

## Amendment to Limitations of Operating Certificates

Effective date: 1/10/12

Pursuant to the authority vested in the Public Health and Health Planning Council, and subject to the approval of the Commissioner of Health by Section 2803(2)(a) of the Public Health Law, section 401.2 of Part 401 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended to be effective upon filing with the Secretary of State, to read as follows:

Section 401.2 is amended to read as follows:

401.2 Limitations of operating certificates. Operating certificates are issued to established operators subject to the following limitations and conditions:

(a) The medical facility shall control admission and discharge of patients or residents to assure that occupancy shall not exceed the bed capacity specified in the operating certificate, except that a hospital may temporarily exceed such capacity in an emergency.

(b) An operating certificate shall be used only by the established operator for the designated site of operation, except that the commissioner may permit the established operator to operate at an alternate or additional site approved by the commissioner on a temporary basis in an emergency. [provided that an] An operating certificate issued for a facility approved to provide:

(1) chronic renal dialysis services shall also encompass the provision of such services to patients at home;

(2) comprehensive outpatient rehabilitation facility (CORF) services shall also encompass the provision of the following services offsite: physical therapy, occupational therapy, speech pathology and in addition, home visits to evaluate the home environment in relation to the patient's established treatment goals; and

(3) outpatient physical therapy, occupational therapy and/or speech-language pathology services shall also encompass the provision of home visits to evaluate the home environment in relation to the patient's established treatment goals.

(c) An operating certificate shall be posted conspicuously at the designated site of operation.

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

The authority for the promulgation of these regulations is contained in section 2803(2)(a)(v) of the Public Health Law, which authorizes the Public Health and Health Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner, that define standards and procedures relating to hospital operating certificates.

### **Legislative Objective:**

The regulatory objective of this authority is to permit the Commissioner of the Department of Health to ensure access to health care in communities where a crisis has prevented or limited an existing local health care facility operator from operating at the site designated on its operating certificate.

### **Needs and Benefits:**

This amendment would give the Commissioner the ability to safeguard the health and welfare of residents of areas affected by emergency situations by permitting operators of health care facilities to resume operations at temporary sites. Under the existing regulation, the Commissioner has no authority to permit an operator to operate its health care facility at any site other than that designated on the operating certificate. In the event all or part of a facility cannot be used due to circumstances related to an emergency such as a natural disaster or a fire, this amendment would permit the

Commissioner to act quickly to ensure that the patients or residents of the operator are temporarily served at an alternate or additional site appropriate under the circumstances. The operator of the affected facility would be able to continue to meet the needs of its patients or residents at a safe and appropriate alternate or additional site pending the repair, replacement or relocation of the designated site of operation.

**COSTS:**

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

None. The ability to receive revenue through continued operations during the temporary relocation would be a benefit to the regulated entity.

**Cost to the Department of Health:**

There will be no costs to the Department.

**Local Government Mandates:**

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

**Paperwork:**

This amendment will increase the paperwork for providers only to the extent required by the temporary relocation of their operations.

**Duplication:**

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

**Alternatives:**

No alternatives were considered, as § 401.2 (b) presents the only barrier to allowing a health care facility operator to operate at a site not designated on its operating certificate.

**Federal Standards:**

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

**Compliance Schedule:**

The proposed amendment will become effective upon filing with the Secretary of State.

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## **REGULATORY FLEXIBILITY ANALYSIS**

### **Effect on Small Businesses and Local Governments:**

No impact on small businesses or local governments is expected.

### **Compliance Requirements:**

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

### **Professional Services:**

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

### **Compliance Costs:**

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

### **Economic & Technology Feasibility:**

This amendment does not impose any new financial or technical burdens upon regulated entities.

### **Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Small Business Participation:**

Any operator of a hospital as defined under Article 28 of the Public Health Law, regardless of size, may need to operate its facility at another or additional location in an emergency. This amendment would allow it to do so.

**No Amelioration or Cure Period Necessary:**

This amendment does not involve the establishment or modification of a violation or of penalties associated with a violation. It merely gives operators of hospitals as defined under Article 28 of the Public Health Law the ability to temporarily operate at sites not designated on their operating certificates in times of emergency. Therefore, as no new penalty could be imposed as a result of this amendment, no cure period was included.

## **RURAL AREA FLEXIBILITY ANALYSIS**

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

This rule will apply to all operators of hospitals as defined under Article 28 of the Public Health Law. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

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

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

### **Compliance Costs:**

There are no direct costs associated with compliance.

### **Minimizing Adverse Impact:**

There is no adverse impact.

### **Opportunity for Rural Area Participation:**

Any operator of a hospital as defined under Article 28 of the Public Health Law, including those in rural areas, may need to operate its facility at another location in an emergency. This amendment would allow it to do so.

## **JOB IMPACT STATEMENT**

### **Nature of Impact:**

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

### **Categories and Numbers Affected:**

This rule will apply to all operators of hospitals as defined under Article 28 of the Public Health Law.

### **Regions of Adverse Impact:**

This rule will apply to operators of hospitals as defined under Article 28 of the Public Health Law in all regions within the State, but it will have no adverse impact on those operators or their employees.

### **Minimizing Adverse Impact:**

The rule would not impose any additional requirements upon regulated entities, and therefore there would be no adverse impact on jobs or employment opportunities.

### **Self-Employment Opportunities:**

The rule is expected to have no impact on self-employment opportunities.

## **EMERGENCY JUSTIFICATION**

The amendment to 10 NYCRR 401.2 (b) will give the Commissioner the ability to safeguard the health and welfare of residents of areas affected by emergency situations by permitting operators of health care facilities licensed pursuant to Public Health Law Article 28 (“facilities”) to resume or continue operations at temporary sites.

Recent weather events have required the temporary evacuation of facilities in the New York metropolitan area and relocation of facilities in Broome and Tioga Counties due to flooding. Section 401.2 (a) of Title 10 allows operators to temporarily exceed the bed capacities stated on their facilities’ operating certificates, which, during the recent emergencies, has allowed operators of facilities impacted by those weather events to transfer their patients or residents to other facilities temporarily. This was effective in the New York metropolitan area due to the availability of adequate space in surrounding facilities and due to the lack of any significant damage to the evacuated facilities. In Broome and Tioga Counties, however, the heavy flooding caused lasting damage to facilities, thereby threatening patients’ access to health care in clinic space and requiring residents of nursing homes to be moved to space in other nursing homes in the area.

Because section 401.2 (b) of Title 10 currently limits an operator’s operating certificate to the site of operation set forth in the operating certificate, an operator of an impacted facility is not able to care for its patients or residents at any other site until the Commissioner has approved a certificate of need application for the relocation of the facility. In Broome County, a hospital filed applications to relocate some of its extension clinics, but a more expedient process could have better mitigated issues of access to

health care. Residents of flooded nursing homes have been cared for in other local nursing homes that had adequate space due to the recent decertification of beds in that area. Although an application to relocate one of the flooded nursing home is expected, currently, nursing homes in Broome County are now at capacity and are unable to accept hospital patients who need to be discharged to nursing home level of care. The number of such patients has been steadily increasing.

This amendment to 10 NYCRR 401.2 (b) is necessary now to allow appropriate arrangements by operators of affected facilities in a manner that will not adversely impact the ability of hospitals in Broome County to properly discharge patients to area nursing homes. The amendment is also necessary to ensure access to appropriate health care for patients or residents during the next time of emergency.