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.

Department of Financial Services

EMERGENCY RULE MAKING

Confidentiality Protocols for Victims of Domestic Violence and Endangered Individuals

I.D. No. DFS-03-13-00004-E
Filing No. 1290
Filing Date: 2012-12-31
Effective Date: 2013-01-01

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

Action taken: Addition of Part 244 (Regulation 168) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; and Insurance Law, sections 301 and 2612

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

Specific reasons underlying the finding of necessity: This regulation governs confidentiality protocols for domestic violence victims and endangered individuals. Insurance Law § 2612 states that if any person covered by an insurance policy issued to another person who is the policyholder or if any person covered under a group policy delivers to the insurer that issued the policy, a valid order of protection against the policyholder or other person, then the insurer is prohibited for the duration of the order from disclosing to the policyholder or other person the address and telephone number of the insured, or of any person or entity providing covered services to the insured.

In addition, on October 25, 2012, Governor Andrew M. Cuomo signed into law Chapter 491 of the Laws of 2012, Part E of which amends Insurance Law § 2612 to require a health insurer to accommodate a reasonable request made by a person covered by an insurance policy or contract issued by the health insurer to receive communications of claim related information from the health insurer by alternative means or at alternative locations if the person clearly states that disclosure of all or part of the information could endanger the person. Except with the express consent of the person making the request, the amendment prohibits a health insurer from disclosing to the policyholder: (1) the address, telephone number, or any other personally identifying information of the person who made the request or child for whose benefit a request was made; (2) the nature of the health care services provided; or (3) the name or address of the provider of the covered services.

Insurance Law § 2612 requires the Superintendent, in consultation with the Commissioner of Health, Office of Children and Family Services, and Office for the Prevention of Domestic Violence, to promulgate rules to guide and enable insurers to guard against the disclosure of the confidential information protected by § 2612. Section 2612 provides important protections to persons who may be subject to domestic violence. Since Part E of Chapter 491 takes effect on January 1, 2013, it is important for the regulation to take effect on that date.

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

Subject: Confidentiality Protocols for Victims of Domestic Violence and Endangered Individuals.

Purpose: Establish requirements whereby insurers may effectively respond to legitimate requests for confidential records and information.

Text of emergency rule: *Section 244.0 Preamble.*

Individuals experiencing actual or threatened violence frequently establish new addresses and telephone numbers to protect their health and safety. Insurance Law section 2612 requires the Superintendent of Financial Services, in consultation with the Commissioner of Health, Office of Children and Family Services, and Office for the Prevention of Domestic Violence, to promulgate rules to guide and enable insurers to guard against the disclosure of information protected by Insurance Law section 2612. This Part establishes requirements with which insurers shall comply to enable them to effectively respond to legitimate requests for confidential records and information in conformance with Insurance Law section 2612.

Section 244.1 Applicability.

(a) This Part shall apply to a policy issued pursuant to the Insurance Law.

(b) With respect to an insurer authorized to write kinds of insurance in addition to accident and health insurance or salary protection insurance, any section of this Part that establishes rules with regard to a requestor or covered individual shall apply only with respect to a policy of accident and health insurance or a policy of salary protection insurance.

Section 244.2 Definitions.

As used in this Part:

(a) Accident and health insurance shall have the meaning set forth in Insurance Law section 1113(a)(3) and with regard to a fraternal benefit society, also shall have the meaning set forth in Insurance Law section 4501(i)-(k), (m), (o), and (p).

(b) Address means a street address, mailing address, or e-mail address.

(c) Claim related information shall have the meaning set forth in Insurance Law section 2612(h)(1)(A).

(d) Covered individual means an individual covered under a policy issued by a health insurer who could be endangered by the disclosure of all or part of claim related information by the health insurer.

(e) Fraternal benefit society shall have the meaning set forth in Insurance Law section 4501(a).

(f) Health insurer shall have the meaning set forth in Insurance Law section 2612(h)(1)(B).

(g) Insured means an individual who is covered under an individual or a group policy.

(h) Insurer shall have the meaning set forth in Insurance Law section 2612(c)(2) and shall include a fraternal benefit society.

(i) Person means an individual or legal entity, including a partnership, limited liability company, association, trust, or corporation.

(j) Policy means a policy, contract, or certificate of insurance, an annuity contract, a child health insurance plan issued pursuant to Title 1-A of Public Health Law Article 25, medical assistance or health care services provided pursuant to Title 11 or 11-D of Social Services Law Article 5, or any certificate issued under any of the foregoing.

(k) Policyholder means a person to whom a policy has been issued.

(l) Reasonable request means a request that contains a statement that disclosure of all or part of the claim related information to which the request pertains could endanger an individual, and the specification of an alternative address, telephone number, or other method of contact.

(m) Requestor means a covered individual, or the individual's legal representative, or with regard to a covered individual who is a child, the child's parent or guardian, who makes a reasonable request to the health insurer.

(n) Salary protection insurance shall have the meaning set forth in Insurance Law section 1113(a)(31).

(o) Victim of domestic violence or victim shall have the meaning set forth in Social Services Law section 459-a(1).

Section 244.3 Confidentiality protocol.

(a) An insurer shall develop and implement a confidentiality protocol whereby, except with the express consent of the individual who delivers to the insurer a valid order of protection, the insurer shall keep confidential and shall not disclose the address and telephone number of the victim of domestic violence, or any child residing with the victim, and the name, address, and telephone number of a person providing covered services to the victim, to a policyholder or another insured covered under the policy against whom the victim has a valid order of protection, if the victim, the victim's legal representative, or if the victim is a child, the child's parent or guardian, delivers to the insurer at its home office a valid order of protection pursuant to Insurance Law section 2612(f) and (g).

(b) A health insurer shall develop and implement a confidentiality protocol whereby the health insurer shall accommodate a reasonable request made by a requestor for a covered individual to receive communications of claim related information from the health insurer by alternative means or at alternative locations. Except with the express consent of the requestor, a health insurer shall not disclose to the policyholder or another insured covered under the policy:

(1) the address, telephone number, or any other personally identifying information of the covered individual or any child residing with the covered individual;

(2) the nature of the health care services provided to the covered individual;

(3) the name, address, and telephone number of the provider of the covered health care services; or

(4) any other information from which there is a reasonable basis to believe the foregoing information could be obtained.

(c) The insurer's confidentiality protocol shall include written procedures that its employees, agents, representatives, or any other persons with whom the insurer contracts or who has gained access to the information from the insurer, with regard to the solicitation, negotiation, or sale of insurance or the adjustment or administration of insurance claims, shall follow. The written procedures shall include:

(1) the procedure by which a requestor may make a reasonable request, provided that the procedure shall not require a justification as part of the reasonable request;

(2) the procedure by which a victim of domestic violence or a covered individual may provide an alternative address, telephone number, or other method of contact;

(3) procedures for limiting access to personally identifying information, such as the name, address, telephone number, and social security number of a victim or covered individual and any other information from which there is a reasonable basis to believe the foregoing information could be obtained;

(4) procedures for limiting or removing personal identifiers before information is used or disclosed, where possible;

(5) a system of internal control procedures, which the insurer shall review at least annually, to ensure the confidentiality of:

(i) addresses, telephone numbers, or other methods of contact;

(ii) the fact that a requestor made a reasonable request or that an order of protection was delivered to the insurer, and any information contained therein; and

(iii) any other information from which there is a reasonable basis to believe the foregoing information could be obtained; and

(6) with regard to a health insurer, the procedure by which a requestor may revoke a reasonable request, provided, however, that the health insurer may require the requestor to submit a sworn statement revoking the request.

(d)(1) An insurer shall notify its employees, agents, representatives, or any other persons with whom the insurer contracts or who has gained access to the information from the insurer, with regard to the solicitation, negotiation, or sale of insurance or the adjustment or administration of insurance claims, that the insurer's protocol is to be followed for the specified victim of domestic violence or covered individual, within three business days of:

(i) receipt of a valid order of protection and an alternative address, telephone number, or other method of contact; or

(ii) receipt of a reasonable request, with regard to a health insurer.

(2) Upon receipt of a valid order of protection or a reasonable request, an insurer shall inform the victim of domestic violence or requestor that the insurer has up to three business days to implement paragraph (1) of this subdivision.

(e) A health insurer may require a requestor to make a reasonable request in writing pursuant to Insurance Law section 2612(h)(3). However, a health insurer shall not require a requestor to provide a justification for the reasonable request.

(f)(1) Prior to releasing any information pursuant to a warrant, subpoena, or court order, an insurer shall notify the victim of domestic violence or requestor, as soon as reasonably practicable, that it intends to release information and specify what type of information it intends to release, unless prohibited by the warrant, subpoena, or court order.

(2) Upon release of information pursuant to a warrant, subpoena, or court order, an insurer shall advise the person to whom the insurer is releasing the information that the information is confidential and that the person should continue to maintain the confidentiality of the information to the extent possible.

(g) An insurer shall comply with Parts 420 and 421 of this Title (Insurance Regulations 169 and 173) and where applicable, the federal Health Insurance Portability and Accountability Act of 1996, as amended, with respect to any information submitted pursuant to Insurance Law section 2612 or this Part.

(h) An insurer or any person subject to the Insurance Law shall not engage in any practice that would prevent or hamper the orderly working of this Part in accomplishing its intended purpose of protecting victims of domestic violence and covered individuals.

(i) An agent, representative, or designee of an insurer, a corporation organized pursuant to Insurance Law Article 43, a health maintenance organization certified pursuant to Public Health Law Article 44, or a provider issued a special certificate of authority pursuant to Public Health Law section 4403-a, who is regulated pursuant to the Insurance Law, need not develop its own confidentiality protocol pursuant to this section if the agent, representative, or designee follows the protocol of the insurer, corporation, health maintenance organization, or provider.

Section 244.4 Notice.

(a) Within six months of this Part's effective date, an insurer shall post conspicuously on its website, and with regard to a health insurer, also annually provide all its participating health service providers with:

(1) a description of Insurance Law section 2612;

(2) the information required by section 244.3(c)(1), (2), and (6); and

(3) the phone number for the New York State Domestic and Sexual Violence Hotline.

(b) An insurer shall post conspicuously on its website the information set forth in paragraphs (1) and (3) of subdivision (a) of this section in a format suitable for printing and posting. A health insurer shall recommend to its participating health service providers that the providers print and post the information in their offices.

(c) This section shall not apply to an agent, representative, or designee of an insurer, a corporation organized pursuant to Insurance Law Article 43, a health maintenance organization certified pursuant to Public Health Law Article 44, or a provider issued a special certificate of authority pursuant to Public Health Law section 4403-a, who is regulated pursuant to the Insurance Law, if the agent, representative, or designee follows the protocol of the insurer, corporation, health maintenance organization, or provider.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 30, 2013.

Text of rule and any required statements and analyses may be obtained from: Joana Lucashuk, New York State Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-2125, email: joana.lucashuk@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: Financial Services Law §§ 202 and 302 and Insurance Law §§ 301 and 2612. Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent of Financial Services (the ''Superintendent'') to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to

the Superintendent under the Insurance Law. Insurance Law § 2612 requires the Superintendent to promulgate rules to guide and enable insurers (as § 2612 defines that term, which includes health maintenance organizations as well as agents, representatives, and designees of the insurers that are regulated under the Insurance Law) to guard against the disclosure of the confidential information protected by Insurance Law § 2612.

2. Legislative objectives: Insurance Law § 2612, which pertains to discrimination based on being a victim of domestic violence, requires the Superintendent, in consultation with the Commissioner of Health, the Office of Children and Family Services, and the Office for the Prevention of Domestic Violence, to promulgate rules to guide and enable insurers to guard against the disclosure of the confidential information protected by § 2612. Furthermore, Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

3. Needs and benefits: Insurance Law § 2612 states that if any person covered by an insurance policy issued to another person who is the policyholder or if any person covered under a group policy delivers to the insurer that issued the policy, at the insurer's home office, a valid order of protection against the policyholder or other person, issued by a court of competent jurisdiction in New York, then the insurer is prohibited for the duration of the order from disclosing to the policyholder or other person the address and telephone number of the insured, or of any person or entity providing covered services to the insured. If a child is a covered person, then the right established by this section may be asserted by, and also will extend to, the child's parent or guardian.

On October 25, 2012, Governor Andrew M. Cuomo signed into law Chapter 491 of the Laws of 2012, Part E of which amends Insurance Law § 2612 to require a health insurer to accommodate a reasonable request made by a person covered by an insurance policy or contract issued by the health insurer to receive communications of claim related information from the health insurer by alternative means or at alternative locations if the person clearly states that disclosure of all or part of the information could endanger the person. If a child is covered by an insurance policy or contract issued by the health insurer, then the child's parent or guardian may make such a request to the health insurer. Except with the express consent of the person making the request, the amendment prohibits a health insurer from disclosing to the policyholder: (1) the address, telephone number, or any other personally identifying information of the person who made the request or child for whose benefit a request was made; (2) the nature of the health care services provided; or (3) the name or address of the provider of the covered services.

Insurance Law § 2612 requires the Superintendent, in consultation with the Commissioner of Health, Office of Children and Family Services, and Office for the Prevention of Domestic Violence, to promulgate rules to guide and enable insurers to guard against the disclosure of the confidential information protected by § 2612. Therefore, after consultation with the Commissioner of Health, the Office of Children and Family Services, and the Office for the Prevention of Domestic Violence, the Superintendent drafted this rule to guide and enable insurers to guard against disclosure.

4. Costs: The requirement that insurers may not disclose the information protected by Insurance Law § 2612 is mandated by the statute itself. The rule establishes certain limited requirements to guide and enable insurers to implement the statute, in accordance with the Legislative mandate that the Superintendent establish rules doing so. The regulation does not impose compliance costs on state or local governments because it is not applicable to them.

The rule may impose compliance costs on insurers because it requires insurers to develop confidentiality protocols and provide certain notices. However, such costs are difficult to estimate and will vary depending upon a number of factors, including the size of the insurer. In fact, insurers already should be complying with the existing requirements of the statute. Moreover, the rule is designed to provide flexibility to insurers and does not prescribe the way in which an insurer must provide the notices, but rather leaves the method up to each insurer. In addition, an agent, representative, or designee of an insurer that is regulated pursuant to the Insurance Law need not establish its own protocol or give certain notices provided that it follows the protocol of the insurer.

The Department does not anticipate significant additional costs to the Department to implement the rule. The Department will monitor compliance with the rule as part of its market conduct examinations of insurers and consumer complaint handling procedures.

5. Local government mandates: This rule does not impose any program, service, duty, or responsibility upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This rule does not impose any reporting requirements, including forms or other paperwork.

7. Duplication: The rule does not duplicate, overlap, or conflict with any state rules or other legal requirements. The rule may overlap with the federal Health Insurance Portability and Accountability Act of 1996 (''HIPAA''), as amended, and may impose additional requirements that are not set forth in HIPAA. However, the rule does not conflict with HIPAA.

8. Alternatives: There were no significant alternatives to consider.

9. Federal standards: HIPAA sets forth rules for restricting the use and disclosure of certain health information and permits an individual to make a request to a health plan to receive communications of protected health information from the health plan by alternative means and at alternative locations if the individual clearly states that the disclosure of all or part of the information could endanger the individual. Insurance Law § 2612, as amended by Chapter 491, and this rule, are consistent with HIPAA. However, § 2612 and the rule may impose additional requirements that are not set forth in HIPAA. For example, the rule sets forth required elements of a confidentiality protocol and requires insurers to provide notice of their confidentiality protocols and of Insurance Law § 2612 by posting certain information on their websites.

10. Compliance schedule: The existing statute already requires an insurer to protect certain information when a person provides the insurer with an order of protection. The new requirements of Insurance Law § 2612 take effect on January 1, 2013. Accordingly, this emergency rule takes effect on January 1, 2013. Within six months of January 1, 2013, an insurer must post certain information on its website.

Regulatory Flexibility Analysis

1. Effect of rule: The rule will not affect any local governments. It will affect regulated insurers, most of which do not come within the definition of ''small business'' as set forth in State Administrative Procedure Act § 102(8), because none are independently owned and operated and employ less than one hundred individuals. The rule also would affect insurance producers and independent insurance adjusters, the vast majority of which are small businesses, because they are independently owned and operated and employ one hundred or less individuals. There are over 200,000 licensed resident and non-resident insurance producers and over 15,000 licensed resident and non-resident independent insurance adjusters in New York that the rule will affect. The Department does not have a record of the exact number of small businesses included in that group. The Department has designed the regulation to place the least burden possible on insurance producers and independent insurance adjusters, as discussed below.

2. Compliance requirements: Insurance Law § 2612(c)(2) and (h)(1)(A) define ''insurer'' and ''health insurer,'' respectively, to include an agent, representative, or designee of an insurer, a corporation organized pursuant to Insurance Law Article 43, a health maintenance organization (''HMO''), a municipal cooperative health benefit plan, or a provider issued a special certificate of authority pursuant to Public Health Law § 4403-a, who is regulated pursuant to the Insurance Law. The rule requires insurers (including health insurers) to develop and implement confidentiality protocols that include written procedures that its employees, agents, representatives, or any other persons with whom the insurer contracts or who has gained access to the information from the insurer, with regard to the solicitation, negotiation, or sale of insurance or the adjustment or administration of insurance claims, must follow. The rule also requires insurers to post certain information on their websites. Since, an agent, representative, or designee who is regulated pursuant to the Insurance Law is included in the definitions of ''insurer'' and ''health insurer,'' these requirements apply to insurance agents and independent insurance adjusters. In certain cases, insurance brokers may act on behalf of insurers, such as when they administer insurance programs for the insurers, and thus the rule would apply to brokers as well. Furthermore, the rule prohibits any person subject to the Insurance Law from engaging in any practice that would prevent or hamper the orderly working of the rule in accomplishing its intended purpose of protecting victims of domestic violence and covered individuals.

However, the Department has attempted to minimize the impact of the rule on insurance producers and independent insurance adjusters by including language that states that an agent, representative, or designee of an insurer, a corporation, an HMO, or a provider, who is regulated pursuant to the Insurance Law, need not develop its own confidentiality protocol if the agent, representative, or designee follows the protocol of the insurer, corporation, HMO, or provider. Nor does a producer or an adjuster who follows the protocol of the insurer, corporation, HMO, or provider need to post certain information on its website.

3. Professional services: The rule would not require an insurance producer or independent insurance adjuster to use professional services.

4. Compliance costs: The rule will not impose any compliance costs on local governments. Insurance producers and independent insurance adjusters, many of whom are small businesses, may incur additional costs of compliance, but they should be minimal. The cost to a producer or an adjuster will be associated primarily with developing and implementing a

confidentiality protocol, unless the producer or adjuster chooses to follow the protocol of the insurer, corporation, HMO, or provider.

5. Economic and technological feasibility: Local governments will not incur an economic or technological impact as a result of this rule. Insurance producers and independent insurance adjusters, many of whom are small businesses, will not have to purchase any new technology to comply with the rule.

6. Minimizing adverse impact: The rule applies to the insurance market throughout New York State. In accordance with Insurance Law § 2612, the same requirements will apply to all insurance producers and independent insurance adjusters, so the rule does not impose any adverse or disparate impact on small businesses. Further, the Department has designed the regulation to place the least burden possible on an insurance producer or insurance adjuster by allowing the producer or adjuster to follow the protocol of the insurer, corporation, HMO, or provider, rather than develop its own protocol.

7. Small business and local government participation: Small businesses and local governments will have an opportunity to participate in the rule making process when the rule is published in the State Register.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers, insurance producers, and independent insurance adjusters affected by this rule operate in every county in this state, including rural areas as defined under State Administrative Procedure Act (''SAPA'') § 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule requires insurers located in rural areas (as Insurance Law § 2612 defines that term, which includes health maintenance organizations as well as agents, representatives, and designees of the insurers who are regulated under the Insurance Law) to develop and implement confidentiality protocols that include written procedures that its employees, agents, representatives, or any other persons with whom the insurer contracts or who has gained access to the information from the insurer, with regard to the solicitation, negotiation, or sale of insurance or the adjustment or administration of insurance claims, must follow. The rule also requires insurers to post certain information on their websites.

However, the Department has attempted to minimize the impact of the rule on insurance producers and independent insurance adjusters located in rural areas by including language that states that an agent, representative, or designee of an insurer, a corporation, an HMO, or a provider, who is regulated pursuant to the Insurance Law, need not develop its own confidentiality protocol if the agent, representative, or designee follows the protocol of the insurer, corporation, HMO, or provider. Nor does a producer or an adjuster who follows the protocol of the insurer, corporation, HMO, or provider need to post certain information on its website.

The rule would not require an insurer, insurance producer, or independent insurance adjuster located in a rural area to use professional services.

3. Costs: Insurers, insurance producers, and independent insurance adjusters located in rural areas may incur additional costs of compliance, but they should be minimal. The cost to an insurer, producer, or adjuster located in rural areas will be associated primarily with developing and implementing a confidentiality protocol. However, a producer or adjuster may choose to follow the protocol of the insurer, corporation, HMO, or provider.

4. Minimizing adverse impact: The rule applies to the insurance market throughout New York State. In accordance with Insurance Law § 2612, the same requirements will apply to all insurers, insurance producers, and independent insurance adjusters, so the rule does not impose any adverse or disparate impact on insurers, insurance producers, or independent insurance adjusters in rural areas.

5. Rural area participation: Insurers, insurance producers, and independent insurance adjusters located in rural areas will have an opportunity to participate in the rule making process when the rule is published in the State Register.

Job Impact Statement

The Department of Financial Services finds that this rule should have no impact on jobs and employment opportunities. As required by Insurance Law § 2612, the rule establishes certain limited requirements to guide and enable insurers to guard against the disclosure of the confidential information protected by § 2612.

Department of Health

NOTICE OF ADOPTION

Adult Homes

I.D. No. HLT-32-12-00020-A
Filing No. 1291
Filing Date: 2012-12-31
Effective Date: 2013-01-16

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

Action taken: Amendment of Parts 486 and 487 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 460-d, 461 and 461-e

Subject: Adult Homes.

Purpose: To limit the number of residents with serious mental illness in large adult homes.

Text of final rule: Section 487.2 is amended to add a new subdivision (c) to read as follows:

(c) Persons with serious mental illness means individuals who meet criteria established by the commissioner of mental health, which shall be persons who have a designated diagnosis of mental illness under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR, American Psychiatric Association, July 2000), and whose severity and duration of mental illness results in substantial functional disability.

Subdivision (d) of Section 487.3 is amended to read as follows:

(d) An operator shall afford any officers*,* [or] duly authorized employee or agents *or any designee of the department* access at any time to the residents, grounds, buildings and any records related to resident care and services.

Subdivision (c) of Section 487.4 is amended to read as follows:

(c) An operator shall not admit or retain a number of persons in excess of the capacity specified on the operating certificate. *No operator of an adult home with a certified capacity of eighty or more and a mental health census, as defined in section 487.13(b)(4) of this Part, of 25 percent or more of the resident population shall admit any person whose admission will increase the mental health census of the facility.*

Subdivision (d) of Section 487.4 is amended to read as follows:

(d) An operator shall not admit an individual before a determination has been made that the facility program can support the physical*, psychological* and social needs of the resident.

Subdivision (g) of Section 487.4 amended to read as follows:

(g) Each mental health evaluation shall be a written and signed report, from a psychiatrist, physician, registered nurse, certified psychologist or certified social worker *who is approved by the department in consultation with the Office of Mental Health, and* who has experience in the assessment and treatment of mental illness. The mental health evaluation shall include:

(1) [significant mental health history and current conditions] *the date of examination*;

(2) [a statement that the resident is not mentally unsuited for care in the facility] *significant mental health history and current conditions, including whether the resident has a serious mental illness as defined in Section 487.2(c) of this Part*;

(3) a statement *that the resident's mental health needs can be adequately met in the facility and a statement* that the resident does not evidence need for placement in a residential treatment facility licensed or operated pursuant to article 19, 23, 29, or 31 of the Mental Hygiene Law;

(4) a statement that the person signing the report has conducted a face-to-face examination of the resident within 30 days of the date of admission or, for required annual evaluations, within 30 days of the report.

Subdivision (b) of section 487.10 is amended to read as follows:

(b) The department *or its designee* may examine the books and records of any facility to determine the accuracy of the financial statement, or for any other reason deemed appropriate by the department to effectuate the purposes of these regulations.

Paragraph 4 of subdivision (c) of section 487.10 is amended to read as follows:

(4) At a minimum, the operator shall maintain:

(i) financial records for each resident which contain, at a minimum, a copy of the current admission agreement, documentation of the status of the resident's payment account, personal fund account, and a current inventory of any personal property held in custody for the resident by the operator;

(ii) personal records for each resident which contain, at a minimum: personal data, including identification of the resident's next of kin, family and sponsor, the name and address of the person or persons to be contacted in the event of emergency, copies of the resident's medical evaluations and other medical information, *copies of the resident's mental health evaluations,* summaries of the social evaluations, and details of referral and such other correspondence and papers as are available to document the physical, mental and social status of the resident; and

(iii) records which are readily available to food service staff and enable staff to plan for and accommodate prescribed dietary regimens, allergies and individual food preferences.

Subdivision (d) of section 487.10 is amended to add a new paragraph (6) to read as follows:

(6) The records and reports required to be maintained by the operator pursuant to this subdivision shall not be posted or otherwise made available to the public.

Paragraph 2 of subdivision (e) of section 487.10 is amended to read as follows:

(2) A quarterly statistical information report;

(3) *for facilities with a certified capacity of 80 beds or more in which twenty percent or more of the resident population are persons with serious mental illness as defined in subsection 487.2(c) of this Part, a quarterly statistical information report which must: (i) identify the quarter being reported on; (ii) contain a census report, which shall include a roster of residents who are persons with serious mental illness as defined in subsection 487.2(c) of this Part; (iii) for any residents admitted during the quarter reported on, the prior residence, and for any residents discharged during the quarter being reported on, the discharge location; and (iv) contain the number of resident deaths which occurred during the quarter being reported on.*

Subdivision (f) of section § 487.10 is amended to add a new paragraph (7) to read as follows:

(7) Mental Health Evaluation;

Part 487 is amended by adding a new section 487.13 to read as follows:

487.13 Transitional Adult Homes

(a) This section shall apply to all transitional adult homes.

(b) Definitions

(1) A transitional adult home is an adult home with a certified capacity of 80 beds or more in which 25 percent or more of the resident population are persons with serious mental illness as defined in subsection 487.2(c) of this Part.

(2) An alternative community setting is any setting other than a transitional adult home that is designed to promote independence and economic self-sufficiency. Alternative community settings include, but are not limited to (i) supported housing, including scattered site apartments and single site apartments; (ii) supported single room occupancy; (iii) supportive housing, including community residence single room occupancy; (iv) community residences; (v) apartment treatment, (vi) senior housing; (vii) enriched housing programs; and (viii) such other housing alternatives as are clinically appropriate.

(3) Community services means services and supports provided in New York State that assist individuals with mental illness to live in the community. Such services and supports include, but are not limited to, assertive community treatment, intensive case management, case management, personalized recovery oriented services, continuing day treatment and Medicaid benefits for which a resident is eligible, including home and community based services waivers, clinic services, certified home health care, personal care assistance, and rehabilitative services.

(4) Mental health census means the number of residents in a facility who are persons with serious mental illness as defined in subsection 487.2(c) of this Part.

(5) Housing contractors means housing providers that have contracted with the Office of Mental Health to provide residents with information regarding housing alternatives and community services and (ii) make community housing available to residents pursuant to such contracts.

(6) Community transition coordinator means a contractor retained by the department to facilitate the transition of residents to alternative community settings.

(c) The operator of every transitional adult home shall submit to the department a compliance plan that is designed to bring the facility's mental health census to a level that is under 25 percent of the resident population over a reasonable period of time, through the lawful discharge of residents with appropriate community services to alternative community settings.

(d) The compliance plan shall be submitted by the deadline set forth in subsection (e) of this section and shall specify:

(1) How and by when the operator will achieve a mental health census that is under 25 percent of the resident population;

(2) How the operator will address the needs of its residents, in particular those residents who are persons with serious mental illness as defined in subsection 487.2(c) of this Part, while the reduction in mental health census is being achieved, including but not limited to:

(i) fostering the development of independent living skills;

(ii) ensuring access to and quality of mental health services;

(iii) encouraging community involvement and integration; and

(iv) fostering a homelike atmosphere;

(e) The operator shall submit the compliance plan no later than 120 calendar days after the effective date of this regulation.

(f) The department, in consultation with the Office of Mental Health, shall review each compliance plan and within 90 calendar days, shall either:

(1) approve the compliance plan; or

(2) require modification of the compliance plan by the operator. Any such modifications shall be submitted within 30 calendar days of notice by the department and shall be subject to the approval of the department, in consultation with the Office of Mental Health.

(3) If the operator does not submit a compliance plan, or submits a compliance plan that is not acceptable to the department after modification, the department will impose a compliance plan on the operator.

(g) Upon approval of the compliance plan by the department, or, if no compliance plan is submitted or approved, upon the imposition of a compliance plan on the operator by the department, the operator shall implement the compliance plan.

(h) The operator shall cooperate with the community transition coordinator, housing contractors, and health home and managed long term care plan assessors and shall provide, without charge, space for residents to meet privately with such individuals or entities. The operator shall not attempt to influence or otherwise discourage individual residents from meeting with such entities and individuals.

Subdivision (c) of Section 486.7 is amended to read as follows:

(c) Penalties for Part 487 of this Title.

Department regulations				Penalty per violation per day
		* * *		
487.10	(d)	(5)	(i)	10
			(ii)	10
			(iii)	10
			(iv)	10
			(v)	10
			(vi)	10
			(vii)	10
			(viii)	10
			(ix)	10
		(6)		*100*
		* * *		
487.10	(f)	(1)		10
		(2)		10
		(3)		10
		(4)		10
		(5)		10
		(6)		10
		(7)		*50*
		* * *		
487.13	*(c)*			*$1000*
	(d)			*1000*
	(e)			*1000*
	(g)			*1000*
	(h)			*1000*

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 487.2(c), 487.4, 487.10 and 487.13.

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

Revised Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in Sections 460-d, 461 and 461-e of the Social Services Law (SSL). SSL Section 460-d (7) requires the Department of Health to adopt regulations

establishing civil penalties of up to $1000 per day to be assessed against adult care facilities found to be in violation of regulations applicable to such facilities. SSL Section 461(1) requires the Department to promulgate regulations establishing general standards applicable to adult care facilities. SSL Section 461-e (5) authorizes the Department to promulgate regulations to require an adult care facility to maintain certain written records with respect to the facility's residents and the operation of the facility.

Section 122(e) of Chapter 436 of the Laws of 1997 provides that effective April 1, 1997, the functions, powers, duties and obligations of the former Department of Social Services concerning adult homes, enriched housing programs, residences for adults and assisted living programs are transferred to the Department of Health.

Legislative Objectives:

The proposed regulation, which would limit the percentage of residents with serious mental illness in adult homes with a certified capacity of eighty or more to less than 25 percent of the resident population, is consistent with the objectives the Legislature sought to advance when it enacted SSL Section 461(2), under which the Department of Health and the Offices of the Department of Mental Hygiene are to develop and promulgate standards for the protection of the health and well-being of adult care facility residents with mental disabilities.

Needs and Benefits:

The New York State Office of Mental Health ("OMH") has made a clinical determination that while mixed use, larger scale congregate housing is an important and viable form of community living, certain housing settings in which there are a significant number of individuals with serious mental illness are not conducive to the recovery or rehabilitation of the residents. This is particularly so when the settings: are not specifically designed to serve people with serious mental illness; are not under the license and control of OMH; do not foster independent living due to institutional practices such as of congregate meals or ritualized medication administration; and do not provide specifically designed rehabilitation programs linked to community work settings. OMH will be issuing regulations applicable to all OMH-licensed psychiatric hospitals and units that prohibit the discharge of a patient to a transitional adult home, as defined in the regulations of the Department of Health, unless the patient was a resident of the home immediately prior to his or her current period of hospitalization.

These regulations, which apply statewide, address the large concentration of individuals with serious mental illness in large adult homes by amending Section 487.4 to limit the number of residents with serious mental illness as defined in new subsection 487.2(c) to less than 25 percent of the resident population, in all adult homes with a certified capacity of eighty or more. Section 487.13 requires the operator of every adult home with a certified capacity of 80 or more in which the number of residents with serious mental illness is already 25 percent or more of the resident population ("transitional adult homes") to create and implement a compliance plan that is acceptable to the Department of Health to reduce that number to a level that is less than 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services. The compliance plan must also specify how the operator of a transitional adult home will serve the needs of its mental health population while the reduction in population is being achieved, particularly with regard to fostering the development of independent living skills, ensuring access to and quality of mental health services, encouraging community involvement and integration, and fostering a homelike atmosphere. Operators of transitional adult homes who do not submit a compliance plan, or who submit a compliance plan that is not acceptable to the Department, will have a compliance plan imposed on them by the Department.

Section 487.4 is also revised to set standards for the mental health evaluations that are currently required for some individuals seeking admission to adult homes, by requiring the mental health professionals conducting the evaluations to be approved by the Department of Health in consultation with the Office of Mental Health, and requiring those professionals to collect additional information about each prospective residents as part of the mental health evaluation.

Section 487.10 is also revised to impose additional record-keeping requirements on all operators of adult homes, and to require an enhanced quarterly statistical information report from operators of transitional adult homes and adult homes with a certified capacity of 80 or more in which 20% or more of the resident population is individuals with serious mental illness.

Part 486 is amended to include penalties for failure to comply with the provisions of Part 487 as amended and new Part 487.13.

Costs:

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

Revisions to the existing mental health evaluation process and minor changes to reporting and records posting could result in relatively minor additional costs to adult homes. For transitional adult homes, there are likely to be additional costs associated with the development of compliance plans, but those costs should also be relatively minor. Any additional costs to transitional adult homes associated with implementing compliance plans will be dependent on the specific components of each compliance plan, which is subject to review and approval by the Department of Health. The estimated amount of lost net revenue to an operator of an adult home that is not able to replace a discharged resident is estimated at between four and five dollars per discharged resident per day.

Costs to State and Local Governments:

As a result of the Compliance Plans required by these regulations, many adult home residents with serious mental illness are expected to transition to alternative community settings, including but not limited to OMH-funded Supported Housing. The annual cost of one Supported Housing unit is approximately $20,000 per person. However, while OMH is engaged in a multi-year effort to expand development of Supported Housing units to serve individuals with serious mental illness, including adult home residents, it is not possible to project the precise number of Supported Housing units that will be needed for this population, which will depend on factors including resident assessments and the need to target units throughout the state. Moreover, it is expected that when adult home residents with behavioral health needs transition to appropriate community housing, coupled with appropriate supportive services, their overall utilization of Medicaid-funded services will decrease and significant savings will result.

Several local governments operate adult homes on a not-for-profit basis. These local governments will incur the same costs as any other adult home or transitional adult home operator.

Costs to the Department of Health:

The Department of Health will utilize existing resources to monitor compliance with this regulation.

Local Government Mandate:

Local governments that operate adult homes must comply with this regulation. No new local government program, project or activity is required by the proposed regulations.

Paperwork:

All adult home operators are currently required to submit a quarterly statistical information report to the Department of Health. These regulations require operators of transitional adult homes, and adult homes close to becoming adult homes to submit an enhanced quarterly statistical information report that includes a census report with a roster of residents who are persons with serious mental illness, and the discharge location of any resident discharged during the quarter, among other information.

Currently, adult home operators are required to obtain mental health evaluations for some residents. Under the new regulations, these mental health evaluations must be retained by the operators.

Adult home operators must maintain all such information confidentially.

In addition, operators of transitional adult homes are required to submit compliance plans to the Department of Health for approval. (See Needs and Benefits, above).

Duplication:

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

Alternatives:

In light of the Office of Mental Health's clinical determination, it is necessary to address the large concentration of individuals with serious mental illness in large adult homes. It was determined that the most appropriate response was limiting the number of residents with serious mental illness to less than 25 percent of the resident population in adult homes with a certified capacity of eighty or more, and requiring operators of adult homes with a certified capacity of 80 or more in which the number of residents with serious mental illness is currently 25 percent or more of the resident population to submit and implement a compliance plan to reduce that number to a level under 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services.

Federal Standards:

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

Compliance Schedule:

All adult homes will need approximately 90 days to come into compliance with new reporting and recordkeeping requirements.

Operators of transitional adult homes will have 120 days to comply with the requirement to submit a compliance plan. The Department of Health will have 90 days in which to review the compliance plan and either approve it or require modifications. Any modifications required by the Department of Health must be submitted within 30 days. Operators of transitional adult homes that fail to submit a plan or to accept modification requested by the Department of Health will have a plan imposed on them.

The time necessary to implement and complete the plan will depend on the plan submitted by the operator and is difficult to predict at this time.

Revised Regulatory Flexibility Analysis

Effect of Rule:

Most of the 384 licensed adult homes in New York State are operated by small businesses as defined in Section 102 of the State Administrative Procedure Act. Approximately 61 licensed adult home operators will be required by the regulations to submit a compliance plan to the Department of Health. Two of these adult homes are operated by local governments.

Compliance Requirements:

Compliance requirements are generally the same for all operators of adult homes and transitional adult homes to which these regulations apply. Section 487.4 limits the number of residents with serious mental illness to less than 25 percent of the resident population, in all adult homes with a certified capacity of eighty or more. Section 487.13 requires operators of adult homes with a certified capacity of 80 or more in which the number of residents with serious mental illness is already 25 percent or more of the resident population ("transitional adult homes") to create and implement a compliance plan that is acceptable to the Department of Health to reduce that number to a level that is less than 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services. The compliance plan must also specify how the operator of a transitional adult home will serve the needs of its mental health population while the reduction in population is being achieved, particularly with regard to ensuring the development of independent living skills, ensuring access to and quality of mental health services, encouraging community involvement and integration, and fostering a homelike atmosphere.

All adult home operators will be required to comply with Section 487.4, which is amended to set standards for the mental health evaluations that are currently required for some individuals seeking admission to adult homes, by requiring the mental health professionals conducting the evaluations to be approved by the Department of Health in consultation with the Office of Mental Health, and requiring those professionals to collect additional information about each prospective residents as part of the mental health evaluation. Mental health evaluations must be retained by adult home operators.

All adult home operators are currently required to submit a quarterly statistical information report to the Department of Health. These regulations require that transitional adult homes and adult homes that are close to becoming transitional submit an enhanced quarterly statistical information report which includes a census report with a roster of residents who are persons with serious mental illness and the discharge location of any resident discharged during the quarter, among other information.

Adult home operators must maintain all such information confidentially.

Professional Services:

No additional professional services will be required to comply with the proposed regulation.

Compliance Costs:

It is anticipated that compliance costs for adult homes and transitional adult homes operated by small businesses will be the same as or proportional to those operated by larger businesses. Amendments to the existing mental health evaluation process and minor changes to reporting and records posting could result in relatively minor additional costs. For transitional adult homes, there are likely to be additional costs associated with the development of compliance plans, but those costs should also be relatively minor. Any additional costs to transitional adult homes associated with implementing compliance plans will be dependent on the specific components of each compliance plan, which is subject to review and approval by the Department of Health. The estimated amount of lost net revenue to an operator of an adult home that is not able to replace a discharged resident is estimated at between four and five dollars per discharged resident per day.

Economic and Technological Feasibility:

No economic or technological barrier to the feasibility of compliance with these regulations by small businesses or local governments is anticipated.

Minimizing Adverse Impact:

These regulations will have the same impact on small business and local governments operating adult homes as they will on other operators of adult homes. Adult homes with a certified capacity of less than 80 residents do not qualify as "transitional adult homes."

Small Business and Local Government Participation:

The Department will meet the requirements of SAPA Section 202-b(6), in part, by publishing a notice of proposed rulemaking in the State Register prior to a comment period.

For Rules that Either Establish or Modify a Violation or Penalties Associated with a Violation:

No cure period was included in the rule because existing regulations already provide that all licensed adult home operators are afforded 30 days from the receipt of a written report citing violations to rectify those violations prior to the imposition of penalties.

Revised Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (http://quickfacts.census.gov). All have adult homes, with the exception of the counties of Hamilton and Tioga.

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

Transitional adult homes as defined in the proposed regulation are located in the following rural counties: Allegany, Cayuga, Genesee, Greene, Herkimer, Rensselaer and Sullivan. No transitional adult homes are located in towns with population densities of 150 persons or fewer per square mile in counties that have a population of 200,000 or greater.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

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

Section 487.4 limits the number of residents with serious mental illness to less than 25 percent of the resident population, in all adult homes with a certified capacity of eighty or more. Section 487.13 requires operators of adult homes with a certified capacity of 80 or more in which the number of residents with serious mental illness is already 25 percent or more of the resident population ("transitional adult homes") to create and implement a compliance plan that is acceptable to the Department of Health to reduce that number to a level that is less than 25 percent of the resident population, over a reasonable period of time, through the lawful discharge of residents to alternative community settings with appropriate community services. The compliance plan must also specify how the operator of a transitional adult home will serve the needs of its mental health population while the reduction in population is being achieved, particularly with regard to ensuring the development of independent living skills, ensuring access to and quality of mental health services, encouraging community involvement and integration, and fostering a homelike atmosphere.

All adult home operators will be required to comply with Section 487.4, which is amended to set standards for the mental health evaluations that are currently required for some individuals seeking admission to adult homes, by requiring the mental health professionals conducting the evaluations to be approved by the Department of Health in consultation with the Office of Mental Health, and requiring those professionals to collect additional information about each prospective residents as part of the mental health evaluation. Mental health evaluations must be retained by adult home operators.

All licensed adult home operators are currently required to submit a quarterly statistical information report to the Department of Health. These regulations require that transitional adult homes and adult homes that are close to becoming transitional submit an enhanced quarterly statistical information report which includes a census report with a roster of residents who are persons with serious mental illness and the discharge location of any resident discharged during the quarter, among other information.

Adult home operators must maintain all such information confidentially.

No professional services will be required to comply with the proposed regulation.

Costs:

It is anticipated that compliance costs for adult homes and transitional adult homes in rural areas will be the same as for those in other areas. Amendments to the existing mental health evaluation process and minor changes to reporting and records posting could result in relatively minor additional costs. For transitional adult homes, there are likely to be additional costs associated with the development of compliance plans, but those costs should also be relatively minor. Any additional costs to transitional adult homes associated with implementing compliance plans will be dependent on the specific components of each compliance plan, which are subject to review and approval by the Department of Health. The estimated amount of lost net revenue to an operator of a privately-owned adult home that is not able to replace a discharged resident is estimated at between four and five dollars per discharged resident per day.

Minimizing Adverse Impact:

It is not anticipated that compliance with these regulations will be more burdensome for adult home operators in rural areas than for operators of adult home operators in other areas of the State.

Rural Area Participation:

The Department will meet the requirements of SAPA § 202-bb(7), in part, by publishing a notice of proposed rulemaking in the State Register prior to a comment period.

Revised Job Impact Statement

Changes made to the last published rule do not necessitate revision to the previously published JIS.

Assessment of Public Comment

Introduction

The Department of Health received numerous comments on the proposed amendments to Section 486.7 and Part 487 of Title 18, NYCRR. Although the Department has made several technical and clarifying amendments to the regulations in response to the comments, the changes do not substantially alter the regulatory scheme.

Clinical Advisory

On August 8, 2012, OMH issued a clinical advisory prohibiting the discharge of patients from OMH-licensed or operated psychiatric hospitals to "Transitional Adult Homes" or "Impacted Adult Homes" on the ground that they are not clinically appropriate settings for the significant number of persons with serious mental illnesses who reside in such settings, and are not conducive to the rehabilitation or recovery of persons with serious mental illness. OMH issued clarifications to its advisory on October 1, 2012. The clinical advisory will take effect when the Department's and OMH's regulations become final.

Statutory Authority

Several commenters argued that the proposed regulations include law and policy changes that can only be made by the legislature, and not by agency rulemaking. The Department disagrees. New York Social Services Law § 461 gives the Department the authority to promulgate regulations establishing standards that apply to all adult care facilities subject to its inspection and supervision. Authority to set penalties and to impose record-keeping requirements is found in SSL sections 461-e and 460-d respectively.

Serious Mental Illness

Several comments were received on the definition of serious mental illness in Section 487.2(c) of the regulations. These included: the regulations provide insufficient guidance on the criteria to be established by the Commissioner of Mental Health to determine for determining if someone has a serious mental illness; the regulations do not define "substantial functional disability;" the definition of persons with serious mental illness should be limited to individuals with a chronic, persistent mental illness requiring regular treatment over a period of time from an OMH provider; and individuals with dementia, episodic depression or anxiety related to losses associated with aging should be excluded from the definition of persons with serious mental illness.

The definition of serious mental illness was drafted in consultation with OMH. "Seriously mentally ill" is defined in New York Mental Hygiene Law 1.03. 14 NYCRR § 599.4(p) provides additional guidance on the meaning of "designated mental illness." "Substantial functional disability" is defined in OMH supported housing guidelines. The Department and OMH will draft joint guidance on the definition of serious mental illness that incorporates these resources, and post the guidance on their respective public websites. Alzheimer's disease and other forms of dementia are not included in the definition of "designated mental illness," and persons with episodic depression or anxiety related to losses associated with aging are not included unless their mental illness results in a substantial functional disability.

Some commenters objected to the definition of serious mental illness because "having received services in the last five years" may include those individuals who saw a mental health practitioner sporadically, or only once, during the last five years and have since recovered. Others maintained that the five-year period was too short. The Department has modified the definition of serious mental illness in its regulations by eliminating Section 487.2(c)(2), which refers to persons who are receiving or have received within the past five years services from a mental hygiene provider which is licensed, operated or funded by OMH.

Because the Department and OMH will provide joint guidance that addresses the concerns expressed by these commenters, the Department declines to change the definition of serious mental illness.

Transitional Adult Homes

Commenters suggested that the 25% figure used to define "transitional adult homes" is far too low to be used as a ceiling. Several commenters noted that this determination was made without any assessment of these facilities or their residents. However, OMH's clinical opinion is that large scale congregate housing with a concentration of significant numbers of people with mental illnesses are not clinically appropriate for individuals with serious mental illness, nor are they conducive to recovery, and that the 25% figure is appropriate.

Some commenters objected to the limitation of the definition of a Transitional Adult Home to homes with a certified capacity of 80 beds or more, arguing that all adult homes with a mental health census of 25% or more should be included in the definition of a Transitional Adult Home. The Department declines to make a change based on this comment because OMH's clinical opinion is that the impact of a mental health census of 25% or more is problematic primarily in the larger adult homes.

The Department will publish a list of Transitional Adult Homes, subject to change based on available data, following final adoption of these regulations.

Compliance Plan

The Department received numerous comments to Section 487.13(c) regarding the submission of a compliance plan by operators of Transitional Adult Homes. The most frequent comment was that the creation and implementation of a compliance plan depends on factors outside the control of Adult Home Operators, such as the availability of alternative community housing. As a result, commenters stated, Adult Home operators may find it difficult if not impossible to implement a compliance plan. In addition, numerous commenters expressed a concern that insufficient alternative housing is available to permit operators of Transitional Adult Homes to implement compliance plans.

The intent of the compliance plan requirement is to solicit ideas and proposals from Transitional Adult Home operators, who are in a position to determine the best way of bringing their mental health census to less than 25% of the resident population. As an initial matter, a successful compliance plan should set forth a process or framework setting forth the steps the facility intends to take in order to move toward compliance.

Other commenters recommended longer deadlines for the submission of the compliance plan, the imposition of a deadline by which the Department must review a compliance plan, and a deadline for the implementation of the compliance plan. The Department has modified the regulations to extend the deadline for submission of a compliance plan to 120 days, and to require the Department to review compliance plans within 90 days of their submission. A deadline for the implementation of compliance plans has not been added at this time.

One commenter recommended that each compliance plan should include a due process procedure for any resident who is not offered alternative housing because he or she is not believed to meet the definition of a person with serious mental illness or is not placed in the housing of his or her choice. The Department declines to adopt this recommendation. A due process procedure would be appropriate if the regulations created an individual right to housing or services. However, these regulations are not intended to create individual entitlements.

Rights of Adult Home Residents

Several commenters stated that placing limitations on the admission of persons with serious mental illness to Transitional Adult Homes is unlawful and discriminatory under both State and Federal laws, including the Fair Housing Act and the American with Disabilities Act. The Department does not agree. The Department has the authority to limit the number of individuals admitted to certain types of facilities or units if the attempt to provide services to more than that number of individuals would negatively impact health, safety and well-being, even if the limitation means that some individuals will not be able to receive services at the facility of their choice. Therefore, the Department declines to modify the regulations based on this comment.

Some commenters also argued that requiring Transitional Adult Homes to reduce their mental health census to less than 25% of the resident population would force the discharge of thousands of adult home residents, resulting in more people becoming homeless or requiring hospitalization. The Department disagrees with these comments. In October, 2012, OMH

issued a Request for Proposals for the development and operation of up to 1050 units of Supported Housing in Queens and Brooklyn. These units are being developed to facilitate the transition to alternative community settings for individuals with serious mental illness currently residing in transitional adult homes. Contracts have been awarded and the anticipated start date is January of 2013.

Contrary to concerns expressed by some commenters, the regulations do not alter or conflict with statutory and regulatory requirements governing the discharge of residents from adult homes. Transition to alternative community settings will take place in a manner that is consistent with existing statutory and regulatory requirements.

Costs to State

Some commenters argued that there was a lack of data to support the Regulatory Impact Statement as it relates to cost. One commenter noted that the Department did not explain how the state came to the $20,000 figure for supported housing units; others noted that the state will have to substantially increase funding for supported services for individuals transitioning to community housing. The cost estimates were provided by OMH, which currently subsidizes community housing, including supported housing. OMH and the Department will be evaluating the community services needed for adult home residents as individuals start the transition to the community.

Commenters also argued that the costs of the regulations to the state will exceed the cost of adult home residence because many current residents of adult homes will be unable to live in an alternative community setting without various supportive services, and in some cases, 24-hour care, which will increase costs. The Department believes that some of these costs will be offset by savings in Medicaid and Medicare spending.

Impact on Adult Homes

Finally, some commenters contend that the costs to Adult Home operators of compliance with the regulations have been significantly underestimated, and that operators of adult homes will be unable to stay in business. It may be the case that some adult homes will no longer be able to stay in business in their current form. However, the Department's primary responsibility is to the health, safety and well-being of AH residents. The Department intends the regulations to provide sufficient flexibility for operators of transitional adult homes so that they can design an appropriate compliance plan, make the transition in an orderly manner while respecting the rights of their residents, and if necessary, adopt a new business model or find another economically viable use of their property if necessary.

Penalties

Several commenters objected to the $1,000 per day penalty for violation of sections 487.13, noting that the penalty is highest available under the statute and comparable to the penalty imposed for violations that cause serious harm to residents, and recommended that the penalty be lowered. The Department declines to adopt this recommendation. The penalty reflects the importance of these regulations to the health, safety and well-being of residents of Transitional Adult Homes with serious mental illness.

Recordkeeping Requirements

Two commenters noted that maintaining a weekly roster of residents with serious mental illness and preparing a quarterly statistical information report with a roster of such residents is burdensome and unnecessary for most non-transitional adult homes. The Department agrees, and has modified the regulations accordingly.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Language Assistance and Official New York State Prescription Form Requirements

I.D. No. HLT-03-13-00005-P

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

Proposed Action: Amendment of section 910.2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 281(2)

Subject: Language Assistance and Official New York State Prescription Form Requirements.

Purpose: To change the Official New York State Prescription Form to indicate whether an individual is limited in English proficiency.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by Section 281(2) of the Public Health Law, Section 910.2 of Title 10 of Part 910 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to add a new subdivisions (g) and (h), to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

(g) A section wherein prescribers may indicate whether an individual is limited English proficient, as defined in section sixty-eight hundred twenty-nine of the education law, shall be included on the Official New York State prescription form. A line shall also be provided on the form where the prescriber may specify the preferred language indicated by the patient in those cases where the patient is limited English proficient. Failure to include such indication on the part of the prescriber shall not invalidate the prescription.

(h) Any Official New York State prescription form that does not contain the limited English proficient section and preferred language line described in subdivision (g) may still be utilized by a prescriber if the form was received from the Department prior to March 30, 2013. For any Official New York State prescription form without the limited proficient section and preferred language line, the prescriber may indicate on the front of that Official New York State prescription form whether the patient is limited English proficient, and, if so, the prescriber shall also indicate the patient's preferred language.

Text of proposed 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

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

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

Regulatory Impact Statement

Statutory Authority:

Section 281(2) of the Public Health Law requires the Commissioner to promulgate regulations necessary to implement the provisions of Article 2-A of the Public Health Law in order to effectuate its purposes and intent with regard to patients having limited English proficiency. The Department proposes amendments to the regulations that would effectuate the necessary changes in that regard due to Chapter 447 of the Laws of 2012.

Legislative Objectives:

The legislative purpose of Section 281 of the Public Health Law, among other provisions, is to promote safe and effective use of prescription medications by reducing the barriers many consumers of limited English proficiency face in trying to understand prescription drug labels, dosage instructions and other vital patient information.

Needs and Benefits:

Language barriers and the inability to read or understand prescription information can pose health risks to patients with limited English proficiency. Amendments to Section 281 of the Public Health law require prescription forms and electronic prescriptions to include a section that allows prescribers to indicate whether an individual is limited English proficient and, if so, the preferred language of the patient. These individuals will benefit by lessened risk of adverse drug events, resulting in fewer visits to emergency departments, fewer hospitalizations and lessened risk of death. This amendment will support legislation passed under Chapter 447 of the Laws of 2012 that aims to reduce the number of medication errors by identifying patients of limited English proficiency so that they can be provided with competent interpretation services and thus avoid health risks associated with prescribed medications.

Costs:

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

The New York State Department of Health provides practitioners, authorized to issue prescriptions, with Official New York State prescription forms. These prescription forms will be modified to include a section or check box that will meet the requirement of indicating limited English proficiency, at no additional cost. A line will also be provided on these forms to allow for the specification of the preferred language, also at no cost to the State or the regulated parties. The proposed rule does not require the regulated entities to perform any additional tasks associated with format of the Official New York State prescription form; although they will be able to add such spaces to those existing forms which do not already have such lines. The new regulatory requirements are not anticipated to have a fiscal impact on authorized prescribers.

Costs to State and Local Government:

The proposed rule will not affect the cost of prescription forms provided to practitioners in New York State. Inclusion of the section to identify limited English proficiency and a line to include the preferred language will be at no cost to the Department of Health's Official Prescription Program.

Inclusion of subdivision (h), allowing practitioners to use and amend current stock would impose no costs to the Department. In addition, allowing prescribers to amend current Official New York State prescription forms avoids two distinct problems. First, it avoids the cost of replacing all Official New York State prescription forms, which are furnished by the Department, currently in the possession of prescribers and institutions.

Second, by allowing prescribers and institutions to use current stock, there will be no need to remove Official New York State prescription forms from current safeguarded locations for the purpose of returning them to the Department or have them destroyed in a safe and secure manner. The theft of Official New York State prescriptions forms is a continuing and costly problem facing the Department, prescribers, institutions, and law enforcement. Moving millions of Official New York State prescription forms from over 130,000 prescribers, in a manner that is outside the normal course of business, would invite theft of these forms on a wide scale.

Costs to the Department of Health:

The proposed rule will not affect the cost of prescription forms provided to practitioners in New York State. Inclusion of the section to identify limited English proficiency and a line to include the preferred language will be at no cost to the Department.

Local Government Mandates:

The proposed rule does not constitute a mandate on local government; nor does it impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

Paperwork:

This regulation imposes no new reporting or filing requirements.

Duplication:

As this proposed regulatory amendment was developed in consultation with the Commissioner of Education, the requirements conform to those of the State Education Law and the State Education Commissioner's regulations. The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

Amendment of the regulation is required by statute. There were no significant alternatives to be considered during the regulatory process.

Federal Standards:

The regulatory amendments do not exceed any minimum standards of the federal government.

Compliance Schedule:

Regulated parties should be able to comply with these regulations effective upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on entities in rural areas, and it does not impose reporting, recordkeeping or other compliance requirements on entities in rural areas. The proposed rule does not require the regulated entities to perform any additional tasks associated with format of the Official New York State prescription form; although they will be able to add such spaces to those existing forms which do not already have such lines. The provisions of this regulation apply uniformly throughout New York State.

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 an adverse impact on jobs and employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Electronic Prescribing, Dispensing and Recordkeeping of Controlled Substances

I.D. No. HLT-03-13-00006-P

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

Proposed Action: Amendment of Part 80 of Title 10 NYCRR.

Statutory authority: Public Health Law, arts. 2-A and 33

Subject: Electronic prescribing, dispensing and recordkeeping of controlled substances.

Purpose: To allow practitioners to issue prescriptions electronically for controlled substances.

Substance of proposed rule (Full text is posted at the following State website:www.health.ny.gov): Part 80 (10 NYCRR)

The proposed regulations provide for electronic prescribing and dispensing of controlled substances and keeping of related records in light of recent amendments to Article 2-A and Article 33 of the Public Health Law.

Amendments are proposed to authorize a practitioner to issue an electronic prescription for controlled substances in Schedules II through V and to allow a pharmacist to annotate, dispense, and electronically archive such prescriptions. The amendments also authorize a pharmacist to endorse a pharmacy's electronic prescription record with his or her electronic signature, and to include other required information on refills of prescriptions for controlled substances in an electronic record. (Note: existing regulations require a pharmacist to endorse such information on an original, hard copy prescription.) The proposed amendments would also require all practitioners and pharmacists engaging in electronic prescribing and dispensing of controlled substances to utilize computer applications that meet federal security requirements to register such computer applications with the New York State Department of Health (the Department), Bureau of Narcotic Enforcement (the Bureau). Amendments are proposed to add language pertaining to circumstances including when:

1. electronic prescribing of controlled substances is temporarily not available;
2. a prescriber has been issued a waiver from the requirement for electronic prescribing of controlled substances;
3. a transmission of electronic prescriptions for controlled substances fails;
4. an electronic prescription for controlled substance is altered during transmission;
5. a prescription will be presented to a pharmacy located outside New York State; and
6. a pharmacy's computer system is experiencing downtime.

The amendments redefine ''prescription'' as referred to in this Part to include an electronic prescription. The amendments also include new definitions for ''digital signature,'' ''electronic signature,'' and ''written prescription.'' The amendments include a statement that compliance does not alter requirements to comply with federal law or regulation.

The amendments allow for oral prescriptions for controlled substances to be reduced to electronic memoranda and for electronic prescriptions to serve as follow-up prescriptions to oral prescriptions. Amendments would also require a practitioner to annotate an electronic follow-up prescription to an oral prescription, thereby alerting the pharmacist that it is a follow-up prescription. The amended regulations require that electronic follow-up prescriptions be associated with or linked to the corresponding oral prescription, regardless of whether the oral prescription was reduced at the time of order to written or electronic memoranda.

Amendments are proposed to require proper safeguarding of practitioners' credentials issued for the purposes of signing electronic prescriptions. They require practitioners to notify the Bureau upon discovery that such credentials have been lost or compromised, or that prescriptions have been purportedly forged electronically and signed using such lost or compromised credentials.

There is no current regulatory mandate that all prescribers utilize electronic prescribing. E-prescribing is voluntary. The regulations (Section 80.64) permit the Commissioner to issue waivers to applying practitioners based on a showing of economic hardship, technological limitations and exceptional circumstances once Article 2-A of the Public Health Law requires all prescribers to prescribe electronically.

The amendments allow for electronic recordkeeping of controlled substance prescription data, providing that such data must remain readily retrievable for inspection by authorized representatives of the Bureau within a defined timeframe, and shall be accessible at the premises where the licensed activity is conducted.

The amendments protect against the transmission of an electronic prescription for a controlled substance using a computer application that does not comply with federal requirements or is otherwise non-compliant.

Text of proposed 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

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

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

Summary of Regulatory Impact Statement

Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provision of Article 2-A and Article 33 of the Public Health Law in order to effectuate their purpose and intent. The Department proposes amendments

to the regulations that would effectuate the changes to the Public Health Law (PHL) resulting from Chapter 178 of the Laws of 2010 and Chapter 447 of the Laws of 2012 amending Articles 2-A and 33 of the Public Health Law.

Legislative Objectives:

The legislative purpose of Article 2-A of the PHL, among other provisions, is to establish standards for electronic prescriptions for controlled substances and provide that all prescriptions made in this State must be made by electronic transmission with certain specified exceptions.

Needs and Benefits:

The Department is proposing amendments to Part 80 of the regulations to allow practitioners to electronically write and transmit prescriptions for controlled substances; permit pharmacies to receive, dispense, maintain and archive records of these electronic prescriptions; allow pharmacists to endorse a pharmacy's electronic record with an electronic signature and other required information for refills of controlled substances; and authorize a pharmacist to document an oral prescription for controlled substances to an electronic record. The result would be a reduction in paperwork and a potential reduction in prescription forgery and the number of medication errors due to illegible handwritten prescriptions or misunderstood oral prescriptions.

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

Costs will be related to purchasing computer application systems. Regarding existing computer applications for electronic prescribing of non-controlled substances, it is expected that those existing applications already have some of the functions required.

Costs to State and Local Government:

The proposed rule does not require the state or local government to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact. It will reduce the number of prescriptions written on official New York State prescription forms, which are paid for by the State, so there may be a positive fiscal impact to the State.

Costs to the Department of Health:

The Department of Health does not anticipate increased administrative costs. Any increased administrative cost is expected to be offset by a decrease in the administrative support related to the paper-based Official Prescription Program.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities.

Paperwork:

Ultimately, these regulations will result in a reduction in paperwork; however, there is paperwork and processing associated with obtaining authorization. Hospitals and other institutional practitioners may conduct this process in-house as part of their own DEA approved procedure. It is anticipated that these activities will occur initially upon implementation of electronic prescribing of controlled substances in a practice setting or a pharmacy, or when a new practitioner or pharmacist joins a practice.

Duplication:

Some requirements of this proposed regulation duplicate requirements set forth in the Drug Enforcement Administration's (DEA) regulations. Certain provisions of this proposed regulation duplicate regulations required by § 6810 of the Education Law.

Alternatives:

Changing the regulations was required by virtue of amendments to statute. There were no significant alternatives to be considered during the regulatory process.

Federal Standards:

The DEA sets minimum maintenance and retention standards for controlled substance records at two years; New York's is five years from the date of transaction. Federal requirements do not currently require practitioners or pharmacies to notify the DEA when their prescribing or dispensing computer applications become certified as meeting federal security standards; New York requires such notification. Federal regulations require that oral authorizations for controlled substances be immediately reduced to writing by the pharmacist; New York allows oral authorizations for controlled substances to be reduced to written memorandum or electronic record.

Compliance Schedule:

The proposed rule permits but does not require utilization of electronic prescribing. However, two years after the regulations implementing Chapter 447 of the Laws of 2012 become final, use of electronic prescriptions and the requirements of these regulations will be mandatory for all prescribers.

Regulatory Flexibility Analysis

Effect of Rule:

This proposed rule will affect New York State practitioners and pharmacists who electronically prescribe and dispense prescriptions for controlled substances. Records retrieved from the Education Department's Office of the Professions show that as of July 2, 2012 there were a total of 135,735 practitioners (physicians, dentists, physician assistants, and nurse practitioners) registered in the State of New York. Records retrieved from the Education Department's Board of Pharmacy show that as of February 22, 2011 there were a total of 5,579 registered pharmacies and as of July 2, 2012 there were 23,460 registered pharmacists in the State of New York. Of these totals, approximately 2,336 represent small business establishments and 94 are owned by government entities, accounting for 48% and 1.9% respectively of the total number of pharmacies. Based on their analysis, the United States Drug Enforcement Administration (DEA) has determined that while the rule will impact a substantial number of small entities, it will not impose a significant economic impact on any small entity. The Department has considered that analysis, and concurs with it. Costs to small business entities in New York beyond those incurred by complying with the federal rule will be negligible.

Compliance Requirements:

The proposed rule permits but does not require utilization of electronic prescribing. However, two years after the regulations implementing Chapter 447 of the Laws of 2012 become final, use of electronic prescriptions and the requirements of these regulations will be mandatory for all prescribers.

Professional Services:

Currently, a practitioner who electronically prescribes controlled substances must apply to a federally approved credential service provider or certification authority to obtain their authentication credentials or digital certificates. Before any computer application can be used to prescribe, dispense, or archive electronic prescriptions for controlled substances, it must be reviewed, tested, and determined by a third party to meet all of the requirements of the federal rule. The third party audit must be performed by a qualified person as defined in the federal rule. Alternatively, the computer application may be certified by a certifying organization whose review process has been approved by DEA as stated in the federal rule. Professional information technology subject matter expertise may be required to upgrade and maintain computer applications to accommodate electronic prescribing and recordkeeping.

Compliance Costs:

Based on their analysis, DEA has determined that while the federal rule will impact a substantial number of small entities, it will not impose a significant economic impact on any small entity. Costs to small business entities in New York beyond those incurred by complying with the federal rule will be negligible.

Amendments to the regulation will require any business entity that participates in electronic prescribing of controlled substances ensure that their system complies with the DEA requirements by either purchasing a certified computer software application or working with software vendors that have obtained the appropriate computer software certification. Amendments also require any practitioner to undergo the identity-proofing process. The DEA's Economic Impact Analysis addresses the impact of the Interim Final Rule on small business entities. The analysis addresses both initial costs and ongoing costs to the smallest practitioner (i.e. a solo practitioner) and to independent pharmacies. Costs to practitioners include those incurred with prescribing software or application, identity proofing and credential, labor costs to complete the application, access control training and to set logical access controls, all requirements to electronically prescribe controlled substances. Ongoing costs will be renewal of the credential, review of security logs and maintenance of the computer application. For pharmacies, costs will include the incremental cost that their application provider charges for programming and audits, the cost of reviewing security logs and initial access control setting and training. Ongoing labor costs will be incurred for reviewing security logs, and maintenance of the computer application, although reprogramming is a routine practice in the software industry and applications are routinely updated to add features and fix problems. Pharmacies also pay a transaction fee to intermediaries per electronic prescription to ensure the pharmacy system will be able to capture the data electronically.

A cure period is not required to be incorporated in the regulations pursuant to Chapter 524 of the Laws of 2011 insofar as the proposed amendments do not involve the establishment or modification of a violation or of penalties associated with a violation.

Economic and Technological Feasibility:

Most pharmacies currently employ an electronic system to process and dispense prescriptions. Many practitioners employ electronic prescribing systems or electronic health record systems to comply with the American Recovery and Reinvestment Act. The Department believes that this trend will continue. Practitioners that do not currently electronically prescribe will be compelled to do so by statute, in accordance with these amendments. Practitioners and pharmacists can expect an initial economic impact due to practitioner identity-proofing, and upgrades to most prescribing and dispensing computer applications to bring them into compliance with computer security requirements in the federal rule.

Subsequent to initial implementation, computer application recertification as required, and identity-proofing of new practitioners will be ongoing costs incurred. The DEA has approved a number of certifying organizations whose certification processes verify and certify that a computer application meets the requirements of 21 CFR Part 1311. Alternatively, computer application providers may obtain a third party audit to verify and certify computer applications. Amendments to the regulation will cause practitioners and pharmacies to incur costs, especially in undergoing identity-proofing, obtaining an authentication credential, and in computer application installation or upgrade. In its economic analysis, the DEA concluded that overall, while it recognizes that the costs of the rule are not trivial, they are not great enough to discourage adoption of electronic prescribing. Implementation of these amendments is economically and technologically feasible at this time.

Minimizing Adverse Impact:

These regulations will allow practitioners and pharmacists to change the way they prescribe and dispense prescriptions for controlled substances from written prescriptions to electronic media. They provide for electronic recordkeeping requirements by pharmacies. To minimize any undue burden on a particular practitioner, the regulations provide for a waiver process for practitioners to be exempted from the requirement to electronically prescribe based upon economic hardship, technological limitations that are not reasonably within the control of the practitioner, or other exceptional circumstance demonstrated by the practitioner.

Small Business and Local Government Participation:

During the drafting of these regulations, the Department consulted with the State Education Department's Board of Pharmacy. The Department also consulted with representatives from the Pharmaceutical Society of the State of New York, the membership of which consists of pharmacists and others who have an interest in the practice of pharmacy, including owners of small businesses, vendors, employees of pharmacies and employees of private and government institutions, and the New York Chapter of the American Society of Consultant Pharmacists, the membership of which consists of pharmacists who provide consulting services to private or government owned residential health care facilities. Issues and comments relevant to dispensing, recordkeeping, and electronic prescriptions were discussed at open forums such as the New York State Pharmacy Conference meetings and the Pharmacy Advisory Committee (PAC) meetings. Pharmacy conferences are held quarterly for the purpose of sharing information among stakeholders in the practice of pharmacy, including representatives from the colleges of pharmacy in New York State, government agencies, regulatory agencies, and all pharmacy practice settings. The PAC acts as an advisory body to the Department of Health on pharmacy issues related to the Medicaid Program. The Department also consulted with the National Association of Chain Drug Stores, an organization dedicated to advancing the interests and objectives of the chain community pharmacy industry, and with various other pharmacy leaders and stakeholders. Pharmacists have been utilizing electronic records for over 30 years and the State Education Department's Board of Pharmacy has allowed such records for non-controlled substances for over 15 years. The regulations were drafted taking into consideration the pharmacy community's comments and suggestions with respect to the current laws and regulations and how the amendments would affect the overall dispensing process.

The Department consulted with the Medical Society of the State of New York, an organization dedicated to promoting and maintaining high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public. The Department also consulted with the Greater New York Hospital Association and the New York City Health and Hospitals Corporation. Input was also received from the Office of Professional Medical Conduct, and the New York Chapter of the American College of Physicians. Amending current regulations to allow for the electronic prescribing of controlled substances was met with general approval. However, opposition has been expressed to the requirement that all prescriptions be transmitted electronically. Most frequently expressed concerns were the expected cost to practitioners as well as technological barriers facing technologically naïve practitioners. The Department is confident that the exceptions and waiver process provided for in the statute address these concerns.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to pharmacies and pharmacists located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain rural areas. These can range in extent from small towns and villages and their surrounding areas, to locations that are sparsely populated. According to the Education Department's Board of Pharmacy, there are a total of 735 registered pharmacies and 2,381 registered pharmacists located in rural counties, which account for 15.1% of the pharmacists and 13.5% of the pharmacies registered in the State of New York.

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

Electronic recordkeeping systems have been available to pharmacists for over 30 years. And, for over 15 years the State Education Department's Board of Pharmacy has allowed electronic records for non-controlled substances. The proposed amendments reflect the industry's widespread and ongoing use of electronic records and impose minimal additional recordkeeping and other compliance requirements beyond what is required in the federal rule.

Costs:

The DEA's Economic Impact Analysis addresses both initial costs and ongoing costs to practitioners and pharmacies. Costs to practitioners include those incurred with prescribing software or application, identity proofing and credential, labor costs to complete the application, access control training and to set logical access controls, all requirements to electronically prescribe controlled substances. Ongoing costs will be renewal of the credential, review of security logs and maintenance of the computer application. Compliance with amendments to New York State's regulations would not incur significant costs above those required by the DEA regulations.

For pharmacies, costs will include the incremental cost that their application provider charges for programming and audits, the cost of reviewing security logs and initial access control setting and training. Ongoing labor costs will be incurred for reviewing security logs, and maintenance of the computer application, although reprogramming is a routine practice in the software industry and applications are routinely updated to add features and fix problems. Costs to business entities in New York, including those located in rural areas, beyond those incurred by complying with the federal rule, will be negligible.

Minimizing Adverse Impact:

These regulations will allow practitioners and pharmacists practicing in rural areas to change the way they prescribe and dispense prescriptions for controlled substances from written prescriptions to electronic media. They provide for electronic recordkeeping requirements by pharmacies. To minimize any undue burden on a particular practitioner once Article 2-A mandates electronic prescribing, the regulations provide for a waiver process for practitioners to be exempted from the requirement to electronically prescribe based upon economic hardship, technological limitations that are not reasonably within the control of the practitioner, or other exceptional circumstance demonstrated by the practitioner. It is anticipated that these waiver categories will sufficiently address burdens of rural providers.

Rural Area Participation:

During the drafting of these regulations, the Department consulted with various statewide groups whose constituencies include rural areas, e.g.: the State Education Department's Board of Pharmacy, the Pharmaceutical Society of the State of New York and the New York Chapter of the American Society of Consultant Pharmacists. Pharmacy conferences were also held quarterly for the purpose of sharing information among stakeholders in the practice of pharmacy, including representatives from the colleges of pharmacy in New York State, government agencies, regulatory agencies, and all pharmacy practice settings. The Department also consulted with the National Association of Chain Drug Stores, an organization dedicated to advancing the interests and objectives of the chain community pharmacy industry in rural and metropolitan areas, and with various other pharmacy leaders and stakeholders. The regulations were drafted taking into consideration the pharmacy community's comments and suggestions with respect to the current laws and regulations and how the amendments would affect the overall dispensing process.

The Department also consulted with the Medical Society of the State of New York and the Greater New York Hospital Association.

Job Impact Statement

A Job Impact Statement is not included because the Department has concluded that the proposed regulatory amendments will not have a substantial adverse effect on jobs and employment opportunities, based on analysis performed by the United States Drug Enforcement Administration with regard to their electronic prescribing requirements, with which the amendments are overwhelmingly consistent, and given that the regulations are simply implementing an underlying requirement imposed by the legislature through the Public Health Law. The proposed amendments do not change the frequency with which prescriptions are issued and dispensed, although they do change the manner in which they are issued and dispensed. The amendments provide the opportunity for increased efficiency, allowing practitioners and pharmacists more clinical face to face time with their patients, and will not, in and of themselves, have a substantial adverse effect upon jobs and employment opportunities.

Office of Mental Health

NOTICE OF ADOPTION

Operation of Psychiatric Inpatient Units of General Hospitals and Operation of Hospitals for Persons with Mental Illness

I.D. No. OMH-32-12-00019-A
Filing No. 1289
Filing Date: 2012-12-31
Effective Date: 2013-01-16

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

Action taken: Amendment of Parts 580 and 582 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 29.15 and 31.04

Subject: Operation of Psychiatric Inpatient Units of General Hospitals and Operation of Hospitals for Persons with Mental Illness.

Purpose: To establish provisions prohibiting the discharge of persons with serious mental illness to transitional adult homes.

Text of final rule: 1. A new subdivision (c) is added to Section 580.6 of Title 14 NYCRR to read as follows:

(c) Discharges.

(1) All discharges shall be in accordance with the provisions of section 29.15 of the Mental Hygiene Law, in a form and format designed by the Office.

(2) A hospital shall be prohibited from discharging any person with serious mental illness to a transitional adult home, as defined in regulations of the Commissioner of Health, unless the person was a resident of the home immediately prior to his or her current period of hospitalization.

2. A new subdivision (c) is added to Section 582.6 of Title 14 NYCRR to read as follows:

(c) Discharges.

(1) All discharges shall be in accordance with the provisions of section 29.15 of the Mental Hygiene Law, in a form and format designed by the Office.

(2) A hospital shall be prohibited from discharging any person with serious mental illness to a transitional adult home, as defined in regulations of the Commissioner of Health, unless the person was a resident of the home immediately prior to his or her current period of hospitalization.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 580.6(c)(2) and 582.6(c)(2).

Text of rule and any required statements and analyses may be obtained from: Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

Revised Regulatory Impact Statement

1. Statutory authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for persons with mental illness pursuant to an operating certificate.

Section 29.15 of the Mental Hygiene Law establishes requirements for the discharge or conditional release of patients from hospitals operated by the Office of Mental Health (Office) or from psychiatric inpatient services subject to licensure by such Office.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The proposed rule furthers the legislative policy of providing high quality mental health services to individuals with mental illness in a safe and secure environment by establishing provisions prohibiting the discharge of patients with serious mental illness to transitional adult homes.

3. Needs and benefits: The proposed amendments to 14 NYCRR Part 580 and 14 NYCRR Part 582 prohibit the discharge of a person with serious mental illness to a transitional adult home, as defined in the regulations of the Commissioner of Health, unless the person was a resident of the home immediately prior to his or her current period of hospitalization. The Office is charged with the responsibility of providing care and treatment for persons with serious mental illness with the goal of supporting and assisting individuals toward integration into the community.

Mixed use, larger scale congregate housing is an important and viable form of community living. However, certain settings where there are a significant number of individuals with serious mental illness may not be conducive to recovery for the residents. A Clinical Advisory from the Office of Mental Health's Chief Medical Officer was issued on August 8, 2012, and an update to that Clinical Advisory was issued on October 1, 2012, prohibiting the discharge of persons with serious mental illness from OMH-licensed or operated psychiatric hospitals to transitional adult homes, formerly known as impacted adult homes unless they were admitted to the psychiatric hospital from the transitional adult home. Transitional adult homes are defined by the Commissioner of Health as adult homes with a certified capacity of 80 beds or more in which at least 25 percent of the residents are persons with serious mental illness.

Transitional adult homes are not designed to effectively serve large numbers of people with serious mental illness, are not licensed by the Office, nor are they under the clinical quality control of the Office. In addition, the transitional adult home model does not foster independent living, with the use of congregate meals, ritualized medication administration and programming that may not be tailored to the individual needs of the residents. Further, the absence of specifically designed rehabilitation and recovery oriented programs is not conducive to the goal of integration into the community.

4. Costs:

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

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

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

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

6. Paperwork: No increased paperwork is anticipated as a result of the amendments to Parts 580 and 582.

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

8. Alternatives: The only alternative to the regulatory amendment that was considered was inaction. Since inaction would be contrary to good clinical practice with the goal of patients being integrated into the community, that alternative was necessarily rejected.

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

10. Compliance schedule: The regulatory amendments are effective immediately upon adoption.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the changes to the final version of the rule are non-substantive. The final adopted rule clarifies the Office's intention that the amendments to 14 NYCRR Parts 580 and 582 pertain to the discharge of individuals with serious mental illness to transitional adult homes, and reflects the use of ''person-first'' language.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes to the final version of the rule are non-substantive. The final adopted rule clarifies the Office's intention that the amendments to 14 NYCRR Parts 580 and 582 pertain to the discharge of individuals with serious mental illness to transitional adult homes, and reflects the use of ''person-first'' language.

Revised Job Impact Statement

A revised Job Impact Statement is not being submitted with this notice because the changes to the final version of the rule are non-substantive. The final adopted rule clarifies the Office's intention that the amendments to 14 NYCRR Parts 580 and 582 pertain to the discharge of individuals with serious mental illness to transitional adult homes, and reflects the use of ''person-first'' language.

Assessment of Public Comment

Introduction

The Office of Mental Health received a number of comments during the public comment period regarding the clinical advisory and the amendment of Parts 580 and 582 of Title 14 NYCRR, Operation of Psychiatric Inpatient Units of General Hospitals and Operation of Hospitals for Persons with Mental Illness. While the agency has made several technical and clarifying amendments to the regulation and the clinical advisory in response to these comments, none of these amendments resulted in substantive change to the regulation. In an effort to capture the comments in an easy-to-read format, they are addressed by section below.

Clinical Advisory

On August 8, 2012, OMH's Chief Medical Officer issued a clinical ad-

visory prohibiting the discharge of patients from OMH-licensed or operated psychiatric hospitals to ''Transitional Adult Homes'' or ''Impacted Adult Homes.'' A second, modified advisory, which incorporated the comments listed below, was issued on October 1, 2012.

A number of commenters objected to the initial advisory, noting that it was enforcing proposed regulations not yet promulgated. The advisory was modified and now states that the advisory will not take effect until OMH and DOH finalize and promulgate the proposed regulations affecting Adult Homes.

One commenter noted that the clinical advisory was even broader than the proposed regulation as it applied to both transitional and impacted adult homes. That comment was accepted and the clinical advisory was amended to apply to only persons with serious mental illness who are being considered for discharge to ''Transitional Adult Homes'' as defined in the final DOH adult home regulations.

Several commenters noted that the clinical advisory did not allow for a person to be discharged to an adult home if he or she was a resident of that home prior to their current hospitalization. This Office agreed with this comment and the advisory was amended accordingly.

Certain commenters suggested that the clinical advisory is overbroad and unsupported by data. One commenter noted that this Office does not know the Adult Home population and therefore is unable to state what each Adult Home resident may want or need. The same commenter maintained that there is insufficient empirical evidence that alternative community settings are better at serving adult home residents than are adult homes. This Office disagrees with these comments. The clinical advisory reflects the latest developments in the field and current treatment for those individuals with serious and persistent mental illness. This Office's Chief Medical Officer has concluded that Adult Homes with a significant proportion of residents with serious mental illness are not conducive to the recovery and rehabilitation of these individuals, and often cannot provide the supports needed for individuals with serious and persistent mental illness. As such, this Office is committed to assist in the provision of alternative housing options and community supports for residents with serious mental illnesses who reside in these transitional adult homes in an effort to promote individual recovery and rehabilitation efforts.

Other commenters agreed with the clinical advisory and believe that it is supported by the cumulative experience of mental health professionals.

Statutory Authority

Several commenters expressed the opinion that the proposed regulation directly modifies Mental Hygiene Law section 29.15 by prohibiting discharges to transitional adult homes. Two commenters noted that OMH cannot modify section 29.15 through an administrative rule making, stating that OMH must receive legislative approval of this policy initiative. This Office does not agree with this analysis. Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations to set the quality and standards of facilities that provide services for persons with mental illness. Additionally, the proposed regulation is based upon the clinical advisory and furthers the legislative policy of providing high quality mental health services to individuals with serious mental illness in a safe and secure environment.

Serious Mental Illness

One commenter noted that the definition of serious mental illness in Section 487.2(c) of the Department of Health regulations, which the OMH regulations incorporate by reference, does not adequately define what the criteria established by the Commissioner of Mental Health will be in order to determine if someone has a serious mental illness. One commenter noted that the definition does not specify how a practitioner is able to determine whether a particular mental illness has the ''severity and duration that results in substantial functional disability.''

''Serious mental illness'' is defined in New York Mental Hygiene Law 1.03. Additionally, 14 NYCRR § 599.4(p) provides the following definition:

Designated mental illness: means a disruption of normal cognitive, emotional, or behavioral functioning, which can be classified and diagnosed using the current edition of the Diagnostic and Statistical Manual of Mental Illness other than: alcohol or drug disorders, developmental disabilities, organic brain syndromes or social conditions (V codes), and whose severity and duration of mental illness results in substantial functional disability.

''Substantial functional disability'' is defined in OMH supported housing guidelines as:

Extended impairment in Functioning Due to Mental Illness:

a) Documentation that the individual has experienced two of the following four functional limitations due to a designated mental illness over the past 12 months on a continuous or intermittent basis:

i. Marked difficulties in self care

ii. Marked restriction of activities of daily living

iii. Marked difficulties in maintaining social functioning

iv. Frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner

Or

b) Reliance on Psychiatric Treatment, Rehabilitation and Supports

A documented history shows that the individual at some prior time met the threshold for extended impairment in functioning due to mental illness, but the symptoms and/or functioning problems are currently attenuated by medication or psychiatric rehabilitation and supports. Medication refers to psychotropic medications which may control certain primary manifestations of mental disorder; e.g. hallucinations, but may or may not affect functional limitations imposed by the mental disorder.

Rather than amending their regulations in order to address these comments, OMH and DOH will draft joint guidance on the definition of SMI that is consistent with these definitions and criteria and post the guidance on their respective public websites.

Two commenters noted that the definition of serious mental illness is overly broad because ''having received services in the last five years'' may include those individuals who saw a mental health practitioner sporadically, or only once, during the last five years and have since recovered. OMH generally agrees with this comment because the definition of persons with serious mental illness is limited to individuals who have a chronic mental illness. DOH has modified the definition of serious mental illness in its regulations by eliminating Section 487.2(c)(2), which referred to persons who are receiving or have received within the past five years services from a mental hygiene provider which is licensed, operated or funded by OMH. The OMH regulations incorporate the modified definition by reference. One commenter noted that the definition fails to distinguish between primary, secondary and tertiary diagnoses. OMH declines to incorporate this change. The current definition accurately reflects the intent of the definition, which depends upon the individual's diagnosis, length of illness and ability to function.

Individuals whose sole diagnosis is episodic depression or anxiety would not fall under the definition of persons with serious mental illness unless their diagnosis results in a substantial functional disability. The joint DOH/OMH guidance will reflect these principles.

Restrictions on Discharge to Adult Homes

One commenter proposed that the restriction on discharges to Adult Homes should apply only to persons with serious mental illness and not to every person. This Office agrees and has incorporated this change in the final rule.

Two commenters noted that it should be the responsibility of the local Directors of Community Services (DCS) to determine whether or not an adult home is the best available placement for an individual. Pursuant to Article 31 of the Mental Hygiene Law, the Commissioner of the Office of Mental Health has the authority to set standards of quality and adequacy of facilities, therefore, OMH declined to accept this comment. However, it should be noted that OMH regularly consults with and has close working relationships with DCS's and the statewide organization that represents them.

Transitional Adult Homes

Commenters suggested that the 25% figure used to define ''transitional adult homes'' is far too low to be used as a ceiling. Several commenters noted that this determination was made without any assessment of these facilities or their residents. As stated in the clinical advisory, large scale congregate housing with a concentration of significant numbers of people with mental illnesses are not clinically appropriate nor are they conducive to recovery. This Office believes it is necessary to provide adult home residents with serious mental illness the opportunity to receive services in the most integrated setting possible, so long as that environment is appropriate to their mental health needs. This Office believes that the 25% figure is appropriate and will not be changed.

Some commenters objected to the limitation of the definition of a Transitional Adult Home to homes with a certified capacity of 80 beds or more, arguing that all adult homes with a mental health census of 25% or more should be included in the definition of a Transitional Adult Home. DOH declines to make a change based on this comment because OMH's clinical opinion is that the impact of a mental health census of 25% or more is problematic primarily in the larger adult homes.

Several commenters noted that Assisted Living Programs (ALPs) should be carved out of the definition of Transitional Adult Homes. ALPs are regulated by DOH, and DOH has declined to accept this recommendation. DOH will publish a list of Transitional Adult Homes, subject to change based on available data, following final adoption of these regulations.

Rights of Adult Home Residents

Several commenters stated that denying admission to an adult home to persons with serious mental illness for reasons unrelated to their own needs is unlawful and discriminatory under both State and Federal laws, including the Fair Housing Act and the Americans with Disabilities Act. The Office does not agree. The proposed regulation is based upon the clinical ad-

visory and furthers the legislative policy of providing high quality mental health services to individuals with serious mental illness in a safe and secure environment. The clinical advisory applies to persons with serious mental illness who are being considered for discharge only to ''Transitional Adult Homes,'' as defined in the Department of Health Adult Home regulations. The Office believes that transitional adult homes are not designed to effectively meet the needs of large numbers of people with serious mental illness. Once a transitional adult home reduces its mental health census to under 25%, the facility becomes a potential discharge option for persons with a serious mental illness.

Some commenters also argued that requiring Transitional Adult Homes to reduce their mental health census to less than 25% of the resident population would force the discharge of thousands of adult home residents, resulting in more people becoming homeless or requiring hospitalization. DOH and OMH disagree with these comments. In October, 2012, OMH issued a Request for Proposals for the development and operation of up to 1050 units of Supported Housing in Queens and Brooklyn. These units are being developed to facilitate the transition to alternative community settings for individuals with serious mental illness currently residing in transitional adult homes. Contracts have been awarded and the anticipated start date will be in early 2013. Furthermore, additional Supported Housing will be developed in the coming months.

Contrary to concerns expressed by some commenters, the regulations do not alter or conflict with statutory and regulatory requirements governing the discharge of residents from adult homes. Transition to alternative community settings will take place in a manner that is consistent with existing statutory and regulatory requirements. The DOH regulations are designed to provide all current transitional adult home residents with serious mental illness a choice to either stay in the adult home or transition to a community setting. For those who stay in adult homes, the DOH regulations require that compliance plans include plans to provide residents with rehabilitative and recovery oriented programs.

Costs to State

Commenters argued that there was a lack of data to support the Regulatory Impact Statement as it relates to cost. One commenter noted that OMH did not demonstrate how the State came to the $20,000 figure for supported housing units, others noted that the State will have to substantially increase funding for supported services for these individuals. The Office of Mental Health currently subsidizes community housing, including supported housing. The Office of Mental Health provides a State Stipend of $14,493 per person for each Supported Housing unit in New York City. This funding is for rent stipends, housing case management services and contingency funds. The remaining cost is an estimate for other community based mental health services. OMH will be evaluating the community services needed for adult home residents as assessments are completed and individuals start the transition to the community.

Commenters also argued that the costs of the regulations to the State will exceed the cost of adult home residence because many current residents of adult homes will be unable to live in an alternative community setting without various supportive services, and in some cases, 24-hour care, which will increase costs. DOH and OMH believe that any potential increase in expenditures is justified in light of OMH's clinical advisory, and added costs for supported apartments and anticipated support services are included in the Budget. DOH believes that some of these costs may be partially offset by savings in Medicaid spending. When transitional adult home residents move to alternative community settings, some service savings could accrue through better management of chronic disease, including mental illness.

Two commenters expressed the belief that as a result of the regulations, there will be increased hospitalizations or placements into more costly treatment settings. Another commenter believed that the regulations would result in higher criminal justice costs and more returns to homeless shelters. OMH and DOH regards these comments as opinions rather than recommendations for amendments to the regulation. Accordingly, no changes were made to the Regulatory Impact Statement as a result of these comments.

Department of Motor Vehicles

NOTICE OF ADOPTION

International Registration Plan

I.D. No. MTV-45-12-00005-A
Filing No. 1286
Filing Date: 2012-12-26
Effective Date: 2013-01-16

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

Action taken: Amendment of Part 28 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 405-i

Subject: International Registration Plan.

Purpose: Makes some minor technical changes and incorporates procedural changes.

Text or summary was published in the November 7, 2012 issue of the Register, I.D. No. MTV-45-12-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 747-0871, email: heidi.bazicki@dmv.ny.gov

Assessment of Public Comment

The agency received no public comment.

Office for People with Developmental Disabilities

EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

Rent Allowance Offset (SSI Update) for IRAs and Community Residences and Annual Increase Percentage for Leases for Real Property

I.D. No. PDD-03-13-00003-EP
Filing No. 1288
Filing Date: 2012-12-31
Effective Date: 2013-01-01

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

Proposed Action: Amendment of sections 635-6.3 and 671.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b), 41.36(c) 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: Regarding the rent allowance offset, prices established for Individualized Residential Alternative facilities and community residences are offset by a rent allowance based on SSI levels. However, SSI levels for 2013 were not public in time for OPWDD to update the reimbursement offset within the timeframes established by the State Administrative Procedure Act for regular rulemaking procedures. Without these amendments, the prices established by OPWDD for these facilities might not be properly offset by the amount of rent received by the provider from other sources (primarily SSI). The State would then be overpaying the provider by an amount equivalent to the increase in rent portion of the SSI. The amount overpaid by the State would likely have to be recovered by imposing a reduction in reimbursement to providers for the delivery of services to individuals with developmental disabilities. This reduction in reimbursement could adversely affect the health, safety and/or welfare of the individuals receiving those services.

Regarding the annual increase percentage for leases, OPWDD has discontinued its practice of conducting site-specific rent studies after the initial lease approval. Instead, it has implemented an annual calendar year increase in the allowable lease costs. The increase is determined by multiplying the base lease amount by a percentage increase established in the regulation. OPWDD updates this percentage increase annually in regulation based on the Rent of Primary Residence component of the Consumer Price Index (CPI). OPWDD decided to use the September CPI figure for consistency from year to year. However, since the September CPI figure was not available until mid October, there was not enough time for OPWDD to propose a non-emergency rulemaking using the September figure and still have the rule effective on January 1, 2013. Use of an inaccurate figure could result in inadequate reimbursement to providers, which could adversely affect the health, safety and/or welfare of the individuals living in residences operated by those providers.

Subject: Rent Allowance Offset (SSI update) for IRAs and Community Residences and Annual Increase Percentage for Leases for Real Property.

Purpose: Update the rent allowance offset for IRAs and Community Residences and the annual increase percentage for leases for real property.

Public hearing(s) will be held at: 10:30 a.m., March 4, 2013 and March 6, 2013 at Office of People with Developmental Disabilities, Counsel's Office Conference Rm., 44 Holland Ave., Albany, NY.

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

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

Text of emergency/proposed rule: Section 635-6.3(b)(3) is amended as follows:

(3) Annual increase percentage.

(i) The annual increase percentage for 2012 is 1.97%.

(ii) The annual increase percentage for 2013 is 2.5%.

Section 671.7(a)(9) is amended by the addition of a new subparagraph (xx) as follows:

(xx) Effective January 1, 2013:

NYC, Nassau, Rockland, Suffolk, and Westchester Counties	*$32.90 per day*
Rest of State	*$31.90 per day*

Note: Rest of paragraph remains unchanged.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 30, 2013.

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

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described 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 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. Section 41.36(c) of the Mental Hygiene Law requires OPWDD to establish fees or rates for community residences.

c. OPWDD has the responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OPWDD.

2. Legislative objectives: These emergency/proposed amendments further the legislative objectives embodied in sections 13.09(b), 41.36 and 43.02 of the Mental Hygiene Law. The emergency/proposed amendments update the rent allowance offset for IRAs and Community Residences and the annual increase percentage for leases for real property.

3. Needs and benefits:

Section (a) below describes the needs and benefits of the rent allowance offset and section (b) below does the same for the annual increase percentage.

a. An essential element of OPWDD's price setting and reimbursement methodologies for IRAs and community residences is an offset for rent which is based on the Supplemental Security Income per diem allowances consistent with levels determined by the Federal Social Security Administration for Congregate Care level II. SSI levels for 2013 were increased. Without these amendments, the prices established by OPWDD for these facilities might not be properly offset by the amount of rent received by the provider from other sources (primarily SSI).

b. For continuing lease arrangements, OPWDD has discontinued its practice of conducting site-specific rent studies after the initial lease approval. Instead, it has implemented an annual calendar year increase in the allowable lease costs. The increase is determined by multiplying the base lease amount by a percentage increase established in the regulation. OPWDD updates this percentage increase annually in regulation based on the Rent of Primary Residence component of the Consumer Price Index. This guarantees an independently derived, statistically sound and uniform means to adjust lease reimbursements fairly and expeditiously.

4. Costs:

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

Regarding the rent allowance offset, the modest increase in the rent offset in the methodology for setting prices for community residences and IRAs will reduce overall expenditures for these programs by $2,266,164. The federal share of this reduction is $521,218 and the state share is $1,744,946.

Regarding the annual increase percentage for leases, OPWDD expects that there will be an increase in costs to the State of approximately $885,000.

There will be no impact to local governments as a result of either of these amendments.

b. Costs to private regulated parties: There are no initial capital investment costs or initial non-capital expenses for either of these amendments.

Regarding the rent allowance offset, providers are realizing an increase in revenue attributable to the increase in SSI for individuals receiving services, which the individuals who live in the certified residences use to pay rent to the provider. OPWDD estimates that the overall increase in revenue attributable to the SSI increase is approximately $2,266,164. These emergency/proposed amendments will reduce reimbursement to providers by the same amount, so that overall providers will receive the same total revenue.

Regarding the annual increase percentage for leases, there are no additional costs associated with implementation and continued compliance with the rule. There may be differences in the reimbursement received for specific facilities between the reimbursement in accordance with the methodology in effect prior to 2012 and the current methodology using the annual percentage increase for 2013, with some reimbursement higher and some lower. However, OPWDD expects that differences will be minor and that the overall reimbursement received by all providers will be about the same and that overall the result will be cost neutral.

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

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

7. Duplication: The emergency/proposed amendments do not duplicate any existing State or Federal requirements that are applicable to IRAs and community residences or other services for persons with developmental disabilities.

8. Alternatives:

Section (a) below describes the alternatives considered for the rent allowance offset and section (b) below does the same for the annual increase percentage.

a. The current course of action as embodied in these emergency/proposed amendments reflects what OPWDD believes to be a fiscally prudent, cost-effective reimbursement of IRA facilities and community residences. There is no alternative to emergency adoption that would allow for prompt, timely implementation updating of the SSI per diem levels contained in the emergency/proposed amendments.

b. OPWDD decided to use the September CPI figure for consistency from year to year. Since the September CPI figure was not available until mid October, there was not enough time for OPWDD to propose a non-emergency rulemaking using the September figure and still have the rule effective on January 1, 2013. OPWDD is consequently filing the regulation in December using the emergency/proposed rulemaking process.

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

10. Compliance schedule: The emergency rule is effective January 1, 2013. OPWDD has concurrently filed the rule as a Notice of Proposed Rule Making, and it intends to finalize the rule as soon as possible within the time frames mandated by the State Administrative Procedure Act.

These amendments do not impose any new requirements with which regulated parties are expected to comply.

Regulatory Flexibility Analysis

A regulatory flexibility analysis for small businesses and local governments is not being submitted because these amendments do not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses. There are no professional services, capital, or other compliance costs imposed on small businesses as a result of these amendments.

Regarding the rent allowance offset, the amendments are concerned with updating the rent offsets, which are based on the Supplemental Security Income (SSI) per diem levels and are a component of OPWDD's price setting methodology for Individualized Residential Alternatives (IRAs) and community residences. Since the amendments do not increase or decrease overall funding for the affected facilities, OPWDD expects that their adoption will not have any adverse effects on regulated parties.

Regarding the annual increase percentage for leases, in lieu of site-specific documentation of lease renewal costs and rent studies, OPWDD is adjusting the existing allowable lease costs for all sites each calendar year by a percentage established in regulation. The percentage corresponds to the annual increase in the Rent of Primary Residence component of the Consumer Price Index. OPWDD expects this measure will not have an adverse economic effect on small businesses because an examination of the specific index to be utilized demonstrated a close correlation to historical rent increases for properties already being reimbursed.

These amendments do not impose any requirements on local governments.

These amendments will consequently have no adverse impacts on small businesses or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not being submitted because the amendments do not impose any adverse impact or significant 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 amendments.

Regarding the rent allowance offset, the amendments are concerned with updating the rent offsets, which are based on the Supplemental Security Income (SSI) per diem levels and which are a component of OPWDD's price setting methodology for Individualized Residential Alternatives (IRAs) and community residences. Since the amendments do not increase or decrease overall funding for the affected facilities, OPWDD expects that their adoption will not have adverse effects on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported budgets and costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodology has been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Regarding the annual increase percentage for leases, in lieu of site-specific documentation of lease renewal costs and rent studies, OPWDD is adjusting the existing allowable lease costs for all sites each calendar year by a percentage established in regulation. The percentage corresponds to the annual increase in the Rent of Primary Residence component of the Consumer Price Index. OPWDD expects this measure will not have an adverse effect on entities in rural areas because an examination of the specific index to be utilized demonstrated a close correlation to historical rent increases for properties already being reimbursed.

This amendment will consequently have no adverse impacts on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

Regarding the rent allowance offset, the amendments are concerned with updating the rent offsets, which are based on the Supplemental Security Income (SSI) per diem levels and are a component of OPWDD's price setting methodology for Individualized Residential Alternatives (IRAs) and community residences. Since the amendments do not increase or decrease overall funding for the affected facilities, OPWDD expects that their adoption will not have a substantial adverse impact on jobs or employment opportunities in New York State.

Regarding the annual increase percentage for leases, in lieu of site-specific documentation of lease renewal costs and rent studies, OPWDD is adjusting the existing allowable lease costs for all sites each calendar year by a percentage established in regulation. The percentage corresponds to the annual increase in the Rent of Primary Residence component of the Consumer Price Index. OPWDD expects this measure will not have a substantial adverse impact on jobs or employment opportunities in New York State because an examination of the specific index to be utilized demonstrated a close correlation to historical rent increases for properties already being reimbursed. Consequently, the amendments are expected to have a neutral overall impact on jobs and employment opportunities among providers.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Whether to Grant, Modify or Deny a Petition by Consolidated Edison Proposing Revisions to Its Demand Response Programs

I.D. No. PSC-03-13-00001-P

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

Proposed Action: The Commission is considering whether to grant, modify or deny a petition by Consolidated Edison Company of New York, Inc. proposing revisions to its demand response programs.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Whether to grant, modify or deny a petition by Consolidated Edison proposing revisions to its demand response programs.

Purpose: Whether to grant, modify or deny a petition by Consolidated Edison proposing revisions to its demand response programs.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a revised petition filed on December 17, 2012 by Consolidated Edison Company of New York, Inc. (Company) in which it proposes certain changes to its demand response programs. According to the Company, the modifications it proposes would make its demand response programs more customer friendly, allow for greater innovation, and help increase enrollment by simplifying program rules and launching user friendly technology.

To achieve the above, the Company proposes in its petition changes to its Commercial System Relief Program (''CSRP'' or ''Rider S''), Distribution Load Relief Program (''DLRP'' or ''Rider U'') and Direct Load Control Program (''DLC'' or ''Rider L) and, completion of the Residential Smart Appliance Program (''RSAP'') pilot. 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.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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-E-0115SP10)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-03-13-00002-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 Jamaica

161 Realty, LLC to submeter electricity at 90-14 161st Street, Jamaica, 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 Jamaica 161 Realty, LLC to submeter electricity at 90-14 161st Street, Jamaica, 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 Jamaica 161 Realty, LLC to submeter electricity at 90-14 161st Street, Jamaica, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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.

(12-E-0560SP1)