they are left in a camper. They state that many people have smaller or older dogs that cannot be taken on the trail.

##### Response:

##### Subdivision (d) paragraph (4)

The regulation will be amended to state "No household pets shall be left unattended in the Assembly Area at any time unless securely confined in a camper or enclosed trailer.

##### 6. Comment: (1)

Commenter expressed concern that there has not been sufficient checking to insure that owners of horses at the Assembly Area facility are in possession of the required Equine Herpes Virus paperwork and Rabies and Health certificates.

##### Response:

As part of the implementation of these regulations, regular enforcement, including spot checking of animal's health paperwork is planned.

##### 7. Comment: (1)

Commenter felt that no rules are needed for the facility and that everything is running smoothly. Also, that we should take into consideration what the users of the facility want.

##### Response:

The regulations were proposed in part due to complaints received from users of the facility and also incidents that Department staff has had to deal with over the years. The regulations were modified and simplified in response to input received after the proposed regulations were first put out for public review. The Department is no longer able to have a regular staff presence at the facility as in the past, which has increased the need for these regulations. The rules are meant as a tool to help keep the facility as a desirable place for users to visit for many years to come.

##### 8. Comment: (4)

Commenter's generally felt that the regulations were sensible and happy that user input was considered in the revisions that were made to the original regulations.

##### Response:

Department staff attempted to balance the need for commonsense rules at the facility, with input from users to help make the regulations more user friendly.

## Department of Financial Services

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

#### State Charter Advisory Board ("Board"): Selection of Candidates Representing Banking Institutions

I.D. No. DFS-42-11-00012-EP

Filing No. 893

Filing Date: 2011-10-03

Effective Date: 2011-10-03

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

**Proposed Action:** Addition of Part 600 to Title 23 NYCRR.

**Statutory authority:** Financial Services Law, section 205-b

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

**Specific reasons underlying the finding of necessity:** Section 205-b of the Financial Services Law, Chapter 18-A of the Consolidated Laws, which establishes the State Charter Advisory Board (the "Board") within the Department of Financial Services, goes into effect on October 3, 2011. These regulations implement the statutory requirement that the Superintendent of Financial Services ("Superintendent") make rules to govern the method by which state chartered institutions may nominate persons to the Board and the process for selecting Board members.

In order to enable the Board to commence its activities, it is necessary that the process for nominating and selecting Board members be established as promptly as possible.

**Subject:** State Charter Advisory Board ("Board"): selection of candidates representing banking institutions.

**Purpose:** This rule implements section 205-b by providing a mechanism to nominate, select, and appoint Board members.

**Text of emergency/proposed rule:** CHAPTER IV REGULATIONS OF THE SUPERINTENDENT OF FINANCIAL SERVICES

**PART 600. STATE CHARTER ADVISORY BOARD: SELECTION OF CANDIDATES REPRESENTING BANKING INSTITUTIONS**

*(Statutory Authority - Financial Services Law § 205-b)*

*Section 600.1 Nomination procedure*

*The following procedure shall be followed in connection with the nomination of candidates for consideration by the Superintendent in appointing members of the State Charter Advisory Board (hereinafter the "Board") who represent banking institutions (each a "Bank Member"):*

*(a) Within 90 days after the provisions of the law creating the Board become effective, and at least 30 days prior to the expiration of the term of any Bank Member, and within 60 days after a vacancy has occurred for any reason other than expiration of term in the office of any Bank Member, the Department of Financial Services (the "Department") shall notify the institutions in the group or groups described in section 600.2 below in which such vacancy has occurred or will occur of the opportunity to nominate candidates to serve as the person representing such group. Such notice may be given by such means as the Superintendent deems appropriate, including publication in the bulletin of the Department.*

*(b) Upon the expiration of a period prescribed by the Superintendent, which shall be not less than 15 days nor more than 45 days from the date on which such nominations were first solicited, the names of the persons nominated shall be submitted to the Superintendent.*

*(c) No institution shall nominate more than one person for any vacancy.*

*(d) Notwithstanding the foregoing provisions of this section 600.1, no solicitation for nominations of candidates shall be required prior to the reappointment of a person who has served not more than one year as a member of the Board.*

*Section 600.2 Representation*

*Of the eight members of the Board representing banking institutions, one member shall represent institutions in each of the following groups:*

*Group One - Credit unions.*

*Group Two - Foreign banking corporations licensed to maintain a branch or an agency in this state.*

*Group Three - Banks, trust companies, private bankers, savings banks, and savings and loan associations (collectively, for purposes of this section 600.2, "Banks") having total assets of more than \$3 billion as shown by the last periodical report of condition received by the Superintendent.*

*Group Four - Banks located in New York City or the Counties of Nassau, Suffolk, Sullivan, Westchester, Rockland, Putnam, Orange, Dutchess or Ulster, and having total assets of less than \$500 million as shown by the last periodical report of condition received by the Superintendent.*

*Group Five - Banks, other than those in Group Four, having assets of less than \$500 million as shown by the last periodical report of condition received by the Superintendent.*

*Group Six - Banks located in New York City and having total assets of \$500 million to \$3 billion as shown by the last periodical report of condition received by the Superintendent.*

*Group Seven -- Banks located in the Counties of Nassau, Suffolk, Rockland, Westchester, Orange, Putnam, Sullivan, Ulster, Dutchess, Delaware, Greene, Columbia, Otsego, Schoharie, Albany, Rensselaer, Herkimer, Montgomery, Schenectady, Fulton, Saratoga, Washington, Warren, Hamilton, Essex, Clinton, Franklin, or St. Lawrence, and having total assets of \$500 million to \$3 billion as shown by the last periodical report of condition received by the Superintendent.*

*Group Eight -- Banks, other than those in Group Six and Group Seven, having total assets of \$500 million to \$3 billion as shown by the last periodical report of condition received by the Superintendent.*

#### *Section 600.3 Appointment of Members*

*Members of the Board shall be selected by the Superintendent in his or her sole discretion. In selecting members, the Superintendent will give due consideration to persons nominated in accordance with section 600.1, the extent to which the Bank Members of the Board reflect a range of size and geographical location, and the other factors set forth in Section 205-b of the Financial Services Law.*

**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 December 31, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1658, email: SAM.ABRAM@DFS.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.

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

Section 205-b of the Financial Services Law ("FSL") creates the State Charter Advisory Board ("Board") and provides that it shall have nine members, who shall be appointed by the Superintendent of Financial Services ("Superintendent"). The membership shall consist of one representative of consumers, one representative of credit unions, one representative of foreign banks, and representatives of banks which, to the extent practicable, reflect a range of size and geographical location. Of those representatives, at least one shall represent institutions of more than \$3 billion in assets and at least two shall represent institutions with less than \$500 million in assets.

Section 205-b further provides that the Superintendent shall make rules governing the method by which state chartered institutions may nominate persons to the Board and the process for selecting such members, provided that the representative of consumers is selected by the Superintendent.

##### 2. Legislative Objectives:

The regulation implements the statutory directive that the Superintendent make rules governing the method by which state chartered institutions may nominate persons to the Board and that the representatives of banks reflect, to the extent practicable, a range of size and geographical location.

##### 3. Needs and Benefits:

The regulation implements the statutory directive in Section 205-b of the FSL by providing mechanisms for nominating and selecting members of the Board.

Consistent with the language of the statute, the regulation provides for one representative for banking institutions (including banks, trust companies, private bankers, savings banks and savings and loan associations) with over \$3 billion in assets ("large banks"), two representatives for banking institutions with under \$500 million in assets ("small banks"), and three representatives for banking institutions with assets between \$500 million and \$3 billion ("intermediate banks").

Pursuant to the statute's mandate that the members representing bank-

ing institutions reflect, to the extent practicable, a range of size and geographic location, the regulation divides the state into two geographically contiguous areas containing roughly equal numbers of small banks for the purpose of appointing representatives of small banks, and three geographically contiguous areas containing roughly equal numbers of intermediate banks for the purpose of appointing representatives of intermediate banks.

##### 4. Costs:

The regulation is not expected to impose any costs upon regulated persons. The costs incurred by the Department of Financial Services in implementing the nominating procedure are expected to be insignificant, and are in any case mandated by FSL Section 205-b.

##### 5. Local Government Mandates:

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

##### 6. Paperwork:

The regulation will not require any new forms, reporting or other paperwork by regulated entities.

##### 7. Duplication:

The regulation will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments. The Board is being created under the FSL, a new state law.

##### 8. Alternatives:

Other possible groupings of state chartered banking institutions that would meet the representational requirements of Section 205-b were considered. However, it is believed that the groupings set forth in the regulation best meet the objective of providing representation that is consistent with the statutorily specified groupings.

##### 9. Federal Standards:

There are no federal standards for this or similar subject areas. The Board is being created under the FSL, a new state law.

##### 10. Compliance Schedule:

The provisions of the FSL creating the Department of Financial Services, including those creating the Board, are expected to become effective on or shortly after October 3, 2011. It is anticipated that following the adoption of the regulation, the DFS will act promptly to implement the nomination procedure contained therein.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Business and Local Governments is not submitted with this notice because it is apparent from the nature and purpose of this rule that it will have no adverse economic impact, and will not impose any reporting, recordkeeping or other compliance requirements, on small businesses and local governments. In fact, the rulemaking, which sets out the process by which uncompensated State Charter Advisory Board members will be nominated, selected, and appointed, provides substantial representation on the State Charter Advisory Board for smaller banks.

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

A Rural Area Flexibility Analysis is not submitted with this notice because it is apparent from the nature and purpose of the rule that it will not have any adverse economic impact or impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. In fact, the rulemaking, which sets out the process by which uncompensated State Charter Advisory Board members will be nominated, selected, and appointed, provides substantial representation on the State Charter Advisory Board to smaller banks, which may include banks in rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this notice because it is apparent from the nature and purpose of this rule that it will not have any adverse impact on jobs and employment opportunities. The rulemaking merely sets out the process by which uncompensated State Charter Advisory Board members will be nominated, selected, and appointed.

## Department of Health

### EMERGENCY RULE MAKING

#### Medicaid Benefit Limits for Enteral Formula, Prescription Footwear, and Compression Stockings

**I.D. No.** HLT-39-11-00007-E

**Filing No.** 869

**Filing Date:** 2011-10-03

**Effective Date:** 2011-10-03

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

**Action taken:** Amendment of Parts 505 and 513 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a and 365-a(2)

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

**Specific reasons underlying the finding of necessity:** Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to SSL section 365-a(2)(g) that establish benefit limits for enteral formula, prescription footwear, and compression stockings take effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis to achieve the savings intended to be realized by the Chapter 59 provisions regarding benefits limits.

**Subject:** Medicaid Benefit Limits for Enteral Formula, Prescription Footwear, and Compression Stockings.

**Purpose:** To impose benefit limitations on Medicaid coverage of enteral formula, prescription footwear, and compression stockings.

**Text of emergency rule:** Paragraph (2) of subdivision (b) of section 505.1 is amended, and a new paragraph (3) is added to read as follows:

(2) the identification card on its face:

(i) restricts an individual recipient to a single provider; or

(ii) requires prior authorization for all ambulatory medical services and supplies except emergency care [.] ; or

(3) *the service exceeds benefit limitations as established by the department.*

The opening language of paragraph (4) of subdivision (a) of section 505.5 is amended to read as follows:

(4) Orthopedic footwear means shoes, shoe modifications, or shoe additions which are used *as follows: in the treatment of children*, to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; *in the treatment of children*, to support a weak or deformed structure of the ankle or foot; *as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation*; or to form an integral part of an orthotic brace. Orthopedic shoes must have, at a minimum, the following features:

Subparagraph (ii) of paragraph (4) of subdivision (b) of section 505.5 is amended to read as follows:

(ii) The maximum number of refills permitted for medical/surgical supplies is found in the fee schedule for durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear. The fee schedule for such equipment and supplies is available *free of charge* from the [department] *Medicaid fiscal agent's website*. [and is also contained in the department's Medicaid Management Information System (MMIS) provider Manual (Durable Medical Equipment, Medical and Surgical Supplies, Prosthetic and Orthotic Appliances). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administra-

tive Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manuals are provided free of charge to every provider of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear at the time of enrollment in the MA program.]

Subparagraph (vi) of paragraph (1) of subdivision (d) of section 505.5 is amended to read as follows:

(vi) [All items not listed in the department's fee schedule for durable medical equipment, medical/surgical supplies, prosthetic and orthotic appliances and orthopedic footwear require prior approval from the New York State Department of Health. The fee schedule for such equipment and supplies is available from the department and is also contained in the department's MMIS Provider Manual (Durable Medical Equipment, Medical/Surgical Supplies, Prosthetic and Orthotic Appliances). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administrative Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manuals are provided free of charge to every provider of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear at the time of enrollment in the MA program.] Reimbursement amounts for unlisted items are determined by the New York State Department of Health and must not exceed the lower of: (a) the acquisition cost to the provider plus 50 percent; or (b) the usual and customary price charged to the general public.

Subparagraph (iii) of paragraph (4) of subdivision (d) of Section 505.5 is amended to read as follows:

(iii) The fee schedule for orthotic and prosthetic appliances and devices is available *free of charge* from the *Medicaid* [department and is also contained in the department's MMIS Provider Manual (Durable Medical Equipment, Medical and Surgical Supplies, Prosthetic and Orthotic Appliances). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administrative Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manuals are provided free of charge to every provider of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear at the time of enrollment in the MA program] *fiscal agent's website*.

Subparagraph (i) of paragraph (5) of subdivision (d) of section 505.5 is amended to read as follows:

(i) Payment for orthopedic footwear must not exceed the lower of:

(a) [the acquisition cost to the provider plus 50%] *the maximum reimbursable amount as shown in the fee schedule for durable medical equipment, medical/surgical supplies, orthotics and prosthetic appliances and orthopedic footwear; the maximum reimbursable amount will be determined for each item of footwear based on an average cost of products representative of that item; or*

(b) the usual and customary price charged to the general public *for the same or similar products*.

Paragraph (1) of subdivision (e) of section 505.5 is amended to read as follows:

(1) [The following items] *Items* of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and devices, and orthopedic footwear are limited in their amount and frequency and may require prior authorization. *Service limits and prior authorization requirements are listed in the provider manual at the Medicaid fiscal agent's website*.

ITEM	LIMIT
Cane	1 every 3 yrs.
Cane, Quad or three prong	1 every 3 yrs.
Flare heels (each)	2 pair per yr.

Cork lifts	2 pair per yr.
Steindler heel corrections	2 pair per yr.
Spenco Insert	2 pair per yr. per child
Heel wedge	2 pair per yr.
Foot, insert, removable, molded to patient model, longitudinal arch support, each	2 per yr. per adult
Foot, insert, removable, molded to patient model, longitudinal/metatarsal support, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal/metatarsal, each	2 per yr. per adult
Longitudinal arch support	1 pair per yr. per adult
Foot, arch support	2 pair per yr. per adult
Removable mold/Levi mold	1 pair per yr. per adult
Elastic stocking/below knee medium wt.	4 pair per yr.
Elastic stocking/below knee heavy wt.	4 pair per yr.
Elastic stocking/above knee medium wt.	4 pair per yr.
Elastic stocking/above knee heavy wt.	4 pair per yr.
Elastic stocking/full length medium wt.	4 pair per yr.
Elastic stocking/full length heavy wt.	4 pair per yr.
Elastic stocking/leotards	4 pair per yr.
Elastic stocking/garter belt	4 pair per yr.
Surgical stocking/below knee	4 pair per yr.
Surgical stocking/thigh length	4 pair per yr.
Surgical stocking/full length	4 pair per yr.
Corset, Sacroiliac 2 per yr. Corset, Lumbar	2 per yr.
Handheld shower head	1 every 3 yrs.
Bed pan, fracture	1 every 3 yrs.
Urinary suspensory	1 every 5 yrs.
Emesis basin	1 every 5 yrs.
Sitz bath	1 every 5 yrs.
Urinal, female, any material	1 every 5 yrs.
Urinal, male, any material	1 every 5 yrs.
Commode pad	1 every 5 yrs.
Flotation pad	1 per yr.
Humidifier, cold air	1 every 3 yrs.
Vaporizer, room type	1 every 3 yrs.
Standard adult wheelchair	1 every 3 yrs.
Electric heating pad standard	1 every 3 yrs.
Hot fomentation heating pads	1 every 3 yrs.
Orthopedic shoes	2 pair per yr.]

A new subdivision (g) of section 505.5 is added to read as follows:

(g) *Benefit limitations. The department shall establish defined benefit limits for certain Medicaid services as part of its Medicaid State Plan. The department shall not allow exceptions to defined benefit limitations. The department has established defined benefit limits on the following services:*

(1) *Compression and surgical stockings are limited to coverage during pregnancy and for venous stasis ulcers.*

(2) *Orthopedic footwear is limited to coverage in the treatment of children to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; in the treatment of children to support a weak or deformed structure of the ankle or foot; as a component of a comprehensive*

*diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace.*

(3) *Enteral nutritional formulas are limited to coverage for tube-fed individuals who cannot chew or swallow food and must obtain nutrition through formula via tube; individuals with rare inborn metabolic disorders requiring specific medical formulas to provide essential nutrients not available through any other means; and for children under age 21 when caloric and dietary nutrients from food cannot be absorbed or metabolized.*

Paragraph (1) of subdivision (b) of section 513.0 is amended to read as follows:

(1) The department, as the single State agency supervising the administration of the MA program, has entered into an interagency agreement with the Department of Health whereby that department will review and approve selected medical, dental and remedial care, services and supplies prior to their being furnished. The purpose of this process is to assure that: the requested medical, dental and remedial care, services or supplies are medically necessary and appropriate for the individual recipient's medical needs; other adequate and less expensive alternatives have been explored and, where appropriate and cost effective, are approved; *the request does not exceed benefit limitations as promulgated by the department*; and the medical, dental and remedial care, services or supplies to be provided conform to accepted professional standards. *The department shall not allow exceptions to defined benefit limitations.*

A new subdivision (h) of section 513.1 is added to read as follows:

(h) *Benefit limits means specified Medicaid coverage limits which cannot be exceeded by obtaining prior approval or authorizations and for which no exceptions are allowed.*

Paragraph (1) of subdivision (a) of section 513.6 is amended to read as follows:

(1) the specific statutory and regulatory standards *and benefit limits* governing the furnishing of the requested care, services, or supplies;

*This notice is intended* to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-39-11-00007-P, Issue of September 28, 2011. The emergency rule will expire December 1, 2011.

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

**Regulatory Impact Statement**

Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

Legislative Objective:

The legislative objective, expressed through SSL section 365-a(2)(g), is to impose benefit limitations on Medicaid coverage of enteral formula, prescription footwear, and compression stockings.

Needs and Benefits:

Enteral formula. Enterals are ordered by practitioners and dispensed by pharmacy or durable medical equipment providers. Medicaid reimburses the cost of enteral formulas for administration via tube or as a liquid oral nutritional therapy when there is a documented diagnostic condition where caloric and dietary nutrients from food cannot be absorbed or metabolized. When prescribed for oral supplementation in adults who can chew and swallow their food, it is objectively difficult to assess medical necessity for the enteral formula and to prevent such reimbursement when used strictly as a convenient food supplement and not due to medical necessity to treat a clinical condition. In the Medicare program enterals are covered for tube-fed individuals only.

Medicaid has attempted to put controls into place such as Card Swipe Prior Authorization and Automated Telephone Prior Authorization. Medicaid has also continued to monitor (through reporting systems) and correct provider prescribing and dispensing activity. In 2004, the enteral pricing methodology was changed, resulting in a 10-20 percent reduction in fees. Despite these measures, total yearly Medicaid utilization and expenditures for enteral nutrition have risen from less than \$11 million per year in 1997 to over \$70 million using the current coverage guidelines and procedures.

By limiting the benefit to specific medical necessity criteria for tube-fed individuals who cannot chew or swallow food, and must obtain nutrition through formula via tube, for individuals with rare inborn metabolic disorders requiring specific medical formulas to provide essential nutrients not available through any other means, and for children when there is a documented diagnostic condition where caloric and dietary nutrients from food cannot be absorbed or metabolized, the regulation will help reduce Medicaid costs by \$15.4 million state and local share annually while continuing to meet intensive medical needs of individual beneficiaries with serious medical conditions.

**Orthopedic footwear.** Orthopedic footwear is ordered by practitioners and dispensed by durable medical equipment providers. Medicaid currently reimburses the cost of footwear for treatment of any physical deformity, range of motion malfunction, or foot or ankle weakness. A significant portion of utilization under the current benefit is for individuals whose needs can be met with off the shelf footwear. When prescribed for these less serious purposes, it is objectively difficult to assess medical necessity for the footwear and to prevent such reimbursement. Medicare reimburses footwear only for treatment of diabetes complications. Additionally, footwear is currently manually priced at invoice cost plus 50 percent, resulting in paper claims.

By limiting the benefit based on medical necessity criteria and adopting the new reimbursement methodology, the regulation will reduce Medicaid costs by \$7.35 million state and local share in State Fiscal Year 2011-12 while continuing to meet intensive medical needs of individual beneficiaries with serious medical conditions.

**Compression stockings.** Compression stockings are ordered by practitioners and dispensed by pharmacy or durable medical equipment providers. Medicaid currently reimburses the costs of stockings for treatment of clinically significant medical conditions such as open wounds, and complications in pregnancy. Medicaid also currently reimburses the cost of stockings that have been prescribed for relatively less serious purposes such as circulatory improvement and wound prevention. When prescribed for these less serious purposes, it is objectively difficult to assess medical necessity for the stockings and to prevent their reimbursement when used strictly for comfort or convenience instead of medically necessary treatment for a clinical condition. Medicare reimburses for stockings only for treatment of open wounds.

By limiting the benefit based on diagnoses of pregnancy or open wounds, the regulation will help reduce Medicaid costs while continuing to meet intensive medical needs of individual beneficiaries with serious medical conditions.

In addition to the changes described above, the regulation amends sections 513.0, 513.1 and 513.6 to clarify that the new benefit limitations are not subject to exception through prior approval. Also, the regulation updates outdated language in section 505.5 regarding how durable medical equipment providers could obtain a hard copy of the Medicaid Provider Manual; such Manual is currently made available to providers online.

#### COSTS:

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

This amendment will not increase costs to the regulated parties. It will reduce revenues to the extent providers are furnishing enteral formula, prescription footwear, or compression stockings beyond the scope of the benefit limit.

#### Costs to State and Local Government:

This amendment will not increase costs to the State or local

governments. Savings to the Medicaid Program will be achieved by establishing these benefit limits.

#### Costs to the Department of Health:

There will be no additional costs to the Department.

#### Local Government Mandates:

This amendment will not impose any program, service, duty, additional cost, or responsibility on any county, city, town, village, school district, fire district, or other special district.

#### Paperwork:

This amendment will not impose any additional paperwork for providers of enteral formula, prescription footwear, or compression stockings.

#### Duplication:

There are no duplicative or conflicting rules identified.

#### Alternatives:

The benefit limits on enteral formula, prescription footwear, and compression stockings are mandated by section 365-a(2)(g) of the SSL. No alternatives were considered.

#### Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

#### Compliance Schedule:

Social services districts and fiscal intermediaries should be able to comply with the proposed regulations when they become effective.

#### *Regulatory Flexibility Analysis*

##### Effect of Rule:

This amendment affects the 3,123 pharmacies and 369 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for enteral formula. The amendment will limit the enteral benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which are small. The Department is anticipating a \$15.40 million reduction in enteral expenditures in State Fiscal Year (SFY) 2011-12 and thereafter.

This amendment affects the 955 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for footwear. The amendment will limit the footwear benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which are small. The Department is anticipating a \$7.35 million reduction in footwear expenditures in SFY 2011-12 and \$16 million annually thereafter.

This amendment affects the 1196 pharmacies and 441 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for stockings. The amendment will limit the stocking benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which are small. The Department is anticipating a \$1.07 million reduction in stocking expenditures in SFY 2011-12 and thereafter.

The fifty-eight local social services districts share in the costs of services provided to eligible beneficiaries who receive Medicaid through their districts.

#### Compliance Requirements:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

#### Professional Services:

No new professional services are required as a result of this amendment.

#### Compliance Costs:

There are no direct costs of compliance with this amendment. However, affected providers will realize reduced Medicaid billings for enteral formula, prescription footwear, and compression stockings. Local social service districts will experience decreased costs in their share of medical expenses for these items as a result of overall decreases in utilization.

#### Economic and Technological Feasibility:

The amendment will not change the way providers bill for services

or affect the way the local districts contribute their local share of Medicaid expenses for enteral formula, prescription footwear, or compression stockings. Therefore, there should be no technological difficulties associated with compliance with the proposed regulation.

**Minimizing Adverse Impact:**

SSL section 365-a(2)(g) requires a benefit limit on the coverage of enteral formula, prescription footwear, and compression stockings. These limits will affect providers by reducing payable Medicaid claims for such items. This impact cannot be avoided given the statutory mandate.

**Small Business and Local Government Participation:**

Local government officials have consistently urged the Department to implement Medicaid cost savings programs. The Department also meets on a regular basis with provider groups such as the New York Medical Equipment Providers (NYMEP). NYMEP has been informed of the proposed changes and has indicated its concerns regarding adequate notice to beneficiaries and practitioners on the revised benefits. Upon promulgating the regulation, the Department will inform the industry of the changes and assist as necessary with the transition to the new benefit limits.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**

The benefit limit on enteral formula will apply to 3123 pharmacies and 369 durable medical equipment providers in New York State. The benefit limit on prescription footwear will apply to 955 durable medical equipment providers in New York State. The benefit limit on compression stockings will apply to 1196 pharmacies and 441 durable medical equipment providers in New York State. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

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

No new reporting, recordkeeping or other compliance requirements and professional services are needed in a rural area to comply with the proposed rule.

**Costs:**

There are no direct costs associated with compliance. However, affected providers will realize reduced Medicaid billable claims for enteral formula, prescription footwear, and compression stockings.

**Minimizing Adverse Impact:**

The Department considered the approaches in Section 202-bb(2)(b) of the State Administrative Procedure Act and found them to be inappropriate given the legislative objective.

**Rural Area Participation:**

The Department meets on a regular basis with provider groups such as the New York Medical Equipment Providers (NYMEP), who represents some rural providers, to discuss reimbursement issues. NYMEP has indicated its concerns regarding adequate notice to beneficiaries and practitioners on the revised benefits. Upon promulgating the regulation, the Department will inform the industry of the changes and assist as necessary with the transition to the new benefit limits.

**Job Impact Statement**

**Nature of Impact:**

This rule will result in decreased Medicaid billable claims for providers of enteral formula, prescription footwear, and compression stockings. This decreased revenue will not likely have an adverse impact on jobs and employment opportunities within these businesses as they offer a wide variety of services which are reimbursed by Medicaid.

**Categories and Numbers Affected:**

This rule, which decreases Medicaid revenue, will not likely affect employment opportunities within providers who provide enteral formula, prescription footwear, and compression stockings.

The dispensing of enteral formula and compression stockings requires store clerk level staff, not licensed professionals.

The dispensing of prescription footwear requires staff certification from a national orthotic and prosthetic accreditation and training body. Support staff require no special training.

**Regions of Adverse Impact:**

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program to provide enteral formula, prescription footwear, and compression stockings.

**Minimizing Adverse Impact:**

SSL section 365-a(2)(g) requires a benefit limit on the coverage of enteral formula, prescription footwear, and compression stockings. These limits will affect providers by reducing payable Medicaid claims for such items. This impact cannot be avoided given the statutory mandate.

**Self-Employment Opportunities:**

The rule is expected to have minimal impact on self-employment opportunities since the majority of providers that will be affected by the rule are not small businesses or sole proprietorships whose sole business is dispensing enteral formula, prescription footwear, or compression stockings.

**EMERGENCY  
RULE MAKING**

**Hospital Quality Contribution**

**I.D. No.** HLT-42-11-00003-E

**Filing No.** 860

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

**Action taken:** Amendment of Subpart 86-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-d-1

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

**Specific reasons underlying the finding of necessity:** Emergency regulations are expressly authorized by the provisions of Public Health Law section 2807-d-1. The proposed emergency regulation will implement statutory action to change the rate of the Hospital Quality Contribution from 1.6% to 2.4% for collections during the period of July 1, 2011 through March 31, 2012. The rate will then be reduced to 1.6% effective April 1, 2012 and for each year thereafter.

The change in rate is designed to collect the required thirty million dollars needed for the Medical Indemnity Fund. The contribution is applied to general hospital revenue that is received for the provision of inpatient obstetrical patient care services.

The original rate of 1.6% was calculated on a full annual amount and on both inpatient obstetrical and newborn revenues. The first Hospital Quality Contribution, for the period July 1, 2011 through March 31, 2012, is not a full annual collection period.

The Department will conduct a reconciliation for the Hospital Quality Contribution after all collections have been processed for the period of July 1, 2011 through March 31, 2012. If the collection amount exceeds or is less than expected, the rate will be reevaluated.

**Subject:** Hospital Quality Contribution.

**Purpose:** To collect thirty million dollars annually for the Medical Indemnity Fund.

**Text of emergency rule:** Subpart 86-1 of 10 NYCRR is amended by adding a new section 86-1.41, to read as follows:

*86-1.41 Hospital Quality Contribution.*

(a) For the period July 1, 2011 through March 31, 2012 a quality contribution shall be imposed on the inpatient revenue of each general hospital that is received for the provision of inpatient obstetrical patient care services in an amount equal to 2.4% of such revenue, as defined in § 2807-d(3)(a) of the Public Health Law.

(b) For the period on and after April 1, 2012, a quality contribution shall be imposed on the inpatient revenue of each general hospital that is received for the provision of inpatient obstetrical patient care services in an amount equal to 1.6% of such revenue, as defined in § 2807-d(3)(a) of the Public Health Law.

(c) For the purposes of computing revenue subject to this section,

*inpatient obstetrical patient care services shall also include services related to the care of newborns, but shall exclude neonatal intensive care services.*

*(d) The funds collected pursuant to this section shall be subject to and administered in accordance with the provisions of § 2807-d-1 of the Public Health Law.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 27, 2011.

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

**Regulatory Impact Statement**

**Statutory Authority:**

Authorization for the collection of “Hospital Quality Contributions” is set forth in section 2807-d-1 of the Public Health Law (PHL), as enacted as part of the 2011-12 state budget and effective for periods on and after July 1, 2011. That statute set the Hospital Quality Contribution at 1.6% of each hospital’s revenue for inpatient obstetrical care services, but provided that the percentage could be increased or decreased by regulation if such an increase or decrease was required to maintain total annual collections at a level of \$30 million.

**Legislative Objectives:**

The express provisions of PHL section 2807-d-1 requires the Department to collect thirty million dollars for the state fiscal year beginning April 1, 2011 and each state fiscal year thereafter for the Medical Indemnity Fund.

**Needs and Benefits:**

Since PHL section 2807-d-1 is not effective until on and after July 1, 2011 the Hospital Quality Contributions will only be collected for nine months of the 2011-12 state fiscal year. The 1.6% set forth in the statute was computed so as to generate \$30 million over a period of twelve months. To generate \$30 million over only nine months the Department of Health has determined that the percentage needs to be increased from 1.6% to 2.4%. The proposed regulation therefore effectuates this increase for the nine month period of July 1, 2011 through March 31, 2012.

**Costs:**

There are no additional administrative costs to the implementation of and continuing compliance with this amendment. There are no additional costs to the Department of Health, state government, or local governments for the implementation of and continuing compliance of this amendment.

**Local Government Mandates:**

The proposed amendment does not impose any new programs, services, duties or responsibilities upon and county, city, town, village, school district, fire district or other special district.

**Paperwork:**

There is no additional paperwork required of providers as a result of the amendment.

**Duplication:**

These regulations do not duplicate existing state or federal regulations.

**Alternatives:**

No significant alternatives are available. The Department is required by the Public Health Law section 2807-d-1 to promulgate implementing regulations.

**Federal Standards:**

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

**Compliance Schedule:**

Section 86-1.41 requires the Department of Health to adjust the Hospital Quality Contribution rate to collections to 2.4% for the period of July 1, 2011 through March 31, 2012 and to 1.6% for the period of April 1, 2012 through March 31, 2013. No further action is required by the providers to achieve compliance with this rule.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees. This rule will have no effect on Local Governments.

**Compliance Requirements:**

There are no reporting, recordkeeping or other affirmative acts that small business or local governments will need to undertake to comply with the proposed rule. A small business guide is therefore not required.

**Professional Services:**

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

**Compliance Costs:**

There are no initial capital costs required to comply with the proposed rules, and there are no annual costs for continuing compliance.

**Economic and Technological Feasibility:**

As the proposed rule affects only the rate applied to the Hospital Quality Contribution paid by General Hospitals, compliance by small businesses and local government is not expected to have any economic or technological implication.

**Minimizing Adverse Impact:**

The proposed amendment reflects statutory intent and requirements.

**Small Business and Local Government Participation:**

The proposed rule resulted from the 2011-12 budget and is based on the recommendation of the Medicaid Redesign Team created by Executive Order. The recommendations process allowed for input from Medicaid industry stakeholders, including large and small providers, and the general public, through statewide hearings and website outreach.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 43 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		

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

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

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of the proposal. No additional professional services will be required for this compliance.

Costs:

There are no initial capital costs or additional annual costs which are required to comply with this proposal.

Minimizing Adverse Impact:

The proposed amendment reflects statutory intent and requirements.

Rural Area Participation:

The proposed rule resulted from the 2011-12 budget and is based on the recommendations of the Medicaid Redesign Team created by Executive Order. The recommendation process allowed for input from Medicaid stakeholders from all areas of the state, including rural areas, through regional hearings and website outreach.

**Job Impact Statement**

Nature of Impact:

The proposed emergency regulation will implement statutory action to change the rate of the Hospital Quality Contribution from 1.6% to 2.4% for collections during the period of July 1, 2011 through March 31, 2012. The rate will then be reduced back to 1.6% effective April 1, 2012.

Categories and Numbers Affected:

It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities.

Regions of Adverse Impact:

The proposed regulations have no implications for job opportunities for any region.

Minimizing Adverse Impact:

No minimizing measures are required.

**EMERGENCY  
RULE MAKING**

**Medicaid Managed Care Programs**

**I.D. No.** HLT-42-11-00004-E

**Filing No.** 861

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

**Action taken:** Repeal of Subparts 360-10, 360-11 and sections 300.12, 360-6.7; and addition of new Subpart 360-10 to Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a, 364-j and 369-ee

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

**Specific reasons underlying the finding of necessity:** Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to Social Services Law section 364-j to expand mandatory enrollment into Medicaid managed care by eliminating many of the prior exemptions and exclusions from enrollment take effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis to achieve the savings intended to be realized by the Chapter 59 provisions regarding expansion of Medicaid managed care enrollment.

**Subject:** Medicaid Managed Care Programs.

**Purpose:** To repeal old and outdated regulations and to consolidate all managed care regulations to make them consistent with statute.

**Substance of emergency rule:** The proposed rule repeals various sections of Title 18 NYCRR that contain managed care regulations and replaces them with a new Subpart 360-10 that consolidates all managed care regulations in one place and makes the regulations consistent with Section 364-j of the Social Services Law (SSL). Section 364-j of the SSL contains the Medicaid managed care program standards. The new Subpart 360-10 will also apply to the Family Health Plus (FHP) program authorized in Section 369-ee of the Social Services Law. FHP-eligible individuals must enroll in a managed care organization (MCO) to receive services and FHP MCOs must comply with most of the programmatic requirements of Section 364-j of the SSL.

The new Subpart 360-10 identifies the Medicaid populations required to enroll and those that are exempt or excluded from enrollment, defines good cause reasons for changing/disenrolling from an MCO, or changing primary care providers (PCPs), adds enrollee fair hearing rights, adds marketing/outreach and enrollment guidelines, and identifies unacceptable practices and the actions to be taken by the State when an MCO commits an unacceptable practice.

The proposed rule repeals the existing Subparts 360-10 and 360-11 and Sections 300.12 and 360-6.7 of Title 18 NYCRR. Section 300.12 applied to the Monroe County Medicap program, a managed care demonstration project that was undertaken in the mid-1980s and that no longer exists. Section 360-6.7 addresses processes and timeframes for disenrollment from the various types of MCOs and these provisions are included in the new Subpart 360-10. Subpart 360-11 implemented provisions relating to special care plans formerly contained in SSL Section 364-j; these provisions were added by Chapter 165 of the Laws of 1991 and later removed by Chapter 649 of the Laws of 1996.

**360-10.1 Introduction**

This section provides an introduction to the managed care program. Section 364-j of Social Services Law provides the framework for the Statewide Medicaid managed care program. Certain Medicaid recipients are required to receive services from Medicaid managed care organizations. Section 369-ee added the Family Health Plus (FHP) program to Social Services Law. Individuals eligible for FHP are required to receive services from a managed care plan unless they are participating in the Family Health Plus premium assistance program.

**360-10.2 Scope**

This section identifies the topics addressed by the Subpart.

**360-10.3 Definitions**

This section includes definitions necessary to understand the regulations.

**360-10.4 Individuals required to enroll in a Medicaid managed care organization**

This section identifies the individuals who will be required to enroll in an MCO.

**360-10.5 Individuals exempt or excluded from enrolling in a Medicaid mandatory managed care organization**

This section identifies the good cause reasons for a Medicaid recipient to be exempt or excluded from enrollment in a mandatory managed care program. The section also includes the procedures for requesting an exemption or exclusion and the timeframes for processing the request. This section also describes the notices that must be provided to a Medicaid recipient if his/her request is denied.

**360-10.6 Good cause for changing or disenrolling from an MCO**

This section describes the good cause reasons for an enrollee to change MCOs and the process for requesting a change or disenrollment. This section also identifies the timeframes for processing the request and the notices that must be provided to the enrollee regarding his/her request.

**360-10.7 Good cause for changing primary care providers**

This section describes the good cause reasons for a managed care enrollee to change primary care providers, the process through which the enrollee may request such a change and the timeframes for processing the request.

**360-10.8 Fair Hearing Rights**

This section identifies the circumstances under which a Medicaid or FHP enrollee may request a fair hearing. Enrollees may request a fair hearing for enrollment decisions made by the local social services

district and decisions made by an MCO or its utilization review agent about services. The section describes the notices that must be sent to advise the enrollee of his/her of her fair hearing rights. The section also explains when aid continuing is available for managed care issues and how the enrollee requests it when requesting a fair hearing.

360-10.9 Appeal Rights for Recipients Enrolled in Medicaid Advantage

This section identifies the Medicaid and Medicare appeal rights that are available for recipients enrolled in a Medicaid Advantage plan.

360-10.10 Marketing/Outreach

This section defines marketing/outreach and establishes marketing/outreach guidelines for MCOs including requiring MCOs to submit a marketing/outreach plan, requiring MCOs to get approval of materials before distribution, and establishing limits for marketing/outreach representative reimbursement.

360-10.11 MCO unacceptable practices

This section identifies additional unacceptable practices for MCOs. These are generally related to marketing/outreach.

360-10.12 MCO sanctions and due process

This section identifies the actions the Department is authorized to take when an MCO commits an infraction.

**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 December 27, 2011.

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

#### Regulatory Impact Statement

Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

Legislative Objectives:

Section 364-j of the SSL governs the Medicaid managed care program, under which certain Medicaid recipients are required or allowed to enroll in and receive services through managed care organizations (MCOs). Section 369-ee of Social Services Law authorized the State to implement the Family Health Plus (FHP) program, a managed care program for individuals aged 19 to 64 who have income too high to qualify for Medicaid. The intent of the Legislature in enacting these programs was to assure that low-income citizens of the State receive quality health care and that they obtain necessary medical services in the most effective and efficient manner.

Chapter 59 of the Laws of 2011 amended SSL section 364-j to expand mandatory enrollment into Medicaid managed care by eliminating many of the exemptions and exclusions from enrollment previously contained in the statute.

Needs and Benefits:

The proposed regulations reflect current program practices and requirements, consolidate all managed care regulations in one place, and conform the regulations to the provisions of SSL section 364-j, including the recent amendments made by Chapter 59 of the Laws of 2011. The proposed regulations identify the individuals required to enroll in Medicaid managed care and identify the populations who are exempt or excluded from enrollment.

The proposed regulations also contain provisions, which apply to both the Medicaid managed care and the FHP programs: specifying good cause criteria for an enrollee to change MCOs or to change their primary care provider; explaining enrollees' rights to challenge actions of their MCO or social services district through the fair hearing process; establishing marketing/outreach guidelines for MCOs; and identifying unacceptable practices and sanctions for MCOs that engage in them.

Costs:

The proposed regulations do not impose any additional costs on local social services districts beyond those imposed by law. The current managed care program operates under a federal Medicaid waiver pursuant to section 1115 of the Social Security Act. Through the waiver, the State receives federal dollars for its Safety Net and FHP populations. Administrative costs associated with implementation of the managed care program incurred at start-up were covered by planning grants. Since 2005, administrative costs for the managed care program have been included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

Local Government Mandates:

The proposed regulations do not create any additional burden to local social services districts beyond those imposed by law.

Paperwork:

Social Services Law requires that Medicaid recipients be advised in writing regarding enrollment, benefits and fair hearing rights. In compliance with the law, the proposed regulations describe the circumstances under which a Medicaid managed care participant should be provided with such notices, who is responsible for sending the notice and what should be included in the notice. There are reporting requirements associated with the program for social service districts and MCOs. The social services district is required to report on exemptions granted, complaints received and other enrollment issues. MCOs must submit network data, complaint reports, financial reports and quality data. These requirements have been in existence since 1997 when the mandatory Medicaid managed care program began. There are no new requirements for the social services districts or the MCOs in the proposed regulations.

Duplication:

The proposed regulations do not duplicate any State or federal requirements unless necessary for clarity.

Alternative Approaches:

The Department is required by SSL section 364-j to promulgate regulations to implement a statewide managed care program. The proposed regulations implement the provisions of SSL section 364-j in a way which balances the needs of MA recipients, managed care providers and local social services districts. No alternatives were considered.

Federal Standards:

Federal managed care regulations are in 42 CFR 438. The proposed regulations do not exceed any minimum standards of the federal government.

Compliance Schedule:

The mandatory Medicaid managed care program has been in operation since 1997. As a result, all counties in the State have some form of managed care. The requirements in the proposed rules have been implemented through the contract between the State or eligible social services and participating MCOs.

#### Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

Section 364-j of Social Services Law (SSL) authorizes a Statewide Medicaid managed care program that includes mandatory enrollment of most Medicaid beneficiaries. In 1997 the State applied for and received approval of a Federal waiver under Section 1115 of the Social Security Act to implement mandatory enrollment. Section 369-ee of SSL authorizes the Family Health Plus (FHP) program and requires eligible persons to receive services through managed care organizations (MCOs). Currently, all counties have implemented some form of managed care. As of April, 2011, forty-nine counties have a mandatory Medicaid managed care program; nine counties have a voluntary Medicaid managed program. All counties have a FHP program.

As a result of the implementation of the Medicaid managed care program and FHP programs, most Medicaid recipients and all FHP eligible persons are required to enroll and receive services from providers who contract with a managed care organization (MCO). MCOs must have a provider network that includes a sufficient array and number of providers to serve enrollees, but they are not required

to contract with any willing provider. Consequently, local providers may lose some of their patients. However, this loss may be offset by an increase in business as a result of the implementation of FHP.

The proposed regulations do not impose any additional requirements beyond those in law and the benefits of the program outweigh any adverse impact.

**Compliance Requirements:**

No new requirements are imposed on local governments beyond those included in law and there are no requirements for small businesses.

**Professional Services:**

No professional services will be necessitated as a result of this rule. However, the services of a professional enrollment broker will be available to counties that choose to access them. The costs of these services are shared by the State and the local districts.

**Compliance Costs:**

No additional costs for compliance will be incurred as a result of this rule beyond those imposed by law. Administrative costs associated with implementation of the managed care program incurred at start-up were covered by planning grants. Since 2005, administrative costs for the managed care program have been included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap. Additionally, the 1115 waiver reduced local government costs by authorizing Federal participation for the Safety Net and Family Health Plus (FHP) populations.

**Economic and Technological Feasibility:**

Administrative costs incurred at program start-up were covered by planning grants. Since 2005, administrative costs for the managed care program are included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

The Medicaid managed care program utilizes existing state systems for operation (Welfare Management System, eMedNY, etc.).

The Department provides ongoing technical assistance to counties to assist in all aspects of planning, implementing and operating the local program.

**Minimizing Adverse Impact:**

The mandatory Medicaid managed care program is implemented only when there are adequate resources available in a local district to support the program. No new requirements are imposed beyond those included in law.

The benefits of the managed care program outweigh any adverse effects. Managed care programs are designed to improve the relationship between individuals and their health care providers and to ensure the proper delivery of preventive medical care. Such programs help avoid the problem of individuals not receiving needed medical care until the onset of advanced stages of illness, at which time the individual would require higher levels of medical care such as emergency room care or inpatient hospital care. The State has fourteen years of Quality Data that demonstrate that Medicaid beneficiaries enrolled in managed care receive better quality care than those in fee-for-service Medicaid.

**Small Business and Local Government Participation:**

The regulations do not introduce a new program. Rather, they codify current program policies and requirements and make the regulations consistent with section 364-j of SSL. During the development of the 1115 waiver application and the design of the managed care program, input was obtained from many interested parties.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

All rural counties with managed care programs will be affected by this rule. As of April 2011, all rural counties have a Medicaid managed care and Family Health Plus (FHP) program.

**Compliance Requirements:**

This rule imposes no additional compliance requirements other than those already contained in Section 364-j of the Social Services Law (SSL).

**Professional Services:**

No professional services will be necessitated as a result of this rule. However, the services of a professional enrollment broker will be available to counties that choose to access them. The costs of these services are shared by the State and the local districts.

**Compliance Costs:**

No additional costs for compliance will be incurred as a result of this rule beyond those imposed by law. The administrative costs incurred by local governments for implementing the Statewide managed care program are included with all other Medicaid administrative costs and beginning in 2005, there was no local share for administrative costs over and above the administrative cost base of the Medicaid administrative cap. Additionally, the Federal Section 1115 waiver which allowed the State to implement mandatory enrollment, reduced local government costs by authorizing Federal participation for the Safety Net and FHP populations.

**Minimizing Adverse Impact:**

The benefits of the managed care program outweigh any adverse effects. Managed care programs are designed to improve the relationship between individuals and their health care providers and to ensure the proper delivery of preventive medical care. Such programs help avoid the problem of individuals not receiving needed medical care until the onset of advanced stages of illness, at which time the individual would require higher levels of medical care such as emergency room care or inpatient hospital care. The State has many years of Quality Data that demonstrate that Medicaid beneficiaries enrolled in managed care receive better quality care than those in fee-for-service Medicaid.

**Feasibility Assessment:**

Administrative costs incurred at program start-up were covered by planning grants. Since 2005, administrative costs for the managed care program are included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

The Medicaid managed care program utilizes existing state systems for operation (Welfare Management System, eMedNY, etc.).

The Department provides ongoing technical assistance to counties to assist in all aspects of planning, implementing and operating the local program.

**Rural Area Participation:**

The proposed regulations do not reflect new policy. Rather, they codify current program policies and requirements and make the regulations consistent with section 364-j of the SSL. During the development of the 1115 waiver application and the design of the managed care program, input was obtained from many interested parties.

**Job Impact Statement**

**Nature of Impact:**

The rule will have no negative impact on jobs and employment opportunities. The mandatory Medicaid managed care program authorized by Section 364-j of the Social Services Law (SSL) will expand job opportunities by encouraging managed care plans to locate and expand in New York State.

**Categories and Numbers Affected:**

Not applicable.

**Regions of Adverse Impact:**

None.

**Minimizing Adverse Impact:**

Not applicable.

**Self-Employment Opportunities:**

Not applicable.

**EMERGENCY  
RULE MAKING**

**Municipal Public Health Services Plan - Radioactive Material and Radiation Equipment**

**I.D. No.** HLT-42-11-00005-E

**Filing No.** 862

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

**Action taken:** Amendment of Part 40 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 602 and 603

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

**Specific reasons underlying the finding of necessity:** On July 1, 2011, state funding for municipal programs to conduct inspections of x-ray facilities and regulate and control radioactive material use in New York City ceased to be available because the Legislature repealed the enabling statute. This emergency regulation moves these programs under a new basic State aid environmental health program. See Public Health Law § 602(3)(b)(5). The Commissioner has authority to issue regulations for basic State aid programs under Public Health Law § 602(3)(b).

If the City discontinues its radioactive materials program, the State must take over this work pursuant to its agreement with the federal Nuclear Regulatory Commission. If municipalities discontinue their x-ray inspection programs, the State will be required to take over this work pursuant to the Public Health Law. The fiscal impact to the State of taking over these programs would be significant.

In 2009, the cost to the State to continue to fund the municipalities that are conducting these programs was approximately \$560,000. It is estimated that the cost to the Department to take over these programs would exceed \$3,000,000. It would be fiscally inefficient for the State to take over programs that are already operational in these municipalities, considering the initial cost of transition and the continuous costs of travel for State employees. Thus, this regulation represents both good public health policy as well as sound fiscal policy.

It is imperative that these local governments continue to operate their radiation protection programs. The proposed regulation ensures that municipalities have the resources to protect the public from the environmental health threat posed by radioactive materials and radiation producing equipment.

**Subject:** Municipal Public Health Services Plan - Radioactive Material and Radiation Equipment.

**Purpose:** To establish funding for certified counties to inspect radiation equipment and the NYCDOHMH to conduct licensing and inspections.

**Text of emergency rule:** Subpart 40-3 is REPEALED, in its entirety. Subpart 40-2 is amended and new subdivisions 40-2.240, 40-2.241, 40-2.250, and 40-2.251 are added to read as follows:

*40-2.240. Radioactive materials licensing and inspection program; performance standard.*

*The municipal public health services plan shall include a radioactive materials licensing and inspection program containing those provisions set forth in section 40-2.241 of this Subpart, if the Department has authorized the municipality to conduct such a program.*

*40-2.241. Radioactive materials licensing and inspection program; authorization.*

*The department shall authorize a municipality's radioactive materials licensing and inspection program if such program includes, at a minimum, provisions for:*

- (a) regulating all facilities in the municipality's jurisdiction;*
- (b) ensuring the technical quality of licensing actions by the municipality;*
- (c) assessing licensee compliance with Part 16 of the State Sanitary Code and conditions of the license, and ensuring correction of violations; and*
- (d) inspecting regulated facilities at a frequency established by the department.*

*40-2.250. Radiation-producing equipment program; performance standard.*

*The municipal public health services plan shall include a radiation-producing equipment inspection program containing those provisions set forth in section 40-2.251 of this Subpart, if the department has certified such a program for the municipality.*

*40-2.251 Radiation-producing equipment program; authorization.*

*The department shall certify a municipality's radiation producing equipment inspection program if such program includes, at a minimum, provisions for:*

*(a) inspecting all facilities and equipment in the municipality's jurisdiction; and*

*(b) performing inspections and issuing reports in accordance with Part 16 of the State Sanitary Code and, in particular, reporting as described in section 16.10.*

**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 December 27, 2011.

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

**Regulatory Impact Statement**

Statutory Authority:

Article 6 of the Public Health Law (PHL) provides statutory authority to provide State aid to municipalities for general public health work (GPHW). PHL § 614(3) defines municipality to be a county or city. PHL § 602(3)(b)(5) provides that GPHW must include certain health services, including environmental health services. PHL § 602(3)(a) authorizes the Commissioner to adopt rules and regulations after consulting with the Public Health and Health Planning Council and county commissioners, boards, and the public health directors, to establish standards of performance for environmental health services delivered under the GPHW program.

Legislative Objectives:

The State Legislature recently amended PHL § 605 to eliminate "optional services" as a category of services eligible for State aid reimbursement. These optional services are still described in regulations of the Department of Health (Department) at 10 NYCRR subpart 40-3. Repealing subpart 40-3 will eliminate this superfluous language.

However, two of the optional services that are no longer eligible for State aid are regulation of radioactive materials and regulation of radiation producing equipment. The Department recognizes that radioactive materials and radiation producing equipment present significant environmental health hazards to the public. The Department should encourage counties to protect their citizens from the potentially harmful effects of radioactive materials and radiation producing equipment by providing State aid to offset the cost of these services.

The Department further recognizes that not every county has the technical capability to regulate radioactive materials and radiation producing equipment. Counties without such technical capability should not be precluded from receiving State aid for public health work. Accordingly, the proposed regulation provides that a county that wishes to receive State aid must regulate radioactive materials and equipment only if its programs have the technical capability to do so, as authorized or certified by the Department.

Needs and Benefits:

Pursuant to a New York State agreement with the federal Nuclear Regulatory Commission (NRC), radioactive materials must be regulated throughout the State. Currently, the New York City Department of Health and Mental Hygiene (DOHMH) is the only municipality certified by the Department to regulate radioactive materials; the State provides this service in all other counties. DOHMH licenses and inspects approximately 350 radioactive material facilities in New York City. By protecting the public from the environmental health hazards from these radioactive materials, DOHMH provides a substantial benefit to the public health.

Additionally, pursuant to Part 16 of the State Sanitary Code, the

Department has certified DOHMH and four additional counties (Suffolk, Westchester, Dutchess and Niagara) to inspect radiation producing equipment. DOHMH and these additional counties license and inspect nearly 10,000 radiation equipment facilities. Like the radioactive materials program, these municipalities offer a substantial public health benefit by protecting their citizens from the environmental health hazards potentially created by radiation producing equipment.

Failure to conduct timely inspections of any of these facilities could result in equipment failure or technician errors going unnoticed and uncorrected for longer periods of time, resulting in radiation overexposure during diagnostic or therapeutic procedures or misadministration of nuclear medicine for patients who require these life-saving health services. Inspection of facilities that use radioactive materials ensures appropriate handling and minimizes exposure to workers, the public and the environment. A security check of high-risk radiation sources is also conducted during these inspections.

A recent series of New York Times articles indicate the public's concern over radiation medical events and malpractice has significantly and justifiably increased. Recent events in Japan further indicate that the public is highly concerned about radiation exposure. During the week of March 14, 2011, the Department's Bureau of Environmental Radiation Protection received approximately 40 calls every day from concerned citizens with concerns about exposure. The public rightfully expects a robust regulatory program, which DOHMH and other counties currently provide, through their partnership with the Department.

Due to the public health threat presented by radiation, it is imperative that these local governments continue to operate their radiation protection programs. The proposed regulation ensures that municipalities have the resources to protect the public from the environmental health threat posed by radioactive materials and radiation producing equipment.

Costs to Regulated Parties for the Implementation of, and Continuing Compliance with, the Rule:

Because the regulated municipalities are currently performing these programs, there will be no increase in their costs. Rather, regulated municipalities that wish to continue these programs will save money by continuing to receive State aid. However, without this regulatory change, the costs to municipalities that wish to continue these programs will increase substantially.

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

The municipalities that operate these programs and receive funding have indicated they would discontinue the programs if State aid is not provided. By encouraging counties to continue these programs, the Department will save money. As noted, pursuant to the State's agreement with the federal Nuclear Regulatory Commission, if DOHMH ceases to regulate radioactive materials, the State must do so. This will cost substantially more than the \$370,000 in State aid that was paid to New York City in State aid in 2009, which represented only 26% of DOHMH's total costs for regulating radioactive materials. Although the NRC could theoretically take over regulation of radioactive materials, the burden on local businesses to pay federal fees would be more than five (5) times higher than the costs imposed by programs operated by State or local government. Similarly, and as a matter of sound public policy, if municipalities cease to regulate radiation producing equipment the Department would take over these programs.

In 2009, the cost to the State to fund the municipalities that conduct these programs was approximately \$560,000. Specifically, New York City was reimbursed \$370,000 for its radioactive materials inspection and licensing program and \$119,000 for the radiation producing equipment program, for a total of \$489,000. Two other counties were reimbursed approximately \$71,000 for their radiation producing equipment programs. The remaining two counties recovered enough in fees that year that they exceeded their expenses for their radiation producing equipment programs and did not receive State aid. These costs are not expected to change if the proposed regulations are adopted.

It would be fiscally inefficient for the State to take over programs that are already operational in these municipalities, considering the

initial cost of transition and the continuous costs of travel for State employees. Thus, this regulation represents both good public health policy as well as sound fiscal policy.

The Information, Including the Source(s) of Such Information and the Methodology, upon Which the Cost Analysis is Based:

The cost analysis is based on calendar year 2009 State Aid claims provided by municipalities, as currently required by PHL § 618 and 10 NYCRR § 40-1.20(b). An annual summary of State aid is routinely prepared by the Department.

Local Government Mandates:

This proposed rule does not impose any program, service, duty or responsibility upon the municipalities that has not already been agreed to and certified by the Department.

Paperwork:

The requirements for reporting will remain unchanged.

Duplication:

There are no relevant rules and other legal requirements of the state and federal governments, that duplicate, overlap or conflict with the proposed rule.

Alternatives:

The alternative is for the Department to take over regulation of radioactive materials as well as regulation of radiation producing equipment in those municipalities that discontinue these programs because they are ineligible for State aid. It is estimated that this alternative would cost the State over \$3,000,000, based on the cost of funding the 22 FTEs currently employed by the municipalities to operate these programs. This number does not include clerical, administrative, and management positions that support the municipal programs.

Federal Standards:

There is no federal minimum standard that determines whether the State must supply State aid to municipalities that choose to provide these services. However, the federal government does require that these programs be provided throughout the State.

Compliance Schedule:

The regulations will take effect upon filing with the Department of State.

#### **Regulatory Flexibility Analysis**

Effect on Small Business:

This rule will apply to county radiation programs that are certified or become certified in the future. Currently only Dutchess, Niagara, Westchester, Suffolk counties and New York City have such programs. The proposed regulatory change will result in no additional cost to these local governments.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41 (c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the cost to small business would be at least five (5) times higher than it is now.

Compliance Requirements:

The certified county programs already meet the requirements and comply with the regulations. Facilities inspected will still be required to meet the requirements of Part 16, regardless of whether they are inspected by county inspectors or State inspectors.

Professional Services:

Certified counties do not need professional services to establish or maintain certification.

Capital Costs and Annual Costs of Compliance:

There are no capital costs associated with this regulation.

Economic and Technological Feasibility:

The proposed regulatory change will result in no additional cost to local governments or impose any new technology requirements or costs.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41 (c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the economic cost to small business would be at least five (5) times higher than it is now.

#### Minimizing Adverse Impact:

No adverse impact of implementation has been identified. Failure to implement may result in some county programs dropping certification, which will then require the State DOH to implement these programs.

#### Small Business Input:

No small businesses were surveyed. The proposed changes do not have any direct effect on small business. Failure to implement these changes may result in fee increases for small business.

#### Rural Area Flexibility Analysis

##### Types and Estimated Numbers of Rural Areas:

No affected county programs are classified as rural areas (18 counties with less than 200,000 population and 9 counties with certain townships with a population density less than 150 persons/square mile).

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

There are no new reporting requirements contained in the proposed regulations. No additional professional service costs are anticipated.

#### Costs:

No rural counties affected.

#### Minimizing Adverse Impact:

No rural counties are affected by this regulation.

#### Rural Area Participation:

No communications were made with rural counties.

#### Job Impact Statement

##### Nature of Impact:

No jobs will be adversely affected by adoption of these regulations. The proposal does not change the regulatory requirements on regulated entities.

##### Categories and Numbers Affected:

The certified counties include Dutchess, Niagara, Westchester, Suffolk and New York City.

##### Regions of Adverse Impact:

No regions will be adversely impacted by the adoption of these regulations.

#### Minimizing Adverse Impact:

As stated, no jobs will be adversely affected by the adoption of the proposed changes in the regulations.

## EMERGENCY RULE MAKING

### Reduction to Statewide Base Price

**I.D. No.** HLT-42-11-00006-E

**Filing No.** 863

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

**Action taken:** Amendment of section 86-1.16 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-c(35)

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to meet the

statutory timeframes prescribed by Chapter 59 of the Laws of 2011, in a timely manner while the State works with the hospital industry to develop and incorporate quality-related measures pertaining to the appropriate use of cesarean deliveries that will generate future savings. The revised statewide base price is intended to achieve the required savings for this proposal.

Public Health Law section 2807-c(35)(b) specifically provides the Commissioner of Health with authority to issue hospital inpatient rate-setting regulations as emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

**Subject:** Reduction to Statewide Base Price.

**Purpose:** Imposes a reduction to the statewide base price as an interim measure.

**Text of emergency rule:** Section 86-1.16 of Subpart 86-1 of title 10 NYCRR is amended by adding a new subdivision (c), to read as follows:

*(c) For the period effective July 1, 2011 through March 31, 2012, the statewide base price shall be adjusted such that total Medicaid payments are decreased by \$24,200,000.*

**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 December 27, 2011.

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

#### Regulatory Impact Statement

##### Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in section 2807-c(35) of the Public Health Law.

##### Legislative Objectives:

The Legislature and Medicaid Redesign Team adopted a proposal to reduce unnecessary cesarean deliveries to promote quality care and reduce unnecessary expenditures. Due to industry concerns with the initial proposal it was determined that a more clinically sound method needs to be developed. To generate immediate savings, however, a reduction in the statewide base price is being implemented while an obstetrical workgroup develops a more clinically sound approach to meet Legislative objectives.

##### Needs and Benefits:

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures that inherently involve risks; however, elective cesarean deliveries increase the risks unnecessarily. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

This amendment, in concert with enacted statute, implements a statewide base price reduction of \$24.2 million dollars to achieve the immediate savings target for unnecessary cesarean deliveries while the state undergoes consultation with affected stakeholders to develop a clinically sound approach to reducing inappropriate cesarean deliveries.

##### COSTS:

##### Costs to State Government:

There are no additional costs to State government as a result of this amendment.

##### Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments.

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

There will be no additional costs to the Department of Health as a result of this amendment.

##### Local Government Mandates:

The proposed amendments do not impose any new programs, ser-

ices, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

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

**Duplication:**

These regulations do not duplicate existing State and federal regulations.

**Alternatives:**

No significant alternatives are available at this time. In collaboration with the hospital industry, the State is in the process of developing a more clinically sound method to achieve this savings. The Department is authorized by the Public Health Law section 2807-c(35)(b)(xiii) to address certain aspects of the hospital reimbursement methodology through regulations.

**Federal Standards:**

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

**Compliance Schedule:**

Section 86-1.16 requires that the statewide base price be reduced by \$24,200,000 for the period effective July 1, 2011 through March 31, 2012.

**Regulatory Flexibility Analysis**

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

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

Health care providers subject to the provisions of this regulation under section 2807-c(35) of the Public Health Law will see a minimal decrease in funding as a result of the reduction in the statewide base price.

This rule will have no direct effect on Local Governments.

**Compliance Requirements:**

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on Local Governments.

**Professional Services:**

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

**Compliance Costs:**

As a result of the new provision of 86-1.16, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will decrease in an amount corresponding to the total statewide base price reduction.

**Economic and Technological Feasibility:**

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements.

**Small Business and Local Government Participation:**

Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 43 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		

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

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

**Professional Services:**

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

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements.

**Rural Area Participation:**

This amendment is the result of ongoing discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation revises the final statewide base price for the period beginning July 1, 2011 through March 31, 2012. The proposed regulation has no implications for job opportunities.

**EMERGENCY  
RULE MAKING**

**Audits of Institutional Cost Reports (ICR)**

**I.D. No.** HLT-42-11-00009-E

**Filing No.** 868

**Filing Date:** 2011-10-03

**Effective Date:** 2011-10-03

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

**Action taken:** Amendment of Subpart 86-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-c(35)

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

**Specific reasons underlying the finding of necessity:** It is necessary to is-

sue the proposed regulations on an emergency basis in order to implement Public Health Law section 2807-c(35)(b)(xiii), as amended by Chapter 59 of the Laws of 2011, in a timely manner related to imposing a fee schedule associated with filing institutional cost reports, which is intended to fund the costs of auditing institutional cost reports. In addition, this regulation eliminates the need for hospitals to submit a CPA certification of their cost reports for years ended on and after December 31, 2010. To avoid these costs, hospitals need to be advised of the elimination of this requirement.

Public Health Law section 2807-c(35), as amended by Chapter 59 of the Laws of 2011, Part H, § 36, specifically provides the Commissioner of Health with authority to issue these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of these new policies related to fee obligations for filing institutional cost reports.

**Subject:** Audits of Institutional Cost Reports (ICR).

**Purpose:** To impose a fee schedule on general hospitals related to the filing of ICRs sufficient to cover the costs of auditing the ICRs.

**Text of emergency rule:** Subdivision (k) of section 86-1.2 of title 10 of NYCRR is amended to read as follows:

(k) Accountant's certification. *With regard to institutional cost reports filed for report years prior to 2010.* [T]he institutional cost report shall be certified by an independent licensed public accountant or an independent certified public accountant. The minimum standard for the term independent shall be the standard used by the State Board of Public Accountancy.

Subdivision (b) of section 86-1.4 of title 10 of NYCRR is amended and a new subdivision (i) is added to read as follows:

(b) Subsequent to the filing of fiscal and statistical reports, field audits [shall] *may* be conducted of the records of medical facilities in a time, manner and place to be determined by the State Department of Health. [Where feasible, the department shall enter into an agreement to use a combined audit (Medicare-Medicaid and other organizations and agencies having audit responsibilities) to satisfy the department's auditing needs. In this respect, the State Department of Health reserves the right, after entering into an agreement to use a combined audit, to reject the audit findings of other organizations and agencies having audit responsibilities and to perform a limited scope or comprehensive audit of their own for the same fiscal period audited by the organization and/or agency.] *Alternatively or in addition the Department may, in its sole discretion, conduct desk audits of such fiscal and statistical reports.*

(i)(1) *Effective for institutional cost reports filed for report periods ending on and after December 31, 2010, the Department shall establish a fee schedule for the purpose of funding audit activities authorized pursuant to this section. Such fee schedule shall be published on the Department's Health website at <http://www.health.state.ny.us>. The amount of such fees shall be based upon the relative amount of the total costs reported by each facility, provided, however, that minimum and maximum fee levels may be established.*

(2) *Additional fees shall be established for facilities filing more than two institutional costs reports for a cost period. The Department may, upon written application submitted prior to the submission of such additional institutional cost reports, waive all or part of such additional fees based on a showing of financial hardship or for other good cause shown. Such a waiver must be in writing.*

(3) *Fees shall be submitted at the time of the submission of the institutional cost reports. A failure to pay such fees may be deemed by the Department as constituting the non-filing of the institutional cost report and subject the facility to the rate reduction authorized pursuant to section 86-1.2(c) of this Subpart. Failure to pay the additional fee associated with the filing of additional institutional cost reports as described in paragraph (2) of this subdivision shall result in the non-utilization of such revised cost reports by the Department. Delinquent fees may be collected by the Department in accordance with the provisions of Public Health Law section 2807-c(18)(h).*

**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 December 31, 2011.

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

**Regulatory Impact Statement**

Statutory Authority:

Public Health Law section 2807-c(35)(b)(xiii) authorizes the Commissioner to impose a fee, by regulation, on general hospitals that is sufficient to cover the costs of auditing the institutional cost reports submitted by such hospitals.

Legislative Objectives:

The Legislature authorized the Commissioner to impose fees sufficient to cover the costs of auditing institutional cost reports for fiscal purposes and to improve the data integrity of information reported by hospitals. Such information is used to make both policy and financial decisions related to the Medicaid program.

Needs and Benefits:

The proposed rule implementing the provisions of Public Health Law section 2807-c(35)(b)(xiii) provides for the establishment and implementation of a new fee schedule to support the costs of auditing institutional cost reports. The rule also details how the audit process will be implemented. At the same time the Department is exercising its discretion under its pre-existing hospital rate-setting regulation authority pursuant to PHL section 2807-c(35)(b) to eliminate the requirement that hospitals secure certification of their cost reports by an independent licensed CPA.

Costs:

Costs to State Government:

There are no additional costs to State government as a result of this amendment.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments. Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this amendment.

Local Government Mandates:

The proposed amendments do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

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

Duplication:

These regulations do not duplicate existing State and federal regulations.

Alternatives:

No significant alternatives are available. The Department is authorized by the Public Health Law section 2807-c(35)(b) to address certain aspects of the hospital reimbursement methodology through regulations.

Federal Standards:

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

Compliance Schedule:

The proposed amendments to Section 86-1.2 limits the requirement that institutional cost reports be certified by an independent licensed or certified public accountant to cost periods prior to 2010. Regulated parties must continue to comply with this provision when filing institutional cost reports for cost periods prior to 2010.

The proposed amendments to Section 86-1.4 allows the Department to impose fees on general hospitals sufficient to cover the costs of auditing the institutional cost reports submitted by general hospitals for cost periods on and after December 31, 2010. Regulated parties must comply with this provision at the time of submission of the institutional cost report. Failure to comply may subject the facility to a rate reduction. In addition, general hospitals that fail to pay the additional fee associated with filing more than two institutional cost reports for a reporting period will be subject to an additional fee.

**Regulatory Flexibility Analysis**

Effect on Small Business and Local Governments:

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

All health care providers who file Institutional Cost Reports with the Department, including the seven hospitals identified as small businesses, are subject to the provisions of this regulation under section 2807-c(35)(b) of the Public Health Law. However, this rule also eliminates the requirement for all hospitals that annual cost reports be certified by an independent CPA, thus reducing the costs and administrative burdens resulting from that current requirement. In addition, provisions are made to waive or reduce some of the new fees for institutions who demonstrate financial hardship and good cause and who apply for such in writing.

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of this rule. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on Local Governments.

Professional Services:

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

Compliance Costs:

While fee obligations related to the filing of institutional cost reports represent a cost for general hospitals, this is offset by the reduction in costs resulting from the elimination of the requirement that reports be certified by an independent certified public accountant. No capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Small Business and Local Government Participation:

Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

**Rural Area Flexibility Analysis**

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 43 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		

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Rural Area Participation:

This amendment is the result of ongoing discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations allow for the Department to perform field or desk audits of the fiscal and statistical records of medical facilities, establish a fee schedule for filing institutional cost reports for report periods on and after December 31, 2010, and require accountant's certification only for institutional cost reports filed for cost years prior to 2010. The proposed regulations have no implications for job opportunities.

**EMERGENCY  
RULE MAKING**

**Managed Care Organizations (MCOs)**

**I.D. No.** HLT-42-11-00013-E

**Filing No.** 931

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-04

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

**Action taken:** Amendment of section 98-1.11 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 4403(2)

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

**Specific reasons underlying the finding of necessity:** The SFY 2012 NYS Budget effective April 1, 2011 incorporates a proposal from the Medicaid Redesign Team (MRT Proposal #6) that reduces the allocation of surplus in the premium rates of Medicaid, Family Health Plus (FHP) and HIV SNP managed care plans from 3% to 1%, resulting in savings to the Medicaid program of approximately \$188 million. The actuarial firm employed by DOH, Mercer Consulting, which must certify the actuarial soundness of the premium rates to CMS, has determined the reduction in surplus allocation will require the lowering of the contingent reserve requirement specified in § 98-1.11(e)(1) from the current 10.5% to 7.25% of premium revenue in order to maintain the actuarial soundness of the

premium rates. The SFY 2012 Article VII budget bill gives DOH the authority to adopt regulations on an emergency basis to implement provisions of the SFY 2012 budget. The amendments to 98-1.11(e) will allow DOH to reduce the surplus allocation in the mainstream Medicaid, FHP and HIV SNP premium rates consistent with the approved SFY 2012 budget.

In light of the amendments to 98-1.11(e), revisions to 98-1.11(b) are needed to clarify in regulation the criteria used to evaluate transfers of assets or loans proposed by managed care organizations regulated by Part 98 that heretofore have been linked in policy to the contingent reserve requirement specified in § 98-1.11(e).

**Subject:** Managed Care Organizations (MCOs).

**Purpose:** To specify approval standards for asset transfers or loans proposed by MCOs.

**Text of emergency rule:** Subdivision (b) of section 98-1.11 is amended to read as follows:

(b) No funds [the aggregate of which involves five percent or more of the MCO's admitted assets at last year-end] shall be transferred or loaned from the MCO article 44 business to any other business, function or contractor of the MCO, or to any subsidiary or member of the MCO's holding company system or to any member or stockholder [over the course of a single calendar year,] without the prior approval of the commissioner and, except in the case of a PHSP, HIV SNP, [or] PCPCP[,] or MLTC, the superintendent. Repayment of any such approved loans, to the extent required, shall be made in accordance with schedules approved by the superintendent and commissioner. *Any such transfers or loans shall require a certification by the MCO that such transfer or loan is in compliance with and does not violate any provision of any applicable law or regulation.*

(1) *No such transfer or loan shall be approved if the net worth of the MCO after the transfer or loan would fall below 12.5 percent of its annual net premium income, and all such transfers and loans must be accompanied by projections submitted by the MCO showing that its net worth shall continue to meet or exceed 12.5 percent of annual net premium income for two calendar years following the transfer or loan.*

(2) *Notwithstanding the provisions of paragraph (1) of this subdivision, no such proposed transfer or loan made by any MCO that received seventy-five percent or more of its net premium income from the New York State Medicaid, Family Health Plus, and Child Health Plus programs during the last calendar year shall be approved if the net worth of the MCO after such transfer or loan would fall below 15 percent of its annual net premium revenue, and all such transfers and loans must be accompanied by projections submitted by the MCO showing that its net worth shall continue to meet or exceed 15 percent of annual net premium revenue for two calendar years following the transfer or loan. In order to ensure the availability of quality health services for an enrolled population, the commissioner may waive the provisions of this paragraph should the proposed transfer of funds or loan be used to purchase a controlling interest, or a substantial portion of the assets, of a MCO certified to operate under Article 44 of the Public Health Law.*

Subdivision (e) of section 98-1.11 is amended to read as follows:

(e)(1) Except for a PCPCP, a certified operating MCO, or an MCO that is initially commencing operations, shall maintain a reserve, to be designated as the contingent reserve [which must be equal to five percent of its annual net premium income].

(i) The contingent reserve for an HMO, PHSP or HIV SNP shall be equal to and shall not exceed:

[(i)] (a) 5 percent of net premium income for the first calendar year subsequent to the effective date of this Subpart;

[(ii)] (b) 6.5 percent of net premium income for the second calendar year subsequent;

[(iii)] (c) 7.5 percent of net premium income for the third calendar year subsequent;

[(iv)] (d) 8.5 percent of net premium income for the fourth calendar year subsequent;

[(v)] (e) 9.5 percent of net premium income for the fifth calendar year subsequent;

[(vi)] (f) 10.5 percent of net premium income for the sixth calendar year subsequent;

[(vii)] (g) 11.5 percent of net premium income for the seventh calendar year subsequent;

[(viii)] (h) 12.5 percent of net premium income for calendar years thereafter.

(ii) *Notwithstanding the provisions of subparagraph (i) above, the contingent reserve applicable to net premium income generated from the Medicaid managed care, Family Health Plus and HIV SNP programs shall be:*

(a) 7.25 percent of net premium income for 2011;

(b) 7.25 percent of net premium income for 2012;

(c) 8.25 percent of net premium income for 2013;

(d) 9.25 percent of net premium income for 2014;

(e) 10.25 percent of net premium income for 2015;

(f) 11.25 percent of net premium income for 2016;

(g) 12.25 percent of net premium income for 2017;

(h) 12.5 percent of net premium income for calendar years after

2017. *The provisions of this subparagraph shall not apply to HMOs and PHSPs beginning operations in 2011 or after.*

(iii) Upon an HMO, PHSP or HIV SNP reaching its maximum contingent reserve of 12.5 percent of its net premium income for a calendar year, it must continue to maintain its contingent reserve at this level thereafter. Such contingent reserve requirement shall be deemed to have been met if the net worth of the HMO, PHSP or HIV SNP, based upon admitted assets, equals or exceeds the applicable contingent reserve requirement for such calendar year.

**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 January 1, 2012.

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

#### Regulatory Impact Statement

##### Statutory Authority:

Public Health Law section 4403(2) states the Commissioner may adopt and amend rules and regulations pursuant to the state administrative procedures act to effectuate the purposes and provisions of Article 44, which governs the certification and operational requirements of Managed Care Organizations (MCOs).

##### Legislative Objectives:

10 NYCRR 98 was extensively amended in 2005 to further implement the provisions of Article 44 of the Public Health Law. The proposed amendments to § 98-1.11(b) and § 98-1.11(e) specify criteria to be used to evaluate requests for approval of asset transfers and loans proposed by MCOs and allows implementation of certain provisions of the SFY 2012 budget and the Medicaid Redesign Team Proposal #6 by temporarily reducing the contingent reserve requirements applied to premium revenues from the Medicaid Managed Care (MMC), Family Health Plus (FHP) and HIV Special Needs Plan (SNP) programs.

##### Needs and Benefits:

§ 98-1.11(b) - Current regulation requires that the Department of Health (DOH) and State Insurance Department (SID), as applicable, must approve any asset transfers or loans of 5% or more of the MCOs admitted assets but fails to stipulate the criteria for approving such transactions. Both agencies follow a policy of approving a transfer or loan only when the net worth of the plan after the transaction would be equal to or greater than 12.5% of annual premium revenue, or 5% for Managed Long Term Care (MLTC) plans. The 12.5% threshold was selected to coincide with the maximum contingent reserve established under § 98-1.11(e)(1), which begins at 5% of premium revenue and increase by 1% per year until the maximum 12.5% standard is reached. The revision to § 98-1.11(b) establishes this criteria for approval in regulation, applies the same criteria to all plans, including MLTC plans, and requires approval for any asset transfer or loan rather than only those that exceed 5% of admitted assets.

The revised regulation also establishes a higher standard for approval of asset transfers or loans made by MCOs that receive 75% or more of their annual premium revenue from managed care programs sponsored by NYS: Medicaid, Family Health Plus and Child Health Plus. The regulation would allow approval of asset transfers or loans only if the net worth of the MCO after the transaction would be equal to or greater than 15% of annual premium revenue. The Commissioner would have the authority, however, to waive the latter provision when the purpose of the asset transfer or loan is for the purchase of another MCO or a controlling interest thereof, that the Commissioner finds is in the public interest.

MCOs would also be required to submit financial projections showing that their net worth would continue to meet or exceed 12.5% or 15% of premium revenue, as applicable, for two calendar years following the transfer or loan.

§ 98-1.11(e) - The approved SFY 2012 NYS Budget incorporates a proposal from the Medicaid Redesign Team that reduces the allocation of surplus in the premium rates of MMC, FHP and HIV SNP managed care plans from 3% to 1% effective April 1, 2011, resulting in savings to the Medicaid program of approximately \$188 million (federal and state shares combined). The actuarial firm employed by DOH, Mercer Consulting, which must certify the actuarial soundness of the premium rates to CMS, has determined the reduction in surplus allocation will require the lowering of the contingent reserve requirement specified in § 98-1.11(e)(1) from the current 10.5% to 7.25% of premium revenue in order to maintain

the actuarial soundness of the premium rates. The revision to 98-1.11(e) will allow DOH to reduce the surplus allocation in the mainstream Medicaid and FHP, and HIV SNP premium rates and allow Mercer to certify the actuarial soundness of the premium rates to CMS.

**Costs:**

The amended regulation imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Health Department or by the MCOs.

**Local Government Mandates:**

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

**Paperwork:**

Paperwork associated with filings to DOH or SID should be minimal and would be no more substantial than the current regulation.

**Duplication:**

These regulations do not duplicate, overlap, or conflict with existing State and federal regulations.

**Alternatives:**

There were minimal alternative standards considered. Revisions to § 98-1.11(b) in part codifies current policy in evaluating requests for approval for asset transfers or loans. Removal of the 5% threshold before approval is required for asset transfers or loans is consistent with the desire of DOH and SID to ensure MCO financial reserve levels do not fall below regulatory requirements via unregulated financial transactions.

Revisions to § 98-1.11(e) are needed to implement provisions of SFY 2012 budget.

**Federal Standards:**

The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

**Compliance Schedule:**

Revisions to § 98-1.11(b) would apply to MCOs immediately upon adoption. Revisions to § 98-1.11(e) would be retroactive to January 1, 2011, once adopted.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

Companies affected by the proposed regulation include all MCOs certified under Article 44 of the Public Health Law. Inasmuch as most of these companies are not independently owned and operated and employ more than 100 individuals, they do not fall within the definition of "small business" found in section 102(8) of the State Administrative Procedure Act. No local governments will be affected.

**Compliance Requirements:**

The amended regulation would not impose additional reporting, recordkeeping or other requirements on small businesses or local governments since the provisions contained therein apply only to MCOs authorized to do business in New York State and regulated by the NYS Health and Insurance Departments.

**Professional Services:**

There are no professional services that will need to be provided by small businesses or local government as a result of the amended regulation.

**Compliance Costs:**

The amended regulation would not impose any new reporting, recordkeeping or other requirements on small businesses or local governments.

**Economic and Technological Feasibility:**

There are no compliance requirements for small businesses or local governments.

**Minimizing Adverse Impacts:**

The amendment will have no adverse impact on small businesses or local governments since the provisions contained therein apply only to regulated MCOs authorized to do business in New York State.

**Small Business and Local Government Participation:**

As the amendments have no impact on small businesses or local governments, no input was sought from these entities.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**

Companies affected by the proposed regulation include all Managed Care Organizations (MCOs) certified under Article 44 of the Public Health Law. The companies affected by this regulation do business in certain "rural areas" as defined under section 102(1) of the State Administrative Procedure Act, although none do so exclusively or have a significant portion of their business in rural areas. Some of the home offices of these companies may lie within rural areas. Further, companies may establish new office facilities and/or relocate in the future depending on their requirements and needs.

**Reporting, Recordkeeping and Other Compliance Requirements:**

None of the compliance requirements are significantly different from requirements presently contained in Part 98 and none pertain exclusively to rural areas. The amendments should not impose any significant ad-

ditional paperwork, recordkeeping or compliance requirements upon any regulated party.

**Costs:**

The amended regulation imposes no additional compliance costs on MCOs or state and local governments.

**Minimizing Adverse Impact:**

The proposed regulation applies to all MCOs certified under Article 44 to do business in New York State, including rural areas. It does not impose any adverse impacts unique to rural areas.

**Rural Area Participation:**

In developing the amended regulation, the Health Department conducted outreach to regulated managed care organizations authorized to do business throughout New York State, including those located or domiciled in rural areas.

**Job Impact Statement**

**Nature of Impact:**

The Health Department finds that these amendments will have no adverse impact on jobs and employment opportunities.

**Categories and Numbers Affected:**

Not Applicable.

**Regions of Adverse Impact:**

No region in New York should experience an adverse impact on jobs and employment opportunities.

**Minimizing Adverse Impact:**

The Health Department finds that these amendments will have no adverse impact on jobs and employment opportunities.

**EMERGENCY  
RULE MAKING**

**Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP)**

**I.D. No.** HLT-42-11-00014-E

**Filing No.** 932

**Filing Date:** 2011-10-04

**Effective Date:** 2011-10-04

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

**Action taken:** Amendment of sections 505.14 and 505.28 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 201(1)(v); and Social Services Law, sections 363-a(2), 365-a(2)(e) and 365-f

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

**Specific reasons underlying the finding of necessity:** Pursuant to the authority vested in the Commissioner of Health by Social Services Law § 365-a(2)(e), the Commissioner is authorized to adopt standards, pursuant to emergency regulation, for the provision and management of services for individuals whose need for such services exceeds a specified level to be determined by the Commissioner.

**Subject:** Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP).

**Purpose:** To establish definitions, criteria and requirements associated with the provision of continuous PC and continuous CDPA services.

**Text of emergency rule:** Paragraph (3) of subdivision (a) of section 505.14 is repealed and a new paragraph (3) is added to read as follows:

(3) *Continuous personal care services means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted.*

Paragraph (4) of subdivision (a) of section 505.14 is amended by adding new subparagraph (iii) to read as follows:

(iii) *Personal care services shall not be authorized if the patient's need for assistance can be met by either or both of the following:*

(a) *voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends or other responsible adult; or formal services provided by an entity or agency; or*  
(b) *adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.*

Paragraph (5) of subdivision (a) of section 505.14 is repealed and a new paragraph (5) is added to read as follows:

(5) *Live-in 24-hour personal care services means the provision of care by one person for a patient who, because of the patient's medical*

condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted.

Clause (b) of subparagraph (i) of paragraph (6) of subdivision (a) of section 505.14 is amended to read as follows:

(b) The [initial] authorization for Level I services shall not exceed eight hours per week. [An exception to this requirement may be made under the following conditions:

(1) The patient requires some or total assistance with meal preparation, including simple modified diets, as a result of the following conditions:

(i) informal caregivers such as family and friends are unavailable, unable or unwilling to provide such assistance or are unacceptable to the patient; and

(ii) community resources to provide meals are unavailable or inaccessible, or inappropriate because of the patient's dietary needs.

(2) In such a situation, the local social services department may authorize up to four additional hours of service per week.]

Clause (b) of subparagraph (ii) of paragraph (6) of subdivision (a) of section 505.14 is amended to read as follows:

(b) When continuous [24-hour care] *personal care services* is indicated, additional requirements for the provision of services, as specified in clause (b)(4)(i)(c) of this section, must be met.

Clause (c) of subparagraph (ii) of paragraph (3) of subdivision (b) of section 505.14 is relettered as clause (d) and a new clause (c) is added to read as follows:

(c) *When live-in 24-hour personal care services is indicated, the social assessment shall evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide.*

Subclauses (5) and (6) of clause (b) of subparagraph (iii) of paragraph (3) of subdivision (b) of section 505.14 are renumbered as subclauses (6) and (7), and new subclause (5) is added to read as follows:

(5) *an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, can meet the patient's need for assistance with personal care functions, and whether such equipment or supplies can be provided safely and cost-effectively.*

Subclause (7) of clause (a) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(7) whether the patient can be served appropriately and more cost-effectively by using *adaptive or specialized medical equipment or supplies* covered by the MA program including, but not limited to, *bedside commodes, urinals, walkers, wheelchairs and insulin pens*; and

Clause (c) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(c) A social services district may determine that the assessments required by subclauses (a)(1) through (6) and (8) of this subparagraph may be included in the social assessment or the nursing assessment.

Clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(c) the case involves the provision of continuous [24-hour] personal care services as defined in paragraph (a)(3) of this section. Documentation for such cases shall be subject to the following requirements:

Subclause (2) of clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(2) The nursing assessment shall document that: the functions required by the patient[.]; the degree of assistance required for each function, including that the patient requires total assistance with *toileting, walking, transferring or feeding*; and the time of this assistance require the provision of continuous [24-hour care] *personal care services*.

Subparagraph (ii) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(ii) The local professional director, or designee, must review the physician's order and the social, nursing and other required assessments in accordance with the standards for levels of services set forth in subdivision (a) of this section, and is responsible for the final determination of the level and amount of care to be provided. *The local professional director or designee shall consult with the patient's treating physician and may conduct an additional assessment of the patient in the home.* The final determination must be made [within five working days of the request] *with reasonable promptness, generally not to exceed seven business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.*

Paragraph (4) of subdivision (b) of section 505.28 is amended to read as follows:

(4) "continuous [24-hour] consumer directed personal assistance" means the provision of uninterrupted care, by more than one consumer

directed personal assistant, *for more than 16 hours per day* for a consumer who, because of the consumer's medical condition [or] and disabilities, requires total assistance with *toileting, walking, transferring or feeding at [unscheduled times during the day and night] at times that cannot be predicted.*

Paragraphs (8) through (13) of subdivision (b) of section 505.28 are renumbered as paragraphs (9) through (14) and the renumbered paragraph (9) is amended to read as follows:

(9) "personal care services" means the nutritional and environmental support functions, personal care functions, or both such functions, that are specified in Section 505.14(a)(6) of this Part *except that, for individuals whose needs are limited to nutritional and environmental support functions, personal care services shall not exceed eight hours per week.*

A new paragraph (8) of subdivision (b) of section 505.28 is added to read as follows:

(8) "live-in 24-hour consumer directed personal assistance" means *the provision of care by one consumer directed personal assistant for a consumer who, because of the consumer's medical condition and disabilities, requires some or total assistance with personal care functions, home health aide services or skilled nursing tasks during the day and night and whose need for assistance during the night is infrequent or can be predicted.*

Subparagraph (iii) of paragraph (2) of subdivision (d) of section 505.28 is amended, and new subparagraphs (iv) and (v) of such paragraph are added, to read as follows:

(iii) an evaluation of the potential contribution of informal supports, such as family members or friends, to the individual's care, which must consider the number and kind of informal supports available to the individual; the ability and motivation of informal supports to assist in care; the extent of informal supports' potential involvement; the availability of informal supports for future assistance; and the acceptability to the individual of the informal supports' involvement in his or her care [.] and;

(iv) *for cases involving continuous consumer directed personal assistance, documentation that: all alternative arrangements for meeting the individual's medical needs have been explored or are infeasible including, but not limited to, the provision of consumer directed personal assistance in combination with other former services or in combination with contributions of informal caregivers; and*

(v) *for cases involving live-in 24-hour consumer directed personal assistance, an evaluation whether the individual's home has adequate sleeping accommodations for a consumer directed personal assistant.*

Subparagraph (i) of paragraph (3) of subdivision (d) of section 505.28 is repealed and a new subparagraph (i) is added to read as follows:

(i) *The nursing assessment must be completed by a registered professional nurse who is employed by the social services district or by a licensed or certified home care services agency or voluntary or proprietary agency under contract with the district.*

Clauses (g) and (h) of subparagraph (ii) of paragraph (3) of subdivision (d) of section 505.28 are relettered as clauses (h) and (i) and a new clause (g) is added to read as follows:

(g) *for continuous consumer directed personal assistance cases, documentation that: the functions the consumer requires; the degree of assistance required for each function, including that the consumer requires total assistance with toileting, walking, transferring or feeding; and the time of this assistance require the provision of continuous consumer directed personal assistance;*

Paragraph (5) of subdivision (d) of section 505.28 is amended to read as follows:

(5) Local professional director review. If there is a disagreement among the physician's order, nursing and social assessments, or a question regarding the level, amount or duration of services to be authorized, or if the case involves continuous [24-hour] consumer directed personal assistance, an independent medical review of the case must be completed by the local professional director, a physician designated by the local professional director or a physician under contract with the social services district. The local professional director or designee must review the physician's order and the nursing and social assessments and is responsible for the final determination regarding the level and amount of services to be authorized. *The local professional director or designee shall consult with the consumer's treating physician and may conduct an additional assessment of the consumer in the home.* The final determination must be made with reasonable promptness, generally not to exceed [five] seven business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.

Paragraph (1) of subdivision (e) of section 505.28 is amended to read as follows:

(1) When the social services district determines pursuant to the as-

assessment process that the individual is eligible to participate in the consumer directed personal assistance program, the district must authorize consumer directed personal assistance according to the consumer's plan of care. The district must not authorize consumer directed personal assistance unless it reasonably expects that such assistance can maintain the individual's health and safety in the home or other setting in which consumer directed personal assistance may be provided. *Consumer directed personal assistance shall not be authorized if the consumer's need for assistance can be met by either or both of the following:*

(i) *voluntary assistance available from informal caregivers including, but not limited to, the consumer's family, friends or other responsible adult; or formal services provided by an entity or agency; or*

(ii) *adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.*

**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 January 1, 2012.

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

#### **Regulatory Impact Statement**

##### Statutory Authority:

Social Services Law ("SSL") § 363-a(2) and Public Health Law § 201(1)(v) provide that the Department has general rulemaking authority to adopt regulations to implement the Medicaid program.

The Commissioner has specific rulemaking authority under SSL § 365-a(2)(e)(ii) to adopt standards, pursuant to emergency regulation, for the provision and management of personal care services for individuals whose need for such services exceeds a specified level to be determined by the Commissioner.

Under SSL § 365-a(2)(e)(iv), personal care services shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

##### Legislative Objectives:

The Legislature sought to reform the Medicaid personal care services program by controlling expenditure growth and promoting self-sufficiency.

The Legislature authorized the Commissioner of Health to adopt standards for the provision and management of personal care services for Medicaid recipients whose need for such services exceeds a specified level. The regulations adopt such standards for Medicaid recipients who seek continuous personal care services or continuous consumer directed personal assistance for more than 16 hours per day.

The Legislature additionally sought to promote the goal of self-sufficiency among Medicaid recipients who do not need hands-on assistance with personal care functions such as bathing, toileting or transferring. It determined that recipients whose need for personal care services is limited to nutritional and environmental support functions, such as shopping, laundry and light housekeeping, could receive no more than eight hours per week of such assistance.

##### Needs and Benefits:

The regulations have two general purposes: to conform the Department's personal care services and consumer directed personal assistance program (CDPAP) regulations to State law limiting the amount of services that can be authorized for individuals who require assistance only with nutritional and environmental support functions; and, to implement State law authorizing the Department to adopt standards for the provision and management of personal care services for individuals whose need for such services exceeds a specified level that the Commissioner may determine.

The term "nutritional and environmental support functions" refers to housekeeping tasks including, but not limited to, laundry, shopping and meal preparation. Department regulations refer to these support functions as "Level I" personal care services. Department's regulations have long provided that social services districts cannot initially authorize Level I services for more than eight hours per week; however, an exception permitted authorizations for Level I services to exceed eight hours per week under certain circumstances.

The Legislature has nullified this regulatory exception. The regulations conform the Department's personal care services regulations to the new State law. They repeal the regulatory exception that permitted social services districts to authorize up to 12 hours of Level I services per week, capping such authorizations at no more than eight hours per week.

The regulations similarly amend the Department's CDPAP regulations. Some CDPAP participants are authorized to receive only assistance with nutritional and environmental support functions. Since personal care services are included within the CDPAP, it is consistent with the Legislature's

intent to extend the eight hour weekly cap on nutritional and environmental services to that program.

The regulations also implement the Department's specific statutory authority to adopt standards pursuant to emergency regulation for the provision and management of personal care services for individuals whose need for such services exceeds a specified level. The Commissioner has determined to adopt such standards for individuals whose need for continuous personal care services or continuous consumer directed personal assistance exceeds 16 hours per day.

The regulations repeal the definition of "continuous 24-hour personal care services," replacing it with a definition of "continuous personal care services." The prior definition applied to individuals who required total assistance with certain personal care functions for 24 hours at unscheduled times during the day and night. The new definition applies to individuals who require such assistance for more than 16 hours per day at times that cannot be predicted.

Cases in which continuous personal care services are indicated must be referred to the local professional director or designee. Such referrals would now be required in additional cases: those involving provision of continuous care for more than 16 hours per day.

The regulations add a requirement that the local professional director or designee consult with the recipient's treating physician and permit such director or designee to conduct an additional assessment of the recipient in the home.

The regulations amend the documentation requirements for nursing assessments in continuous personal care services cases.

The regulations add a definition of live-in 24 hour personal care services. This level of service has long existed, primarily in New York City, but has never been explicitly set forth in the Department's regulations. The regulations also require that, for recipients who may be eligible for such services, the social assessment evaluate whether the recipient's home has adequate sleeping accommodations for the live-in aide.

The regulations provide that personal care services shall not be authorized when the recipient's need for assistance can be met by the voluntary assistance of informal caregivers or by formal services or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively. The regulations require that the nursing assessments that districts currently complete or obtain include an evaluation whether adaptive or specialized equipment or supplies can meet the recipient's need for assistance and whether such equipment or supplies can be provided safely and cost-effectively.

The regulations adopt conforming amendments to the Department's CDPAP regulations.

##### Costs to Regulated Parties:

Regulated parties include entities that voluntarily contract with social services districts to provide personal care services to, or to perform certain CDPAP functions for, Medicaid recipients. These entities include licensed home care services agencies, agencies that are exempt from licensure, and CDPAP fiscal intermediaries.

Social services districts may no longer authorize certain Medicaid recipients to receive more than eight hours per week of assistance with nutritional and environmental support functions. To the extent that regulated parties were formerly reimbursed for more than eight hours per week for these services, their Medicaid revenue will decrease. This is a consequence of State law, not the regulations. The regulations do not impose any additional costs on these regulated parties.

##### Costs to State Government:

The regulations impose no additional costs on State government.

The statutory cap on nutritional and environmental support functions will result in cost-savings to the State share of Medicaid expenditures. The estimated annual personal care services and CDPAP cost-savings for subsequent State fiscal years are approximately \$3.4 million.

This estimate is based on 2010 recipient and expenditure data for the personal care services program. According to such data, 2,377 New York City recipients received more than eight hours per week of Level I services, the average being 11 weekly hours of such service. The number of Level I hours that exceeded eight hours per week was thus approximately 370,800 hours (2,377 recipients x 3 hours per week x 52 weeks). Multiplying this hourly total by the 2010 average hourly New York City personal care aide cost (\$17.30) results in total annual savings of \$6.4, or \$3.2 million in State share savings. Application of this calculation to the Rest of State recipient and expenditure data yields an additional \$200,000 in State share savings, or \$3.4 million.

State Medicaid cost-savings are also projected to occur as a result of changes to continuous personal care services authorizations. It is not possible to accurately estimate such savings. However, the Department anticipates that most recipients currently authorized for continuous 24-hour personal care services will continue to receive that level of care. Others may be authorized for continuous services for 16 hours per day or

live-in 24 hour personal care services. Still others may be authorized for services for more than 16 hours per day but fewer than 24 hours per day.

The estimated State share savings for this portion of the regulations are \$33.1 million. This comprises approximately \$17.1 million in personal care savings and \$15.9 million in CDPAP savings. This estimate is based on 2010 personal care services and CDPAP recipient and expenditure data. In 2010, 1,809 Medicaid recipients were authorized to receive more than 16 hours of services per day. The assumption is that these recipients were authorized for continuous 24-hour services, which has an average annual per person cost of approximately \$166,000. Assuming that 20 percent were authorized for live-in 24-hour services at an average annual per person cost of approximately \$83,000, and 15 percent were authorized for 16 hours per day at an average hourly cost of between approximately \$17.00 and \$22.00, depending on service and location, the annual State share savings per recipient would range from approximately \$28,000 to \$35,000.

#### Costs to Local Government:

The regulation will not require social services districts to incur new costs. State law limits the amount that districts must pay for Medicaid services provided to district recipients. Districts may claim State reimbursement for any costs they may incur when administering the Medicaid program.

#### Costs to the Department of Health:

There will be no additional costs to the Department.

#### Local Government Mandates:

The regulations require social services districts to refer additional cases to their local professional directors or designees. Currently, the regulations require that such referrals be made for continuous 24 hour care and certain other cases. Under the proposed regulations, such referrals must also be made for recipients who may require continuous services for more than 16 hours.

#### Paperwork:

The regulations specify additional documentation requirements for the social and nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients. For persons who may be eligible for live-in 24 hour services, the social assessment must evaluate whether the recipient's home has adequate sleeping accommodations for the live-in aide. The nursing assessments for all personal care services and CDPAP cases, including those not involving continuous services, must include an evaluation whether adaptive or specialized equipment or supplies can meet the recipient's need for assistance and whether such equipment or supplies can be used safely and cost-effectively. The amendments to the CDPAP regulations also specify additional documentation requirements for the social and nursing assessments for cases involving continuous consumer directed personal assistance. These requirements mirror long-standing documentation requirements in the personal care services regulations.

#### Duplication:

The regulations do not duplicate any existing federal, state or local regulations.

#### Alternatives:

With respect to the regulation that caps authorizations for nutritional and environmental support functions to eight hours per week, no alternatives exist. The regulation must conform to State law that imposes this weekly cap. With respect to the regulation that establishes new requirements for continuous services, alternatives existed but were not now pursued. One such alternative may be the repeal of the regulatory authorization for continuous 24-hour services. The Department determined to promulgate further regulatory controls regarding the provision and management of continuous services, rather than repeal such services in their entirety.

#### Federal Standards:

This rule does not exceed any minimum federal standards.

#### Compliance Schedule:

The Department has issued instructions to social services districts advising them of the new State law that limits nutritional and environmental support functions to no more than eight hours per week for certain recipients. Districts should not now be authorizing more than eight hours per week of such assistance and should thus be able to comply with the regulations when they become effective. With regard to the remaining regulations, social services districts should be able to comply with the regulations when they become effective. For applicants, social services districts would apply the regulations when assessing applicants' eligibility for personal care services and the CDPAP. For current recipients, districts would apply the regulations upon reassessing these recipients' continued eligibility for services.

#### Regulatory Flexibility Analysis

##### Effect of Rule:

The regulation limiting authorizations of nutritional and environmental support functions to no more than eight hours per week primarily affects

licensed home care services agencies and exempt agencies that provide only such Level I services. These entities are the primary employers of individuals providing Level I services. Most recipients of Level I personal care services are located in New York City. There are currently eight Level I only personal care service providers in New York City, none of which employ fewer than 100 persons.

Fiscal intermediaries that are enrolled as Medicaid providers and that facilitate payments for the nutritional and environmental support functions provided to consumer directed personal assistance program (CDPAP) participants may also experience slight reductions in service hours reimbursed. There are approximately 46 fiscal intermediaries that contract with social services districts. Fiscal intermediaries are typically non-profit entities such as independent living centers but may also include home care services agencies.

With respect to continuous care, a significant majority of existing 24-hour a day continuous care cases are located in New York City. There are currently 60 Level II personal care service providers in New York City, none of which employ fewer than 100 persons.

The regulations also affect social services districts. There are 62 counties in New York State, but only 58 social services districts. The City of New York comprises five counties but is one social services district.

#### Compliance Requirements:

Social services districts currently assess whether Medicaid recipients are eligible for personal care services and the CDPAP. When 24 hour continuous care is indicated, districts are currently required to refer such cases to the local professional director or designee for final determination. The regulations would require districts to refer additional continuous care cases to the local professional director or designee; namely, those cases in which continuous care for more than 16 hours a day is indicated would also be referred to the local professional director or designee. The local professional director or designee would be required to consult with the recipient's treating physician before approving continuous care for more than 16 hours per day.

In addition, the nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients would be required to include an evaluation of whether adaptive or specialized equipment or supplies would be appropriate and could be safely and cost-effectively provided. In cases involving the authorization of live-in 24 hour services, the social assessments that districts currently are required to complete would have to include an evaluation whether the recipient's home had sufficient sleeping accommodations for a live-in aide.

#### Professional Services:

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

#### Compliance Costs:

No capital costs will be imposed as a result of this rule, nor are there any annual costs of compliance.

#### Economic and Technological Feasibility:

There are no additional economic costs or technology requirements associated with this rule.

#### Minimizing Adverse Impact:

The regulations should not have an adverse economic impact on social services districts. Districts currently assess Medicaid recipients to determine whether they are eligible for personal care services or the CDPAP. The regulations modify these assessment procedures. Should districts incur administrative costs to comply with the regulation, they may seek State reimbursement for such costs.

Small businesses providing Level I personal care services and consumer directed environmental and nutritional support functions may experience slight reductions in service hours provided. This is a consequence of State law limiting these services to no more than eight hours per week.

Small businesses currently providing continuous 24-hour services may experience some reductions in service hours provided.

#### Small Business and Local Government Participation:

The Department solicited comments on the regulations from the New York City Human Resources Administration, which administers the personal care services program and CDPAP for New York City Medicaid recipients who are not enrolled in managed care. Most of the State's personal care services and CDPAP recipients reside in New York City. Personal care services provided to New York City recipients comprises approximately 84 percent of Medicaid personal care services expenditures

Small business and local governments also have the opportunity to provide input into the redesign of New York State's Medicaid program. The Medicaid Redesign Team (MRT) was tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the 2011-12 Fiscal Year. As part of its work, the MRT sought and continues to seek ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas. The MRT conducted regional public hearings across the State to solicit ideas from

the public on ways to reduce costs and improve the quality of the Medicaid program. Additionally, a web page was established, providing a vehicle for all individuals and organizations to provide ideas, comments and recommendations.

**Rural Area Flexibility Analysis**

Types and Estimated Numbers of Rural Areas:  
 Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. In 2010, only 6% of all continuous care cases resided in the counties listed below. Currently there are 34 organizations which maintain contracts with local districts to provide consumer directed environmental and nutritional support functions, and 50 individual licensed home care services agencies which maintain contracts with local districts to provide Level I personal care services, within the following 43 counties having populations of 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		

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

Social services districts would be required to refer additional cases to their local professional directors or designees. Currently, the personal care services and CDPAP regulations require that such referrals be made for recipients seeking continuous 24-hour services and in certain other cases. Under the regulations, such referrals must also be made for recipients who require continuous care for more than 16 hours. The regulations also specify additional documentation requirements for the social and nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients.

Costs:  
 There are no new capital or additional operating costs associated with the rule.

Minimizing Adverse Impact:  
 It is anticipated the rule will have minimal impact on rural areas as the Department has determined that the preponderance of Level I services in excess of eight hours per week occur in downstate urban areas. Additionally, in 2010, only 6% of all individuals receiving continuous care services resided in those counties listed above. To the extent that social services districts incur administrative costs to comply with the regulations' requirements for referral of continuous care cases and social and nursing assessment documentation requirements, they may seek State reimbursement of such expenses.

Rural Area Participation:  
 Individuals and organizations from rural areas have the opportunity to provide input into the redesign of New York State's Medicaid program. The Medicaid Redesign Team (MRT) is tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the 2011-12 Fiscal Year. As part of its work, the MRT sought and continues to seek ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas. The MRT conducted regional public hearings across the State to solicit ideas from the public on ways to reduce costs and improve the quality of the Medicaid program. Additionally, a web page was established, providing a vehicle for all individuals and organizations to provide ideas, comments and recommendations.

**Job Impact Statement**

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the

proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

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

**Distributions from the Health Care Initiatives Pool for Poison Control Center Operations**

I.D. No. HLT-42-11-00001-P

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

**Proposed Action:** Amendment of section 68.6 of Title 10 NYCRR.  
**Statutory authority:** Public Health Law, sections 2500-d, 2807-j and 2807-l

**Subject:** Distributions from the Health Care Initiatives Pool for Poison Control Center Operations.

**Purpose:** Revises the methodology for distributing HCRA grant funding to Regional Poison Control Centers (RPCCs).

**Text of proposed rule:** Section 68.6 - Distributions from the Health Care Initiatives Pool for Poison Control Center Operations is REPEALED and a new Section 68.6 is added to read as follows:

*Section 68.6 - Distributions from the Health Care Initiatives Pool for Poison Control Center Operations*

(a) *The monies available for distribution from the Health Care Initiatives (HCI) Pool for poison control center operations shall be distributed on a semi-annual basis in accordance with the methodology below:*

(1) *Population density by county, as established by the latest available decennial census data for New York State (NYS) as determined by the U.S. Census Bureau, shall be the basis for allocating available HCI Pool monies for distribution to the regional poison control centers.*

(2) *Population density applicable to the total county geographic area served by each regional poison control center shall be determined and the center's percentage to total NYS population density shall be calculated.*

(3) *Available HCI Pool monies shall be distributed proportionally to each regional poison control center based on the center's percentage population density served to total NYS population density.*

(b) *The Commissioner shall consider only those applications for prospective revisions of the projected pool distributions which are in writing and are based on errors, whether mathematical or clerical, made by the department in the pool distribution calculation process. Applications made pursuant to this subdivision must be submitted within thirty days of receipt of notice of the projected pool distribution for the calendar year.*

**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.

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

**Regulatory Impact Statement**

Statutory Authority:

The statutory authority for the regulation is contained in sections 2500-d(7), 2807-j, and 2807-l(1)(c)(iv) of the Public Health Law (PHL), which authorizes the Commissioner to make distributions from the Health Care Initiatives (HCI) Pool to the Regional Poison Control Centers (RPCCs). This HCI Pool funding is intended to assist the Centers with meeting the operational costs of providing expert poison call response and poison consultation services on a 24/7 basis to health care professionals and the public statewide.

Legislative Objectives:

The enacted 2010/11 New York State (NYS) Budget (10th Extender Bill, Section 13 of Part B of Chapter 109 of the Laws of 2010)

decreased total HCI Pool funding to the RPCCs and directed consolidation of PCC services down from five RPCCs statewide to two RPCCs (one upstate and one downstate). To implement consolidation, effective January 1, 2011, the Commissioner has removed the designation of three Centers, thereby eliminating their eligibility for HCI Pool grant funding, and designated two RPCCs, one located at SUNY Syracuse University Hospital as the upstate RPCC and another located at Bellevue Hospital as the downstate RPCC, which remain eligible on an ongoing basis for HCI Pool grant monies. Consolidation down to two RPCCs restructured the geographical service area the surviving RPCCs are now responsible for and rendered the HCI Pool funding distribution methodology contained in section 68.6 of 10 NYCRR obsolete. Under the current methodology a Center's award is fixed at an amount established based on pre-HCRA (1996) operating costs. The methodology is outdated and provides no sensitivity to reflect current RPCC operations, both from a cost and a programmatic standpoint.

#### Needs and Benefits:

Effective January 1, 1997, the New York Prospective Hospital Reimbursement Methodology (NYPHRM) system expired and was replaced by a new system established under the Health Care Reform Act (HCRA) of 1996. HCRA substantially deregulated hospital reimbursement, allowing insurers, employers and other health care payers to freely negotiate rates of payment with hospitals, rather than base their payments as previously done on the Medicaid rates. For hospitals that sponsored PCCs, and for Emergency Room (ER) services in particular, the Medicaid ER rate included cost consideration for PCC operations. Under HCRA deregulation and effective January 1, 1997, forward, other payers were no longer obligated to recognize such PCC costs in their reimbursement rates to the sponsoring hospitals, placing financial support for this imperative public health service in jeopardy. To address this concern, enhanced funding for PCC operations was made available to the Centers through HCRA HCI Pool grant funding.

Effective January 1, 1997, forward, the HCI Pool grant amounts calculated for each PCC were determined based on each Center's ratio of projected revenue shortfall created by the expiration of the NYPHRM, plus allocated Medicare costs, to total projected revenue shortfall. PCC cost as reported on the affiliated hospital's 1996 Institutional Cost Report was utilized as the basis for this calculation, and once established the award amount was fixed for the given PCC at the 1996 determined grant dollar amount. This methodology, in place since the implementation of the HCRA, provides no flexibility to appropriately respond to changes in PCC operations over time or to recognize the impact on operating costs of State mandated PCC restructuring, as provided for in the enacted 2010/11 State Budget.

The proposed amendment repeals the existing obsolete provisions and establishes a new distribution methodology that will allow for more equitable distribution of available HCI Pool funds, as appropriated annually by the legislative/budget process, to the remaining two RPCCs on an ongoing basis, effective January 1, 2011.

#### COSTS:

##### Costs to State Government:

There will be no additional costs to State government as a result of implementation of the regulation. To the extent that funds are appropriated annually by a given enacted State budget, the proposed amendment serves only to revise the methodology by which such appropriated Pool funds will be distributed to the RPCCs effective January 1, 2011, forward.

##### Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties.

##### Costs to Local Government:

There will be no additional costs to local governments as a result of these amendments. The funds are State grants with no local district share of costs (not Medicaid funds).

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

There will be no additional costs to the Department of Health.

##### Local Government Mandates:

This regulation does not impose any program, service, duty or other

responsibility on any county, city, town, village, school district, fire district or other special district.

##### Paperwork:

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

##### Duplication:

These regulations do not duplicate existing State and Federal regulations.

##### Alternatives:

An alternative was evaluated prior to the selection of the proposed distribution methodology that considered the volume of human exposure calls by county as received by the RPCCs over time. Historically, the Centers have not consistently reported such data to the Department over the past decade, particularly as it relates to county specific call volume. The Department acknowledges that the American Association of Poison Control Centers (AAPCC) owns and manages a large database on poison information and human exposure calls. However, the reports they produce are generic in nature and do not offer the requisite state specific, by county, information that would be necessary to serve as a basis for Pool fund distributions. Though customized reports are available for sale, it is unknown whether reporting to the database on all calls is a mandatory requirement of PCC nationwide or to what degree the AAPCC database is inclusive of all poison related calls/services for a given PCC/state (by county). Furthermore, any such special reports would come at a cost to the Department and may not appreciably improve decision making relative to distributing HCI Pool grant funding. Population density related to the geographic areas served by the two RPCCs, as determined by the US Census Bureau's latest decennial survey data, provides a common ground that should fairly reflect each Center's scope of obligation for poison call response (exposure calls), poison consultation services (poison information requests) and poison education responsibilities for their respective service areas.

##### Federal Standards:

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

##### Compliance Schedule:

The proposed amendment establishes a revised distribution methodology for HCI Pool grant funds. There is no period of time necessary for regulated parties to achieve compliance with the regulation.

##### *Regulatory Flexibility Analysis*

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required pursuant to Section 202-b(3)(a) of the State Administrative Procedures Act. It is apparent from the nature of the proposed rule that it does not impose any adverse economic impact on small businesses or local governments, and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The proposed rule revises the methodology for determining Health Care Initiatives (HCI) Pool grant distributions to Regional Poison Control Centers (RPCCs). Effective January 1, 2011, poison control center operations statewide will be downsized from five RPCCs to two RPCCs, rendering the existing grant distribution methodology obsolete. The proposed regulation revises the methodology to reflect population density related to the restructured geographic area served by the surviving RPCCs, rather than continue their grant funding at the amounts that were established in 1997 based on poison control service revenue shortfall established for 1997. The HCI Pool grant funds are 100% State dollars, as appropriated for a given calendar year, and the proposed revised distribution methodology will have no impact on small businesses and local governments.

##### *Rural Area Flexibility Analysis*

A Rural Area Flexibility Analysis is not required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act. It is apparent from the nature of the proposed rule that it does not impose any adverse economic impact on rural areas, and will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The proposed rule revises the methodology for determining Health Care Initiatives (HCI) Pool grant distributions to Regional Poison Control Centers (RPCCs). Effective January 1, 2011, poison control center operations statewide will be downsized from five RPCCs to two RPCCs, rendering the existing grant distribution methodology obsolete. The proposed

regulation revises the methodology to reflect population density related to the restructured geographic area served by the surviving RPCCs, rather than continue their grant funding at the amounts that were established in 1997 based on poison control service revenue shortfall established for 1997. The HCI Pool grant funds are 100% State dollars, as appropriated for a given calendar year, and the proposed revised distribution methodology will have no impact rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities. The proposed regulation replaces an existing obsolete methodology for determining grant funding to Regional Poison Control Centers. The proposed regulation will have no implications for job opportunities.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### **Life Settlements**

**I.D. No.** INS-42-11-00002-E

**Filing No.** 859

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

**Action taken:** Addition of Part 381 (Regulation 198) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2137, 7803 and 7804, as added by L. 2009, ch. 499, section 21

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

**Specific reasons underlying the finding of necessity:** This part sets forth the license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries and financial accountability requirements for life settlement providers as required under sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. These sections, along with other sections of the new life settlement legislation, became effective May 18, 2010.

These sections of the Insurance Law require licensing and registration of life settlement providers, life settlement intermediaries and life settlement brokers. In order to license and register these persons, the fees associated with the licensing and registration, as well as financial accountability requirements which life settlement providers must demonstrate at licensing, must first be established by regulation as required by the legislation. The licensing of these entities is a critical aspect of the new life settlement law in order to properly safeguard the public in life settlement transactions.

Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary, or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established and maintained in effect on an emergency basis to facilitate the processing of these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration and thereby engaging in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to continue to accept ap-

plications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers. If the Department was unable to accept applications for licensure, a competitive disadvantage for applicants seeking such licensure could result.

This regulation has been in effect on an emergency basis since April 23, 2010. The emergency action was necessary to establish fees and financial accountability standards in order to commence licensing life settlement providers, intermediaries and brokers, to ensure the implementation of Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. This regulation was promulgated on an emergency basis on April 23, 2010, July 19, 2010, October 14, 2010, January 11, 2011, April 11, 2011, and July 8, 2011.

The Department is still focused on, and continues to be engaged in outreach to interested parties regarding, additional issues regarding licensing that need to be addressed in future amendments to the regulation (e.g., processing of submitted licensing applications; establishing internal procedures, processes and systems; responding to life settlement issues and inquiries).

Pending approval and adoption of the permanent proposal, Regulation No. 198 must remain in effect on an emergency basis for the general welfare.

**Subject:** Life Settlements.

**Purpose:** To implement chapter 499 of the Laws of 2009's provisions of license fees and financial accountability requirements.

**Text of emergency rule:** Chapter XV of Title 11 is renamed "Life Settlements".

**Section 381.1 License fees and financial accountability requirements for life settlement providers.**

(a) The application for a license as a life settlement provider shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$10,000.

(b) The financial accountability of a life settlement provider required in accordance with section 7803(c)(2)(E) of the Insurance Law, to assure the faithful performance of its obligations to owners and insureds on life settlement contracts subject to Article 78 of the Insurance Law, shall be in an amount at least equivalent to \$250,000, shall be maintained at all times and may be evidenced in one of the following manners:

(1) Assets in excess of liabilities in an amount at least equal to \$250,000 as reflected in the applicant's financial statements;

(2) A surety bond in an amount at least equal to \$250,000 placed in trust with the superintendent issued by an insurer licensed in this State to write fidelity and surety insurance under section 1113(a)(16) of the Insurance Law; or

(3) Securities placed in trust with the superintendent consisting of securities of the types specified in section 1402(b)(1) and (2) of the Insurance Law, estimated at an amount not exceeding their current market value, but with a total par value not less than \$250,000; provided that:

(i) If the life settlement provider is incorporated in another state, the securities allowed for placement in the trust may consist of direct obligations of that state; and

(ii) If the aggregate market value of the securities in trust falls below the required amount, the superintendent may require the life settlement provider to deposit additional securities of like character.

(c) The application for the biennial renewal of a life settlement provider license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$5,000.

**Section 381.2 License fees for life settlement brokers.**

(a) The application for a license as a life settlement broker shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.

(b) The application for the biennial renewal of a life settlement broker license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.

**Section 381.3 Registration fees for life settlement intermediaries.**

(a) The application for registration as a life settlement intermediary shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$7,500.

(b) The application for the biennial renewal of a life settlement intermediary registration shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$2,500.

**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 December 26, 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 and 301 of the Insurance Law, sections 2137, 7803, 7804, and 7817 of the Insurance Law as added by Chapter 499 of the Laws of 2009, and section 21 of Chapter 499 of the Laws of 2009.

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

Section 2137, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement brokers. Section 2137(h)(8) requires licensing and renewal fee be determined by the Superintendent, provided that such fees do not exceed that which is required for the licensing and renewal of an insurance producer with a life line of authority.

Section 7803, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement providers. Section 7803(c)(1) requires the application for a life settlement provider's license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(h)(1) provides that an application for renewal of the license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(c)(2)(E) requires a life settlement provider to demonstrate financial accountability as evidenced by a bond or other method for financial accountability as determined by the Superintendent pursuant to regulation.

Section 7804, as added by Chapter 499 of the Laws of 2009, sets forth the registration requirements for life settlement intermediaries. Section 7804(c)(1) requires the application for a life settlement intermediary registration be accompanied by a fee in an amount to be established by the Superintendent. Section 7804(i)(1) provides that an application for renewal of the registration be accompanied by a fee in an amount to be established by the Superintendent.

Pursuant to State Administrative Procedure Act Section 202, the implementation of the fee requirements under Sections 2137, 7803 and 7804 requires the promulgation of regulations.

Section 7817, as added by Chapter 499 of the Laws of 2009, authorizes the Superintendent to promulgate regulations necessary for the implementation of provisions of Article 78.

Section 21(6) of Chapter 499 of the Laws of 2009 authorizes the Superintendent to promulgate rules and regulations necessary for the implementation of its provisions.

2. Legislative objectives: Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, which became effective May 18, 2010, require the licensing of life settlement providers and life settlement brokers and the registration of life settlement intermediaries. Such sections also provide that the license and registration fees charged these persons and the financial accountability requirements that life settlement providers must demonstrate at licensing shall be established by the Superintendent.

Section 21(6) of Chapter 499 of the Laws of 2009 and section 7817 of the Insurance Law authorize the Superintendent to promulgate rules and regulations necessary for the implementation of provisions of Chapter 499 of the Laws of 2009. This rule is necessary to implement Sections 2137, 7803 and 7804 of the Insurance Law.

3. Needs and benefits: Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established on an emergency basis to facilitate the processing of these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration and thereby continue to engage in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to accept applications for licensure by life settlement providers, life settlement intermediar-

ies and life settlement brokers. If the Department was unable to continue to accept applications for licensure, a competitive disadvantage for applicants seeking such licensure could result.

Adoption of this rule establishing license and registration fees and financial accountability requirements is necessary for the timely implementation of the life settlement legislation.

4. Costs: The rule requires an initial license application fee of \$10,000 for life settlement providers and an initial registration application fee of \$7,500 for intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

In developing the license and renewal fees for life settlement providers, life settlement intermediaries and life settlement brokers, the following were considered:

- New York Insurance Law Section 332 provides that the expenses of the Department for any fiscal year, including all direct and indirect costs, shall be assessed by the Superintendent pro rata upon all domestic insurers and licensed United States branches of alien insurers domiciled in New York. Life settlement providers and life settlement intermediaries are not subject to this assessment. As a result, these expenses will be borne by insurers through the Section 332 assessments, since fees collected by the Superintendent are turned over to the State's general fund, and do not directly reimburse the expenses of the Department. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration. Several factors were considered in arriving at appropriate fees:
- Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.
- Initial and renewal licensing fees charged to life settlement providers are set at rates greater than initial and renewal registration fees charged to life settlement intermediaries. The differences in such fees reflect the lesser time-based expenses associated with the registration of intermediaries than associated with provider licensing.
- New Insurance Law Sections 2137 provides that the licensing or renewal fees prescribed by the Superintendent for a life settlement broker shall not exceed the licensing or renewal fee for an insurance producer with a life line of authority. In accordance with the statute, this rule sets the licensing and renewal fee for a life settlement broker at \$40, which is equal to the current licensing or renewal fee of an insurance producer with a life line of authority.

In developing the financial accountability requirements that a life settlement provider must comply with, the Superintendent considered the cash outlay of each offered compliance option. The establishment of a surety bond requires the purchase of the surety bond. The deposit of securities with the Superintendent requires the establishment of a custodian account and incurrence of the associated expenses. The maintenance of a required level of assets in excess of liabilities may require the addition of capital where such level is not currently maintained.

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: No additional paperwork should result from the provisions set by this rule.

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

8. Alternatives: In the development of the licensing and registration fees imposed on life settlement providers and life settlement intermediaries, the Department's draft proposal was premised on the Superintendent

retaining the fees to cover Department costs, and the fees were significantly higher than as included in the emergency regulation. However, as noted, such fees are turned over to the State's general fund and thus do not directly reimburse the Department for its expenses.

The Department solicited comments from interested parties on the draft rule, which contained the higher fees. An outreach draft of the rule was posted on the Department's website for a two-week public comment period and a meeting was held at the Department on April 6, 2010 to discuss the rule with interested parties. The Life Insurance Settlement Association (LISA), a life settlement industry trade association, and other life settlement interested parties commented that the intended fees would present a financial barrier for some life settlement providers wishing to compete in the New York marketplace. LISA, as well as other interested parties, took the position that a decreased number of licensed providers in New York inhibits fair competition and industry growth, which would ultimately harm New York policyholders seeking the assistance of the secondary market for life insurance because of the lack of competition. In response to these comments, the initial license fee for life settlement providers was reduced from \$20,000 to \$10,000 and the initial registration fee for life settlement intermediaries was reduced from \$10,000 to \$7,500.

The Life Insurance Council of New York (LICONY), a life insurance trade association, has expressed support of a licensing and registration fee structure set at a level that is sufficient so that participating entities are paying for the regulation of their industry. The Superintendent attempted to balance the competing interests discussed above to arrive at a fee schedule that would be fair and equitable.

With regard to financial accountability requirements, the outreach draft posted to the Department's website for public comment had provided two options - surety bond and security deposit - to comply with such demonstration. After consideration of the comments received from LISA and other life settlement industry interested parties indicating that these options would create a financial barrier for some providers wishing to enter and operate in the New York market, the Superintendent added a third option that provides a less costly and less capital restrictive compliance alternative. The third option allows a life settlement provider to satisfy the financial accountability requirements by demonstrating that its assets exceed its liabilities by an amount no less than \$250,000. These financial accountability requirements are on a par with the requirements in many other states.

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

10. Compliance schedule: This regulation has been in effect on an emergency basis since April, 2010. The emergency action was necessary to establish fees and financial accountability standards in order to commence licensing life settlement providers, intermediaries and brokers, to ensure the implementation of Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009.

Since the emergency regulation went into effect in April, 2010, the Department has focused on the issues that needed to be addressed regarding licensing (e.g., development of licensing applications and processing of submitted applications; establishing internal procedures, processes and systems; responding to life settlement issues and inquiries). The Department continues to be engaged in outreach to interested parties to get their input regarding the additional provisions to be added to the regulation.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements for life settlement providers.

This rule is directed to life settlement providers, life settlement brokers and life settlement intermediaries. Some of these entities may come 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 conduct life settlement business, none of which are local governments.

2. Compliance requirements: The affected parties will need to accompany their applications along with fees as prescribed by this rule. Also, each life settlement provider applying for license has to comply with financial accountability requirements by demonstrating that its assets exceeds its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

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

4. Compliance costs: The regulation requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required

to pay a renewal fee every two years, in amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must comply with financial accountability requirements by demonstrating that its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

5. Economic and technological feasibility: The affected parties will need to pay licensing and registration fees as prescribed by the rule.

6. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by the rule may present a financial barrier for some small-business life settlement providers and life settlement intermediaries wishing to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the licensing and registration fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to small-business life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on small-business life settlement providers and intermediaries were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comment received by the Department from interested parties in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance in the rule.

7. Small business and local government participation: Affected small businesses had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19, 2010 and to participate (in person or by conference call) in a meeting held at the Department on April 6, 2010 to discuss the rule.

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

1. Types and estimated numbers of rural areas: There may be some life settlement providers, life settlement brokers, and life settlement intermediaries that do business in rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting or record-keeping requirements on public or private entities in rural areas. The affected parties that do business in rural areas will need to comply with the license and registration fees and financial accountability requirements imposed by the rule.

3. Costs: The rule requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

4. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by the rule may present a financial barrier for some life settlement providers and life

settlement intermediaries doing business in rural areas that wish to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to rural area life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on life settlement providers and intermediaries doing business in rural areas were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comments received from interested parties by the Department in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance included in the rule.

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 starting March 19, 2010 and to participate (in person or by teleconference) in the Department meeting on April 6, 2010 with interested parties to discuss the rule.

#### **Job Impact Statement**

The Insurance Department finds that this rule should have no impact on jobs and employment opportunities. This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements that life settlement providers must demonstrate at licensing. Additional licensing and registration requirements will be established by related rulemakings in the near future.

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## Division of the Lottery

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

#### **Jackpot Prize Payments for Multi-Jurisdictional Games and Lotto and Technical Rule Changes**

**I.D. No.** LTR-42-11-00010-P

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

**Proposed Action:** Amendment of sections 2806.2, 2806.4, 2806.7(b), 2806.13, 2817.2 and 2817.15; addition of section 2806.4(c); and repeal of section 2817.10(d) of Title 21 NYCRR.

**Statutory authority:** Tax Law, sections 1601, 1604, 1612 and 1617

**Subject:** Jackpot prize payments for Multi-Jurisdictional Games and Lotto and technical rule changes.

**Purpose:** To clarify the options for payment of jackpot prizes and game features to conform with accepted industry standards.

**Text of proposed rule:**

PART 2806  
MULTI-JURISDICTIONAL LOTTERY GAMES

Paragraphs (4) and (9) of subdivision (a) of section 2806.2 are amended to read as follows:

§ 2806.2 Mega Millions definitions

(a) The following definitions shall apply to Mega Millions.

(4) [Cash Option] *Lump Sum Option* - The manner in which the [on-line] Mega Millions Jackpot Prize may be paid in a single payment.

(9) Mega Millions Play Slip - for the [on-line] Mega Millions game, a computer-readable form, printed and issued by the New York Lottery, used in purchasing a Mega Millions Ticket, having up to five (5) separate play areas. [The Play Slip additionally includes boxes for selection of Cash Option or Annuity Option.] The play slip also provides for multiple drawing wagering up to 26 draws.

Subdivision (a) of section 2806.4 is amended and a new subdivision (c) is added to read as follows:

§ 2806.4 Ticket price

(a) [For the on-line Mega Millions game:] Mega Millions Tickets may be purchased for \$ 1.00 per play at the discretion of the Purchaser, in accordance with the number of game panels and inclusive drawings. The Purchaser receives one play for each \$ 1.00 wagered in Mega Millions. [Instants will be at the price stated on any such ticket.] Tickets may contain multiple plays. *The Division may authorize the sale of Mega Millions tickets at a different purchase price. Such a change in the purchase price shall be announced publicly by the Division prior to the effective date of such change.*

*(c) A Mega Millions game feature may be added at the discretion of the Director. A game feature is an alternative or additional method for playing the game within the same basic design.*

Paragraphs (3) and (4) of subdivision (b) and subparagraph (ii) of paragraph (4) of subdivision (b) of section 2806.7 are amended to read as follows:

§ 2806.7 Prize structure

(b) Jackpot prize payments. For the [on-line] Mega Millions game:

(3) If there are multiple winners of the annuitized Mega Millions jackpot prize from among all participating state lotteries, and if the annuitized amount of prize being awarded to each winner equals or exceeds \$ 1 Million, then the winner(s) in New York will be paid in accordance with their selection of lump sum or annuity [made at the time of ticket purchase]. If there are multiple winners of the annuitized Mega Millions jackpot prize from among all participating state lotteries, and if the annuitized amount of the prize being awarded to each winner is less than \$ 1 million, then the winner(s) in New York will be paid in a lump sum amount[, notwithstanding purchaser's selection at time of purchase].

(4) Purchasers in New York must select either an annuity jackpot prize or lump sum jackpot prize [at the time of ticket purchase]. *A jackpot prize shall be paid, at the election of a player made no later than sixty (60) days after the player becomes entitled to the prize, with either an annuity or lump sum payment. If the payment election is not made by a player within sixty (60) days after the player becomes entitled to the prize, then the prize shall be paid as an annuity prize. An election to take a lump sum payment may be made at the time of the prize claim or within sixty (60) days after the player becomes entitled to the prize. An election made after the winner becomes entitled to the prize is final and cannot be revoked, withdrawn or otherwise changed without the approval of the Division.*

(ii) [Cash option] *Lump sum option* jackpot prizes shall be paid in a single payment upon completion of internal validation procedures. The [cash option] *lump sum option* amount offered shall be the amount determined by multiplying the annuitized prize amount by a discount value set by Mega Millions Finance Committee prior to each drawing (the "[cash] *lump sum* equivalent jackpot prize"), divided by the number of total jackpot prize winners for the Mega Millions game.

Paragraph (7) of subdivision (b), paragraph (1) of subdivision (c), paragraph (1) of subdivision (e), paragraphs (3) and (5) of subdivision (h), and paragraphs (1), (2) and (3) of subdivision (i) of section 2806.13 are amended to read as follows:

## § 2806.13 Powerball

## b. Definitions.

The following definitions apply to Powerball:

(7) “[Set] *Fixed Prize*” means all other prizes except the Jackpot Prize that are advertised to be paid by a single [cash] payment and, except in instances specified in this section, will be equal to the prize amount established for the prize level.

## c. Game Description.

(1) Powerball is a five (5) out of fifty-nine (59) plus one (1) out of thirty-nine (39) computerized lottery game which pays the Jackpot Prize, at the election of the player made in accordance with this section or by a default election made in accordance with this section, either on an annuitized pari-mutuel basis or as a [cash] lump sum payment of the total cash held for this prize pool on a pari-mutuel basis. Except as provided in this section, all other prizes are paid on a *fixed* [set cash] lump sum basis. To play Powerball, a player may select five (5) different numbers, from one (1) through fifty-nine (59) and one (1) additional number from one (1) through thirty-nine (39). The additional number may be the same as one of the first five (5) numbers selected by a player. A player may select a set of five (5) numbers and one additional number by communicating the six (6) numbers to a Lottery Sales Agent, or by marking six (6) numbered spaces in any one panel on a Play Slip and submitting the Play Slip to an Agent or by requesting Quick Pick from an Agent. An Agent will then issue a ticket containing the selected set or sets of numbers, each of which constitutes a game play.

## e. Ticket Prices.

(1) A Powerball ticket may be purchased for \$1.00 per play in accordance with the number of game panels and inclusive drawings. The purchaser receives one play for each \$1.00 wagered in Powerball. Tickets may contain multiple plays. *The Division may authorize the sale of Powerball tickets at a different purchase price. Such a change in the purchase price shall be announced publicly by the Division prior to the effective date of such change.*

## h. Prize Pool, Prize Structure and Probability of Winning.

(3) Expected Prize Payout Percentages. The Jackpot Prize shall be determined on a pari-mutuel basis. Except as provided in this section, all other prizes shall be paid as [set cash] *fixed lump sum* prizes with the following expected prize payout percentages:

(5) The prize pool percentage allocated to the [set] *fixed* prizes [the cash prizes of \$200,000 or less] shall be carried forward to subsequent drawings if all or a portion of it is not needed to pay the [set] *fixed* prizes awarded in the current drawing. The Division, in consultation with other state lotteries selling Powerball tickets, may decide that it is necessary to pay a [set] *fixed* prize as a pari-mutuel prize.

## i. Prize Payment.

(1) Jackpot Prizes. Jackpot prizes shall be paid, at the election of a player made no later than sixty (60) days after the player becomes entitled to the prize, with either an annuity or [cash] *lump sum* payment. If the payment election is not made by a player within sixty (60) days after the player becomes entitled to the prize, then the prize shall be paid as an annuity prize. An election to take a [cash] *lump sum* payment may be made at the time of the prize claim or within sixty (60) days after the player becomes entitled to the prize. An election made after the winner becomes entitled to the prize is final and cannot be revoked, withdrawn or otherwise changed without the approval of the Division. Shares of the Jackpot Prize shall be determined by dividing the cash available in the Jackpot Prize pool equally among all winners of the Jackpot Prize in all participating lottery states. Winner(s) who elect a [cash] *lump sum* payment shall be paid their share(s) in a single [cash] *lump sum* payment upon successful completion of validation procedures. Neither MUSL nor the participating lotteries shall be responsible or liable for changes in the advertised or estimated annuity prize amount and the actual amount determined after the prize payment method is actually known to MUSL. In certain instances announced by MUSL, the Jackpot Prize shall be a guaranteed amount and shall be determined pursuant to paragraph (5) of this subdivision. All annuitized prizes shall be paid annually in thirty (30) payments

with the initial payment being made in [cash] a *lump sum* to be followed by twenty-nine (29) payments, upon successful completion of validation procedures. All annuitized prizes shall be paid annually in thirty (30) graduated payments (increasing each year) by a rate as determined by MUSL. Prize payments may be rounded down to the nearest one thousand dollars (\$1,000).

(2) Low-Tier [Cash] Prize Payments. All low-tier [cash] prizes [(all prizes except the Jackpot Prize)] shall be paid in one payment.

(3) Prizes Rounded. Annuitized payments of the Jackpot Prize or a share of the Jackpot Prize may be rounded to facilitate the purchase of an appropriate funding mechanism. Amounts remaining after rounding on an annuitized Jackpot Prize shall be added to the [first cash] *initial* payment to the winner or winners. Prizes other than the Jackpot Prize, which, under these rules, may become single-payment, pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Amounts remaining after rounding shall be carried forward to the prize pool for the next drawing.

## Part 2817

## LOTTO

Paragraph (1) of subdivision (b) of section 2817.2 is amended to read as follows:

## § 2817.2 Payment of Prizes

(b) Each first prize payment shall be subject to the following provisions of this subdivision.

(1) If, pursuant to paragraph (a) (1) of this section, the calculated share for each game panel qualifying for a first prize in a particular LOTTO drawing would provide annual payments of \$10,000 or more, a winner shall receive [a first] *an initial payment in an amount as similar as possible* [equal] to the first [of the annual payments as is practicable] *annuity payment*. After providing for such a first payment, the division, as authorized by the comptroller, shall invest the remaining first prize money in securities authorized by the State Finance Law for the investment of state funds at current rates payable over a period of years. From the returns of principal and earnings on such investment, the division shall pay annual prize installments to each first prize winner. Such annual prize installments shall be payable for a term of years to be determined by the division. The number of years in the term payment schedule may be changed by the division from time to time. Any such change will be publicly announced by the division. Such announcement may be made in a news release, an advertisement, on the division’s website, or in such other form as the director, in his or her discretion, may prescribe to maximize public awareness. [At the time of purchase,] LOTTO players may elect whether a first prize shall be payable in installments over a term of years in accordance with the foregoing provisions of this paragraph or, alternatively, whether a first prize shall be payable in a lump sum. If a prize is awarded in a lump sum as a result of a player having elected that option, the amount of the lump sum payment shall be equal to the first prize discounted to present value based upon market rates on the business day following the drawing, divided by the number of game panels qualifying for a first prize. *A jackpot prize shall be paid, at the election of a player made no later than sixty (60) days after the player becomes entitled to the prize, with either an annuity or lump sum payment. If the payment election is not made by a player within sixty (60) days after the player becomes entitled to the prize, then the prize shall be paid as an annuity prize. An election to take a lump sum payment may be made at the time of the prize claim or within sixty (60) days after the player becomes entitled to the prize. An election made after the winner becomes entitled to the prize is final and cannot be revoked, withdrawn or otherwise changed without the approval of the Division.*

Subdivision (d) of section 2817.10 is repealed.

Subdivision (d) of section 2817.15 is amended to read as follows:

§ 2817.15 Determination of prizes for variations of the LOTTO game.

(d) In addition to the announced prize structure, the division may offer special prizes from time to time[, in the form of either cash or other valuable consideration, if such additional special prizes are authorized by the director at her or his discretion].

*Text of proposed rule and any required statements and analyses may be obtained from:* Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, PO Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, email: nyrules@lottery.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: The amendments to 21 NYCRR Parts 2806 and 2817 are proposed pursuant to Tax Law, Sections 1601, 1604, 1612 and 1617.

Tax Law § 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively for aid to education. Tax Law § 1604 authorizes the Division of the Lottery (the Lottery) “to promulgate rules and regulations governing the establishment and operation thereof.” Tax Law § 1612 (a) describes the distribution of revenues for any joint, multi-jurisdiction, and out-of-state lottery and the Lotto game. Tax Law Section 1617 authorizes the Lottery Director to “enter into an agreement with a government-authorized group of one or more other jurisdictions providing for the operation and administration of a joint, multi-jurisdiction, and out-of-state lottery.”

2. Legislative objectives: The purpose of operating Lottery games is to generate earnings for the support of education in the State. Amendment of this regulation is expected to advance the Lottery’s ability to generate earnings for education by offering winners of the Mega Millions and Lotto jackpot prizes a more convenient jackpot prize payment option by permitting players to elect lump sum payments or annuity payments within sixty days of claiming such prizes. Previously, players were required to make such elections at the time of ticket purchase. This jackpot prize election time frame was already available for the Powerball jackpot prize. Therefore, this change makes Mega Millions and Lotto consistent with the Powerball jackpot prize election option. Additionally, technical changes were made to terminology to more accurately describe such terms. Lastly, a provision was added to the rules of the Powerball and Mega Millions games to provide the flexibility to offer tickets for such games at different purchase prices to promptly accommodate any changes in the purchase prices of such games as may be approved by the consortium of states that participate in such games.

3. Needs and benefits: Amendments to the multi-jurisdictional game regulations and the Lotto game regulations will allow the Lottery to continue its effort to keep and enlarge its market share of players (from within New York State and other states) who play lottery games and bring more consistency to its three jackpot draw games.

4. Costs:

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

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: None.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the Lottery’s experience in operating State Lottery games for more than 40 years.

5. Local government mandates: None. No local government is authorized or required to do any act, apply any effort, expend any funds, or use any other resources in connection with the operation of the Mega Millions, Powerball or Lotto games. All necessary actions will be carried out by the Lottery or licensed Lottery retailers who will be completely responsible for all aspects of game operations at the local retail level. The Lottery has no authority and no need to impose any mandate on any local government. Consequently, no provision of the rule imposes any burden on any local government in the State.

6. Paperwork: There are no changes in paperwork requirements, except for an additional form that jackpot winners in the Mega Millions, Lotto and Powerball games will be asked to complete to elect lump sum payment or annuity payments. Game information will be issued by the New York Lottery for public convenience on the Lottery’s website and through point of sale advertising materials at retailer locations.

7. Duplication: None.

8. Alternatives: The alternative to amending the Powerball, Mega Millions and Lotto game regulations is to not make all the jackpot draw games consistent for the convenience and benefit of Lottery players. Additionally, any alternative to making the proposed technical changes to terminology in the Powerball, Mega Millions and Lotto games would result in less accurate and less clear regulatory language for such games.

The proposed amendments to the Powerball, Mega Millions and Lotto games will ensure that the Lottery will be able to offer the best possible or games, which will appeal to more customers and result in maximum sales and revenue for aid to education in New York State.

9. Federal standards: None.

10. Compliance schedule: None.

#### **Regulatory Flexibility Analysis and Rural Area Flexibility Analysis**

The proposed rulemaking does not require a Regulatory Flexibility Analysis or a Rural Area Flexibility Analysis. There will be no adverse impact on rural areas, small business or local governments.

The proposed amendments to the New York Lottery’s Powerball, Mega Millions and Lotto game regulations will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. Small businesses will not have any additional recordkeeping requirements as a result of the proposed amendments. Additionally, the proposed amendments are anticipated to have a positive affect on the revenue of small businesses that sell lottery tickets because such amendments are being made for the convenience and benefit of Lottery players. Revenue from such games may increase which will increase sales commissions paid to retailers as players find the amendments being made to be more convenient and beneficial. Local governments are not regulated by the New York Lottery or its regulations nor are any economic or recordkeeping requirements imposed on local governments as a result of the proposed amendments to such regulations.

#### **Job Impact Statement**

The proposed amendment of 21 NYCRR Parts 2806 and 2817 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State.

The amendments are being made to update certain technical aspects of the Mega Millions, Powerball and Lotto games. Some of the technical changes are being made for the convenience of Lottery players. The changes will not adversely impact jobs and employment opportunities within New York State.

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

### **Powerball Game Design and Quick Draw Game “Draw” Definition**

**I.D. No.** LTR-42-11-00011-P

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

**Proposed Action:** Amendment of sections 2806.13 and 2835.1 of Title 21 NYCRR.

**Statutory authority:** Tax Law, sections 1601, 1604, 1612 and 1617

**Subject:** Powerball game design and Quick Draw game “draw” definition.

**Purpose:** To conform to the changes required by the Powerball consortium and recent amendments to section 1612 of the Lottery for Education Law.

**Text of proposed rule:** Paragraph (2) of subdivision (a) of section 2806.13 is amended to read as follows:

(a) Purpose.

(2) During each Powerball drawing, six (6) Powerball winning numbers will be selected from two (2) fields of numbers in the following manner: five (5) winning numbers from a field of one (1) through fifty-nine (59), and one (1) winning number from a field of one (1) through thirty-[nine (39)] five (35).

Paragraphs (1), (4), and (6) of subdivision (b) of section 2806.13 is amended to read as follows:

(b) Definitions.

The following definitions apply to Powerball:

(1) [“Match 5 Bonus Prize” means the bonus money won when a Jackpot Prize has reached a new high level and bonus prize monies have been declared under this section. The Match 5 Bonus Prize does not include the original amount declared for the Match 5 Prize.] *Intentionally omitted.*

(4) “Powerball Play Area” means the area of the play slip, also known as a “panel” which contains two sets of numbered spaces to be marked by a player, the first set containing fifty-nine (59) spaces, numbered one (1) through fifty-nine (59) and the second set containing thirty-[nine (39)] *five (35)* spaces, numbered one (1) through thirty-[nine (39)] *five (35)*.

(6) “Powerball Winning numbers” means the six (6) numbers, the first five (5) from a field of fifty-nine (59) numbers and the last one (1) from a field of thirty-[nine (39)] *five (35)* numbers, randomly selected at each drawing, which shall be used to determine winning plays shown on a game ticket.

Paragraph (1) of subdivision (c) of section 2806.13 is amended to read as follows:

(c) Game Description.

(1) Powerball is a five (5) out of fifty-nine (59) plus one (1) out of thirty-[nine (39)] *five (35)* computerized lottery game which pays the Jackpot Prize, at the election of the player made in accordance with this section or by a default election made in accordance with this section, either on an annuitized pari-mutuel basis or as a [cash] lump sum payment of the total cash held for this prize pool on a pari-mutuel basis. Except as provided in this section, all other prizes are paid on a [set cash] *fixed* basis. To play Powerball, a player may select five (5) different numbers, from one (1) through fifty-nine (59) and one (1) additional number from one (1) through thirty-[nine (39)] *five (35)*. The additional number may be the same as one of the first five (5) numbers selected by a player. A player may select a set of five (5) numbers and one additional number by communicating the six (6) numbers to a Lottery Sales Agent, or by marking six (6) numbered spaces in any one panel on a Play Slip and submitting the Play Slip to an Agent or by requesting Quick Pick from an Agent. An Agent will then issue a ticket containing the selected set or sets of numbers, each of which constitutes a game play.

Paragraph (1) of subdivision (e) of section 2806.13 is amended to read as follows:

(e) Ticket Prices.

(1) A Powerball ticket may be purchased for \$[1.00] *2.00* per play in accordance with the number of game panels and inclusive drawings. The purchaser receives one play for each \$[1.00] *2.00* wagered in Powerball. Tickets may contain multiple plays. *The Division may authorize the sale of Powerball tickets at a different purchase price. Such a change in the purchase price shall be announced publicly by the Division prior to the effective date of such change.*

Paragraphs (3), (5), (6) and (7) of subdivision (h) of section 2806.13 are amended to read as follows:

(h) Prize Pool, Prize Structure and Probability of Winning.

(3) Expected Prize Payout Percentages. The Jackpot Prize shall be determined on a pari-mutuel basis. Except as provided in this section, all other prizes shall be paid as [set cash] *fixed lump sum* prizes with the following expected prize payout percentages:

Number of Matches Per Play	Prize Payment	Prize Pool Percentage Allocated to Prize
All five (5) of first set plus one (1) of second set.	Jackpot Prize	[65.0577] <i>63.9511%*</i>
All five (5) of first set and none of second set.	\$[2] <i>1,000,000</i>	[7.7849] <i>19.4038%</i>
Any four (4) of first set plus one (1) of second set.	\$10,000	[2.7657] <i>1.5409%</i>
Any four (4) of first set and none of second set.	\$100	[1.0510] <i>0.5239%</i>
Any three (3) of first set plus one (1) of second set.	\$100	[1.4658] <i>0.8167%</i>
Any three (3) of first set and none of second set.	\$7	[3.8991] <i>1.9437%</i>
Any two (2) of first set plus one (1) of second set.	\$7	[1.7785] <i>0.9909%</i>

Any one (1) of first set plus one (1) of second set.	\$4	[6.4789] <i>3.6097%</i>
None of first set plus one (1) of second set.	\$[3] <i>4</i>	[9.7184] <i>7.2194%</i>

[When the Jackpot Prize reaches a new high level, the Prize Pool Percentage allocated to the Jackpot Prize shall be reduced to that percentage needed to fund a maximum Jackpot Prize increase, with the remainder funding the Match 5 Bonus Prize category.]

(5) The prize pool percentage allocated to the [set] *fixed* prizes [(the cash prizes of \$200,000 or less)] shall be carried forward to subsequent drawings if all or a portion of it is not needed to pay the [set] *fixed* prizes awarded in the current drawing. The Division, in consultation with other state lotteries selling Powerball tickets, may decide that it is necessary to pay a [set] *fixed* prize as a pari-mutuel prize.

(6) [The prize money allocated to the Match 5 Bonus Prize shall be divided equally by the number of game panels eligible for the Match 5 prize when a game panel is eligible for the new high Jackpot amount.

(7) Probability of Winning. The following table sets forth the probability of winning and the probable distribution of winners in and among each prize category based upon the total number of possible combinations in Powerball.

Number of Matches Per Ticket	Probability Distribution Winners Probability	Probable/Set Prize Amount
All five (5) of first set plus one (1) of second set	1 1: [195,249,054] <i>175,223,510.0000</i>	Jackpot Prize
All five (5) of first set and none of second set	38 1: 5,[138,133.0000] <i>153,632.6471</i>	\$[2] <i>1,000,000</i>
Any four (4) of first set plus one (1) of second set	270 1: [723,144.6444] <i>648,975.9630</i>	\$10,000
Any four (4) of first set and none of second set	9,180 [10,260] 1: 19,[030.1222] <i>087.5283</i>	\$100
Any three (3) of first set plus one (1) of second set	14,310 1: [13,644.2386] <i>12,244.8295</i>	\$100
Any three (3) of first set and none of second set	486,540 [543,780] 1: [359.0589] <i>360.1420</i>	\$7
Any two (2) of first set plus one (1) of second set	248,040 1: [787.1676] <i>706.4325</i>	\$7
Any one (1) of first set plus one (1) of second set	1,581,255 1: [123.4773] <i>110.8129</i>	\$4
None of first set plus one (1) of second set	3,162,510 1: [61.7386] <i>55.4065</i>	\$3
Overall	5,502,140 [5,560,464] 1: [35.1138] <i>31.8464</i>	

Paragraphs (4) and (7) of subdivision (i) of section 2806.13 are amended to read as follows:

(i) Prize Payment.

(4) Rollover. If the Jackpot Prize is not won in a drawing, the prize money allocated for the Jackpot Prize shall roll over and be added to the Jackpot Prize pool for the following drawing. [If a new high Jackpot Prize is not won in a drawing, the prize money allocated for the Match 5 Bonus Prizes shall roll over and be added to the Match 5 Bonus Prize pool for the following drawing.]

[(7) Jackpot Prize Maximum Increase. Creation of Match 5 Bonus Prizes. When the Jackpot Prize reaches a new high annuitized amount, the maximum amount to be allocated to the Jackpot Prize pool from the Jackpot Prize percentage shall be the previous high amount plus \$25 million (annuitized) or as otherwise set by MUSL. Any amount of the Jackpot Prize percentage which exceeds the \$25 million (annuitized) increase shall be added to the Match 5 Bonus Prize Pool. The Match 5 Bonus prize pool shall accumulate until the Jackpot Prize is won, at which time the Match 5 Bonus prize pool shall be divided equally by the number of game panels eligible for the Match 5 prize. If there are no Match 5 winning tickets for the drawing when the new high Jackpot Prize is won, then the Match 5 Bonus prize pool shall be divided equally by the number of game panels eligible for the Match 4+1 prize.]

Paragraph (8) of subdivision (j) of section 2806.13 is amended to read as follows:

## (j) Ticket Responsibility.

(8) Child support arrears [and], public assistance repayments and past due State tax liabilities shall be withheld from Powerball prizes in such amounts as may be required by law.

Subdivision (h) of section 2835.1 is amended to read as follows:

(h) Draw means the time at which the winning numbers are drawn for the Quick Draw game. Draw will be held daily at [five minute] intervals during the hours designated by the Director. [Draws will not be held during more than 13 hours in any 24-hour period or during more than eight consecutive hours. In the discretion of the Lottery, there may be minor variations in the five-minute intervals between draws.] If for any reason a drawing cannot be held, the next draw will take place at the next scheduled draw time.

**Text of proposed rule and any required statements and analyses may be obtained from:** Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, Schenectady, NY 12301-7500, (518) 388-3408, email: nylrules@lottery.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: The amendments to 21 NYCRR Part 2806.13 is proposed pursuant to Lottery for Education Law, Sections 1601, 1604, 1612 and 1617.

Tax Law § 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively for aid to education. Tax Law § 1604 authorizes the Division of the Lottery (the Lottery) “to promulgate rules and regulations governing the establishment and operation thereof.” Tax Law § 1612 (a) describes the distribution of revenues for the Quick Draw game and any joint, multi-jurisdiction, and out-of-state lottery game. Tax Law Section 1617 authorizes the Lottery Director to “enter into an agreement with a government-authorized group of one or more other jurisdictions providing for the operation and administration of a joint, multi-jurisdiction, and out-of-state lottery.”

2. Legislative objectives: The purpose of operating Lottery games is to generate earnings for the support of education in the State. Amendment of this regulation is expected to advance the Lottery’s ability to generate earnings for education.

3. Needs and benefits: This rulemaking is necessary to continue participation in the Powerball game. The consortium of State lotteries that participate in the Powerball game and the Multi-State Lottery Association (“MUSL”), the organization that has administered the Powerball game since the inception of the game, has approved and adopted amendments to the Powerball game effective as of January 18, 2012. Each participating state lottery within the Powerball consortium is required to comply with the official Powerball game rules, as amended. Therefore, the proposed amendments to the New York Lottery’s regulations are necessary to continue participation in the Powerball game. Furthermore, the new Powerball game design is expected to generate more revenue for education at a time when such revenue is urgently needed.

This rulemaking is also necessary to conform the Quick Draw game regulations to recent amendments to Section 1612 of the Lottery for Education Law made by Chapter 147 of the Laws of 2010.

## 4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None. There are no costs to Lottery sales agents for the implementation and continuing compliance with the rule. The Lottery provides the necessary equipment to its sales agents to sell Lottery games and will make any necessary hardware and software changes to such equipment to accommodate the new Powerball game design at no cost to the sales agents. Information about the new game design and other materials to promote the Powerball game are also provided to Lottery sales agents at no cost to the sales agents.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, because the cost associated with the Powerball game changes, such as printing new play cards and tickets, and advertising the new game design are expected to be minimal and more than compensated for by the increase in revenue. Any minimal operating costs that may have been incurred as a result of the recently enacted amendments to the Quick Draw game made to section 1612(a) of the Lottery for Education Law by Chapter 147 of the Laws of 2010 were more than compensated for by the increase in revenue for such game.

c. Sources of cost evaluations: Estimated annual sales of the Powerball game are expected to increase by approximately \$70 million with an expected annual revenue increase of approximately \$24 million. When the new game design is launched in January of 2012, the revenue impact for

fiscal year 2011-2012 is expected to be approximately \$6 million. The foregoing cost evaluations are based on the Lottery’s experience in operating State Lottery games for more than 40 years.

5. Local government mandates: None. No local government is authorized or required to do any act, apply any effort, expend any funds, or use any other resources in connection with the amendment of the Powerball and Quick Draw game rules. All necessary actions will be carried out by the Lottery or licensed Lottery retailers who will be completely responsible for all aspects of game operations at the local retail level. The Lottery has no authority and no need to impose any mandate on any local government. Consequently, no provision of the rule imposes any burden on any local government in the State.

6. Paperwork: There are no changes in paperwork requirements. Game information will be issued by the New York Lottery for public convenience on the Lottery’s website and through point of sale advertising materials at retailer locations.

7. Duplication: None.

8. Alternatives: The Powerball game regulations must be amended to conform to the rules implemented by MUSL and the Powerball consortium. The alternative to amending the Powerball game regulations is to forego participation in the Powerball game and loss of substantial revenue to education within the State of New York.

The proposed amendments to the Powerball game will ensure that the Lottery will be able to offer the best possible game which will result in maximum sales and revenue for aid to education in New York State.

The Quick Draw game rules must be amended to conform to recent amendments made to section 1612 (a) of the Lottery for Education Law by Chapter 147 of the Laws of 2010.

9. Federal standards: None.

10. Compliance schedule: None.

**Regulatory Flexibility Analysis and Rural Area Flexibility Analysis**

The proposed rulemaking does not require a Regulatory Flexibility Analysis or a Rural Area Flexibility Analysis. There will be no adverse impact on rural areas, small business or local governments.

The proposed amendments to the New York Lottery’s Powerball and Quick Draw game regulations will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. The proposed amendment to the Quick Draw game is being made to conform the Quick Draw game regulations to recent amendments to the Lottery for Education Law. Small businesses will not have any additional recordkeeping requirements as a result of the proposed amendments.

Additionally, the proposed amendments to the Powerball game are anticipated to have a positive affect on the revenue of small businesses that sell lottery tickets because such amendments are being made for the convenience and benefit of Lottery players. Revenue from the Powerball game may increase which will increase sales commissions paid to retailers as players find the amendments being made to be more beneficial.

Local governments are not regulated by the New York Lottery or its regulations nor are any economic or recordkeeping requirements imposed on local governments as a result of the proposed amendments to such regulations.

**Job Impact Statement**

The proposed amendment of 21 NYCRR Part 2806 and section 2835.1 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State.

The amendments are being made to change certain technical aspects of the Powerball game and to conform the Quick Draw game regulations to recent amendments to the Lottery for Education Law. The changes will not adversely impact jobs and employments opportunities within New York State.

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## Office of Mental Health

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**NOTICE OF ADOPTION****Implementation of Medicaid Fee Reductions in Various OMH-Licensed Programs**

**I.D. No.** OMH-32-11-00003-A

**Filing No.** 870

**Filing Date:** 2011-10-03

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of Parts 512, 588 and 591 of Title 14 NYCRR.  
**Statutory authority:** Mental Hygiene Law, sections 7.09, 43.01 and 43.02  
**Subject:** Implementation of Medicaid fee reductions in various OMH-licensed programs.

**Purpose:** To reduce rates for various non-State-operated programs consistent with the 2011-2012 enacted State budget.

**Text or summary was published in:** the August 10, 2011 issue of the Register, I.D. No. OMH-32-11-00003-P.

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

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

**Assessment of Public Comment**

The agency received one letter of comment regarding the amendments to Parts 512, 588 and 591 of Title 14 NYCRR.

Issue: The writer objected to the language in the regulatory filing paperwork that indicated that the regulation would not result in increased costs to local governments or regulated parties, or impose additional duties on the counties.

Response: The regulatory impact statement clearly indicated that the amendments will reduce the rates paid under the Medical Assistance Program for various programs licensed by the Office of Mental Health, and details the amount of the reduction by program category. While this reduction is not considered a “cost” to regulated parties per se, it is understood that a total Medicaid reduction of \$842,300 is significant and could pose a hardship for providers of services. The reduction is necessitated by the 1.1% reduction in Medicaid contained in the enacted State Budget.

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## Office for People with Developmental Disabilities

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

**Provider Allocation of OPWDD Funding**

**I.D. No.** PDD-42-11-00008-EP

**Filing No.** 865

**Filing Date:** 2011-09-29

**Effective Date:** 2011-09-29

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

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

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

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

**Specific reasons underlying the finding of necessity:** This emergency rule is being promulgated on September 29, 2011 to rescind a specific provision in various rules concerning efficiency adjustments in rate setting methodologies that were adopted on July 1, 2011. The implementation of the provision had been postponed by a previous emergency rule which expired on September 28.

The rules concerning efficiency adjustments reduce the operating components of reimbursement to providers of supervised residential habilitation services, group day habilitation and supplemental group day habilitation services, prevocational services, and under 31-bed ICF/DDs.

These rules concerning efficiency adjustments contain a stipulation that would restrict providers from allocating funds to administrative expenses if they were not designated for administrative costs in the price or rate. Subsequent to publication of the proposed regulations, providers claimed that, in the context of the various July 1, 2011 price and rate reductions, such restrictions could have a severe impact on those providers already demonstrating the greatest level of administrative efficiencies in their operations. For some providers, the restriction could compound and/or exacerbate the effects of the administrative aspects of reductions.

OPWDD is rescinding this provision because it could potentially hamper a provider’s ability to sustain necessary administrative aspects of

operations, and the restriction, if left intact could potentially compromise a provider’s ability to provide services and continue operations. Thus, it is necessary for the health, welfare and safety of individuals these providers serve to rescind the restriction.

**Subject:** Provider allocation of OPWDD funding.

**Purpose:** To repeal a provision that restricts providers’ abilities to allocate revenues to administrative expense.

**Text of emergency/proposed rule:** Paragraph 635-10.5(b)(22) is deleted as follows:

[(22) Effective September 30, 2011, 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.]

Paragraph 635-10.5(c)(17) is deleted as follows:

[(17) Effective September 30, 2011, 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.]

Paragraph 635-10.5(e)(12) is deleted as follows and paragraphs (13) and (14) are renumbered to (12) and (13):

[(12) Effective September 30, 2011, 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.]

Paragraph 671.7(a)(14) is deleted as follows:

[(14) Effective September 30, 2011, 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.]

Subparagraph 681.14(d)(1)(iii) is deleted as follows:

[(iii) Effective September 30, 2011, revenues realized by providers from reimbursement attributable to components of the rate other than the administrative component shall not be used to fund administrative expenses.]

**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 December 27, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, OPWDD, Regulatory Affairs Unit, 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:** 45 days after publication of this notice.

**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 emergency/proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The emergency/proposed amendments concern the way in which providers may allocate revenues to administrative expenses.

3. Needs and Benefits: Four regulations adopted on July 1, 2011 implemented efficiency adjustments and impacted supervised Individual Residential Alternatives (IRAs), supervised community residences (CRs), group day habilitation, supplemental group day habilitation, prevocational services, and ICF/DDs with bed capacities of 30 or less. Possible reductions in operating reimbursement ranged from zero to ten percent.

All four of these regulations contain a provision that prohibits providers from allocating funding to administrative expenses that was designated in the price or rate for other than administrative expenses. Emergency amendments filed on July 1, 2011 delayed the implementation this provision effective July 1, 2011 and thereby temporarily prevented the restriction from taking effect. The purpose of the delay was to afford OPWDD more time to conduct a dialogue with providers and to assess the potential consequences of this amendment to providers. The emergency regulations expired on September 28, 2011. This emergency/proposed regulation rescinds the provision; however, alternatives to address the unrestricted nature of provider interchange flexibility related to agency administration will be further explored (see Section 8, “Alternatives”).

89 public comments were submitted which expressed concerns and/or opposition to the provision which is being rescinded by these emergency/proposed regulations. Providers have claimed that, in the context of the July 1, 2011 reductions in reimbursement, a restriction on the application of funding to administrative expenses could have a severe impact on those providers already demonstrating the greatest efficiencies in their operations. For some, this would compound and/or exacerbate the effects of the reductions, especially when those reductions targeted the administrative component of reimbursement. To avoid harmful effects that could threaten a provider's ability to continue operations, OPWDD is rescinding this provision, but will consider alternatives to address the unrestricted nature of provider interchange flexibility related to agency administration (see Section 8, "Alternatives").

OPWDD anticipates that, due to the repeal of the allocation restriction, providers will be enabled to exercise flexibility and autonomy in adapting to the reimbursement reductions and will be better able to sustain the administrative aspects of operations.

#### 4. Costs:

##### a. Costs to the agency and to the State and its local governments:

The emergency/proposed amendments do not change reimbursement levels. There is therefore no cost to OPWDD, to the State, or to local governments. The emergency/proposed amendments eliminate the potential to recover monies OPWDD allocates to other categories and that providers spend on administrative expenses. However, it is impossible to know how much money, if any, would have been spent in violation of the interchange restriction and subsequently recovered.

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.

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 emergency/proposed amendments do not require any additional paperwork to be completed by providers.

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

8. Alternatives: OPWDD considered leaving the provision regarding interchange intact by not promulgating this emergency/proposed regulation. However, OPWDD decided to further delay the effective date of the restriction on interchange, in response to claims from providers that they will be harmed by the restriction. OPWDD will be considering alternatives which would be effectuated by the proposal of regulations in the future. A work team consisting of stakeholders, Division of the Budget staff, Office for People with Developmental Disabilities staff and Governor's Office staff is to be established to develop an alternative proposal to address the unrestricted nature of provider funding interchange flexibility related to agency administration. This work team is expected to complete its work within 60 days of the promulgation of this emergency regulation.

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

10. Compliance Schedule: The emergency amendments are effective September 29, 2011. OPWDD expects to finalize the proposed amendments as soon as possible in conformance with the timeframes established in the State Administrative Procedure Act. There are no compliance activities associated with these amendments.

#### **Regulatory Flexibility Analysis**

1. Effect on small business: The emergency/proposed regulations apply to providers of residential habilitation delivered in supervised Individualized Residential Alternative (IRAs) and Community Residences (CRs), group and supplemental group day habilitation services, prevocational services, and under 31-bed ICF/DD 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 255 providers that offer supervised residential habilitation; 290 that offer group and supplemental group day habilitation; 100 that offer prevocational services; and 102 that operate ICF/DDs. Providers which offer a combination of services may be represented in more than one of these counts. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The emergency/proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. By rescinding a restrictive provision, the emergency/proposed amendments allow providers to retain the flexibility they have in allocating their OPWDD funding and to avoid any negative impact this provision, if allowed to become effective, might

have engendered. Because it essentially precludes a negative impact from occurring, there is a positive impact to providers.

OPWDD has determined that these amendments do not create any increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The emergency/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 do not add to the professional service needs of local governments.

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

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

6. Minimizing adverse impact: The purpose of these emergency/proposed amendments is to repeal the provisions in OPWDD's July 1, 2011 regulations that would have restricted the ability of providers to use resources for administrative expenses and, thereby, to maintain the flexibility providers have experienced in the process of allocating resources. With respect to resource allocation, this amendment preserves the status that existed on June 30, 2011.

7. Small business participation: The elimination of the restriction was recommended by representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), at a meeting that occurred on April 18, 2011. Some of the members of NYSACRA have fewer than 100 employees. Finally, OPWDD mailed similar emergency amendments which were promulgated on July 1 to all providers, including providers that are small businesses. OPWDD received 89 comments on the previous emergency regulations all which expressed serious reservations and/or opposition to the imposition of the restriction. Some of these comments may have been from providers which are considered to be small businesses.

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

A rural area flexibility analysis for these emergency/proposed amendments is not being submitted because the amendments do not impose any adverse impact or reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the emergency/proposed amendments.

The emergency/proposed amendments rescind a provision contained in regulations that were adopted effective July 1, 2011 that would have limited providers' abilities to allocate resources and could have had a negative impact on some providers. This provision was, however, temporarily suspended until September 29, 2011 by virtue of emergency regulations. These emergency/proposed amendments with an effective date of September 29, 2011 prevent the provision from being implemented and keep the revenue allocation process intact, unaltered and undisturbed. The impact to providers, including providers in rural areas, will be positive because it simply prevents any negative impact from the restriction from occurring.

#### **Job Impact Statement**

OPWDD is not submitting a Job Impact Statement for this emergency/proposed rule making because the rule making does not have a substantial adverse impact on jobs or employment opportunities.

The emergency/proposed rule rescinds a provision contained in four regulations that impact providers of residential habilitation in supervised Individual Residential Alternatives (IRAs) and supervised Community Residences (CRs), group and supplemental group day habilitation services, prevocational services, and under 31-bed ICF/DDs. Upon adoption of those four regulations on July 1, 2011, the provision limited a provider's ability to allocate resources. An emergency regulation filed on July 1, 2011 postponed the provision's effective date leaving the status of providers' allocation process temporarily unaltered and undisturbed until its expiration. This emergency amendment temporarily rescinds the provision and proposes the promulgation of regulations to permanently rescind the provision.

The impact to providers is positive as it precludes any negative impact from the restriction from occurring and therefore prevents any potential negative impact on jobs and employment opportunities.

## Public Service Commission

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

#### Petition for the Submetering of Electricity

**I.D. No.** PSC-42-11-00017-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 Lane Towers, Inc. to submeter electricity at 107-40 Queens Boulevard, Forest Hills, New York.

**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 Lane Towers, Inc. to submeter electricity at 107-40 Queens Boulevard, Forest Hills, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Lane Towers, Inc. to submeter electricity at 107-40 Queens Boulevard, Forest Hills, New York, located in the service 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](mailto: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](mailto: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-0529SP1)

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

#### Availability of Telecommunications Services in New York State at Just and Reasonable Rates

**I.D. No.** PSC-42-11-00018-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 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 advisability 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, including an additional \$600,000 in funding, through September 30, 2011. On September 16, 2011, the Commission issued an order providing for further extension of that fund pending exhaustion of that \$600,000 in additional funding or further Commission order. 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) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto: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](mailto: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-0527SP3)

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

#### New York Power Authority (NYPA) Expansion and Replacement Power

**I.D. No.** PSC-42-11-00019-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 petition and tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid for approval of agreement regarding treatment of allocations of New York Power Authority Expansion and Replacement Power.

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

**Subject:** New York Power Authority (NYPA) Expansion and Replacement Power.

**Purpose:** For approval of agreement regarding treatment of allocations of NYPA Expansion and Replacement Power beginning January 1, 2012.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a filing by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) for approval of a petition and related tariff amendments regarding treatment of allocations of New York Power Authority Expansion Power and Replacement Power. The proposed tariff amendments have an effective date of January 1, 2012. The Commission may adopt in whole or in part, modify or reject National Grid'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](mailto: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](mailto: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-0535SP1)

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

**National Grid’s Procedures, Terms and Conditions for an Economic Development Plan**

**I.D. No.** PSC-42-11-00020-P

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

**Proposed Action:** The Commission is considering a petition from Niagara Mohawk Power Corporation d/b/a National Grid detailing its procedures, terms, and conditions for an economic development plan.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

**Subject:** National Grid’s procedures, terms and conditions for an economic development plan.

**Purpose:** Consideration of National Grid’s procedures, terms and conditions for an economic development plan.

**Substance of proposed rule:** On August 31, 2011, Niagara Mohawk Power Corporation d/b/a National Grid submitted its Economic Development Grant Programs Annual Report to the Commission detailing the economic development programs and proposed changes to the program. The Commission is considering whether to grant, deny or modify, in whole or part, the proposal filed by National Grid. The Commission may apply its decision here 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.

(10-E-0050SP9)

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

**Request to Eliminate or Modify Reporting Requirements**

**I.D. No.** PSC-42-11-00021-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve Consolidated Edison Company of New York, Inc.’s request to eliminate or modify reporting requirements imposed by the Commission in Cases 06-E-0894 and 06-E-1158.

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

**Subject:** Request to eliminate or modify reporting requirements.

**Purpose:** To decide whether to approve the request to eliminate or modify reporting requirements.

**Substance of proposed rule:** The Public Service Commission (Commission) initiated Cases 06-E-0894 and 06-E-1158 to investigate electric service outages that occurred in 2006 in Consolidated Edison Company of New York, Inc.’s (Con Edison) Westchester and Long Island City service areas. In its July 20, 2007 Order, the Commission directed Con Edison to report on the Company’s implementation of certain recommendations developed by Commission Staff in that proceeding. Con Edison requests permission to eliminate reporting requirements on four recommendations that due to developments since the requirements were implemented it no longer considers useful and modify the reporting requirements of three others to simplify their administration. The Commission may approve, reject, or modify, in whole or in part, Con Edison’s request.

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

New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

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

(06-E-0894SP8)

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

**Amendments to 16 NYCRR Chapter VII, Subchapter F, Part 753**

**I.D. No.** PSC-42-11-00022-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 753 of Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1), 65(1) and 119-b(2)

**Subject:** Amendments to 16 NYCRR Chapter VII, Subchapter F, Part 753.

**Purpose:** To consider proposed amendments to 16 NYCRR Chapter VII, Subchapter F, Part 753.

**Text of proposed rule:** 1. That the provisions of Section 202(1) of the State Administrative Procedure Act and Section 101-a(2) of the Executive Law having been complied with, Part 753 of Chapter VII of Title 16 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, effective upon publication of a Notice of Adoption in the State Register, as follows (Deletions are bracketed; new material is italicized):

SUBCHAPTER F - Miscellaneous.

PART 753

PROTECTION OF UNDERGROUND FACILITIES

(Statutory Authority: Public Service Law § 119-b and

General Business Law Article 36)

753-1.2 Definitions.

(a) *Automated Positive Response (APR) system:* a system established by the one-call notification system to furnish a single point of contact between member operators and excavators for the purpose of communicating the status of an excavation location request as provided by the member operators.

- (b)
- ([b]c)
- ([c]d)
- ([d]e)
- ([e]f)
- ([f]g)
- ([g]h)
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- ([r]s)
- ([s]t)
- ([t]u)
- ([u]v)
- ([v]w)
- ([w]x)
- ([x]y)

753-3.3 Commencement of excavation or demolition.

(d) Where available through the one-call notification system, the excavator shall utilize the Automated Positive Response (APR) system in order to obtain the response(s) of the operators that were notified by the one-call notification system.

753-3.14 Emergency requirements.

(b) Immediately notify [the local police and fire departments]911 and the operator of the affected facility of the exact location, nature of the emergency and of the underground facility which is affected.

753-4.5 Operator's response to notice

(a) Prior to the stated commencement date of the excavation or demolition work as stated in the recorded notice, the operator shall make a reasonable attempt to inform the excavator[directly], by means of an Automated Positive Response (APR) system, where available, or by means of direct communications with the excavator, where APR is not available, that either:

753-4.6 Locating underground facilities.

(c)...

(3) By any other means as mutually agreed to by the operator and excavator, including but not limited to written descriptions, photographs [and]or verbal instructions. Such agreement shall be provided in writing to the excavator upon his or her request

753-4.7 Uniform color code.

(f) Purple - Radioactive materials, reclaimed water, irrigation and slurry line.

753-5.3 System duties.

(d) Provide an Automated Positive Response (APR) system for mandatory use by excavators and member operators, where determined by the one-call notification system to be technologically and economically practical.

**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.

#### Consensus Rule Making Determination

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102(11)(c), it makes technical changes and is otherwise non-controversial.

Subdivision 3.3 of section 753 of New York Code of Rules and Regulations (NYCRR) currently requires that, prior to proceeding with excavation or demolition, an excavator must receive notification from utility operators relative to the presence of any underground facilities in the work area and whether they have been marked (in response to notice by the excavator to the one-call system of planned excavation or demolition in accordance with subdivisions 3.1 and 3.2 of section 753). The current system whereby each operator must directly contact the excavator has several weaknesses, such as: (1) operators have several choices of how to provide positive response to the excavator (phone, fax, or e-mail) and the excavator may not know in which form the response will be received, (2) when operators respond by phone, the excavator does not have a "hard-copy" record that positive response was received, (3) the excavator needs to create its own list of operators that have and have not responded, (4) when the response is made by fax there may be issues such as the receiving fax not having been turned on, being out of ink, out of paper, etc., (5) when the response is made by phone it may be to an answering machine that malfunctions, cuts-out before the message is complete, or is accidentally erased before the intended person receives the message. The proposed change to this section establishes an Automated Positive Response (APR) system, implemented by Dig Safely New York, that facilitates interaction between utility operators and excavators by establishing a central repository for the response to be provided by utility operators to excavators, and for excavators to check on the status of their markout requests.

Subdivision 3.14 of section 753 currently requires that an excavator immediately notify the local police and fire departments, as well as the operator of the affected facility, of the exact location, nature of the emergency, and of the underground facility which is affected. This language was developed prior to the widespread use of 911. The proposed language reduces to one 911 call the existing requirement that both the fire and police departments be notified. Emergencies are readily addressed by the 911 system and the appropriate first responders will be expeditiously contacted.

Subdivision 4.7 of section 753 specifies the color code to be used by facility locators to mark locations of the various utilities. To bring section 753 into conformance with the American Public Works Association recommendation and Common Ground Alliance best practices, the proposed language specifies that the color purple include radioactive materials.

Subdivision 4.6(c)(3) of section 753 currently may be read to require by use of the word "and" that written descriptions, photographs and verbal instructions must all be utilized as alternative means of designating the location of buried facilities if mutually agreed to. The proposed language replaces the word "and" with "or" to make clear that only one method need be utilized.

The proposed rule will improve the communication between utility operators and excavators resulting in reduced uncertainty of the excavator with regard to which responses have been received and increase utility operators' efficiency in notifying excavators of underground facilities. It also makes technical and updating changes which are non-controversial. Staff has discussed these proposed revisions to 16 NYCRR Part 753 with various stake holders including excavators, utility operators and one-call systems, and has received positive comments. Based on communications with stakeholders, no person is likely to object to the adoption of the rule as written. In accordance with the provisions of the State Administrative Procedure Act (SAPA) § 202(1)(b)(i), this therefore should be considered a consensus rule making.

#### Job Impact Statement

The Department of Public Service (DPS) projects that there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply enables Dig Safely New York to implement a system called Automated Positive Response (APR), to facilitate through a central information repository, the process by which utility operators respond to excavators to advise them of whether underground facilities are present within a proposed excavation site and makes other minor changes to 16 NYCRR Part 753, Protection of Underground Facilities. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

(10-M-0466SP1)

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## State University of New York

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### NOTICE OF ADOPTION

#### Amendment to the Traffic and Parking Regulations at the State University of New York College at Purchase

**I.D. No.** SUN-31-11-00004-A

**Filing No.** 857

**Filing Date:** 2011-09-28

**Effective Date:** 2011-10-19

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

**Action taken:** Amendment of sections 568.4 - 568.7 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Amendment to the traffic and parking regulations at the State University of New York College at Purchase.

**Purpose:** Amend existing regulations to change the name of certain buildings and roads, and update the method and place of payment of fines.

**Text or summary was published** in the August 3, 2011 issue of the Register, I.D. No. SUN-31-11-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Lisa S. Campo, State University of New York, University Plaza, S-325, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

#### Assessment of Public Comment

The agency received no public comment.