

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; or C for first Continuation.)

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

Banking Department

EMERGENCY RULE MAKING

Compliance with Community Reinvestment Act Requirements

I.D. No. BNK-49-06-00002-E

Filing No. 1385

Filing date: Nov. 17, 2006

Effective date: Nov. 20, 2006

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

Action taken: Amendment of Part 76 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 10, 14(1) and 28-b

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

Specific reasons underlying the finding of necessity: The purpose of the Community Reinvestment Act (“CRA”) is to encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations. Every New York State–chartered bank must comply with both the State and federal CRA laws and regulations and is examined by State and federal regulators with respect to CRA.

Effective September 1, 2005, State chartered banks will have to comply with the amended federal CRA regulations recently adopted jointly by the

Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

When Part 76 was first adopted, and for the subsequent amendments made thereto, the State CRA regulation was designed to create compatibility with the federal CRA regulations so that banks chartered under the New York Banking Law would not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden. Consequently, the recently adopted CRA federal amendments which become effective September 1, 2005, necessitate the emergency adoption of the amendments to Part 76 of the General Regulations of the Banking Board to make the State CRA regulations compatible with the federal CRA regulation.

Subject: Compliance with Community Reinvestment Act requirements.

Purpose: To encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations.

Substance of emergency rule: Section 76.2(b) is amended to include references to “metropolitan divisions” in determining an area’s median family income.

Section 76.2(f) is amended to revise the definition of “community development” to include activities that revitalize or stabilize disaster areas and distressed or underserved middle-income nonmetropolitan geographies.

Section 76.2(q) is amended to add a definition of “metropolitan division”.

Sections 76.2(q) to 76.2(w) are renumbered to account for the added definition in Section 76.2(q), as noted above.

Section 76.2(t) is amended to raise the asset threshold for a “small banking institution” to \$1 billion, to introduce the new concept of an “intermediate small banking institution,” and to add provisions for adjusting the asset thresholds for small and intermediate small banking institutions.

Section 76.2(u) is amended to reflect the aforementioned renumbering, and to update references to the Banking Department’s address.

Section 76.2(v) is amended to reflect the aforementioned renumbering, to clarify a reference to Federal Reserve Regulation BB and to update references to the Banking Department’s address.

Section 76.5(a) is amended to replace the requirement for biennial CRA examinations with more flexible CRA examination scheduling criteria and to clarify the connection between the numerical ratings specified in Part 76 and the words commonly used to describe the rating.

Section 76.5(b) is amended to provide examples of laws, rules and regulations that, when violated, could lead to reduced CRA performance ratings.

Section 76.6(b) is amended to include references to metropolitan divisions.

Section 76.6(c)(1) is amended to include references to metropolitan divisions.

Section 76.8(a)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending as part of the institution’s CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.8(b)(2) is amended to eliminate a reference to loan renewals.

Section 76.8(c)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending by an affiliate of the institution as part of the institution’s CRA

performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.8(d) is amended to clarify that the loans being discussed in the Section are community development loans.

Section 76.8(d)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending by an affiliate of the institution as part of the institution's CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.10(d)(1) is amended to clarify the circumstances under which additional consideration will be given for branches located outside low- or moderate-income areas.

Section 76.10(d)(2) is amended to clarify the criteria for evaluating an institution's record of opening new branches and closing existing branches.

Section 76.10(f) is amended to add a provision specifying that the Banking Department will look favorably upon an institution's efforts to establish a Banking Development District.

Section 76.12(a)(1) is added to identify which performance criteria apply to small banking institutions that are not intermediate small banking institutions.

Section 76.12(a)(2) is added to identify the performance criteria that apply to intermediate small banking institutions.

Section 76.12(b) is added to delineate the Lending Test criteria that apply to all small banking institutions.

Section 76.12(c) is added to identify the Community Development Test performance criteria that apply only to intermediate small banking institutions.

Section 76.13(g)(1) is amended to correct an inaccurate cross-reference.

In addition, various technical amendments have been made to Part 76 to correct punctuation, renumber sub-paragraphs, and make similar minor adjustments.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire February 14, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Secretary to the Banking Board, Banking Department, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Banking Law Sections 10, 14(1) and 28-b authorize the Banking Board to promulgate rules and regulations effectuating the provisions of the Community Reinvestment Act ("CRA").

2. Legislative Objectives:

The purpose of CRA is to encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations. The amendments to Part 76 make compatible the New York State CRA regulations to the changes made to the federal CRA regulations, recently adopted jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (the "Federal Agencies") that became effective on September 1, 2005. As a result, the amendments establish a CRA framework paralleling that in the federal CRA regulation, by which the State of New York Banking Department ("Banking Department") can assess a banking institution's record of helping to meet the credit needs of its local community.

3. Needs and Benefits:

Every New York State-chartered bank must comply with both the State and federal CRA laws and regulations. Thus, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. This rule making primarily involves amendments to Part 76 with respect to certain provisions of the State CRA regulation to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law do not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden.

Specifically, the rule includes amendments that reduce the regulatory burden imposed on banks with an asset size between \$250 million and \$1 billion, now referred to as "intermediate small banking institutions", without regard to holding company affiliation, by exempting them from CRA

loan data collection and reporting obligations. The intermediate small banking institutions will not be subject to the lending, investment, and service CRA performance tests. Instead, their CRA performance will be evaluated under the small bank lending test combined with a flexible new community development CRA performance test. This has the effect of reducing regulatory burden on institutions that fall within this category because they are relieved from their obligation to collect and report information about small business, small farm, and community development loans.

As mentioned above, the rule includes the implementation of a community development test for intermediate small banking institutions that provides a more appropriate framework for assessing community reinvestment performance by these banks. The number and amount of community development loans, the number of qualified investments, and the provision of community development services by an intermediate small banking institution, and the bank's responsiveness through such activities to community development lending, investment, and service needs, are evaluated in the context of the individual bank's capacities, business strategy, the bank's assessment area(s), and the number and types of opportunities for community development activities.

The rule also revises the definition of "community development" to increase the number and kinds of tracts in which bank activities are eligible for community development consideration. Specifically, the category of community development with respect to activities that "revitalize or stabilize" is revised to provide that activities that revitalize or stabilize areas designated by the federal agencies as "distressed or underserved nonmetropolitan middle-income geographies" will qualify as community development activities. In addition, the rule extends the definition of "community development" to cover efforts made by banks to revitalize or stabilize designated disaster areas.

Further, the rule amends Part 76 to reflect certain technical changes to the regulation implementing the CRA to conform to changes made by the Office of Management and Budget ("OMB") regarding the standards for defining Metropolitan Statistical Areas, and changes related to census tracts adopted by the U.S. Bureau of the Census ("Census"). OMB standards for defining statistical areas provide nationally consistent definitions to use when collecting, tabulating and publishing federal statistics by geographic area. The CRA regulation relies on OMB standards for defining metropolitan areas for purposes of CRA data collection and reporting and for delineating institutions' assessment areas.

The CRA definition of "geography" affects CRA assessment area delineation, data collection and reporting. The CRA regulation defined the term "geography" as a "census tract or a block-numbering area delineated by the United States Bureau of the Census in the most recent decennial census." Beginning with the 2000 Census, the Census only assigns tracts and no longer assigns block-numbering areas. Accordingly, the regulation amends the definition of geography to delete the term "block-numbering area".

Amendments to Part 76 also establish a CRA examination schedule for State chartered banks that will more closely align, to the extent feasible, the State CRA examination schedule with that of the bank's federal regulator, thereby eliminating, when possible, non-concurrent CRA examinations.

In addition, the rule includes certain amendments that clarify the existing CRA regulations to assist regulated entities whose CRA performance is being assessed. In particular, Part 76 is amended to clarify, by way of examples, actions that evidence discrimination, or evidence credit practices that violate an applicable law, rule, or regulation. Such evidence will adversely affect the evaluation of a bank's CRA performance.

Also included in the rule are clarifying amendments that: (a) describe the level of CRA performance associated with the CRA numerical performance ratings currently referred to throughout the regulation, (b) explain the criteria currently considered for evaluating a bank's CRA performance with respect to branch distribution, (c) specify the data referred to that must be maintained with respect to additional lending activity if banks elect to have additional lending activity considered in assessing their CRA performance, (d) make explicit the Banking Department's already existing practice to consider a bank's efforts to establish a Banking Development District in evaluating the bank's service test CRA performance criteria, and (e) state the Department's existing practice to apply the CRA performance criteria uniformly.

In addition to the foregoing, there are other small amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number

sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

4. Costs:

Costs to State Government: None.

It is expected that there will not be an increase in the amount of examiner hours needed to conduct CRA examinations of State-chartered banks by amending the State's CRA regulations to create compatibility with the federal CRA regulations, and establishing a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator.

Costs to Local Government: None.

Costs to the Regulated Entities:

The Banking Department expects that because every New York State-chartered bank must comply with both the State and federal CRA laws and regulations, and the rule primarily seeks amendments to the State's CRA regulation to create compatibility with the federal CRA regulations, there will be no additional costs to the regulated entities due to the amendments to Part 76.

It is expected that the changes in Part 76, overall, will result in cost-savings to the regulated entities. Specifically, because the amendments to Part 76 primarily create compatibility with the federal CRA regulations, New York State-chartered banks that are subject to both the State and federal CRA laws and regulations will not incur the additional costs that would likely result if the regulated entities were required to satisfy two conflicting sets of CRA regulations. The estimated savings to the regulated entities in this regard can not be quantified by the Banking Department because there are a number of factors affecting a bank's CRA compliance costs, including the institution's asset size, the scope and type of its CRA programs, and the personnel involved in administering the programs and compliance with CRA.

Additionally, because the rule establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator, eliminating the regulatory burden of non-concurrent examinations, when possible, in this area will eliminate additional costs to the regulated entities for CRA examinations. The Banking Department is unable to estimate the savings to the regulated entities in this respect because the costs to an institution for an on-site CRA examination can vary greatly according to the institution's asset size, the scope and type of its CRA programs, and the number of personnel needed to assist in connection with the examination.

5. Local Government Mandates:

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

6. Paperwork:

The rule will provide regulatory relief for State-chartered banks with an asset size between \$250 million and \$1 billion (intermediate small banking institutions) because it exempts these banks from CRA loan data collection and reporting obligations. As a result, such intermediate small banking institutions will be relieved of their obligation to collect and report information to the State and federal regulators about small business, small farm, and community development loans.

Additionally, since the rule establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator, a reduction in paperwork will result since the banks will have to produce the necessary paperwork only once per CRA evaluation period for concurrent examinations.

7. Duplication:

Every New York State-chartered bank must comply with both the State and federal CRA laws and regulations. Consequently, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. The rule seeks amendments to Part 76 of the State CRA regulation to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law do not have to satisfy conflicting sets of CRA regulations.

8. Alternative Approaches:

Proposal – New York State-chartered banks must comply with both the State and federal CRA laws and regulations. Therefore, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. As previously discussed in the Needs and Benefits section contained herein, the rule is necessary because it primarily amends Part 76 in various ways so that the

State CRA regulation is compatible with the federal CRA regulation and establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator.

Due to the fact that State-chartered banks are required to comply with State and federal laws and regulations with respect to CRA, the Banking Department reasoned when Part 76 was first established, and during subsequent amendments thereto, that the State CRA regulation should be compatible with the federal CRA regulation. This approach to CRA has provided the regulated institutions with a consistent set of performance criteria with respect to their CRA activity. Accordingly, the rule contains amendments to Part 76 that will again provide a consistent approach to CRA compliance for the regulated entities so that they will not have to satisfy conflicting sets of CRA regulations. To the extent possible, it will also enable them to be examined concurrently by the State and federal regulator for CRA purposes, thereby eliminating the regulatory burden of non-concurrent CRA examinations. In the past, preventing regulated institutions from having to satisfy two different sets of CRA regulations has reduced their CRA regulatory burden. For that reason, it is expected that the current amendments will have a similar effect.

Do not propose the rule – If this alternative were considered, regulated entities would be faced with CRA compliance requirements under the State and federal regulations that would be substantially different.

The regulated entities also would be required to submit to non-concurrent CRA examinations by the State and federal regulators. As explained in the Needs and Benefits section, this approach was not considered because the Banking Department believes that it is unnecessary to increase the regulatory burden placed on State-chartered banks by having them comply with conflicting sets of CRA regulations and subjecting them to non-concurrent CRA examinations.

9. Federal Standards:

Federal CRA regulations recently adopted by the Federal Agencies become effective on September 1, 2005. The rule amends the State CRA regulation to make it compatible with the federal CRA regulations.

10. Compliance Schedule:

Compliance with the rule is required upon its becoming effective.

Regulatory Flexibility Analysis

The rule makes amendments to Part 76, the State's CRA regulation, primarily to make it compatible with the recently amended federal CRA regulations, which become effective September 1, 2005. All New York State-chartered banks must comply with both the State and federal CRA laws and regulations.

Effect of the rule:

With respect to asset size of the State-chartered banks, the rule specifically includes amendments to Part 76 similar to the changes recently adopted in the federal CRA regulations, that reduce the regulatory burden imposed on banks with an asset size between \$ 250 million and \$ 1 billion (referred to as "intermediate small banking institutions"), without regard to holding company affiliation. These amendments exempt intermediate small banking institutions from CRA loan data collection and reporting requirements. Also, the intermediate small banking institutions will not be subject to the lending, investment, and service CRA performance tests. Instead, their CRA performance will be evaluated under the small bank lending test combined with a flexible new community development CRA performance test. This has the effect of reducing regulatory burden on institutions that fall within this category because they are relieved from their obligation to collect and report information about small business, small farm, and community development loans.

The implementation of a new community development test for the intermediate small banking institutions will provide a more appropriate framework for assessing community reinvestment performance by these banks. The number and amount of community development loans, the number of qualified investments, and the provision of community development services by an intermediate small bank, and the bank's responsiveness through such activities to community development lending, investment, and service needs is evaluated in the context of the individual bank's capacities, business strategy, the bank's assessment area(s), and the number and types of opportunities for community development activities. Accordingly, because the performance standards for the intermediate small banking institutions will have the effect of reducing regulatory burden on these institutions, it is apparent that the amendments will not impose any appreciable or substantial adverse impact on State-chartered banks licensed under New York Law.

The rule affects State-chartered banks. It will have no effect on local governments because there are no local governments that are State-chartered banks.

Rural Area Flexibility Analysis

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. As is more fully described in the Regulatory Impact Statement, the rule contains amendments to Part 76 to make various changes with respect to the ways in which the CRA performance is assessed for banks with a certain asset size to make the State CRA rules compatible with the recently adopted amendments to the federal CRA regulation. The amendments to Part 76 also establish a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator. Additionally, amendments to Part 76 seek to clarify certain provisions of the existing State CRA regulation to assist the regulated entities whose CRA performance is being assessed. Finally, there are certain amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

Consequently, there is nothing about the character and nature of the rule that would make it difficult for, or prevent State-chartered banks from complying with the rule based on a particular office location. Accordingly, it is unlikely that the rule would cause regulated parties to seek flexibility with respect to any part, or parts thereof, even if the regulated parties were located in a designated rural area as defined in New York State Executive Law Section 481(7).

Job Impact Statement

The purpose of CRA is to encourage banking institutions to help meet the credit needs of their local communities, including low and moderate income neighborhoods, consistent with safe and sound operations. Every New York-State chartered bank must comply with both the State and federal CRA laws and regulations and is examined by State and federal regulators with respect to CRA. Recent amendments to the federal CRA regulation that apply to federal as well as State-chartered banks were adopted and will become effective September 1, 2005. Accordingly, the amendments to Part 76, the State's CRA regulations, are intended primarily to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law will not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden.

As is more fully described in the Regulatory Impact Statement, the rule contains amendments to Part 76 to make various changes with respect to the ways in which certain bank's CRA performance is assessed to make the State CRA rules compatible with the recently adopted amendments to the federal CRA regulation. Furthermore, amendments to Part 76 establish a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator. Additionally, amendments to Part 76 seek to clarify certain provisions of the existing State CRA regulation to assist the regulated entities whose CRA performance is being assessed. Finally, there are certain amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

Accordingly, based on the nature and purpose of the rule, it will have no impact on jobs in New York State.

Education Department

EMERGENCY RULE MAKING

Behavioral Interventions

I.D. No. EDU-28-06-00005-E

Filing No. 1391

Filing date: Nov. 17, 2006

Effective date: Nov. 18, 2006

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

Action taken: Amendment of sections 19.5, 200.1, 200.4 and 200.7; and addition of section 200.22 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 210 (not subdivided), 305(1), (2) and (20), 4401(2), 4402(1), 4403(3) and 4410(13)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed rule is to establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; to provide for a child-specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive interventions.

Until the adoption of emergency regulations, effective June 23, 2006, neither New York State Education Law nor the Regulations of the Commissioner prohibited the use of aversive interventions in school programs serving New York State students. Aversive interventions have the potential to affect the health and safety of children, yet there was a lack of a clear policy and no standards on their use in school programs. Through site visits, reports and complaints filed by parents, school districts and others, the Department identified concerns with preschool programs serving children with disabilities that use aversive interventions such as sprays to the face and noxious tastes placed on the child's lips, and an out-of-state residential school serving more than 145 New York State students with disabilities that is using contingent food programs, mechanical restraints and electric shock interventions to modify students' behaviors. A recent site review of the out-of-state residential school identified significant concerns for the potential impact on the health and safety of New York's students placed at this school. Regulations are needed to limit the aversive interventions that inflict pain and discomfort to children and have the potential to result in physical injury and/or emotional harm. In those exceptional instances when a child displays such extreme self-injurious or aggressive behaviors as to warrant a form of punishment to intervene with the behavior, regulations are necessary to ensure that such interventions are used in accordance with the highest standards of oversight and monitoring and in accordance with research-based practices.

The proposed rule was adopted as an emergency measure at the June 2006 meeting of the Board of Regents, effective June 23, 2006, upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and safety in order to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive interventions that inflict pain or discomfort, by immediately establishing standards for the use of such interventions that will ensure they are used only when absolutely necessary and under conditions of minimal intensity and duration to accomplish their purpose. A Notice of Emergency Adoption and Proposed Rule Making was filed with the Department of State on June 23, 2006 and was published in the State Register on July 12, 2006. A second emergency adoption was taken at the September 11-12, 2006 Regents meeting to keep the rule continuously in effect until the effective date of the rule's adoption on a permanent basis.

The State Education Department has received a substantial amount of public comment on the proposed rule making in response to its publication in the State Register, and three public hearings concerning the proposed rule that were conducted by the Department in August 2006. Additional time is required to review the public comment and determine whether any revisions should be made to the proposed rule in response to the public comment.

In the event it is determined that substantial revisions must be made to the proposed rule, State Administrative Procedure Act section 202(4-a)

requires that the revised proposed rule may not be adopted as a permanent rule until at least 30 days after publication of a Notice of Revised Rule Making in the State Register. Accordingly, the proposed rule cannot be presented for permanent adoption until the January 8-9, 2007 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period for revised rules established by the State Administrative Procedure Act.

However, pursuant to SAPA section 202(6)(b), the September 2006 emergency adoption will expire on November 17, 2006 (sixty days after the date of its filing with the Department of State on September 19, 2006). A third emergency action is necessary for the preservation of the public health and safety to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive interventions that inflict pain or discomfort, by ensuring that the rule's standards providing for the use of such interventions only when absolutely necessary and under conditions of minimal intensity and duration to accomplish their purpose, remain continuously in effect until the effective date of the rule's adoption on a permanent basis.

Subject: Behavioral interventions, including aversive interventions.

Purpose: To establish standards for behavioral interventions, including a prohibition on the use of aversive interventions; provide for a child-specific exception to the prohibition on the use of aversive interventions; and to establish standards for programs using aversive interventions.

Substance of emergency rule: The Commissioner of Education proposes to amend section 19.5 of the Rules of the Board of Regents and sections 200.1, 200.4 and 200.7 of the Regulations of the Commissioner of Education, and to add a new section 200.22 of the Commissioner's Regulations, effective November 18, 2006, relating to standards for behavioral interventions, including aversive behavioral interventions. The following is a summary of the substance of the proposed amendments.

Section 19.5(a)(1) of the Rules of the Board of Regents, as amended, provides that no teacher, administrator, officer, employee or agent of a school district in New York State, a board of cooperative educational services (BOCES), a charter school, a State-operated and State-supported school, an approved preschool program, an approved private school, an approved out-of-State day or residential school, or a registered nonpublic nursery, kindergarten, elementary or secondary school in this State, shall use corporal punishment against a pupil.

Section 19.5(b) of the Rules of the Board of Regents, as amended, establishes a prohibition on the use of aversive behavioral interventions, except as provided by a child-specific exception pursuant to proposed section 200.22(e) of the Commissioner's Regulations, and defines the term 'aversive behavioral intervention.'

Sections 200.1(III) and (mmm) of the Commissioner's Regulations, as added, provide, respectively, definitions of the terms 'aversive behavioral intervention' and 'behavioral intervention plan.'

Section 200.4(d)(3)(i) of the Commissioner's Regulations, as amended, provides that the CSE or CPSE shall, in developing a student's IEP, consider supports and strategies to address student behaviors that are consistent with the requirements in section 200.22.

Section 200.7(a)(2)(i)(f) of the Commissioner's Regulations, as added, provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

Section 200.7(a)(3)(iv) of the Commissioner's Regulations, as amended, provides that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22 or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) of the Commissioner's Regulations, as added, provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

Section 200.7(c)(6) of the Commissioner's Regulations, as added, requires a private school that proposes to use or continue to use aversive behavioral interventions in its program shall submit, not later than August 15, 2006, its written policies and procedures on behavioral interventions to

the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f); provides that any school that fails to meet this requirement shall be immediately closed to new admissions of New York Students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program; and provides that failure to comply with this requirement may result in termination of private school approval pursuant to section 200.7(a)(3).

Section 200.22 of the Commissioner's Regulations, as added, establishes program standards for behavioral interventions. This section further provides that for an education program operated pursuant to section 112 of the Education Law and Part 116 of the Regulations of the Commissioner of Education, if a provision of section 200.22 relating to use of time out rooms, emergency use of physical restraints, or aversive behavioral interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of section 200.22 shall not apply.

Section 200.22(a) establishes requirements for the conduct of a functional behavioral assessment to assess student behaviors.

Section 200.22(b) establishes requirements for behavioral intervention plans.

Section 200.22(c) establishes requirements regarding the use of time out rooms.

Section 200.22(d) establishes requirements for the emergency use of physical restraints.

Section 200.22(e) establishes the process for a child-specific exception to the Regents prohibition on the use of aversive behavioral interventions, including timelines and procedures for an independent panel of experts appointed by the commissioner or commissioner's designee to make a recommendation to the CSE or CPSE and to the Commissioner as to whether a child-specific exception is warranted.

Section 200.22(f)(1) sets forth applicability provisions for the requirements set forth in the subdivision.

Section 200.22(f)(2) establishes general requirements for programs that employ the use of aversive behavioral interventions.

Section 200.22(f)(3) requires each school that uses aversive behavioral interventions to establish a Human Rights Committee to monitor the school's behavior intervention program to ensure the protection of legal and human rights of individuals.

Section 200.22(f)(4) establishes supervision and training requirements for persons who use aversive behavioral interventions.

Section 200.22(f)(5) states that aversive behavioral interventions shall be provided only with the informed written consent of the parent and no parent shall be required by the program to remove the student from the program if he or she refuses consent for an aversive behavioral intervention.

Section 200.22(f)(6) requires that the program's use of aversive behavioral interventions, including a review of all incident reports relating to such interventions, shall be subject to quality assurance reviews.

Section 200.22(f)(7) provides for ongoing monitoring of student progress in programs using aversive behavioral interventions; and requires a school district that places a student in such a program to oversee the student's education and behavior program, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the student's parent; and requires the CSE or CPSE to convene a meeting at least every six months to review the student's educational program and placement.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-28-06-00005-EP, Issue of July 12, 2006. The emergency rule will expire January 15, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Section 210 authorizes the Regents to register institutions in terms of New York standards.

Section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties charged by the Regents.

Section 4401 authorizes the Commissioner to approve private day and residential programs to serve students with disabilities.

Section 4402 establishes school district duties for education of students with disabilities.

Section 4403 outlines Department and school district responsibilities concerning education programs and services to students with disabilities. Section 4403(3) authorizes the Department to adopt rules and regulations as the Commissioner deems in their best interests.

Section 4410 outlines education services and programs for preschool children with disabilities. Section 4410(13) authorizes the Commissioner to adopt regulations.

LEGISLATIVE OBJECTIVES:

The rule carries out the above objectives to ensure that students with disabilities are provided a free appropriate public education, including behavioral assessments and interventions consistent with federal law.

NEEDS AND BENEFITS:

The rule is necessary to establish standards for behavioral interventions, including a prohibition on use of aversive behavioral interventions (ABIs); to provide for a child specific exception; and to establish standards for programs using ABIs. The rule ensures that ABIs are used only when necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring.

The rule is, in part, based on the following studies.

“On the Status of Knowledge for Using Punishment: Implications for Treating Behavior Disorders,” Dorothea C. Lerman and Christina M. Vorndran, Louisiana State University and the Louisiana Center for Excellence in Autism (*Journal of Applied Behavior Analysis*, 2002, 35, 431-464). This report, highlighting research findings relating to use of punishment to treat problem behaviors, was considered in developing standards for ABIs, including that ABIs be combined with reinforcement procedures; include procedures for generalization and maintenance of behaviors and for fading ABI use; be limited to behaviors of greatest concern; apply the lowest intensity and duration; employ strategies that increase the effectiveness of mild levels of ABIs; and use alternative procedures other than increasing an ABI’s magnitude when an aversive fails to suppress a behavior over time. The report discussed ethical and practical issues surrounding use of punishers to change behaviors and side effects of punishment including collateral effects as emotional reactions, and increases in aggressive and/or escape behaviors. The criteria to be used by the independent panel is based, in part, upon information in this study that ABIs may be indicated when the variables maintaining a problem behavior cannot be identified; when problem behavior must be suppressed rapidly to prevent serious physical harm; or when other interventions have not reduced self-injurious behavior to clinically acceptable levels without use of punishment-based interventions.

“Establishing and Maintaining Treatment Effects with Less Intrusive Consequences Via a Paring Procedure”, Christina M. Vorndran and Dorothea C. Lerman, Louisiana State University (*Journal of Applied Behavior Analysis*, 2006, 39, 35-48) discussed the need to design interventions using punishment to be the least intrusive possible and to include strategies to improve an ABI’s effectiveness and acceptability. This study was considered in proposing standards that ABIs be implemented consistent with peer-reviewed research based practices; include individualized procedures for the generalization and maintenance of behaviors and for the fading of ABI use; and employ strategies to increase the effectiveness of mild levels of ABIs.

“Contingent Electric Shock (SIBIS) and a Conditioned Punisher Eliminate Severe Head Banging in a Preschool Child”, Sarah-Jeanne Salvy, James A. Mulick, Eric Butter, Rita Kahng Bartlett and Thomas R. Linscheid, (*Behavioral Interventions*, 2004, 19:59-72), published online in Wiley InterScience (www.interscience.wiley.com), which discussed strategies that increase the effectiveness of mild levels of ABIs, was considered in establishing standards for ABI use.

“School-wide Positive Behavior Support Implementer’s Blueprint and Self-Assessment” (Center on Positive Behavioral Interventions and Supports, University of Oregon, 2004), which discussed research findings relating to negative side effects associated with the exclusive use of punishing environments and consequences, and “Why Must Behavior Intervention Plans Be Based on Functional Assessments?”, G. Roy Mayer,

California State University, Los Angeles, 1997 (published online at www.calstatela.edu/academic/adm_coun/docs/501/funcart.html) were considered in proposing standards for assessing and addressing collateral effects of the use of punishment. These studies identified that punishment-based interventions can lead to students engaging in aggressive and/or escape behaviors and foster development of negative attitudes toward self and school programs. Mayer’s article also identified that when reinforcement approaches are used to reduce behavior that match the function or reasons for the behavior, they are “just as effective as punishment approaches when used on self-injurious behavior of individuals with disabilities.” Mayer’s finding was considered in proposing the requirement that ABIs be combined with reinforcement procedures, as individually determined based on an assessment of the student’s reinforcement preferences.

“Physical Restraint in School”, Joseph B. Ryan and Reece L. Peterson, University of Nebraska-Lincoln, 2005, which discusses research, court and Office of Civil Rights rulings on individual rights of students, restraint procedures and professional training for emergency interventions, including the use of physical restraint in educational settings, was considered in proposing policy and standards for emergency physical restraint interventions.

“Functional Behavioral Assessment: Policy Development in Light of Emerging Research and Practice”, W. David Tilly, Joseph Kovalesski, Glen Dunlap, Timothy Knoster, Linda Bambara, Donald Kincaid, (March 24, 1998), developed at request of National Association of State Directors of Special Education (NASDSE) and “A Practical Guide to Functional Behavioral Assessment” Margaret E. Shippen, Robert G. Simpson and Steven A. Crites, (*Teaching Exceptional Children*, Vol. 35, No.5, pp.36-44, 2003, Council for Exceptional Children) were considered in the development of standards for functional behavioral assessments (FBAs) and behavioral intervention plans (BIPs).

COSTS:

- a. Costs to State government: See costs to the Education Department.
- b. Costs to local governments: None
- c. Costs to regulated parties: School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using ABIs and most of these have only one student where such a recommendation currently appears on the student’s individualized education program (IEP). Schools using ABIs may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).
- d. Costs to the Education Department of implementation and continuing compliance: The cost of funding a three-member independent panel of experts to provide a recommendation regarding the need for a child-specific exception is estimated at approximately \$360,000 for the first year. This calculation was based on approximately 100 requests for child-specific exceptions, at an estimated cost of \$3,600 for each student. Additional costs for State administration and oversight of the child-specific exception, including duplication of materials for the panel are estimated at \$10,000 annually. The annual costs of the review panel are expected to be less in subsequent years. These costs may be offset if the CSE/CPSE determines that a student no longer requires ABIs since the cost for one student currently placed in an out-of-state residential school for ABIs ranges from \$281,180 to \$329,970 per year.

LOCAL GOVERNMENT MANDATES:

Section 19.5(a) prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of ABIs except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.4(d)(3)(i) requires a CSE/CPSE, in developing a student’s IEP, to consider supports and strategies to address student behaviors that are consistent with program standards in section 200.22 relating to a student’s FBA, BIP, use of time out rooms, emergency interventions and ABIs.

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school, which uses a time out room as part of its behavior management approach, is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency use of physical restraints.

Section 200.22(e) provides, effective on or after October 1, 2006, whenever a CSE/CPSE is considering whether a child-specific exception to the prohibition of the use of ABIs is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE/CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception allowing the use of ABIs. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, ABIs to be used, and aversive conditioning devices where the ABIs include use of such devices.

Public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of ABIs. Each school using ABIs shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using ABIs shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), ABIs shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of ABIs is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE/CPSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use ABIs pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

PAPERWORK:

CSEs/CPSEs must compile and submit student record information and school districts must submit an application for a child-specific exception to the prohibition on the use of ABIs. Currently there are approximately 23 school districts that have students recommended for ABIs.

DUPLICATION:

The rule will not duplicate, overlap or conflict with any other State or federal statute or regulation.

ALTERNATIVES:

The Department considered other states' experiences with statutes and/or regulations prohibiting ABIs in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of ABIs, but determined there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which ABIs may be warranted.

FEDERAL STANDARDS:

The rule does not exceed any minimum federal standards.

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

SMALL BUSINESSES:

The proposed rule is necessary to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions for students with disabilities; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions and do not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

LOCAL GOVERNMENTS:

The proposed rule applies to all public school districts, boards of cooperative educational services (BOCES) and charter schools in this State. Currently, there are approximately 23 school districts that have students recommended for aversive behavioral interventions.

COMPLIANCE REQUIREMENTS:

Section 19.5(a) of the Regents Rules prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of ABIs except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.4(d)(3)(i) of the Commissioner's Regulations requires a CSE/CPSE, in developing a student's IEP, to consider supports and strategies to address student behaviors that are consistent with program standards in section 200.22 relating to a student's FBA, BIP, use of time out rooms, emergency interventions and ABIs.

Section 200.7(a)(2)(i)(f) provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

Section 200.7(a)(3)(iv) that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22 or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

Section 200.7(c)(6) requires a private school that proposed to use or continue to use aversive behavioral interventions in its program shall submit, not later than August 15, 2006, its written policies and procedures on behavioral interventions to the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f); provides that any school that fails to meet this requirement shall be immediately closed to new admissions of New York Students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program; and provides that failure to comply with this requirement may result in termination of private school approval pursuant to section 200.7(a)(3).

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school that uses a time out room as part of its behavior management approach is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency use of physical restraints.

Section 200.22(e) provides, effective on or after October 1, 2006, whenever a CSE/CPSE is considering whether a child-specific exception to the prohibition of the use of ABIs is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE/CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception allowing the use of ABIs. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, ABIs to be used, and aversive conditioning devices where the ABIs include use of such devices.

Public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of ABIs. Each school using ABIs shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using ABIs shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), ABIs shall be provided only with the parent's informed

written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of ABIs is subject to quality assurance reviews pursuant to section 200.22(f)(6) and the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE/CPSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use ABIs pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional service requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using ABIs and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using ABIs may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Regents policy to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. In developing the proposed amendment, the Department considered other states' experiences with statutes and/or regulations prohibiting aversive behavioral interventions in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought the professional expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of aversive behavioral interventions, but determined that there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which aversive behavioral interventions may be warranted. The proposed rule will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices and the highest standards of oversight and monitoring; under conditions of minimal intensity and duration to accomplish their purpose; and consistent with the requirements of the Individuals with Disabilities Education Act (IDEA).

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule will be provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. In addition, the State Education Department will schedule public hearings on the proposed amendments.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The rule will apply to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, approved preschool programs, approved private schools, approved out-of-state day or residential schools, and registered nonpublic nursery, kindergarten, elementary or secondary schools in this State, including those in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

Section 19.5(a) of the Regents Rules prohibits use of corporal punishment in school districts, BOCES, charter schools, State-operated or State-supported schools, approved preschool programs, approved private schools, approved out-of-State day or residential schools, or in registered nonpublic nursery, kindergarten, elementary or secondary schools in the State.

Section 19.5(b) prohibits use of ABIs except pursuant to a child-specific exception pursuant to section 200.22(e) and (f).

Section 200.4(d)(3)(i) of the Commissioner's Regulations requires a CSE/CPSE, in developing a student's IEP, to consider supports and strategies to address student behaviors that are consistent with program standards in section 200.22 relating to a student's FBA, BIP, use of time out rooms, emergency interventions and ABIs.

Section 200.7(a)(2)(i)(f) provides that conditional approval of private schools to serve students with disabilities shall also be based on submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

Section 200.7(a)(3)(iv) that a school may be removed from the list of approved schools five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions, including but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22 or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22(f).

Section 200.7(b)(8) provides that except as provided in section 200.22(e), an approved private school, a State-operated school or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

Section 200.7(c)(6) requires a private school that proposed to use or continue to use aversive behavioral interventions in its program shall submit, not later than August 15, 2006, its written policies and procedures on behavioral interventions to the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f); provides that any school that fails to meet this requirement shall be immediately closed to new admissions of New York Students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program; and provides that failure to comply with this requirement may result in termination of private school approval pursuant to section 200.7(a)(3).

A CSE/CPSE shall conduct a FBA in accordance with section 200.22(a) and develop and implement a BIP in accordance with 200.22(b).

Each school that uses a time out room as part of its behavior management approach is subject to section 200.22(c) requirements.

Section 200.22(d) establishes requirements regarding emergency use of physical restraints.

Section 200.22(e) provides, effective on or after October 1, 2006, whenever a CSE/CPSE is considering whether a child-specific exception to the prohibition of the use of ABIs is warranted, the school district shall submit an application to the Commissioner for referral to an independent panel of experts. The CSE/CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception allowing the use of ABIs. The school district shall notify the Commissioner when such exemption has been included in the student's IEP. An IEP providing such exemption shall identify the specific targeted behaviors, ABIs to be used, and aversive conditioning devices where the ABIs include use of such devices.

Public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools in NYS and approved out-of-State day or residential schools are subject to section 200.22(f) program standards for use of ABIs. Each school using ABIs shall establish a Human Rights Committee pursuant to section 200.22(f)(3) to monitor the program. Persons using ABIs shall be supervised and trained pursuant to section 200.22(f)(4). Pursuant to section 200.22(f)(5), ABIs shall be provided only with the parent's informed written consent and no parent shall be required by the program to remove the student from the program if the parent refuses consent. Use of ABIs is subject to quality assurance reviews pursuant to section 200.22(f)(6) and

the program shall provide for ongoing monitoring of student progress pursuant to section 200.22(f)(7), including quarterly written progress reports. A school district placing a student in such program shall ensure the student's IEP and BIP are being implemented. The CSE/CPSE shall convene at least every six months to review the student's educational program and placement, including review of written progress monitoring and incident reports, at least annual observations of, and, as appropriate, interviews with the student and regular communication with the parent. Each school proposing to use ABIs pursuant to a child-specific exception shall submit its policies and procedures consistent with section 200.22(f) to the Department for approval prior to use.

The proposed amendment will not impose any additional professional service requirements on school districts.

COSTS:

School districts may incur minimal costs to duplicate materials to submit an application for a child-specific exception and for required observations (estimated at a \$200 per student) and Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) meetings at least every six months for students receiving aversive behavioral interventions (estimated at \$1,000 per student). Currently, it is estimated that less than 30 school districts in New York State have students placed in schools using ABIs and most of these have only one student where such a recommendation currently appears on the student's individualized education program (IEP). Schools using ABIs may also incur additional administrative costs estimated at less than \$8,000 annually for implementing standards, including training (estimated at \$2,000 annually) and costs associated with convening Human Rights Committee meetings at least quarterly (e.g., administrative oversight, duplication and meeting costs estimated at \$6,000 per year).

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Regents policy to establish standards for behavioral interventions, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. In developing the proposed amendment, the Department considered other states' experiences with statutes and/or regulations prohibiting aversive behavioral interventions in school programs, including definitions, child-specific exceptions and standards; conducted a review of the research literature; and sought the professional expertise of individuals with credentials in behavioral psychology. The Department considered a full prohibition on the use of aversive behavioral interventions, but determined that there may be exceptional circumstances in which a student may be displaying behaviors that threaten the health or safety of the student for which aversive behavioral interventions may be warranted. The proposed rule will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices and the highest standards of oversight and monitoring; under conditions of minimal intensity and duration to accomplish their purpose; and consistent with the requirements of the Individuals with Disabilities Education Act (IDEA). The proposed amendments are necessary to ensure the health and safety of students. Since these requirements apply to all school districts, BOCES, charter schools, and other affected entities in the State, it is not possible to adopt different standards for entities located in rural areas.

RURAL AREA PARTICIPATION:

The proposed rule will be submitted for discussion and comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas. In addition, the State Education Department will schedule public hearings on the proposed amendments.

Job Impact Statement

The proposed rule is necessary in order to establish standards for behavioral interventions for students with disabilities, including a prohibition on the use of aversive behavioral interventions; to provide for a child specific exception to the prohibition on the use of aversive behavioral interventions; and to establish standards for programs using aversive behavioral interventions. These amendments will ensure that aversive behavioral interventions are used only when necessary; in accordance with research-based practices; under conditions of minimal intensity and duration to accomplish their purpose; and in accordance with the highest standards of oversight and monitoring. The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Proposed Rule Making on July 12, 2006, the State Education Department (SED) received the following comments.

1. General

COMMENT:

Most opposed use of aversives; some supported procedures to limit aversives and assure children receive other appropriate interventions; a few opposed any restrictions on aversives.

DEPARTMENT RESPONSE:

Use of aversives has been considered in relation to its treatment value for students with severe self-injurious behaviors, its basis in scientific research, its potential effect on a student's health and safety, and moral and ethical issues. SED does not support the use of aversives. However, some parents expressed that without this intervention their child's health and safety is at risk because of the child's severe self-injurious behaviors. Revised rule allows for new child-specific exceptions to use aversive interventions until June 30, 2009, provided that students with aversive interventions recommended on their individualized education programs (IEPs) as of June 30, 2009 may continue to be considered for a child-specific exception annually thereafter. SED will take steps during the next two years to ensure that effective research-based alternative behavioral interventions are available for all New York students.

2. Section 19.5(a) – Prohibition of corporal punishment

COMMENT:

Prohibit corporal punishment without exception; distinguish between "physical force" and "corporal punishment."

DEPARTMENT RESPONSE:

Corporal punishment is prohibited without exception. Other recommended changes are beyond scope of proposed rule making.

3. Section 19.5(b)(2) and Section 200.1(III) – Definition of aversive intervention

COMMENT:

Categorize restrictive interventions at different levels; identify aversives not allowed; add definitions of other interventions; allow aversives such as helmets and restraints necessary to avoid injury; prohibit harmful aversives such as electric shock and noxious sprays.

DEPARTMENT RESPONSE:

Revised rule revised definition of 'aversive intervention' and specifies aversives not allowed. It is not practicable to define the various forms of other behavioral interventions.

4. Section 19.5(b) – Exception to the prohibition on aversives

COMMENT:

Prohibit aversives without exception. Mild aversives may be more appropriate than time out or restraints. Allowing aversives violates students' civil rights. It is discriminatory to prohibit aversives for nondisabled students but allow them for students with disabilities.

DEPARTMENT RESPONSE:

Limited exceptions to use aversives are intended to address parent concerns for their children with severe self-injurious behaviors who may not have had the opportunity to benefit from current research and practice on the effective use of nonaversive interventions. Revised rule sunsets child-specific exception by June 30, 2009 except for students with IEPs including aversive interventions as of June 30, 2009.

5. Section 200.7 – Approval of private schools

COMMENT:

Require onsite program review by SED staff prior to approval of a new program.

DEPARTMENT RESPONSE:

SED may consider this recommendation in future rule making.

6. Section 200.22(a) – Functional Behavioral Assessment (FBA)

COMMENT:

Prohibit use of aversives and require training on FBAs and positive behavior intervention plans (BIPs). Require in-depth analyses of behaviors when shock is used.

DEPARTMENT RESPONSE:

The Individuals with Disabilities Education Act (IDEA) requires IEPs to include positive behavioral supports and services and FBAs and BIPs to be developed and implemented for students with behaviors that impede learning. The definition of BIP is revised to require intervention strategies to include positive behavioral supports and interventions.

7. Section 200.22(b) – BIPs

COMMENT:

Specify qualified professionals that can design and supervise BIPs; require all interventions, including antecedent and other consequences, be supported by peer-reviewed research.

DEPARTMENT RESPONSE:

Requirement that BIPs be designed and supervised by qualified professionals in accordance with their respective areas of professional competence has been deleted since BIPs are often developed by teams of qualified individuals. Section 200.4 requires the IEP to include, to extent practicable, programs and services that are based on peer-reviewed research.

8. Section 200.22(c) – Time Out Rooms

COMMENT:

Define time out room; prohibit its use; provide clear procedures on its use with the student's safety as the priority; prohibit seclusion.

DEPARTMENT RESPONSE:

Revised rule establishes standards for use of time out rooms including physical and monitoring requirements, parent rights and IEP requirements. Section is revised to define "time out room;" add other monitoring, policy and parent communication requirements; and clarify that time out rooms are to be used in conjunction with a BIP except for unanticipated situations that pose an immediate concern for the physical safety of the student or others.

9. Section 200.22(d) – Emergency use of physical restraints

COMMENT:

Prohibit non-emergency restraint use in facilities receiving federal funding. Adopt federal law (42 USC § 15009); allow use of mechanical restraints for emergency interventions; define physical, chemical and mechanical restraints; specify appropriate durations of restraint; add reporting requirements; and require parent consent prior to use of physical restraint.

DEPARTMENT RESPONSE:

Proposed regulation is consistent with federal law. Revised rule defines emergency; clarifies emergency interventions may not be used as a punishment and may be used only in situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed; requires the school to maintain documentation on the use of emergency interventions; and prohibits use of aversives as an emergency intervention. It is not possible to specify the appropriate duration of an emergency intervention or require parent consent prior to intervening in an emergency situation.

10. Section 200.22(e) – Child-specific exception to use aversives

COMMENT:

While most opposed a child-specific exception, comments requested clarification and additional protections if exception allowed, including: clarify criteria for when an exception is appropriate; require Panel to include other individuals, including those experienced with aversives; do not limit Panel's review to written documentation; require districts to notify SED if a previously approved aversive plan is discontinued; include an enforcement mechanism so that school districts would be held accountable for noncompliance; allow Committees on Special Education (CSEs) to reapply if alternative procedures fail to suppress or reduce behaviors; give parents the right to choose aversives; allow court-ordered use of aversives; do not allow CSEs to make the final decision to allow aversives; require more medical information and CSE consultation with a certified behavior analyst or psychologist with extensive experience in behavior analysis; do not limit aversives based on a student's unsuccessful history with positive behavioral supports; and clarify that an exception application must be submitted annually.

DEPARTMENT RESPONSE:

Panel's determination is based on the professional judgment of the Panel members in review of the individual student's behaviors, evaluations, including medical information, and history of the use of positive and other behavioral interventions used with the student. Positive behavioral supports are only one factor in the determination. Panel members must have appropriate clinical and behavioral expertise to make a determination. It is not necessary for such individuals to have experience using aversives. Only a CSE can develop a student's IEP consistent with federal and State laws and regulations.

Revised rule requires CSE to notify and provide a copy of the student's IEP to SED when a child-specific exception is in the IEP and when IEPs are amended to no longer include a child-specific exception; to require the school physician to be invited to the CSE meeting whenever a recommendation for the use of aversives is being considered; and clarify that an exception application must be submitted each year.

11. Section 200.22(f) – Program standards for the use of aversives

COMMENT:

Provide greater limitations on programs using aversives; require greater oversight and supervision when aversives used, including medical and psychological reviews, outcome measures identified and use of video cameras. Clarify what is meant by use of aversives in a humane and dignified manner. Define "aggressive behavior." Ban electric skin shock and do not allow devices that administer electric shock. Limit behaviors for which aversives can be used to only most serious ones. Give programs discretion as to type of aversives that can be used, including use of contingent physical restraints and allow aversives to be used for noncompliant and antecedent behaviors because one program reported students who were receiving aversives for noncompliance and other inappropriate behaviors are now demonstrating academic and behavioral regression. Require related services for a student receiving aversives to include "research-validated cognitive-behavior therapy" and "sensory integrative experiences." Limit use of aversive devices only with populations for which devices have been approved; and require regular maintenance of aversive devices. Allow physical restraint to be used as a contingent procedure. Adopt policies and procedures specific to the use of helmets, restraints and other mechanical devices to ensure the health and safety of a child, not to punish or inflict discomfort. Disseminate information on risks associated with using restraints, seclusion and physical force to school personnel. Prohibit use of aversive consequences in combination with negative practice (overcorrection) procedure.

DEPARTMENT RESPONSE:

Revised rule limits programs using aversives to those whose policies and procedures are approved by June 30, 2007; prohibits use of aversives by preschool programs; requires aversives be considered only for students displaying self-injurious and/or aggressive behaviors that threaten the physical well being of the student or that of others and only to address such behaviors; requires CSE to request participation of school physician to any meeting where use of aversives is being considered; requires aversives be administered by appropriately licensed professionals or certified special education teachers or under the direct supervision and direct observation of such staff; defines emergency interventions; and requires training in safe and effective restraint for staff who may be called upon to implement emergency interventions.

Use of automated aversive conditioning devices present health and safety risks. Mechanical restraint for the purpose of applying another aversive such as skin shock is corporal punishment. The CSE determines appropriate related services for a student. Proposed regulations require evidence of the safety and effectiveness of aversive devices for the population to be served. Interventions medically necessary for the treatment or protection of the student are not considered aversives.

12. Human Rights Committee (HRC)

COMMENT:

Clarify purpose of the HRC; require special educators, school psychologists and positive behavior experts as members. Allow staff employed by the agency and others not employed by the program to serve on the HRC; do not allow a physician's assistant or nurse practitioner to be used in place of a doctor and a law student or paralegal in place of a lawyer.

DEPARTMENT RESPONSE:

The HRC serves as an objective review body to protect student rights. To be practicable, flexibility to appoint a licensed physician, physician's assistant or nurse practitioner and an attorney, law student or paralegal is necessary to ensure availability of medical and legal perspectives at HRC meetings. The revised rule allows additional HRC members who are not affiliated with the program.

13. Supervision and training requirements

COMMENT:

Require higher qualifications on individuals who provide, supervise and monitor aversive interventions.

DEPARTMENT RESPONSE:

Revised rule requires appropriately licensed professionals or certified special education teachers or under the direct supervision and direct observation of such staff to administer aversives.

14. Parental Consent

COMMENT:

Ensure parents understand their rights and are provided with effective alternatives to aversives. Allow adult students to provide consent for aversives. Allow the program to discharge the student if the parent does not consent for aversives.

DEPARTMENT RESPONSE:

A school must provide the parent with written prior notice that describes any other options considered when it requests parent consent. A

program must not intentionally or unintentionally coerce a parent to provide consent. NYS does not transfer IDEA rights to the student at the age of majority.

15. School district responsibility for progress monitoring

COMMENT:

Increase school district oversight of a student in a program that uses aversives.

DEPARTMENT RESPONSE:

Revised rule requires a six-month student observation and interview.

16. Other:

COMMENT:

Restrict use of medications with negative side effects and that are not approved for children by the Food and Drug Administration.

DEPARTMENT RESPONSE:

The use of medication is beyond the scope of this rule making.

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

Supplemental Educational Services

I.D. No. EDU-49-06-00003-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 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (33), 308 (not subdivided), 309 (not subdivided) and 3713 (1) and (2)

Subject: Supplemental educational services (SES).

Purpose: To prescribe requirements regarding the use of rewards and incentives by SES providers; revise reporting dates for SES providers and local educational agencies (LEAs); and correct inaccurate references in the SES regulations.

Text of proposed rule: 1. Paragraph (2) of division (d) of section 120.4 of the Regulations of the Commissioner of Education is amended, effective March 8, 2007, as follows:

(2) The commissioner shall approve an eligible applicant for inclusion on the department’s list of approved supplemental educational service providers, upon the commissioner’s determination that its application satisfies each of the following criteria:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .

(ix) the applicant is fiscally sound and will be able to fulfill its agreement to provide services to the eligible child and the local educational agency pursuant to paragraph [(f)(6)] (f)(8) of this section;

- (x) . . .
- (xi) . . .
- (xii) . . .

(xiii) the applicant shall provide additional assurances that:

- (a) . . .
- (b) . . .
- (c) . . .
- (d) . . .

(e) the applicant will provide parents and teachers of eligible students receiving supplemental educational services and the appropriate title I LEA with information on the progress of such students in increasing achievement in a format, and to the extent practicable, in a language or other mode of communication that such parents can understand; [and]

(f) the applicant has adequate insurance for liability, property loss and personal injury involving students receiving supplemental educational services from the applicant; and

(g) the applicant shall not make any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional

program, of nominal rewards or incentives as defined in subparagraph (xvii) of paragraph (8) of subdivision (f) of this section.

2. A new paragraph (3) of subdivision (d) of section 120.4 of the Regulations of the Commissioner of Education is added, effective March 8, 2007, as follows:

(3) Where an applicant uses alternate methods for delivery of services, which may include online, Internet-based approaches, as well as other distance-learning technologies, the provision of equipment, including computers, to students to use or keep as a means of receiving such supplemental educational services, must be approved by the commissioner as part of the applicant’s instructional program.

3. Subdivision (f) of section 120.4 of the Regulations of the Commissioner of Education is amended, effective March 8, 2007, as follows:

(f) Local educational agency responsibilities. A title I LEA that is required to arrange for the provision of supplemental educational services with an approved provider pursuant to section 1116(e) of the NCLB, 20 U.S.C. section 6316(e) (Public Law, section 107-110, section 1116[e], 115 STAT. 1491-1494; Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-9328; 2002; available at the Office of Counsel, State Education Building, Room 148, Albany, NY 12234) shall:

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .

(8) contact providers selected by the parents and enter into a contractual agreement with each such provider that includes:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .
- (ix) . . .
- (x) . . .
- (xi) . . .
- (xii) . . .
- (xiii) . . .
- (xiv) . . .
- (xv) . . .

(xvi) a requirement that the provider submit to the title I LEA, [commencing on May 31, 2003 and annually thereafter,] annually on or before September 30, a final written report in a form prescribed by the commissioner that summarizes the progress of eligible students provided with supplemental educational services during the preceding academic year, pursuant to its agreement(s) with the local educational agency;

(xvii) a provision stating: “The provider is prohibited from making any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii).”

For purposes of this subparagraph, a nominal reward or incentive is defined as an award or incentive that:

- (a) does not exceed a total value of \$25 per student per year;
- (b) is directly linked to documented meaningful attendance benchmarks and/or completion of assessment and program objectives; and
- (c) is approved by the commissioner as part of the provider’s instructional program.

(9) monitor the following:

- (i) . . .

(ii) the responsibilities of each approved provider with which the title I LEA has contracted with to:

- (a) . . .
- (b) . . .
- (c) . . .
- (d) . . .

(e) comply with the applicable contractual agreement pursuant to paragraph [(5)] (8) of this subdivision;

(10) notify the State Education Department of any noncompliance by an approved provider with respect to the provider's responsibilities as listed in subparagraph [(7)(ii)] (9)(ii) of this subdivision, including immediate notification of the department of any noncompliance involving a threat to the health and/or safety of students;

(11) [commencing on June 30, 2003 and annually thereafter,] submit to the State Education Department, *annually on or before October 31*, a monitoring report of *supplemental educational services provided during the preceding academic year*, in a form prescribed by the commissioner, together with a copy of each provider's report prepared pursuant to subparagraph [(5)(xvi)] (8)(xvi) of this subdivision.

Text of proposed rule and any required statements and analyses may be obtained from: Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Jean Stevens, Interim Deputy Commissioner, State Education Department, Office of Elementary, Middle, Secondary and Continuing Education, Rm. 873, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents. Section 305(33) requires the Commissioner to adopt regulations regarding approval of providers of supplemental educational services in accordance with the provisions of the Federal No Child Left Behind Act of 2001, Pub. L. 107-110 (NCLB).

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept Federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with Federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to Supplemental Educational Services.

NEEDS AND BENEFITS:

The proposed amendment of section 120.4 of the Commissioner's Regulations is necessary to implement policy adopted by the Board of Regents regarding the provision of Supplemental Educational Services (SES). The proposed amendment will:

a. Regulate the use of rewards and incentives by SES providers; this will prevent inappropriate actions on the part of providers, prohibiting them from using incentives, gratuities, payments, or compensation to solicit enrollment, encourage parents to switch providers once students are enrolled, or attempt to influence parents, students, LEAs, LEA staff and/or school staff.

b. Amend reporting dates for SES providers and local educational agencies (LEAs) to so that accurate information and data are collected on a timeline that is most suitable for the providers and the LEAs; and

c. Correct inaccurate references in current SES regulations.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any additional program, service, duty or responsibility on local governments.

PAPERWORK:

An application submitted by a provider seeking the Commissioner's approval to offer SES services shall include an assurance that the applicant shall not make any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii).

The contract between a local educational agency (LEA) and an approved provider for the provision of SES shall include a requirement that the provider submit to the LEA annually on or before September 30, a final written report in a form prescribe by the commissioner that summarizes the progress of eligible students provided with SES during the preceding academic year, pursuant to its agreement(s) with the LEA. The contract shall also include a provision stating: "The provider is prohibited from making any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii)."

A Title I LEA that is required to arrange for the provision of SES with an approved provider shall submit to the Department, annually on or before October 31, a monitoring report of SES provided during the preceding academic year, in a form prescribed by the Commissioner, together with a copy of each provider's report prepared pursuant to section 120.4(f)(8)(xvi) of the Commissioner's Regulations.

DUPLICATION:

The proposed amendment does not duplicate existing State or federal regulations.

ALTERNATIVES:

There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that SES Providers, and LEAs required to offer SES, will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

EFFECT OF RULE:

The proposed amendment generally applies to school districts, boards of cooperative educational services and charter schools that receive funding as local educational agencies (LEAs) pursuant to the Federal Elementary and Secondary Education Act of 1965, as amended, or that seek to provide supplemental educational services (SES) as an approved provider pursuant to the No Child Left Behind Act of 2001, Pub. L. 107-110 (NCLB).

In addition to LEAs, the proposed amendment also applies to non-profit or for-profit entities, including sole proprietorships, partnerships and corporations, that seek to provide supplemental educational services as an approved provider pursuant to the NCLB. It is believed that the vast majority of potential providers are for-profit tutoring services. These range from companies with many employees, advertising their services on the Internet and elsewhere, to private individuals working out of offices in their homes and making their availability known through Internet-based and newspaper classified services. Some tutoring services are available from public and private school teachers working after hours. However, the large majority of the known providers are individuals who are not certified teachers, but who have at least a Bachelors degree and some tutoring experience. Most of the potential providers offer tutoring in a variety of

subjects and grade levels, ranging from the primary grades through college. All but a very few of these may be considered small businesses. Since the State does not license or otherwise regulate tutoring services, the number of potential providers who are small businesses is unknown and incapable of being estimated at the present time. At present, 298 SES providers have been approved by the State Education Department to provide such services under the NCLB. Approximately 97 of these providers are small businesses.

COMPLIANCE REQUIREMENTS:

Where an applicant uses alternate methods for delivery of services, which may include online, Internet-based approaches, as well as other distance-learning technologies, the provision of equipment, including computers, to students to use or keep as a means of receiving such supplemental educational services, must be approved by the commissioner as part of the applicant's instructional program.

An application submitted by a provider seeking the Commissioner's approval to offer SES services shall include an assurance that the applicant shall not make any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii).

The contract between a local educational agency (LEA) and an approved provider for the provision of SES shall include a requirement that the provider submit to the LEA annually on or before September 30, a final written report in a form prescribe by the commissioner that summarizes the progress of eligible students provided with SES during the preceding academic year, pursuant to its agreement(s) with the LEA. The contract shall also include a provision stating: "The provider is prohibited from making any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii)."

A Title I LEA that is required to arrange for the provision of SES with an approved provider shall submit to the Department, annually on or before October 31, a monitoring report of SES provided during the preceding academic year, in a form prescribed by the Commissioner, together with a copy of each provider's report prepared pursuant to section 120.4(f)(8)(xvi) of the Commissioner's Regulations.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment does not impose any additional compliance costs.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or additional costs.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy adopted by the Board of Regents. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES, charter schools and providers.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed amendment will be provided to approved small business supplemental educational services providers and each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and para-professionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators repre-

senting the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment generally applies to school districts, boards of cooperative educational services (BOCES) and charter schools that receive funding as local educational agencies (LEAs) pursuant to the Federal Elementary and Secondary Education Act of 1965, as amended, or school districts, BOCES and non-profit or for-profit entities that seek to provide supplemental educational services (SES) as an approved provider pursuant to the No Child Left Behind Act of 2001 (NCLB), including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment also applies to charter schools in such areas, to the extent that they are authorized to administer SES. At present, there are no such charter schools located in rural areas.

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

Where an applicant uses alternate methods for delivery of services, which may include online, Internet-based approaches, as well as other distance-learning technologies, the provision of equipment, including computers, to students to use or keep as a means of receiving such supplemental educational services, must be approved by the commissioner as part of the applicant's instructional program.

An application submitted by a provider seeking the Commissioner's approval to offer SES services shall include an assurance that the applicant shall not make any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii).

The contract between a local educational agency (LEA) and an approved provider for the provision of SES shall include a requirement that the provider submit to the LEA annually on or before September 30, a final written report in a form prescribe by the commissioner that summarizes the progress of eligible students provided with SES during the preceding academic year, pursuant to its agreement(s) with the LEA. The contract shall also include a provision stating: "The provider is prohibited from making any offer or advertisement of rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, students, LEAs, LEA staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once students are enrolled, and/or attempting to influence parents, students, LEAs, LEA staff and/or school staff; provided that nothing herein shall be deemed to prohibit the use, as part of the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii)."

A Title I LEA that is required to arrange for the provision of SES with an approved provider shall submit to the Department, annually on or before October 31, a monitoring report of SES provided during the preceding academic year, in a form prescribed by the Commissioner, together with a copy of each provider's report prepared pursuant to section 120.4(f)(8)(xvi) of the Commissioner's Regulations.

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment does not impose any additional compliance costs.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy adopted by the Board of Regents, and has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on entities in rural areas. Where possible, the amendment has incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting the regulatory requirements. The Regents policy upon which the proposed amendments are based applies uniformly across the State. Therefore, it was not possible to establish different compliance and reporting requirements for entities in rural areas, or to exempt them from the provisions of the proposed amendment.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee and Nonpublic Schools Advisory Council, whose memberships include schools located in rural areas. In addition, copies of the proposed amendment will be provided to approved supplemental educational services providers, each charter school, and to the one existing county vocational education and extension board to give them an opportunity to participate in this proposed rule making. Copies of the proposed amendment were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed amendment relates to the provision of supplemental educational services by school districts, boards of cooperative educational services (BOCES), charter schools, and private non-profit and for-profit providers pursuant to section 1116(e) of the federal No Child Left Behind Act of 2001, Pub. L. 107-110. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the regulation that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

ERRATUM

Clarification for notice of proposed rule making, published in the November 22, 2006 issue of the Register, I.D. No. ENV-47-06-00008-P. The subject is *Revision to Part 621, Uniform Procedures Concerning Air Pollution*.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Bait Fish Regulations and Fish Health Inspection Reports

I.D. No. ENV-49-06-00014-EP

Filing No. 1398

Filing date: Nov. 21, 2006

Effective date: Nov. 21, 2006

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

Action taken: Amendment of Parts 10, 35 and 188 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305 and 11-0325

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

Specific reasons underlying the finding of necessity: Viral hemorrhagic septicemia virus (VHS) is a serious pathogen of fish that is causing an emerging disease in the Great Lakes region of the United States and Canada. This disease causes the hemorrhaging of the fish's tissues, including internal organs, and affects all sizes of fish. Not all infected fish develop the disease, but they can continue to carry it and spread it to others. There is no known cure for VHS.

VHS was first confirmed in New York waters in May 2006 when it was linked to the death of round gobies and muskellunge in Lake Ontario and the St. Lawrence River. Most recently, VHS caused the death of walleye in Conesus Lake. The virus has now been confirmed in round goby, burbot,

smallmouth bass, muskellunge, pumpkinseed, rock bass, bluntnose minnow, emerald shiner and walleye in infected waters in New York State.

Due to the potential adverse effects of the disease on fish populations and the desire to prevent or delay its spread to other states, a Federal Order was issued (October 24, 2006) by the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) that prohibits the importation of certain species of live fish from Ontario and Quebec and the interstate movement of the same fish species from eight states bordering the Great Lakes.

The Federal Order does not, however, address the movement of fish within New York State. In-state movement of fish could potentially lead to the spread of VHS in New York and significant adverse impacts to the state's fish resources. Moreover, the spread of VHS in New York could result in negative impacts to the state economy. More than a million New Yorkers hold state fishing licenses. Freshwater sportfishing contributes an estimated \$1.4 billion annually to the state's economy, supporting over 17,000 jobs.

Therefore, the Department is adopting regulations which address the commercial collection of bait fish, personal possession and use of bait fish, and requirements for fish health inspection reports. The promulgation of this regulation on an emergency basis is necessary in order to prevent the spread of VHS in New York and to protect New York's fish resources. It is also necessary to prevent negative impacts to the state's economy that would be associated with the spread of VHS in New York.

Subject: Possession and personal use of bait fish, taking bait fish for commercial purposes, and fish health inspection requirements.

Purpose: To prevent the spread of VHS in New York and protect New York's fish resources, and prevent negative impacts to the State's economy that would be associated with the spread of VHS in New York.

Text of emergency/proposed rule: Paragraph 10.1(a)(3) is amended to read as follows:

(3) possess, kill or unnecessarily injure fish of a species listed in excess of the daily limit specified for such species except that fish caught and returned to the water immediately without unnecessary injury will not be counted as part of the daily limit[.]; or

New Paragraphs 10.1(a) (4) and (5) are added to read as follows:

(4) *Except in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, no person shall possess for personal use more than 100 bait fish in the aggregate of the species listed in Environmental Conservation Law Section 11-1315 (1)(a); or*

(5) *Except in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, bait fish collected for personal use from any water of the State of New York shall only be possessed or used in the water from which such bait fish were collected, and shall not be used or possessed in any other water of the State.*

Part 35 of Title 6 of NYCRR is amended as follows:

Paragraphs 35.2 (d) (5) and (6) are amended to read as follows:

(5) Cayuga County. Barge Canal (Seneca Canal); Cayuga Lake and Canal; Crane Brook; Cross Lake; [Fair Haven Bay (Little Sodus Bay);] Lake Como; [Lake Ontario]; Little Gully, Town of Springport; North Brook, from Route 31 to Seneca River; Paines Creek, Town of Ledyard; Seneca River; Sennett Brook, from N.Y.C.R.R. main line to Seneca River; Sterling Valley Creek, from road bridge on Route 104 to Lake Ontario).

(6) Chautauqua County. Alder Bottom Creek; Baker Creek in Town of Busti; Brokenstraw Creek, from State line to Jaquins Pond; [Canadaway Creek, from mouth to Route 5; Cattaraugus Creek, from mouth to Route 5; Crooked Brook, from mouth to Route 5;] Dry Brook in Town of Poland; East Branch of Little Brokenstraw; Frew Run; Kiantone Creek [, Lake Erie]; Lindquist Creek in Town of Busti; [Little Canadaway Creek, from mouth to Route 5; Silver Creek, from mouth to Route 5;] Stillwater Creek in Town of Kiantone only; town stream, downstream of Clymer Pond only; Twentyeighth Creek in Town of Ellington [, Walnut Creek, mouth to Route 5].

Paragraph 35.2(d)(14) is repealed, and paragraphs 35.2(d)(15) through (52) are renumbered as paragraph 35.2(d)(14) through paragraph 35.2(d)(51).

Paragraph 35.2(d)(53) is repealed, and paragraph 35.2(d)(54) is renumbered as paragraph 35.2(d)(53).

Newly renumbered paragraph 35.2(d)(21) is amended to read as follows:

(21) Jefferson County. [Beaver Meadow Creek; Bedford Creek;] Butterfield Lake; [Chaumont River;] Clear Lake; [Cranberry Creek; Crooked Creek; Flat Rock Creek; Fox Creek; French Creek and tributaries, excepting lower three miles of French Creek;] Grass Lake; [Guffins Creek;

Horse Creek;] Hyde Creek; Hyde Lake; Indian River, west of Route 11; [Lake Ontario; Little Stony Creek and tributaries, all above the first road crossing (not including Six Town Pond); Mill Creek and tributaries, from first road crossing to Stowell Corners;] Moon Lake; [Mud Creek; Mullet Creek and tributaries, excepting Mullet Creek below Route 12; Muskalonge Creek;] Muskalonge Lake; [North Sand Creek, from the highway bridge in Woodville upstream to the Ellisburg-Adams town line; Otter Creek and tributaries; Perch River;] Philomel Creek and tributaries; Red Lake; [St. Lawrence River; Skinner Creek and tributaries, downstream from the Lum Road, also called McDonald Hill Road, located approximately 3.5 miles southwest of Mannsville; South Sandy Creek, from bridge at Ellisburg on Route 193 up stream to Route 11;] Stony Creek, above Henderson Pond upstream to the bridge on the Adams Center Sackets Harbor County Road, also known as South Harbor Road; Three Mile Creek].

(i) No person licensed to take bait fish shall use nets longer than 10 feet to take bait fish in Lake Ontario and the St. Lawrence River, March 1 through June 10.]

(ii)(i) No person licensed to take bait fish shall take bait fish with nets or traps in any waters in Jefferson County east of US Route 11.

Newly renumbered paragraph 35.2(d)(22) is amended as follows:

(22) Livingston County. [Conesus Lake,] Hemlock Lake.

Newly renumbered paragraph 35.2(d)(24) is amended as follows:

(24) Monroe County. Barge Canal; [Braddocks Bay; Buck Pond; Cranberry Pond,] East Lake, Town of Sweden; Genesee River *upstream of the lower falls in Rochester*; Irondequoit Bay; Lake Ontario; Long Pond; Round Pond; Salmon Creek, north of Ridge Road].

Newly renumbered paragraph 35.2(d)(26) is amended as follows:

(26) Niagara County. Barge Canal;] *east of Lock E35* [Lake Ontario; Niagara River including the Little Rivers; Tonawanda Creek/Erie Barge Canal, from Niagara River east to junction with Barge Canal near Pendleton; East Branch Twelve Mile Creek, from mouth to Route 18].

Newly renumbered paragraph 35.2(d)(31) is amended as follows:

(31) Orleans County. Barge Canal; [Johnson Creek, from Kuckville to Lake Ontario; Lake Ontario; Oak Orchard Creek, from waterport to Lake Ontario;] Swetts Dam (Medina Dam).

Newly renumbered paragraph 35.2(d)(32) is amended as follows:

(32) Oswego County. [Blind Creek and tributaries west of Route 11; Catfish Creek north of the hamlet of New Haven; Eight Mile Creek north of Route 104A; Lake Ontario; Lindsey Creek to Jefferson county line; first tributary of Lindsey Creek, lower one-half mile; Little Sandy Creek west of Route 11; Nine Mile Creek north of Route 104A;] Oneida Lake; Oneida River; [Oswego Canal;] Oswego River *above the Varick dam in Oswego*; Ox Creek; [Rice or Three Mile Creek north of Fruit Valley; Salmon River from Pulaski to Lake Ontario; Skinner Creek;] all streams in Towns of Hastings, West Monroe and Constantia, from Oneida Lake to Route 49 [; North Sandy Pond].

(i) No person licensed to take bait fish shall take bait fish with nets or traps in Scriba Creek from Oneida Lake to Route 49 from December 16th through September 14th of the following year.

(ii) No person licensed to take bait shall take bait fish in North Sandy Pond or take such fish with seines longer than 150 feet from May 16th through September 14th of the following year.]

Newly renumbered paragraph 35.2(d)(37) is amended as follows:

(37) St. Lawrence County. Black Lake; Beaver Creek, Town of De Peyster; [Big Sucker Creek, Towns of Lisbon, Waddington;] Birch Creek from Lee Bridge to Indian Point, Town of Macomb; [Black Creek, Town of Hammond;] Bostwick Creek, Town of Rossie; [Brandy Brook, Towns of Waddington and Madrid; Chippewa Bay; Chippewa Creek, Town of Hammond;] Cook Creek and its tributaries; Farr Creek, Town of DeKalb; Fish Creek, from Black Lake to Popes Mills, Town of Macomb; Grass Lake; Hickory Lake, Town of Macomb; Indian Creek, Town of DeKalb; Indian River, Towns of Hammond and Rossie; [Lisbon Creek, Towns of Oswegatchie and Lisbon; Little Sucker Brook, Town of Waddington;] Mud Lake, Town of De Peyster; Oswegatchie River *above the dam in Ogdensburg*; [St. Lawrence River; St. Regis River, from Helena to the St. Lawrence River, Town of Brasher;] South Brook, Town of DeKalb; Sucker Creek, Town of Oswegatchie; Tibbits Creek, Town of Oswegatchie;] Tupper Lake.

(i) No person licensed to take bait fish shall use nets longer than 10 feet to take bait fish in Chippewa Bay, Chippewa Creek downstream from the Star Route 12, or in the St. Lawrence River from the Jefferson St. Lawrence county line downstream to Chippewa Point from March 1st through June 10th.

Note: As provided in section 11-1309 of the Environmental Conservation Law, fishing for all species of fish is prohibited from January 1st through April 30th in the Oswegatchie River and its tributaries below the dam in Ogdensburg.]

Newly renumbered paragraph 35.2(d)(50) is amended as follows:

(50) Wayne County. Barge Canal; [Bear Creek; Black Brook; Blind Sodus Bay; Blind Sodus Creek;] Clyde River; [East Bay; First Creek;] Ganargua Creek; [Lake Ontario;] Old Erie Canal; [Port Bay;] Red Creek, Towns of Palmyra and Marion; [Salmon Creek; Second Creek, below falls at Red Mill;] Seneca River; [Sodus Bay; Swales Creek; Wolcott Creek].

Part 188 of Title 6 of NYCRR, entitled "Fish Health Inspection Requirements" is amended as follows:

Section 188.1 is repealed, and new sections 188.1 and 188.2 are added to read as follows:

Section 188.1 Prohibitions. Except in the marine and coastal district, as defined in Environmental Conservation Law Section 13-0103, no person shall place live fish into the waters of the State, or possess, import or transport live fish for purposes of placing them into waters of the State, unless such fish are accompanied by a fish health inspection report issued within the previous twelve (12) months. This section shall not prohibit the personal use of bait fish in accordance with paragraph 10.1(a)(5) of Part 10 of this Chapter. All fish health inspection reports required by this section shall comply with section 188.2 of this Part.

Section 188.2 Fish Health Inspections

(a) A fish health inspection report shall certify that the fish are free of :

- (1) Viral Hemorrhagic Septicemia (VHS) ;
- (2) *Aeromonas salmonicida* (Furunculosis) ;
- (3) *Yersinia ruckeri* (Enteric Red Mouth);
- (4) Infectious Pancreatic Necrosis Virus (IPN);
- (5) Spring Viremia of Carp Virus (Infectious carp dropsy);
- (6) *Heterosporis*.

(b) Additional fish health inspection requirements for Salmonidae. In addition to the requirements of subdivision (a) of this section, a fish health inspection report for Salmonidae shall certify that the fish are free of :

- (1) *Myxobolus cerebralis* (whirling disease);
- (2) *Renibacterium salmoninarum* (bacterial kidney disease);
- (3) Infectious Hematopoietic Necrosis Virus (IHN).

(c) Fish health inspection reports shall be issued by one of the following independent qualified inspectors:

- (1) American Fisheries Society certified fish pathologists;
- (2) American Fisheries Society certified fish health inspectors;
- (3) licensed veterinarians with demonstrated capability to perform fish health inspections;

(4) government employees with demonstrated capability to perform fish health inspections;

(5) university or college personnel with demonstrated capability to perform fish health inspections; or

(6) private laboratory personnel with demonstrated capability to perform fish health inspections.

(d) Fish health inspection reports required by this section shall be based upon and conform with testing methods and procedures recognized by the American Fisheries Society or the World Organization of Animal Health.

(e) Fish health inspection reports required by this Part shall contain the following information:

- (1) Name, business address and business phone number of the inspector;
- (2) Facility name, physical address of the facility, and business phone number of the facility from which the tested fish came from;
- (3) Date fish were taken for testing;
- (4) Lot number of fish tested;
- (5) Species of fish tested;
- (6) Number of fish tested;
- (7) Pathogens tested for;
- (8) Type of test used; and
- (9) Results of the test.

(f) A fish health inspection report shall not be required for fish placed into an aquarium or possessed for purposes of placing such fish into an aquarium.

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 February 18, 2007.

Text of rule and any required statements and analyses may be obtained from: Shaun Keeler, Department of Environmental Conserva-

tion, 625 Broadway, Albany, NY 12233, (518) 402-8920, e-mail: sxkeeler@gw.dec.state.ny.us

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

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

Additional matter required by statute: A Programmatic Impact Statement is on file with the Department of Environmental Conservation.

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

Regulatory Impact Statement

Statutory authority:

The Commissioner of Environmental Conservation, pursuant to Environmental Conservation Law (ECL) Sections 3-0301, 11-0303, and 11-0305, has authority to protect the fish and wildlife resources of New York State.

Environmental Conservation Law Section 11-0325 provides the Department of Environmental Conservation (Department) with authority to take action necessary to protect fish and wildlife from dangerous diseases. If the Department determines that an epizootic disease which endangers the health and welfare of native fish populations exists in any area of the state, or is in imminent danger of developing or being introduced into the state, the Department is authorized to adopt measures or regulations necessary to prevent the development, spread or introduction of such disease.

Legislative objectives:

The legislative objective of ECL Sections 3-0301, 11-0303, and 11-0305 is to grant the Commissioner the powers necessary for the Department to protect New York's natural resources, including fish resources, in accordance with the environmental policy of the state.

The legislative objective of ECL Section 11-0325 is to provide the Department with broad authority to respond to the presence or threat of a disease that endangers the health or welfare of fish or wildlife populations.

Needs and benefits:

Viral hemorrhagic septicemia virus (VHS) is a serious pathogen of fish that is causing an emerging disease in the Great Lakes region of the United States and Canada. This disease causes the hemorrhaging of the fish's tissues, including internal organs, and affects all sizes of fish. Not all infected fish develop the disease, but they can continue to carry it and spread it to others. There is no known cure for VHS.

VHS was first confirmed in New York waters in May 2006 when it was linked to the death of round gobies and muskellunge in Lake Ontario and the St. Lawrence River. Most recently, VHS caused the death of walleye in Conesus Lake. The virus has now been confirmed in round goby, burbot, smallmouth bass, muskellunge, pumpkinseed, rock bass, bluntnose minnow, emerald shiner and walleye in infected waters in New York State.

Due to the potential adverse effects of the disease on fish populations and the desire to prevent or delay its spread to other states, a Federal Order was issued (October 24, 2006) by the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) that prohibits the importation of certain species of live fish from Ontario and Quebec and the interstate movement of the same fish species from eight states bordering the Great Lakes: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

The Federal Order does not, however, address the movement of fish within New York State. In-state movement of fish could potentially lead to the spread of VHS in New York and significant adverse impacts to the state's fish resources. Moreover, the spread of VHS in New York could result in negative impacts to the state economy. More than a million New Yorkers hold state fishing licenses. Freshwater sportfishing contributes an estimated \$1.4 billion annually to the state's economy, supporting over 17,000 jobs.

Therefore, the Department is adopting regulations which address the commercial collection of bait fish, personal possession and use of bait fish, and requirements for fish health inspection reports. The promulgation of this regulation on an emergency basis is necessary in order to prevent the spread of VHS in New York and to protect New York's fish resources. It is also necessary to prevent negative impacts to the state's economy that would be associated with the spread of VHS in New York.

Costs:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will incur costs associated with fish health inspection reports required by these regulations.

From consulting with those in the field of disease testing, the cost for the supplies and materials needed for testing a "lot" of fish (ie 60 fish) is approximately \$600. Factoring in accompanying services provided by a

qualified tester (personnel service and use of laboratory facilities) results in a total estimated cost of approximately \$1600.

Local government mandates:

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

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will be required to maintain documentation associated with fish health inspections.

Duplication:

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

Alternatives:

No Action: The Department has considered and rejected the option of taking no action to address VHS. Failing to act to address VHS would allow the disease to spread unchecked to other waters of the state. The spread of VHS could compromise the health of New York's freshwater fish populations and could have significant economic impacts on commercial and recreational activities associated with the state's freshwater fish populations.

Federal standards:

The United States Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) issued a federal order (October 24, 2006) that prohibits the importation of certain species of live fish from Ontario and Quebec and interstate movement of the same fish species from eight states bordering the Great Lakes.

Compliance schedule:

Immediate compliance will be required.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed rule will allow the Department to take actions designed to prevent the spread of viral hemorrhagic septicemia virus (VHS), a serious pathogen of fish that is causing an emerging disease in the Great Lakes region of the US and Canada. Due to the potential adverse effects of the disease on fish populations and the desire to prevent or delay its spread to other states, a Federal Order has already been issued (October 24, 2006) by the USDA Animal and Plant Health Inspection Service (APHIS) that prohibits the importation of certain species of live fish from Ontario and Quebec and interstate movement of the same fish species from eight states bordering the Great Lakes (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin). The rule will prevent the collection of bait fish from VHS positive waters as well as require that all fish to be released to the waters of New York be certified as disease free. The number of commercial bait fish licenses (allowing for the collection and/or selling of bait) that have been issued, statewide, by DEC is approximately 400, of which an estimated 250 reside in the area of the state with VHS positive waters. In addition to commercial bait fish operators, private hatchery operations will also be affected by this rule. This year, DEC issued 35 licenses to rear/sell trout and salmon, and 25 licenses to rear/sell black bass (In-state). These operations will now be required to certify that fish in their possession are disease free, prior to release to the waters of New York.

2. Compliance requirements:

Fish being sold for release to state waters, largely by commercial bait fish dealers and hatcheries, must be accompanied by fish health inspection reports, from a qualified tester, certifying that the fish have been tested for the required pathogens and are disease free.

3. Professional services:

A fish health inspection report, issued by an independent qualified inspector, certifying that fish are disease free, will be required for the release of fish into the waters of New York by any of the regulated parties.

4. Compliance costs:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will incur costs associated with fish health inspection reports required by these regulations.

From consulting with those in the field of disease testing, the cost for the supplies and materials needed for testing a "lot" of fish (ie 60 fish) is approximately \$600. Factoring in accompanying services provided by a qualified tester (personnel service and use of laboratory facilities) results in a total estimated cost of approximately \$1600.

5. Economic and technological feasibility:

Testing for a group of pathogens will be required for the small businesses that sell fish to be released to the waters of New York. Since the testing will need to be conducted by qualified testers, the small businesses

will not need to establish any new technology at their facilities. This requirement does not effect or apply to local governments. The costs of the testing is described above.

6. Minimizing adverse impact:

The rule making does not prohibit the collection of bait from waters in New York that have not tested positively for VHS. Therefore, some waters in New York remain available for bait fish collection by commercial operators. The rule making also allows the commercial hatcheries to sell freshwater fish for release into the waters of New York once they have been determined to be disease free.

7. Small business and local government participation:

The emergency rule making process does not provide opportunity for public hearings and/or public meetings. The immediate outreach efforts of the Department included the issuance of a statewide news release (10/31/06) informing the public of this crisis and indicating that the Department was contemplating measures that could be taken to address VHS. In addition, DEC forwarded copies of a VHS New York information sheet, the APHIS Industry Alert, and the APHIS Federal Order to the holders of Fishing Preserve Licenses in New York, licensed Private Hatchery Operators, holders of Great Lakes commercial fishing licenses, and those licensed by the Department to collect and/or sell bait fish.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed rule will affect all rural areas in New York. Most commercial bait fish dealers and licensed fish hatcheries and most of their customers that are seeking to stock private waters pursuant to a Department permit are located in rural areas. The number of commercial bait fish licenses (allowing for the collection and/or selling of bait) that have been issued, statewide, by DEC is approximately 400, of which an estimated 250 reside in the area of the state with VHS positive waters. In addition to commercial bait fish operators, private hatchery operations will also be affected by this rule. This year, DEC issued 35 licenses to rear/sell trout and salmon, and 25 licenses to rear/sell black bass (In-state). Some rural counties own and operate trout hatcheries. Examples include Essex County and Warren County.

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

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will be required to maintain documentation associated with fish health inspections.

4. Costs:

Commercial hatchery operators, bait fish dealers, and other entities that possess or transport fish intended for release in New York waters, will incur costs associated with fish health inspection reports required by these regulations.

From consulting with those in the field of disease testing, the cost for the supplies and materials needed for testing a "lot" of fish (ie. 60 fish) is approximately \$600. Factoring in accompanying services provided by a qualified tester (personnel service and use of laboratory facilities) results in a total estimated cost of approximately \$1600.

4. Minimizing adverse impact:

The rule making does not prohibit the collection of bait from waters in New York that have not tested positively for VHS. Therefore, some waters in New York remain available for bait fish collection by commercial operators. The rule making also allows the commercial hatcheries to sell freshwater fish for release into the waters of New York once they have been determined to be disease free.

5. Rural area participation:

The emergency rule making process does not provide opportunity for public hearings and/or public meetings. The immediate outreach efforts of the Department included the issuance of a statewide news release (10/31/06) informing the public of this crisis and indicating that the Department was contemplating measures that could be taken to address VHS. In addition, DEC forwarded copies of a VHS New York information sheet, the APHIS Industry Alert, and the APHIS Federal Order to the holders of Fishing Preserve Licenses in New York, licensed Private Hatchery Operators, holders of Great Lakes commercial fishing licenses, and those licensed by the Department to collect and/or sell bait fish.

Job Impact Statement

The Department has determined that this emergency rule making will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting the freshwater fish species resource), the proposed rule will protect jobs and employment

opportunities. Therefore, the Department has determined that a job impact statement is not required.

Due to the potential adverse effects of Viral Hemorrhagic Septicemia (VHS) on fish populations and the desire to prevent or delay its spread to other states, the USDA Animal and Plant Health Inspection Service (APHIS) issued a Federal Order on October 24, 2006, that prohibits the importation of certain species of live fish from Ontario and Quebec and interstate movement of the same species from eight states bordering the Great Lakes, including New York.

This rule making is necessary to protect New York's freshwater fish species and their populations from VHS by preventing the spread of this virus to additional waters, thereby safeguarding the health of the freshwater fisheries of New York State. New York's freshwater sportfishing industry currently contributes an estimated \$1.4 billion annually to the state's economy, supporting over 17,000 jobs. Some additional jobs are likely to be generated, in order to accommodate the required fish collection, sampling and testing.

Commercial bait fish dealers and private hatchery operators are the two employment areas that will most likely be affected by this rule making.

For licensed commercial bait fish dealers (approximately 400), this rule making will prohibit the commercial harvest or collection of bait fish from VHS positive waters, and will require that fish to be released in the waters of New York be certified as disease free. However, it is unlikely that these restrictions will result in a substantial adverse impact on jobs due to several qualifying factors. First, not all licensed dealers engage in the restricted activities. For example, some licensees may operate retail establishments that do not collect fish from the waters of New York or release fish to the wild. Second, a portion of the licensed commercial baitfish dealers sell bait as just one component of their business (e.g. in conjunction with selling fishing tackle, fishing clothing, operating a marina), and would therefore remain viable even without the sale of bait fish. Third, a portion of the licensees obtain their bait fish from waters in New York that are not VHS positive. Of the 400 licensed dealers, approximately 150 dealers reside in portions of the state containing waters where VHS has not been detected. Fourth, a portion of the licensed commercial bait fish operators obtain their bait fish from fish farms and do not collect bait fish from the wild. Fifth, many bait fish operators purchase fish from a disease free source (e.g. fish farms) and therefore will not need to test the fish for disease.

Private hatchery operators will also be affected by the restrictions on fish movement noted above. In 2006, DEC issued 35 licenses to rear/sell trout and salmon, and 25 licenses to rear/sell black bass in New York. The regulations will require that these operations certify that their fish as disease free if the fish are to be sold for bait for use in the waters of the state of New York. The estimated cost for the supplies and materials needed for testing a "lot" of fish (ie. 60 fish) is approximately \$600. With the additional cost of services provided by a qualified tester (personnel service and use of laboratory facilities), the total estimated cost is approximately \$1600. While this is not an insignificant sum, the presence of VHS in New York will likely dictate a market in which buyers require certification from sellers that the fish are disease free. Therefore, the testing requirements in the proposed regulations will likely contribute to the marketability of the hatchery operator's product. For this reason, it does not appear that the Department's regulations on disease testing will result in a loss of fish hatchery jobs.

The Department has determined that this emergency rule making will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting the freshwater fish species resource), the proposed rule will in fact protect jobs and employment opportunities dependent on New York's fishery resources. While it is difficult to determine exactly how many jobs may be affected by this rule making, based on the above, the Department does not believe it will result in the decrease of more than one hundred jobs (or the equivalent). Therefore, the Department has determined that a job impact statement is not required.

NOTICE OF ADOPTION

Migratory Game Bird Regulations for the 2006-2007 Season

I.D. No. ENV-39-06-00009-A

Filing No. 1397

Filing date: Nov. 21, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of section 2.30 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

Subject: Migratory game bird hunting regulations for the 2006-2007 season.

Purpose: To adjust migratory bird hunting regulations to conform with Federal regulations.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. ENV-39-06-00009-EP, Issue of Sept. 27, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Bryan L. Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8919, e-mail: blswift@gw.dec.state.ny.us

Assessment of Public Comment

The Department received two public comments on the proposed rule making. The comments submitted to the Department concerning the proposal are summarized below, followed by the Department's response:

Comment: Opening of the regular goose season on the 4th Saturday in October (East Central Goose Hunting Area) is about 2 weeks later than is necessary. Unless this is driven by some mandatory requirement of the U.S. Department of the Interior, a three-week "resting" period for the geese after the close of the September Canada goose season should be sufficient to allow migratory geese to go through.

Response: Opening and closing dates for Canada goose seasons are constrained by federal regulations adopted by the U.S. Fish and Wildlife Service. The season opening date for the East Central Goose Hunting Area (4th Saturday in October) was the earliest allowed this year in accordance with those regulations.

Comment: The relatively late opening date for the Western Zone duck season results in fewer birds being around and overlaps too much with other small game hunting seasons.

Response: Department staff are aware of these concerns regarding the timing of our duck seasons. Seasons were set based on the Department's assessment of the best balance of opportunity for hunters who hold very diverse views about when the season should be held. The Department will consider the comments received and other hunter input in the season-setting process for 2007. Hunters are encouraged to provide input again next spring to the Waterfowl Season-setting Task Forces that we have established for each hunting zone. For more information, visit the Department website (<http://www.dec.state.ny.us/website/dfw/wmr/wildlife/guide/migbregs.html>) in March 2007.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Architectural and Industrial Maintenance Coatings

I.D. No. ENV-49-06-00015-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 205 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0105, 19-0301 and 19-0305

Subject: Architectural and industrial maintenance coatings.

Purpose: To end the small manufacturer exemption on Dec. 31, 2006 and establish a sell-through end date of May 15, 2007 to eliminate the unlimited sell-through of non-complying coatings manufactured before Jan. 1, 2005.

Public hearing(s) will be held at: 9:00 a.m., Jan. 10, 2007 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY; 9:00 a.m., Jan. 11, 2007 at Department of Environmental Conservation, Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, NY; 1:00 p.m., Jan. 12, 2007 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY.

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

Interpreter Service: Interpreter services will be made available to deaf 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.

Text of proposed rule: Part 205, Architectural and Industrial Maintenance (AIM) Coatings

Sections 205.1 through 205.2 remain unchanged.

Section 205.3 (a) is amended to read as follows:

Section 205.3 Standards.

(a) 'VOC content limits.' Except as provided in [subdivision] *subdivisions* (b) and (g) of this section, no person shall manufacture, blend, or repack for sale within the State of New York, supply, sell, or offer for sale within the State of New York or solicit for application or apply within the State of New York any architectural coating manufactured on or after January 1, 2005 which contains volatile organic compounds in excess of the limits specified in the following Table of Standards. Limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water, exempt compounds, or colorant added to tint bases. 'Manufacturer's maximum recommendation' means the maximum recommendation for thinning that is indicated on the label or lid of the coating container.

The remainder of section 205.3(a) remains unchanged.

Sections 205.3(b) through 205.3(f) remain unchanged.

New Section 205.3(g) is added to read as follows:

(g) 'Sell Through of Coatings.' A coating manufactured prior to January 1, 2005, or previously granted an exemption pursuant to Section 205.7, may be sold, supplied, or offered for sale until May 15, 2007, so long as the coating complied with standards in effect at the time the coating was manufactured.

Sections 205.4 through 205.7(e) remain unchanged.

Section 205.7 (f) is amended to read as follows:

(f) Any exemption granted under subdivision (d) of this section may remain in effect no later than December 31, [2007] 2006.

Section 205.7(g) is deleted.

Section 205.7(h) is renumbered as follows:

[(h)](g) Limited exemptions for small AIM coatings manufacturers as approved by the director, Division of Air Resources, Department of Environmental Conservation under this Part, will be submitted to the EPA as State Implementation Plan revisions for approval.

Section 205.8 remains unchanged.

Text of proposed rule and any required statements and analyses may be obtained from: Daniel S. Brinsko, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: 205aim@gw.dec.state.ny.us

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

Public comment will be received until: 5 days after the last scheduled public hearing required by statute.

Additional matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule must be approved by the Environmental Board.

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

Summary of Regulatory Impact Statement

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings).

The Department now proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." The Department proposes to end the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" end date provision so that products manufactured prior to January 1, 2005, or granted a SME, which do not meet Part 205 VOC content limits, cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

In 2005, the Department granted SMEs to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information

submitted in connection with the SME applications, and has now determined that the SMEs account for approximately 4 tons of VOC emission reductions per ozone season day (tpd) out of the 14 tpd of reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rule making is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from the continued sale of AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre-2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007, after which all AIM products sold in New York State must comply with the low VOC content limits in Part 205. By eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress towards attaining the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs will not end until December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the Ozone Transport Region with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

The promulgation of these Part 205 amendments is authorized by the following sections of the Environmental Conservation Law which, taken together, clearly empower the Department to establish and implement the Program: Section 1-0101; Section 3-0301; Section 19-0103; Section 19-0105; Section 19-0301 and Section 19-0305.

Part 205 currently includes the SME provision that allows the Department to grant an exemption to a small AIM coatings manufacturer in order to allow more time for the manufacturer to acquire the technology to comply with the new VOC content limits. Twenty-two small manufacturers applied for and twenty received SMEs. Revised Part 205 was estimated to achieve VOC emission reductions of 14 tons per ozone season day (tpd) and the Department has determined that as a result of granting the SMEs, 4 tpd of VOC emission reductions that had been anticipated were not realized. These emission reductions are essential to the Department's strategy to bring NYCMA, and the other nonattainment areas of the state into attainment with the eight-hour NAAQS for ozone. In a letter dated January 27, 2006 from Raymond Werner, Chief, Air Programs Branch, USEPA Region 2 Office, to Dave Shaw, Director Division of Air Resources of DEC, EPA requested an accounting of the shortfall measures to meet the 42 tpd VOC emission reduction shortfall. New York cannot make this demonstration unless it is able to take credit for all of the emission reductions anticipated through implementation of the six "shortfall measures", which included the 14 tpd from Part 205, the AIM Coatings rule.

In addition to evaluating the SME provision, the Department also reviewed a provision that was considered during the last rule making but not included in the final adopted rule in 2003. Part 205 currently does not contain a "sell-through" end date for sales of AIM coatings manufactured before January 1, 2005 and thus allows the sale of AIM coatings manufactured before 2005 to continue indefinitely. Because the Department believed that AIM coatings moved quickly through the market (based upon discussions with industry during the rule making process), it was believed that there was not a need for a cut-off date. Since adoption of the final rule in 2003, the Department has discovered that some of these products do have long shelf lives and have remained in the market for periods sometimes exceeding two years. Moreover, the Department has also been advised that some manufacturers stockpiled AIM coatings manufactured prior to the rule implementation date of January 1, 2005 to ensure that they could continue to sell 2004 formulations after the revised rule took effect. As a result, it is important to establish a "sell-through" end date to ensure that the entire 14 tpd of VOC emission reductions are realized as soon as possible. The Department now concludes that if a "sell-through" end date is not invoked then non-compliant products will continue to be sold for a

long time, and New York State will not realize the full potential of the VOC emission reductions expected during the rule making process. The Department's selection of May 15, 2007 as a "sell-through" end date effectively provides the regulated community with a "sell-through" period nearly two and a half years. Also, May 15th corresponds to the beginning of the ozone season, so removing these higher VOC products from the market before the start of the ozone season will improve New York's ability to attain the ozone NAAQS.

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. Ozone at ground level causes throat irritation, congestion, chest pains, nausea and labored breathing. It aggravates respiratory conditions like chronic lung and heart diseases, allergies and asthma. Ozone damages the lungs and may contribute to lung disease. Even exercising healthy adults can experience 15 percent to 20 percent reductions in lung function from exposure to low levels of ozone over several hours. Children are most at risk from exposure to ozone. Because their respiratory systems are still developing, they are more susceptible than adults. This problem is exacerbated because ozone is a summertime phenomenon. Children are outside playing and exercising more often during the summer which results in children being exposed to ozone more than adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone.

Implementation of the Part 205 revisions will, in concert with similar regulations adopted by other States and other measures undertaken by New York, lower levels of ozone in New York State and will decrease the adverse public health and welfare effects described above.

The cost of the proposed regulations will mostly affect the twenty SME manufacturers to whom the Department granted a SME. There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but Department staff expects this to be minor. Large manufacturers who have existing inventories of product manufactured prior to January 1, 2005 will have to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

Small manufacturers may have increased costs associated with the production of compliant AIM coatings and may experience a reduction in profits to the extent that their sales increased during the SME as a result of their ability to make and sell higher VOC products. These manufacturers must now make and sell complying coatings and accordingly their production costs may increase slightly and they may sell less product. Since compliant formulations are available for all coating categories, however, the Department expects that the financial effects of this rule are beneficial to the overall market since all manufacturers must meet the same VOC content limits.

It should be noted that the impact to consumers is expected to be minimal since there are already a large amount of complying coatings on store shelves (produced by manufactures that did not receive a SME). Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases.

The Department evaluated several alternatives and determined that the most preferable alternative is to end the SME in December 2006 and the "sell-through" in May 2007. This option provides time for the manufacturers who have products granted a SME or products manufactured prior to January 1, 2005 to "sell-through" any remaining inventory. In particular, ending the "sell-through" by May 15, 2007 allows manufacturers time to liquidate inventory while ensuring that sale of non-complying products is curtailed by the 2007 ozone season. This is the preferred option because it ensures New York can realize the necessary VOC emission reductions.

EPA approved Part 205 into New York's State Implementation Plan on December 13, 2004. As a result of EPA's action, the VOC content limits in Part 205 represent the Federal standards for AIM coatings in New York. EPA has asked New York to demonstrate compliance with the ozone NAAQS. To do this, the Department needs to demonstrate 42 tpd of VOC emission reductions identified by EPA as the shortfall. In order to achieve the 42 tpd of shortfall reductions, the Department adopted six VOC control measures including the Part 205 AIM coatings rule. The AIM coatings rule was expected to produce 14 tpd of the VOC shortfall emission reductions but because of the SME and the unlimited sell-through provisions the Department is not able to make its shortfall demonstration to EPA. These revisions will allow the Department to comply with that federal mandate.

Regulatory Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings).

On July 18, 1997 the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). EPA has designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. Previously, New York State had been subject to the one-hour ambient air quality standard for ozone, which remained in effect until June 2005. New York State is required to develop and implement enforceable strategies to get those areas into attainment by 2009. Attainment is measured over a three year average, so NOx and VOC emission reductions are needed before the ozone season (May through October) of 2007 in order to have the best chance of measuring attainment.

The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." The Department proposes to end the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" provision so that products manufactured prior to January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

In 2005, the Department granted a SME to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for 4 tons per ozone season day (tpd) out of the 14 tpd of VOC emission reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rulemaking is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre 2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007 which would require that only VOC compliant coatings be sold after that date. By eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress in its efforts to attain the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs will not end until December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the OTR with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

1. Effects on Small Businesses and Local Governments. No local governments will be directly affected by the revisions to 6 NYCRR Part 205, the Architectural and Industrial Maintenance (AIM) Coatings regulation. Small businesses that manufacture AIM coatings for sale pursuant to a small manufacturer exemption (SME) provision for certain products under section 205.7 had a three year exemption that would have ended on December 31, 2007. With these rule revisions, the SME will end on

December 31, 2006. In addition, as a result of the new sell through provision, AIM coatings manufacturers will have until May 15, 2007 to sell products which were grandfathered or received a SME.

2. Compliance Requirements. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Small businesses which were not granted a SME will face no additional requirements. Manufacturers who were granted a SME will have to comply with the low VOC content limits of Part 205, which may involve reformulating some of their coatings. Contractors and retailers who use or sell AIM simply need to continue to purchase compliant coatings.

3. Professional Services. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. It is not anticipated that small businesses that manufacture architectural coatings will need to contract out for professional services to comply with this regulation. In the few cases where small manufacturers do not already have compliant formulations to replace those SME products complying formulations are available at little or no cost from both the solvent and the raw material suppliers to this industry. See Chemidex.com on the web.

4. Compliance Costs. There are no additional compliance costs for small businesses and local governments as a result of this rule except for the 11 New York State manufacturers granted a SME. Since there are compliant coatings now available in all AIM categories, small businesses and local governments that previously purchased AIM coatings that received a SME, they are not expected to see a price increase for the purchase of compliant AIM coatings.

There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but the Department expects this to be minor. Manufacturers that have existing inventories of product manufactured before January 1, 2005 will need to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

The proposed regulations will mostly affect the eleven New York urban/suburban businesses that received an SME for certain products. Some of manufacturers may have increased costs associated with the production of compliant AIM coatings. The Department is aware of some small manufacturers who, after having been granted a SME, were able to increase sales and market share of their products. These manufacturers will now be required to produce compliant coatings which will have to compete in the market place with the compliant coatings of other manufacturers. Consequently, they might experience reduced profits to the extent they cannot maintain the same level of sales with compliant VOC coatings as they did with their higher VOC content coatings. Compliant formulations are available for all coating categories, however, so all manufacturers should be able to access that technology going forward. Department staff believe that the financial effects of this rule are beneficial to the overall market since this rule would no longer provide a market advantage to those companies that received the SMEs or had large inventories of products manufactured before January 2005.

It should be noted that the impact to consumers is expected to be minimal since there are already large amounts of complying coatings on store shelves (produced by manufacturers that did not receive a SME). Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases.

5. Minimizing Adverse Impact. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. The emergency adoption of these revisions ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date. The Department is providing four months advance notice of the end of the SME and almost nine months notice of the sell through end date. This will provide manufacturers time to liquidate their existing inventories, or transfer those inventories to non-OTR states.

6. Small Business and Local Government Participation. Since local governments are not directly affected by this regulation, the Department did not contact local governments directly. On September 21, 2005 the Department notified all the manufacturers who had been granted a SME of its intent to end the SME by December 31, 2006, with no extensions. Only two (one New York company) of the twenty companies with SMEs responded and also that those responses were many months after the initial notification. While the one New York company indicated that they would like to see the SME provision remain as well as the ability to sell non-complying manufactured before January 1, 2005, indications are that they now have the ability to reformulate their products to comply with Part 205.

The Department will also be giving official notice of this rulemaking to each of the twenty companies with SMEs.

7. Economic and Technological Feasibility. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Compliant products are available in all coating categories statewide to meet all consumer needs. The VOC content limits adopted in 2003 were based in large part on the 2000 California Air Resources Boards (CARB) suggested control measure (SCM) for AIM coatings. The SCM is a model AIM coatings rule that is used as a template by the California Air Districts for their AIM coatings regulations. The SCM is based on a 1998 AIM coatings survey by CARB in which they determined the technical feasibility of VOC content limits for each AIM coating category. In effect, the availability of products in a particular coating category at or below a specific VOC content limit indicated the feasibility of that category establishing a standard at that content limit. Since inception of the SCM VOC content limits into California in 2003, there have been no known complaints by small businesses with regards to compliance with the new AIM coatings standards. Likewise, according to CARB, there have been no known small manufacturers to go out of business as a result of the new AIM coatings regulations. By eliminating the SMEs and invoking a "sell-through" end date, this will keep New York State consistent with California as well as the other OTC states that don't have an SME provision.

Rural Area Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings). See 6 NYCRR Part 205.

On July 18, 1997 the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). EPA has designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. Previously, New York State had been subject to the one-hour ambient air quality standard for ozone, which remained in effect until June 2005. New York State is required to develop and implement enforceable strategies to get those areas into attainment by 2009. Attainment is measured over a three year average, so NO_x and VOC emission reductions are needed before the ozone season (May through October) of 2007 in order to have the best chance of measuring attainment.

The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." The Department proposes to end the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" provision so that products manufactured prior to January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

In 2005, the Department granted a SME to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for 4 tons per ozone season day (tpd) out of the 14 tpd of VOC emission reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rule making is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre 2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007 which would require that only VOC compliant coatings be sold after that date. By

eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress in its efforts to attain the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs will not end until December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the OTR with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

1. Types and estimated number of rural areas: Rural areas are not particularly affected by the revisions. Part 205 will continue to apply on a statewide basis. This is due in large part to the fact that only eleven of the twenty manufacturers granted SMEs are located in New York State. Of the eleven, nine manufacturers are located in NYCMA, and the other two are located in upstate New York in urban/suburban communities. None of the eleven manufacturers are located in rural communities. The impact to rural consumers, if any, is expected to be minimal since there is already a large number of compliant AIM coatings available for retail sale throughout the state.

2. Reporting, recordkeeping and other compliance requirements: Part 205 will continue to apply on a statewide basis. Rural areas are not particularly affected by the revisions. Reporting, recordkeeping, and labeling requirements are essentially unchanged since January 2005 when the Part 205 revisions went into effect. Eleven of the current twenty SMEs are for businesses located in New York urban or suburban communities. Rural area businesses are not expected to be effected by these revisions. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs: The cost of the proposed regulations will mostly affect the eleven New York urban/suburban businesses that received an SME for certain products. There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but the Department expects this to be minor. Manufacturers that have existing inventories of product manufactured prior to January 1, 2005 will need to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

It is expected that the small manufacturers may have increased costs associated with the production of compliant AIM coatings. The Department is aware of some small manufacturers who, after having been granted a SME, were able to increase sales and market share of their products. These manufacturers will now be required to produce compliant coatings which will have to compete in the market place with the compliant coatings of other manufacturers. Consequently, they might experience reduced profits to the extent they cannot maintain the same level of sales with compliant VOC coatings as they did with their higher VOC content coatings. Compliant formulations are available for all coating categories, however, so all manufacturers should be able to access that technology going forward. Department staff believe that the financial effects of this rule are beneficial to the overall market since this rule would no longer provide a market advantage to those companies that received the SMEs or had large inventories of products manufactured before January 2005.

It should be noted that the impact to consumers is expected to be minimal since there are already large amounts of compliant coatings on store shelves (produced by manufactures that did not receive a SME). Competition from these existing compliant coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases. Since eleven of the current twenty SMEs are for businesses located in New York urban or suburban communities, rural area businesses are not expected to be effected by these revisions.

4. Minimizing adverse impact: Part 205 was not anticipated to have an adverse effect on rural areas when it was promulgated in 2003 and took effect in January 2005. To date, the Department is unaware of any particular adverse impacts experienced by rural areas as a result of the promulgation of Part 205 in 2003. Rather, the rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants. These revisions are not expected to adversely

impact on rural areas since many of the products affected are currently not sold in rural areas and compliant products are available in all coating categories statewide to meet all consumer needs. Ending the SMEs by December 31, 2006 and establishing a May 15, 2007 "sell-through" end date ensures a fair and level playing field for all AIM coatings manufacturers and, more importantly, that the State, as a whole, can achieve compliance with the NAAQS for ozone in a timely manner.

5. Rural area participation: Rural areas are not particularly affected by the revisions. Eleven of the current twenty SMEs were granted to businesses located in New York, all of which are located in urban or suburban communities and non are located in rural areas. Consequently, the Department did not see a need to reach out to rural communities.

Job Impact Statement

1. Nature of impact: The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. Under the Department's proposal, this exemption, otherwise known as the small manufacturers exemption or "SME", will now end on December 31, 2006, one year earlier, and cannot be extended thereafter. These businesses must stop manufacturing non-complying products by December 31st and will have to reformulate their AIM coatings to comply with the content limits in Part 205 if they do not already have compliant formulations. The Department is aware that some manufacturers already have compliant formulations and thus will be able to make this transition easily. Second, the Department proposes to include a "sell-through" provision so that products manufactured before January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot continue to be sold indefinitely. Companies will have until May 15, 2007 to liquidate their existing inventory or move it out of the State. In most cases, manufacturers have already sold all products manufactured before 2005 or will be able to sell it before May 15, 2007 and will therefore, not be adversely impacted by this rule.

These revisions are not expected to have an adverse impact on jobs and employment opportunities in the State. Part 205 has applied Statewide since it was promulgated in 2003 and it will continue to apply on a statewide basis. Since the VOC content limits went into effect on January 1, 2005, there has been no evidence of an adverse impact on employment as a result of regulating AIM coatings. If anything, these revisions will have a positive economic impact in terms of placing all AIM manufacturers on a level economic playing field.

2. Categories and numbers affected: This rule will affect eleven in-State and nine out-of-State small manufacturers who were granted a SME by the Department. In addition, the rule will affect manufacturers who have remaining inventories of AIM coatings manufactured prior to January 1, 2005 that does not comply with Part 205 VOC content limitations.

3. Regions of adverse impact: The Department does not expect there to be regions of adverse impact in the State. The VOC emission limits in Part 205 have applied state-wide since January 1, 2005, and there has been no resulting adverse impact on any particular region of the State. Of the eleven in-state manufacturers who were granted a SME, nine are located in the New York City Metropolitan Area (NYCMA). The Department, however, expects that these coatings manufacturers will be able to readily reformulate their products through the purchase of commercially available technology and that there will be no adverse impact on employment as a result of this rule making.

4. Minimizing adverse impact: The Department is providing advance notice of these rule revisions to the regulated community so that companies have sufficient time to take the necessary steps to come into compliance with Part 205. These steps include reformulating products and ensuring that existing inventories of non-complying products are sold prior to May 15, 2007, or moved out of the State. Compliant formulations are available for all AIM coating categories and are currently being sold throughout the State. The Department, therefore, does not anticipate any adverse impacts on employment from the adoption of these rule revisions. The Department, moreover, believes that this rule will have a positive economic impact on the AIM coatings market because all manufacturers will be operating on a level playing field. Competition will likely constrain manufacturers from passing on production costs to consumers. In sum, the Department does not expect this regulation to have an adverse effect on employment in the State.

5. Self employment opportunities: Not applicable.

Office of General Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Preferred Source Vendors

I.D. No. GNS-49-06-00001-P

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

Proposed action: This is a consensus rule making to amend the title of Part 250, and sections 250.9, 250.12, 250.13, 250.14, 250.15 and 250.18 of Title 9 NYCRR.

Statutory authority: Executive Law, section 200; State Finance Law, section 162; and Labor Law, section 349

Subject: Preferred source vendors.

Purpose: To add to the list of preferred source vendors those apparel manufacturers and contractors who are included in the special Sept. 11th bidders registry, as added by section 349 of the Labor Law, approved for such purposes by the Commissioner of Labor.

Text of proposed rule:

TITLE 9
EXECUTIVE DEPARTMENT
SUBTITLE G
OFFICE OF GENERAL SERVICES
CHAPTER I [DIVISION OF STANDARDS AND PURCHASE]
PROCUREMENT SERVICES GROUP
[SUBCHAPTER A BUREAU OF PURCHASING]
PART 250
PURCHASING PROCEDURES AND PURCHASES
FROM PREFERRED SOURCES
9 NYCRR § 250.1

Subdivisions (a) through (t) of section 250.1 are re-lettered subdivisions (b) through (u) and a new subdivision (a) is added to read as follows:

(a) "Apparel" or "textiles" shall mean all articles of clothing or goods produced by weaving, knitting, or felting or any similar production processes for such articles of clothing and shall include all goods produced by the apparel industry as defined by subdivision (c) of section three hundred forty of the labor law.

A new subdivision (h) is added to section § 250.9 to read as follows:

(h) For purchases involving apparel and textiles see Section 250.15 (g) of this Part.

Section 250.12 is amended to read as follows:

§ 250.12 Purpose of preferred sources

To advance special social and economic goals, selected providers shall have preferred source status for the purposes of procurement in accordance with the provisions of this Part. Procurement from these providers, *except those defined in paragraph f of subdivision thirteen of this section*, shall be exempted from the competitive procurement provisions of Part 250. Such exemption shall apply to commodities produced, manufactured or assembled, including those repackaged to meet the form, function and utility required by state agencies, in New York State and, where so designated, services provided by those sources in accordance with this Part.

A new subdivision (f) is added to section 250.13 and subsections (d) through (f) are amended to read as follows:

(d) Commodities and services produced by any qualified charitable non-profit-making agency for other severely disabled persons approved for such purposes by the Commissioner of Education, or incorporated under the laws of this State and approved for such purposes by the Commissioner of Education; [or]

(e) Commodities and services produced by a qualified veterans workshop providing job and employment-skills training to veterans where such a workshop is operated by the United States Department of Veterans Affairs and is manufacturing products or performing services within this State and where such workshop is approved for such purposes by the commissioner of education; or [.]

(f) Commodities provided by any qualified apparel manufacturer and contractor on the special September eleventh bidders registry, as added by section three hundred forty-nine of the labor law, approved for such purposes by the commissioner of labor.

A new subdivision (d) is added to section 250.14 to read as follows:

(d) Paragraphs a, b and c of this subdivision shall not apply to commodities provided by any qualified apparel manufacturer and contractor on the special September eleventh bidders registry, as added by section three hundred forty-nine of the labor law, or approved for such purposes by the commissioner of labor. The commissioner of labor shall periodically provide the commissioner of general services with the special September eleventh bidders registry, as added by section three hundred forty-nine of the labor law, of qualified apparel manufacturers and contractors. The commissioner of labor shall also make the registry available upon request to other state agencies, public benefit corporations, public authorities, and, if requested, to political subdivisions.

New subdivisions (g) and (h) are added to section 250.15 to read as follows:

(g) Priority in purchasing requirements for apparel or textiles.

1. Notwithstanding anything to the contrary, political subdivisions may adopt and apply the priority established herein by specifically including the provisions of this subdivision in their bid specifications.

2. Conditions for participation in certain state contracts. In the event the state seeks to purchase apparel or textiles pursuant to a competitive bid pursuant to section one hundred sixty-three of the State Finance Law or other applicable competitive procurement statutes, the following additional conditions shall apply:

(i) the bid shall include a statement that a state agency shall not enter into a contract to purchase or obtain for any purpose any apparel from a bidder unable or unwilling to provide documentation as part of its bid:

(A) attesting that such apparel was manufactured in compliance with all applicable labor and occupational safety laws, including, but not limited to, child labor laws, wage and hour laws and workplace safety laws;

(B) stating, if known, the name and address of each subcontractor to be utilized; and

(C) stating, if known, all manufacturing plants utilized by the bidder or subcontractor.

(ii) manufacturers and contractors identified on the special September eleventh bidders registry, as added by section three hundred forty-nine of the labor law, shall be a preferred source for purposes of a competitive bid and the associated contract award for apparel or textile procurements where the price bid by such participating qualified registrant bidder is not greater than fifteen percent more than the lowest price bid by an otherwise responsive and responsible bidder. Where there is more than one participating qualified registrant bidder, the state shall make the contract award based upon the lowest price bid among such bidders.

(iii) where no qualified bidders under subparagraph (ii) of this paragraph participate in the competitive bid for the specified apparel or textiles the state shall award the contract to the otherwise lowest responsive and responsible bidder pursuant to section one hundred sixty-three of the State Finance Law or other applicable competitive procurement statutes.

3. Waiver. The provisions of this section may be waived by the head of any state agency, department, board, bureau, commission, division, or any public benefit corporation or public authority a majority of whose members are appointed by the governor where it is determined in writing and included in the procurement record that it is in the best interests of the state to do so.

(h) For purposes of the provisions of this section "State" shall mean any New York state agency, department, board, bureau, commission, division, or any public benefit corporation or public authority a majority of whose members are appointed by the governor.

A new subdivision (c) is added to section 250.18 to read as follows:

(c) Apparel manufacturers and contractors on the special September eleventh bidders registry, as added by section three hundred forty-nine of the labor law, approved for such purposes by the commissioner of labor, are prohibited from participating in the partnering program as a preferred source. However, those businesses on the above-described September eleventh bidders registry may participate in the partnering program as a private vendor without any preferred source advantages.

Text of proposed rule and any required statements and analyses may be obtained from: Paula B. Hanlon, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: paula.hanlon@ogs.state.ny.us

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

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

Consensus Rule Making Determination

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102 (11) (b), it implements or confirms to non-discretionary statutory provisions. Chapter 350 of the Laws of 2002 amended Labor Law § 349 to create a "Special September Eleventh Bidders Registry for apparel manufacturers and contractors adversely impacted by the September 11, 2001 attack on the United States of America" (as defined by Labor Law § 349). The name of the Act was the New York State Apparel Workers Fair Labor Conditions and Procurement Act.

Labor Law § 349 (4) states that "for purposes of procurements of apparel and textiles, the department shall make the registry available to any state agency, department, board, bureau, commission, division, or any public benefit corporation, public authority, a majority of whose members are appointed by the governor, and if requested, to political subdivisions." As New York State's primary procurement agency, it is important that OGS regulations reflect and include the statutory amendments regarding vendors on the September Eleventh Bidders Registry as they pertain to preferred sources.

Chapter 350 of the Laws of 2002 also amended State Finance Law § 162 (Preferred Sources) to add to the categories included under preferred sources, "(4) Commodities provided by any qualified apparel manufacturer and contractor on the special September eleventh bidders registry, as added by section three hundred forty-nine of the labor law, approved for such purposes by the commissioner of labor". Chapter 350 provided the procedures for incorporating the designated entities into the preferred sources process. The proposed consensus rule reflects those amendments.

Chapter 338 of the Laws of 2006 extended the provisions of the New York State Apparel Workers Fair Labor Conditions and Procurement Act until September 1, 2008.

The proposed rule also makes technical changes to the title of 9 NYCRR Part 250. The title of these regulations makes reference to "Chapter I. Division of Standards and Purchase" and to "Subchapter A. Bureau of Purchasing." These regulations will update these designations. The Division of Standards and Purchase is now the "Procurement Services Group" and the Bureau of Purchasing no longer exists and has no comparable replacement. As a result the proposed rule amends Chapter I and removes Subchapter A.

Job Impact Statement

The Office of General Services projects no substantial adverse impact on jobs or employment opportunities in the State of New York as a result of this rule. The rule simply mirrors statute and ensures that the apparel manufacturers and contractors included in the Special September Eleventh Bidders Registry, in accordance with Labor Law § 349, are given preferred source status throughout the procurement process as required by Labor Law § 349 and State Finance Law § 162. There will be no change in the number of agency employees as a result of these regulations. Nothing in the proposed regulations will increase or decrease the number of jobs in New York State, have an adverse impact on specific regions in New York State or negatively impact jobs in New York State.

Department of Health

NOTICE OF ADOPTION

Personal Care Services Program

I.D. No. HLT-28-06-00020-A

Filing No. 1390

Filing date: Nov. 17, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of section 505.14 of Title 18 NYCRR.

Statutory authority: Social Services Law, section 363-a(1)

Subject: Personal care services.

Purpose: To repeal provisions that are obsolete due to court decisions and/or expired statutory authority.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-28-06-00020-P, Issue of July 12, 2006.

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

Text of rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Assessment of Public Comment

A Notice of a Proposed Consensus Rule Making to Section 505.14 of Title 18 was published in the July 12, 2006, issue of the *State Register*. The New York State Department of Health received comments from a not-for-profit organization that advocates for Medicaid recipients.

Comment:

The commentator welcomed the Department's removal of obsolete and expired provisions from the Department's personal care services regulations but advocated that the Department take the further step of reorganizing these regulations within their own Part of Title 18.

Response:

The Department has no immediate plans to reorganize the personal care services regulations within their own Part.

Comment:

The commentator also noted a renumbering error. Specifically, the regulations had proposed to renumber Section 505.14(b)(3)(vii) as Section 505.14(b)(3)(vi). The commentator stated that Section 505.14(b)(3)(vii) should instead be renumbered as Section 505.14(b)(3)(v).

Response:

The Department accepted this comment. When the rule is adopted, it will renumber Section 505.14(b)(3)(vii) as Section 505.14(b)(3)(v).

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

Expansion of the New York State Newborn Screening Panel

I.D. No. HLT-49-06-00005-P

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

Proposed action: Amendment of Subpart 69-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2500-a

Subject: Expansion of the New York State Newborn Screening Panel.

Purpose: To add Krabbe disease to the New York State Newborn Screening Panel and clarify the requirement for timely specimen transfer.

Text of proposed rule: Section 69-1.2 of Subpart 69-1 is amended as follows:

Section 69-1.2 Diseases and conditions tested. (a) Unless a specific exemption is granted by the State Commissioner of Health, the testing required by section 2500-a and section 2500-f of the Public Health Law shall be performed by the testing laboratory according to recognized clinical laboratory procedures.

(b) Diseases and conditions to be tested for shall include:

- argininemia (ARG);
- argininosuccinic acidemia (ASA);
- biotinidase deficiency;
- branched-chain ketonuria, also known as maple syrup urine disease (MSUD);
- carnitine palmitoyl transferase Ia deficiency (CPT-IA);
- carnitine palmitoyl transferase II deficiency (CPT-II);
- carnitine-acylcarnitine translocase deficiency (CAT);
- carnitine uptake defect (CUD);
- citrullinemia (CIT);
- cobalamin A,B cofactor deficiency (Cbl A,B);
- congenital adrenal hyperplasia (CAH);
- cystic fibrosis (CF);
- dienoyl-CoA reductase deficiency (DE REDUCT);
- galactosemia;
- galactosylceramidase deficiency (Krabbe disease);*
- glutaric acidemia type I (GA-I);
- hemoglobinopathies, including homozygous sickle cell disease;
- homocystinuria;
- human immunodeficiency virus (HIV) exposure and infection;
- 3-hydroxy-3-methylglutaryl-CoA lyase deficiency (HMG);
- hyperammonemia/ornithinemia/citrullinemia (HHH);
- hypermethioninemia (HMET);

- hypothyroidism;
 - isobutyryl-CoA dehydrogenase deficiency (IBG or IBCD);
 - isovaleric acidemia (IVA);
 - long-chain 3-hydroxyacyl-CoA dehydrogenase deficiency (LCHADD);
 - malonic aciduria (MAL);
 - medium-chain acyl-CoA dehydrogenase deficiency (MCADD);
 - medium-chain ketoacyl-CoA thiolase deficiency (MCKAT);
 - medium/short-chain hydroxyacyl-CoA dehydrogenase deficiency (M/SCHAD);
 - 2-methylbutyryl-CoA dehydrogenase deficiency (2MBG);
 - 3-methylcrotonyl-CoA carboxylase deficiency (3-MCC);
 - 3-methylglutaconic aciduria (3MGA);
 - 2-methyl 3-hydroxy butyryl-CoA dehydrogenase deficiency (2M3HBA);
 - methylmalonic acidemia (Cbl C,D);
 - methylmalonyl-CoA mutase deficiency (MUT);
 - mitochondrial acetoacetyl-CoA thiolase deficiency (BKT);
 - mitochondrial trifunctional protein deficiency (TFP);
 - multiple acyl-CoA dehydrogenase deficiency (MADD, also known as GA-II);
 - multiple carboxylase deficiency (MCD);
 - phenylketonuria (PKU);
 - propionic acidemia (PA);
 - short-chain acyl-CoA dehydrogenase deficiency (SCADD);
 - tyrosinemia (TYR); and
 - very long-chain acyl-CoA dehydrogenase deficiency (VLCADD).
- Subdivisions (a) and (g) of Section 69-1.3 are amended as follows:

Section 69-1.3 Responsibilities of the chief executive officer. The chief executive officer shall ensure that a satisfactory specimen is submitted to the testing laboratory for each newborn born in the hospital, or admitted to the hospital within the first twenty-eight (28) days of life from whom no specimen has been previously collected, and that the following procedures are carried out:

(a) The infant's parent is informed of the purpose and need for newborn screening, and given newborn screening educational materials provided by the testing laboratory.

* * *

(g) All specimens shall be allowed to air dry thoroughly on a flat nonabsorbent surface for a minimum of four (4) hours prior to [transmittal] forwarding to the testing laboratory. All specimens shall be forwarded to the testing laboratory within twenty-four (24) hours of collection [by first class mail] *using the testing laboratory's delivery service* or [its] *an equivalent arrangement designed to ensure delivery of specimens to the testing laboratory no later than forty-eight (48) hours after collection.*

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: 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:

Public Health Law (PHL) Section 2500-a (a) provides statutory authority for the Commissioner of Health to designate in regulation diseases or conditions for newborn testing, in accordance to the Department's mandate to prevent infant and child mortality, morbidity, and diseases and disorders of childhood.

Legislative Objectives:

This proposal, which would add one condition – galactosylceramidase deficiency, or Krabbe disease – to the list of 43 genetic/congenital disorders and one infectious disease currently in regulation, is in keeping with the Legislature's public health aims of early identification and timely medical intervention for all the State's youngest citizens.

Needs and Benefits:

Data compiled from New York State's Newborn Screening Program (Program) and other states programs have shown that timely intervention and treatment for metabolic disorders can drastically improve affected infants' survival chances and quality of life. For Krabbe disease, early detection through screening is critical to successful treatment.

Krabbe disease is a lipid storage disorder caused by a deficiency of the enzyme galactosylceramidase; it occurs with an incidence of approximately one in 100,000 births.

Affected infants typically succumb to Krabbe disease by two to five years of age after an agonizing clinical course. Newborns appear normal for the first few months of life but manifest extreme irritability, spasticity, and developmental delay before six months of age. Regression in psychomotor development results in feeding difficulties and marked hypertonicty, and eventually progresses to loss of voluntary movement. The infants become deaf and blind, and are prone to pneumonia and other infections; death from infection is common. However, Krabbe disease can be treated if detected early. Treatment is primarily by hematopoietic stem cell transplant using donor cord blood samples. Without newborn screening, a child may not be recognized as having Krabbe disease until he/she develops clinical signs and symptoms.

Costs:

Costs to Private Regulated Parties:

Birthing facilities will incur no new costs related to collection and submission of newborn blood specimens to the Program, since the same dried blood spot specimens now collected and forwarded to the Program for other currently available testing would also be tested for Krabbe disease. Starting in 2005, the Department began to offer free-of-cost delivery services to deter birthing facilities from bundling specimens to save postage costs, and encourage timely shipment of individual newborn specimens; birthing facilities do not incur postage or other delivery costs for the pre-paid delivery service.

The Program estimates that 150 to 200 newborns would screen positive for the new condition annually. Since timing is crucial, *i.e.*, treatment must be started early to be effective, newborns that screen positive – those with low activity of the affected enzyme, galactosylceramidase, as measured in the dried blood spot specimen – will undergo DNA-based molecular analysis, using the same specimen submitted for the initial enzyme test. Infants determined to carry mutations associated with Krabbe disease will require a confirmatory test that measures enzyme activity using a liquid blood specimen. Positive screening results are expected to be confirmed in an estimated 10 to 50 percent of infants who undergo the confirmatory enzyme activity testing. These 15 to 100 infants will be referred for additional diagnostic workup, including: a measurement of protein in spinal fluid; a brain stem evoked auditory response (BAER) test; and magnetic resonance imaging (MRI) to assess white matter in the brain. Results from the entire battery of tests will be reviewed by an advisory committee to the Department, comprised of experts in metabolic disorders and Krabbe disease detection and treatment, and representing facilities with a role in ensuring successful implementation of this proposal. If an infant is determined to be afflicted with Krabbe disease, a pre-established communications system will be activated, and plans for treatment begun immediately. The Department anticipates that more than 95 percent of referred infants will ultimately be found not to be afflicted with Krabbe disease, based on laboratory test and clinical assessment data.

Specialized care centers (*i.e.*, medical centers with facilities for, and staff expert in, diagnosis and treatment of inherited metabolic diseases), local hospitals designated by such centers, and pediatricians in private practice would likely incur minimal costs related to fulfilling their responsibilities for specimen collection to perform additional laboratory testing and referral of screening-positive infants for diagnostic services; such costs would be limited to human resources costs of approximately 0.5 person-hour. Specialized care centers, and to a lesser extent local hospitals and independent providers, will incur additional human resources costs for supplying diagnostic and treatment services, and ongoing medical management to the approximately two to ten infants per year whose disorder is confirmed. Costs of laboratory testing for infants who screen positive for Krabbe disease include an estimated \$200 for confirmatory enzyme analysis; and, for infants whose results are confirmed, another \$50 for measurement of protein in the infant's spinal fluid, as well as the provider's charge for a lumbar puncture.

For infants with a confirmed diagnosis of Krabbe disease, costs would also be incurred for required clinical services and procedures, including: medical and consultative services rendered by a neurologist, a developmental pediatrician and a hematologist with expertise in stem cell transplantation; HLA typing and chemotherapy; MRI testing to monitor the affected infant's brain post-transplant; and genetic counseling for the family. The actual total cost of all requisite services and procedures to evaluate and treat a newborn with Krabbe disease cannot be assessed more exactly due to the large variations in charges for the professional component of specialists and ancillary providers services, and the scope of required services, including the length of time required for hospitalization.

The Department expects that costs of medical services and supplies will be reimbursed by all payer mechanisms now covering the care of

children identified with conditions in the current newborn screening panel. The Department also expects that medical care providers will claim reimbursement from payors at a rate equal to the usual and customary charge, thereby recouping costs.

Costs for Implementation and Administration of the Rule:

Costs to State Government:

Although funding for the State's Newborn Screening Program requires State expenditures, proactively treating congenital abnormalities ultimately may result in savings by precluding the need for more financially burdensome medical and institutional services.

State-operated facilities providing birthing services, and infant follow-up and medical care would incur costs and savings as described above for regulated parties. The Medicaid Program would also experience costs equal to the 25-percent State share for treatment and medical care of affected Medicaid-eligible children. Medicaid would also benefit from cost savings, since early diagnosis would avoid medical complications, thereby reducing the average length of hospital stays and the need for expensive high-technology health care services.

Costs to the Department:

Costs incurred by the Department's Wadsworth Center for performing newborn screening tests, providing short- and long-term follow-up, and supporting continuing research in neonatal and genetic diseases are covered by State budget appropriations recently augmented by dedicated line-item funding for Program expansion. Starting in 2005, the Department assumed the costs of specimen submission by making a pre-paid delivery service available to birthing facilities. The Program's budget includes \$90,000 for specimen delivery services; however, no part of the expenditure for these services is a direct result of this amendment.

The Program expects to sustain minimal to no additional laboratory instrumentation costs related to this proposal, since the necessary technology is already in place. A system for follow-up and assured access to necessary treatment for identified infants is fully established. No additional staff would be required as a result of this proposal.

The Department will incur costs, estimated at from \$3,800 to \$4,000 annually, to provide specimen collection kits, including materials and postage, to pediatricians for collecting liquid blood specimens from an estimated 200 presumptive-positive infants, and forwarding the specimens by overnight courier for confirmatory testing at one or more laboratories approved by the Department.

Costs to Local Government:

Local government-operated facilities providing birthing services, and infant follow-up and medical care, would incur the costs and savings described above for private regulated parties. County governments would also assume costs equal to the 25-percent county share for treatment and medical care of affected Medicaid-eligible children, and thus realize cost savings as described above for State-operated facilities.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district, unless a county, city, town or village government; or school, fire or other special district operates a facility, such as a hospital, caring for infants 28 days of age or under, and, therefore, is subject to these regulations to the same extent as a private regulated party.

Paperwork:

No increase in paperwork would be attributable to activities related to specimen collection, and reporting and filing of test results, as the number and type of forms now used for these purposes will not change. Facilities that submit newborn specimens will sustain minimal to no increases in paperwork, specifically, only that necessary to conduct and document follow-up and/or referral activities.

Duplication:

These rules do not duplicate any other law, rule or regulation.

Alternative Approaches:

Potential delays in detection of Krabbe disease until onset of clinical signs and symptoms would result in increased infant morbidity and mortality, and are therefore unacceptable. Given the strong indications that treatment is available to ameliorate adverse clinical outcomes in affected infants, the Department has determined that there are no alternatives to mandating newborn screening for this condition.

Federal Standards:

There are no existing federal standards for medical screening of newborns.

Compliance Schedule:

The director of the Newborn Screening Program has participated in discussions with representatives of the Governor's Office, the Health

Commissioner's Office and the Department's Public Affairs Group to optimize coordinated notification of affected parties and implementation of this single additional test into the newborn screening program. Educational materials for parents and health care professionals have been updated with information on the expanded screening panel. The Program is collaborating with various Department offices, including the Office of Medicaid Management and the Office of Managed Care, to ensure adequate reimbursement and coverage inclusiveness for required follow-up services, including confirmatory and diagnostic testing, treatment and monitoring.

The Department is continuing to work with the State Newborn Screening Task Force members, directors of specialty care centers, national experts in Krabbe disease diagnosis and treatment, health care professionals, and payors on ongoing assessment of the scope of needed follow-up services and their availability. On January 13, 2006, the director of the Newborn Screening Program gave an invited presentation to the North-eastern New York Organization of Nurse Executives, regarding the Department's plans for including Krabbe disease in the screening panel and the expected impact of such plans on hospitals. On January 30, 2006, participants in a conference on Krabbe disease in New York City reviewed this State's Krabbe disease testing algorithm and plans to ensure the health care infrastructure's readiness to implement this proposal. In addition to staff from several Department offices with a role in the algorithm's implementation, representatives from specialty care centers, transplant facilities, advocacy organizations, a confirmatory testing laboratory, and other interested parties also attended the conference.

Strong support for the amendment is expected from patient advocacy organizations representing affected individuals and families, as well as the medical community at large. The Commissioner of Health is expected to notify all New York State-licensed physicians of this newborn screening panel expansion. The letter will also be distributed to hospital chief executive officers (CEOs) and their designees responsible for newborn screening, as well as other affected parties. There appears to be no potential for organized opposition. Consequently, regulated parties should be able to comply with these regulations as of their effective date, upon publication of a Notice of Adoption in the *New York State Register*.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

This proposed amendment to add one new condition – a lipid storage disorder known as galactosylceramidase deficiency, or Krabbe disease – to the list of 43 genetic/congenital disorders and one infectious disease for which every newborn in New York State must be tested, will affect hospitals; alternative birthing centers; and physician and midwifery practices operating as small businesses, or operated by local government, provided such facilities care for infants 28 days of age or under, or are required to register the birth of a child. The Department estimates that ten hospitals and one birthing center in the State meet the definition of a small business. No facility recognized as having medical expertise in clinical assessment and treatment of Krabbe disease is operated as a small business. Local government, including the New York City Health and Hospitals Corporation, operates 21 hospitals. New York State licenses 67,790 physicians and certifies 350 licensed midwives, some of whom, specifically those in private practice, operate as small businesses. It is not possible, however, to estimate the number of these medical professionals operating an affected small business, primarily because the actual number of physicians involved in delivering infants cannot be ascertained.

Compliance Requirements:

The Department expects that affected facilities, and medical practices operated as small businesses or by local governments, will experience minimal additional regulatory burdens in complying with the amendment's requirements, as functions related to mandatory newborn screening are already embedded in established policies and practices of affected institutions and individuals. Activities related to collection and submission of blood specimens to the State's Newborn Screening Program will not change, since the same newborn dried blood spot specimens now collected and mailed to the Program for other currently performed testing would also be used for the additional test proposed by this amendment. However, birthing facilities and at-home birth attendants (*i.e.*, licensed midwives) would be required to follow up infants screening positive for Krabbe disease, and assume referral responsibility for medical evaluation and additional testing. This anticipated increased burden is expected to have a minimal effect on the ability of small businesses or local government-operated facilities to comply, as no such facility would experience an increase of more than one to two per month in the number of infants requiring referral. Therefore, the Department expects that regulated parties

will be able to comply with these regulations as of their effective date, upon publication a Notice of Adoption in the *New York State Register*.

Professional Services:

No need for additional professional services is anticipated. Birthing facilities' existing professional staffs are expected to be able to assume any increase in workload resulting from the Program's newborn screening for Krabbe disease and identification of screening-positive infants. Infants with positive screening tests for Krabbe disease would be referred to a facility employing a physician and other medical professionals with expertise in Krabbe disease.

Compliance Costs:

Birthing facilities operated as small businesses and by local governments, and practitioners who are small business owners (*e.g.*, private-practicing licensed midwives who assist with at-home births) will incur no new costs related to collection and submission of blood specimens to the State Newborn Screening Program, since the same dried blood spot specimens now collected and mailed to the Program for other currently available testing would also be used for the additional test proposed by this amendment. However, such facilities, and, to a lesser extent, at-home birth attendants, would likely incur minimal costs related to following up infants screening positive for Krabbe disease, primarily because the testing proposed under this regulation is expected to result in, on average, fewer than one screening-positive infant per week at each of the 11 birthing facilities that are small businesses. Communicating the need and/or arranging referral for medical evaluation of one additional identified infant would require 0.5 person-hour, and these tasks are expected to be able to be accomplished with existing staff.

Affected small business, and government-operated hospitals and independent providers operating as a small business, such as primary and ancillary care providers (*i.e.*, pediatricians, neurologists and hematologists), may incur additional human resources costs for supplying post-evaluation and treatment services, and ongoing medical management services to the approximately two to three screening-positive infants whose disorder is confirmed. Clinical services and procedures required for an affected infant could include: medical and consultative services rendered by a neurologist, a developmental pediatrician, and a hematologist with expertise in stem cell transplantation; a spinal tap for spinal fluid specimen collection; and genetic counseling for the family. It is unlikely that practitioners and facilities that are small businesses would incur costs related to treatment, such as costs for chemotherapy to depress the immune system prior to transplant; the transplantation procedure itself; laboratory testing; magnetic resonance imaging (MRI) to monitor the affected infant's brain post-transplant; and costs related to the infant's occupying a bed in the neonatal intensive care unit. The cost of all required services and procedures to evaluate and treat newborns with Krabbe disease born annually in New York State cannot be estimated due to large variations in charges for the professional component of specialists' and ancillary providers' services, and the scope of required services. The Department provides the following prevailing rates, so that small businesses that may become involved in treatment and ongoing care of affected infants may be better able to estimate costs: \$300 for a comprehensive-level office visit; \$150 for genetic counseling visits; \$2,500 for imaging services; and \$250 for confirmatory laboratory testing.

The Department expects that costs of medical services and supplies will be reimbursed by all payor mechanisms now covering the care of children identified with conditions in the current newborn screening panel. Payors include: indemnity health plans; managed care organizations; and New York State's medical assistance program (Medicaid), Child Health Plus, and Children with Special Health Care Needs programs.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses and local governments affected by this amendment.

Minimizing Adverse Impact:

The Department did not consider alternate, less stringent compliance requirements, or regulatory exceptions for facilities operated as small businesses or by local government, because of the importance of the proposed testing to statewide infant public health and welfare. These amendments will not have an adverse impact on the ability of small businesses or local governments to comply with Department requirements for mandatory newborn screening, as full compliance would require minimal enhancements to present collection, reporting, follow-up and record-keeping practices.

Small Business and Local Government Participation:

The feasibility of adding Krabbe disease to the State's newborn screening panel has been discussed with affected parties ever since the Department began testing for a number of new conditions using tandem mass spectrometry technology. Therefore, regulated parties that are small businesses and local governments have been aware of the Department's intention to include Krabbe disease in the panel for some time.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

Rural areas are defined as counties with a population of fewer than 200,000 residents; and, for counties with a population larger than 200,000, rural areas are defined as towns with a population density of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with a population density characteristic of rural areas.

This proposed amendment to add one new condition – galactosylceramidase deficiency or Krabbe disease, a lipid storage disorder – to the list of 43 genetic/congenital disorders and one infectious disease for which every newborn in the State must be tested, will affect hospitals, alternative birthing centers, and physician and midwifery practices located in rural areas, provided such facilities care for infants 28 days of age or under, or are required to register the birth of a child. The Department estimates that 54 hospitals and birthing centers operate in rural areas, and another 30 birthing facilities are located in counties with low-population density townships. No facility recognized as having medical expertise in clinical assessment and treatment of Krabbe disease operates in a rural area. New York State licenses 67,790 physicians and certifies 350 licensed midwives, some of whom are engaged in private practice in areas designated as rural; however, the number of professionals practicing in rural areas cannot be estimated because licensing agencies do not maintain records of licensees' employment addresses.

Reporting, Recordkeeping and Other Compliance Requirements:

The Department expects that birthing facilities and medical practices affected by this amendment and operating in rural areas will experience minimal additional regulatory burdens in complying with the amendment's requirements, as activities related to mandatory newborn screening are already part of established policies and practices of affected institutions and individuals. Collection and submission of blood specimens to the State's Newborn Screening Program will not be altered by this amendment, since the same dried blood spot specimens now collected and mailed to the Program for other currently available newborn testing would also be used for the additional test proposed by this amendment. However, birthing facilities and at-home birth attendants (*i.e.*, licensed midwives) would be required to follow up infants screening positive for Krabbe disease, and assume referral responsibility for medical evaluation and additional testing. This requirement is expected to affect minimally the ability of rural facilities to comply, as no such facility would experience an increase of more than one to two per month in infants requiring referral. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with these regulations as of their effective date, upon publication of a Notice of Adoption in the *New York State Register*.

Professional Services:

No need for additional professional services is anticipated. Birthing facilities' existing professional staff are expected to be able to assume any increase in workload resulting from the Program's newborn screening for Krabbe disease and identification of screening-positive infants. Infants with a positive screening test for Krabbe disease will be referred to a facility employing a physician and other medical professionals with expertise in Krabbe disease.

Compliance Costs:

Birthing facilities operating in rural areas and practitioners in private practice in rural areas (*i.e.*, licensed midwives who assist with at-home births) will incur no new costs related to collection and submission of blood specimens to the State's Newborn Screening Program, since the same dried blood spot specimens now collected and mailed to the Program for other currently available testing would also be used for the additional test proposed by this amendment. However, such facilities and, to a lesser

extent, at-home birth attendants would likely incur minimal costs related to follow-up of infants screening positive, since the proposed added testing is expected to result in no more than one additional referral per month. Communicating the need and/or arranging referral for medical evaluation of one additional identified infant would require 0.5 person-hour, and these tasks are expected to be able to be accomplished with existing staff. The Department estimates that more than 95 percent of infants will be ultimately found not to be afflicted with the target condition, based on clinical assessment and confirmatory testing data.

Rural providers, including clinical specialists (*i.e.*, medical geneticists) and primary and ancillary care providers (*i.e.*, pediatricians, neurologists and hematologists), may incur additional human resources costs for providing post-evaluation and treatment services, and ongoing medical management to the approximately two to three infants per year whose disorder is confirmed. Clinical services and procedures required for an affected infant could include: medical and consultative services rendered by a neurologist, a developmental pediatrician, and a hematologist with expertise in stem cell transplantation; a spinal tap procedure for spinal fluid specimen collection; laboratory testing; and genetic counseling for the family. It is unlikely that facilities in rural areas would incur costs related to treatment, such as costs for chemotherapy to depress the immune system prior to transplant; the transplantation procedure itself; magnetic resonance imaging (MRI) to monitor the affected infant's brain post-transplant; and costs related to the infant's occupying a bed in the neonatal intensive care unit. The cost of all requisite services and procedures to evaluate and treat infants with Krabbe disease born annually in New York State cannot be estimated due to large variations in charges for the professional component of specialists' and ancillary providers' services, and the scope of requisite services, including the length of time required for hospitalization. To the extent specialized services would be delivered in a rural area, the Department provides the following prevailing rates, so that rural providers who may become involved in treatment and ongoing care of affected infants may be better able to estimate costs: \$300 for a comprehensive-level office visit; \$150 for genetic counseling visits; \$2,500 for imaging services; and \$250 for confirmatory laboratory testing.

The Department expects that costs of medical services and supplies will be reimbursed by all payor mechanisms now covering the care of children identified with conditions already in the newborn screening panel. Payors include: indemnity health plans; managed care organizations; and New York State's medical assistance program (Medicaid), Child Health Plus, and Children with Special Health Care Needs programs.

Minimizing Adverse Impact:

The Department did not consider less stringent compliance requirements or regulatory exceptions for facilities located in rural areas because of the importance of expanded testing to statewide infant public health and welfare. These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for mandatory newborn screening, as full compliance would entail minimal changes to present collection, reporting, follow-up and recordkeeping practices.

Rural Area Participation:

The feasibility of adding Krabbe disease to the newborn screening panel has been discussed with affected parties ever since the Department began testing for a number of new conditions using tandem mass spectrometry technology. Therefore, regulated parties located in rural areas have been aware of the Department's intention to include Krabbe disease in the panel for some time.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment proposes the addition of one condition – a lipid storage disorder known as Krabbe disease – to the scope of newborn screening services already provided by the Department. It is expected that no regulated parties will experience other than minimal impact on their workload, and therefore none will need to hire new personnel. Therefore, this proposed amendment carries no adverse implications for job opportunities.

Higher Education Services Corporation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New York State Licensed Social Worker Loan Forgiveness Program

I.D. No. ESC-49-06-00004-EP

Filing No. 1395

Filing date: Nov. 20, 2006

Effective date: Nov. 20, 2006

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

Action taken: Addition of section 2201.8 to Title 8 NYCRR.

Statutory authority: Education Law, sections 653, 655 and 679-a

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

Specific reasons underlying the finding of necessity: The emergency rule is necessary because compliance with the normal proposal process will delay loan forgiveness to eligible recipients.

Subject: New York State Licensed Social Worker Loan Forgiveness Program.

Purpose: To implement the New York State Licensed Social Worker Loan Forgiveness Program.

Text of emergency/proposed rule: New section 2201.8 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

Section 2201.8 New York State Licensed Social Worker Loan Forgiveness Program

(a) Definitions.

(1) "Year" means one calendar year beginning January 1st and concluding on December 31st. Service for less than one year may be permitted in the first and last years of participation in the program provided that the awards will be prorated to reflect the actual service provided.

(2) "Student Loan Debt" means New York State or federal governmental loans, or loans made by commercial entities subject to governmental examination. It does not, however, include parent PLUS loans, or loans that may be canceled under any other program, or private loans given for example by family or friends, or student loan debts paid via credit card.

(3) "Full-time" means providing social worker services for a minimum of 35 hours in a calendar week.

(4) "Economically disadvantaged" shall be determined by ranking each applicant by their New York State combined net taxable income for the applicant and their spouse so that the applicant with the lowest net taxable income will receive the first award. Awards shall continue to be granted in such order until funding is expended.

(5) "Program" means the New York State Licensed Social Worker Loan Forgiveness Program codified in section 679-a of the education law.

(b) Administrative Requirements. The following administrative requirements shall apply to this program:

(1) Applications for the New York State Licensed Social Worker Loan Forgiveness Program shall be postmarked or electronically transmitted no later than March 1st of each year, provided that this deadline may be extended at the discretion of the corporation;

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

(3) The pool of applicants shall be those who have successfully met the filing deadline and who otherwise meet the eligibility requirements of the program; and

(4) The corporation shall offset a loan forgiveness award if the recipient owes a debt to the corporation or is in default on a student loan guaranteed or owned by the corporation in an amount equal to the debt or defaulted loan, plus any fees, penalties, collection costs, interest or other monies allowable under state and federal law.

(c) Disqualifications. The applicant shall be disqualified from receiving an award for any of the following conditions:

(1) The applicant has a service obligation owed to any other state or federal program.

(2) The applicant has loans for which documentation is not available.

(3) The applicant has loans without a promissory note.

(4) The applicant is in default on a federally guaranteed student loan, unless the loan is guaranteed by the corporation.

(5) The applicant's loans are paid in full.

(d) Priorities. The priority of an award shall be that set forth in the enabling legislation. In the event that funding is insufficient to make awards within any given priority, recipients shall be chosen by random selection. Random selection shall be conducted by lottery.

(e) Designation of Critical Human Service Areas.

(1) The president of the corporation may appoint one chairperson from among the members of the committee to facilitate meetings.

(2) The committee is established for consultation purposes only, shall have no voting rights, and shall not need a quorum to meet.

(3) The committee may meet by electronic means, including but not limited to, teleconferencing and videoconferencing.

(4) With regard to the designation of critical human service areas by the corporation, the committee shall meet at least once annually to consult with the corporation. Designation of critical human service areas by the corporation shall be published by the corporation and provided on the corporation's website.

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 February 18, 2007.

Text of rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, Associate Attorney, Higher Education Services Corporation, 99 Washington Ave., Rm. 1350, Albany, NY 12255, (518) 473-1581, e-mail: CFisher@HESC.com

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

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

Regulatory Impact Statement

Statutory authority:

New York State Higher Education Services Corporation's (HESC) statutory authority to promulgate proposals and administer the New York State Licensed Social Worker Loan Forgiveness Program is codified in sections 653, 655 and 679-a of the Education Law.

Chapter 57 of the Laws of 2005 created a previous version of the New York State Licensed Social Worker Loan Forgiveness Program on April 12, 2005. This program, codified in section 605 of the education law, was complicated and contained an ostensible triple penalty for anyone who failed to live up to the requirements of the program.

On June 24, 2005, a repealer was introduced in the legislature as part of an omnibus chapter amendment that created a much simpler loan forgiveness program absent penalties and transferred the administration of the program to the HESC by adding new section 679-a to the Education Law. The bill received a message of necessity and was thereafter signed into law on July 3, 2005, in Chapter 161 of the Laws of 2005.

Legislative objectives:

The legislature established the New York State Licensed Social Worker Loan Forgiveness Program to entice licensed social workers to provide social work services in critical human service areas within New York State. Successful applicants can receive \$6,500.00 for each year that these services are provided up to a cumulative amount of \$26,000.00.

Priority in receiving such awards are as follows: 1) applicants who have received an award for service in a previous year and performed social work services in a critical human service area; 2) applicants who have not yet received an award but who performed service in a critical human service area in the previous year; and 3) applicants who are economically disadvantaged as defined by the corporation.

The statute requires HESC to administer the program including defining "economically disadvantaged," determining the manner in which awards will be distributed if funds are insufficient, and designating "critical human service areas" in consultation with a committee comprised of specific state agencies.

Needs and benefits:

According to statute, "critical human service areas" are geographic areas that exhibit social worker shortages in health, mental health, substance abuse, aging, HIV/AIDS, child welfare or communities with multilingual needs. This program will fill the need for more social workers by offering them student loan forgiveness incentives for each year of service performed.

The statute requires HESC to designate critical human service areas. HESC will need to collaborate with other state agencies possessing expertise in the health and human services industry to ensure fair and effective designations.

The proposal addresses administrative concerns by providing an annual application deadline, defining the terms “year,” “student loan debt,” “full time,” and “economically disadvantaged” applicants, and by providing a structure for implementing the program.

Costs:

a. It is anticipated that there will be no costs to HESC for the implementation of, or continuing compliance with, this rule except for programmatic administration costs.

b. There are no application fees, processing fees, or other costs to the applicants of this program.

c. There are no costs to the collaborating state agencies possessing health and human services expertise because the expertise will be provided by state employees already on the state payroll during the regular work-week within the scope of their present duties.

d. The cost of this program to the State in the first year, FY 2005-06, and in the second year, FY 2006-07, shall not exceed \$1,000,000.00 per year. Future costs to the State shall not exceed the annual appropriation for the program. It is anticipated that there will be no costs to Local Governments for the implementation of, or continuing compliance with, this rule.

e. The source of the cost data in (b) above is derived from statute which limits the total awards under the program to amounts appropriated by the legislature, which is \$1,000,000.00 for 2005-06, and \$1,000,000.00 for 2006-07.

Local government mandates:

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

Paperwork:

This proposal will require potential recipients of the New York State Licensed Social Worker Loan Forgiveness Program to submit an annual application and supporting documentation to establish their eligibility for this program. No additional paperwork will be required. The applications will become electronic in the foreseeable future.

Duplication:

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

Alternatives:

In preparing this proposal, HESC met with the New York State and New York City chapters of the National Association of Social Workers (NASW). This proposal is a reflection of those meetings.

As noted above, HESC is required to define “economically disadvantaged,” (the third statutory priority in distributing awards). The New York State Licensed Social Worker Loan Forgiveness Program was passed in an omnibus bill, therefore there is no memo to clarify the meaning of “economically disadvantaged.” While in other New York State a program, “economically disadvantaged” is a term of art indicating financial hardship, NASW indicated that for the purposes of this proposal, “economically disadvantaged” was included to ensure that the financial need of an applicant would be considered. Accordingly, HESC’s proposal ranks applicants using the combined net taxable income for the applicant and their spouse. In the event the third statutory priority for awards is reached, applicants with the lowest combined net taxable income will be given preference over those with the highest.

Further, information from NASW indicates that “full time” for the social work industry in New York typically means 35 hours per week. The proposal reflects this.

The proposal’s definitions for “disqualifications” and “student loan debt,” are based on those of similar federal programs such as the U.S. Department of Education’s Perkins Loan Forgiveness Program and the U.S. Health and Human Services Nursing Education Loan Repayment Program, as well as the New York State Nursing Faculty Loan Forgiveness Incentive Program.

“Year” has been defined by the proposal as a calendar year inasmuch as this program does not take place in an academic setting, therefore using “academic year” as the definition for “year” would be inappropriate. Based upon input from NASW, the definition of “year” will allow for pro-rated awards.

Federal standards:

This proposal does not exceed any minimum standards of the Federal Government. Efforts were made to align this proposal with programs in similar federal subject areas.

Compliance schedule:

The agency will be able to comply with the proposal immediately upon its adoption.

Regulatory Flexibility Analysis

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation’s Notice of Emergency Adoption and Notice of Proposed Rule Making seeking to add a new section 2201.8 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on small businesses or local governments. This agency finds that this rule will not impose any compliance requirements or adverse economic impact on small businesses or local governments because it implements a statutory student loan forgiveness program funded by New York State and administered by a State agency.

Rural Area Flexibility Analysis

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation’s Notice of Emergency Adoption and Proposed Rule Making seeking to add a new section 2201.8 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. This agency finds that this rule will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, and that there will be no costs for the implementation of, or continuing compliance with, this rule except for programmatic administration costs.

The program will have a positive impact on rural areas deemed “critical human service areas” by attracting social workers to those areas. The program implements the New York State Licensed Social Worker Loan Forgiveness program.

For 2006, 24 of the 28 counties deemed critical human service areas are rural counties or contain rural areas as defined in section 481(7) of the Executive Law. They are: Allegany, Cattaraugus, Chautauqua, Chemung, Chenango, Clinton, Cortland, Jefferson, Lewis, Franklin, Fulton, Herkimer, Oswego, Steuben, St. Lawrence, Sullivan, Tompkins and Yates counties. The remaining 6 counties have rural areas in the form of townships with population densities of less than 150 people per square mile. They are Broome, Erie, Monroe, Niagara, Oneida and Onondaga counties.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation’s Notice of Emergency Adoption and Proposed Rule Making seeking to add a new section 2201.8 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will have a positive impact or no impact on jobs and employment opportunities. The proposal implements a statutory student loan forgiveness program funded by New York State and administered by a State agency. Licensed social workers will likely be attracted to jobs in critical human service areas by this program.

Department of Law

NOTICE OF ADOPTION

Cooperative Sponsor Disclosure Requirements

I.D. No. LAW-30-06-00004-A

Filing No. 1386

Filing date: Nov. 17, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of sections 18.3(c), (e), (e)(6), (v)(5) and 18.5(c)(3) of Title 13 NYCRR.

Statutory authority: General Business Law, section 352-e(6)(a) and (b)

Subject: Cooperative sponsor disclosure requirements.

Purpose: To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and possible negative repercussions of excessive sponsor retention.

Text or summary was published in the notice of proposed rule making, I.D. No. LAW-30-06-00004-P, Issue of July 26, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Kenneth E. Demario, Office of the Attorney General, 120 Broadway, New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario @oag.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Condominium Sponsor Disclosure Requirements

I.D. No. LAW-30-06-00005-A

Filing No. 1389

Filing date: Nov. 17, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of section 23.3(c), (e), (e)(5), (v) and (w) of Title 13 NYCRR.

Statutory authority: General Business Law, section 352-e(6)(a) and (b)

Subject: Condominium sponsor disclosure requirements.

Purpose: To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and possible negative repercussions of excessive sponsor retention.

Text or summary was published in the notice of proposed rule making, I.D. No. LAW-30-06-00005-P, Issue of July 26, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Kenneth E. Demario, Office of the Attorney General, 120 Broadway, New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario @oag.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Condominium Sponsor Disclosure Requirements

I.D. No. LAW-30-06-00006-A

Filing No. 1387

Filing date: Nov. 17, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of section 20.3(c), (d), (t), (u) and (v) of Title 13 NYCRR.

Statutory authority: General Business Law, section 352-e(6)(a) and (b)

Subject: Condominium sponsor disclosure requirements.

Purpose: To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and possible negative repercussions of excessive sponsor retention.

Text or summary was published in the notice of proposed rule making, I.D. No. LAW-30-06-00006-P, Issue of July 26, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Kenneth E. Demario, Office of the Attorney General, 120 Broadway, New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario @oag.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Cooperative Sponsor Disclosure Requirements

I.D. No. LAW-30-06-00007-A

Filing No. 1388

Filing date: Nov. 17, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of section 21.3(c), (e), (s) and (x) of Title 13 NYCRR.

Statutory authority: General Business Law, section 352-e(6)(a) and (b)

Subject: Cooperative sponsor disclosure requirements.

Purpose: To ensure that sponsors fully inform potential purchasers of their intention to sell or retain the other units, and possible negative repercussions of excessive sponsor retention.

Text or summary was published in the notice of proposed rule making, I.D. No. LAW-30-06-00007-P, Issue of July 26, 2006.

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

Text of rule and any required statements and analyses may be obtained from: Kenneth E. Demario, Office of the Attorney General, 120 Broadway, New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario @oag.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Division of Probation and Correctional Alternatives

EMERGENCY RULE MAKING

Probation Investigations and Reports

I.D. No. PRO-41-06-00008-E

Filing No. 1396

Filing date: Nov. 21, 2006

Effective date: Nov. 21, 2006

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

Action taken: Repeal of Part 350 and addition of new Part 350 to Title 9 NYCRR.

Statutory authority: Executive Law, section 243(1); and Family Court Act, section 252-a

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

Specific reasons underlying the finding of necessity: To enhance public/victim safety, promote offender accountability and informed judicial decisionmaking as well as provide greater flexibility to probation departments in the investigation and preparation of probation reports to the courts. It is imperative to immediately strengthen regulations governing probation investigations and reports to reflect recent statutory and/or regulatory changes in the area of sex offenses, DNA, ignition interlock, and better address issues relative to fingerprinting, citizenship, victim compensation and the unnecessary placement of children. The new rule addresses the important need for the verification of information and documented means by which information provided to courts is verified.

It provides clear guidance in identifying individuals subject to DNA sample collection and explains SORA applicability and the key factors for risk classification. It addresses the need to address citizenship and identify criminal aliens that may be subject to federal deportation proceedings. New victim-related provisions will facilitate greater imposition of restitution and improve restitution collection. Other provisions relative to orders of protection safeguard domestic violence victims and promote batterer accountability. Fingerprinting provisions ensure that the court is aware of the complete criminal history of the offender or those seeking custody,

adoption, visitation or the guardianship of children. Due to the myriad of public safety and general welfare issues addressed by this rule, DPCA has determined that the readoption of this important rule should proceed pursuant to emergency rule making.

Subject: Investigations and reports prepared by probation departments.

Purpose: To clarify existing laws governing the investigation and reports and to provide the court with relevant and reliable information for decisionmaking consistent with good probation practice.

Substance of emergency rule: Part 350 - Investigations and Reports

The emergency revision amends Part 350 of Title 9 NYCRR to reflect current best practice and emphasize recent statutory changes and policy direction to promote greater offender/respondent accountability, interests and safety of victims and youth, as well as to provide key information regarding the individual who is the subject of a court-ordered investigation to ensure appropriate decision-making. These changes clarify and update certain existing provisions to ensure good professional practice, and provide flexibility in specific areas while maintaining quality service delivery. The emergency rule also better distinguishes and integrates provisions with respect to juvenile, criminal court, and other court investigations and reports.

The definitional section, Section 350.1 is retained. However it has been expanded to include and/or clarify particular terms, such as legal history, social circumstances, verification, victim, victim impact statement, and various types of interviews.

A newly added Section 350.2 clarifies the varied types of investigations which probation conducts and Section 350.4 governing applicability establishes the scope of the investigation and report rule consistent with this earlier noted section.

Section 350.3 entitled "Objective" delineates those dispositional and regulatory agencies that may or are required to receive probation reports for immediate or future decision-making.

Section 350.5 provides a general statement as to investigations and reports and clarifies the need to distinguish between fact and professional assessment, information sources, professional and other assessment protocols and observations, and to cite sources of information.

Section 350.6 governs the investigation process. Previous language in this area has been reworked and certain noteworthy provisions are highlighted below:

(a) Order for investigation and report. Refers to DPCA-2.2 Court Order for Investigation and Report to obtain the required information necessary to initiate the investigation and report process. The CJTN and NYSID are also required in this document. Allows for entry of information into an electronic case record management system.

(b) Scope of investigation. Refers to DPCA-221 Pre-Dispositional/Pre-Plea/Pre-Sentence Investigation Report Worksheet for the minimum required information, and articulates that this information is to be included where it has a bearing on the disposition of a case. This section organizes the format and contents of the report, incorporating areas to be addressed, both new and as previously described in various sections of the existing rule. It more clearly distinguishes the information required for juvenile and criminal court investigations, and incorporates more recent changes in law and probation practice (*i.e.*, SORA eligibility, persistent and predicate felony status, immigration and alien status, juvenile placement considerations). This section specifies and expands the range of risk, need and protective factor information to be included. It requires victim information in all cases where there is a victim, and specifies and expands the types of information to be sought from and about the victim. It clarifies who can speak on the victim's behalf and addresses reimbursement received from Crime Victims Board.

(c) Conducting the investigation.

1. Obtaining basic legal information. This was moved to the top of this section to more accurately reflect actual workflow. Specifies and expands the legal information that should be gathered prior to the interview with the defendant.

2. Interviews with respondent/defendant, or subject(s) of the court order for investigation. Delineates what types of interviews are required and/or permissible. Recognizes procedures approved by DPCA and the NYS Division of Parole (DOP) for cases where the defendant is in the custody of the NYS Department of Correctional Services (DOCS). Provides relief from an in-person interview of defendant/respondent on a case-by-case basis where individual resides in a distant jurisdiction and probation director has determined exigent circumstances exist.

3. Other interviews/contacts. For juvenile cases, provides a requirement to interview parents/guardians for the purpose of gathering information relative to the parent's/guardian's perspective of the youth's legal and

social circumstances, as well as the parent's/guardian's perceived ability and willingness to assist in meeting the goals of supervision of the youth in probation-bound cases. For youth eligible to receive youthful offender treatment, encourages such interviews, as appropriate. Requires communication with the victim/victim representative to inform them of their right to seek restitution and to attempt to secure a victim impact statement.

4. Types of Assessment. Incorporates financial, community, and institutional resource assessment from existing rule. Adds a requirement to assess a respondent/defendant risk and needs.

5. Verification. Expands the list of informational elements requiring verification to include: citizenship; place of birth; current address; alien status; and steps taken to verify the information. Expands the list of informational elements to be verified, when such is likely to have a bearing on recommendation, to include names of members of the household and their relationship to the respondent/defendant.

d. Preservation of investigation materials. Adds that the probation officer shall document the sources of information.

Section 350.7 governs preparation of reports and highlighted below are important features:

(a) Scope of report. Provides that the Investigation Facesheet must contain the information as provided for in DPCA-220 Pre-Dispositional/Pre-Plea/Pre-Sentence Investigation Report Facesheet.

(b) Informational contents of report and format. Provides for the following:

- Reorganizes into subsections content including legal history, current offense information, social circumstances, evaluative analysis, and recommendation.

- Incorporates some of the language from existing rule 350.6(b).

- Clarifies relevant information to be reported from various interviews, including arresting officer, respondent/defendant, victim(s), and parent(s).

- Distinguishes between required family court and criminal court legal history, and adds a requirement for order of protection information.

- Adds that a victim impact statement is always relevant to the recommendation or court disposition.

- Requires that the address of the victim or victim family member not be included in the report.

- Refers to new 350.5(b)(2) for contents regarding social circumstances.

- The evaluative analysis section is significantly expanded to specify the elements requiring probation officer assessment and analysis.

- Adds that the recommendation must be consistent with law.

- Requires a recommendation for special conditions that address public safety, repairation, DNA collection, and offender accountability when probation or conditional discharge is recommended.

- Requires a recommendation for restitution, where such is being sought, that acknowledges the defendant's potential earnings/allowances while in the community or in prison.

- Where prison is anticipated, requires that the rate of payment shall not be specified, and that the start date for payment shall not be recommended for deferral.

- Adds provision for exception of portion of the report where disclosure would endanger the safety of any person.

- Provides for electronic signatures and date stamping as to when and by whom review was completed.

- For potential supervision transfer cases, adds requirement to secure all necessary information necessary to affect transfer at time of sentence.

Section 350.8 governs certificate of relief from disabilities investigations and reports and is similar to existing language, except for the new language which requires a recommendation be made as to the relief to be granted.

Section 350.9 pertains to special requirements for pre-plea investigations and reports which is similar in nature to existing language, yet clarifies in general the scope of pre-plea investigations and reports shall conform to pre-dispositional reports, that the recommendation shall take into account that there is no conviction, and recognizes situations where on advice of counsel or their own volition, the defendant declines to discuss the current offense.

Section 350.10 governs submission, transmittal and confidentiality of probation reports and while similar to existing language, it has been updated to conform to state law and reflect recent regulatory changes to DPCA's case record rule governing confidentiality and accessibility of probation reports.

Section 350.11 governs pre-disposition investigations and reports in all other family court cases and while similar to existing regulatory provisions, new language requires fingerprinting and criminal history search of

the parties in custody, adoption, visitation, and guardianship investigations to conform to recent statutory changes in this area.

Lastly, Section 350.12 retains without change guidelines, as required by Family Court Act Section 252-a, for schedule of payments relating to family court custody investigation fees which have been authorized by law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. PRO-41-06-00008-EP, Issue of October 11, 2006. The emergency rule will expire January 19, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Linda J. Valenti, Counsel, Division of Probation and Correctional Alternatives, 80 Wolf Rd., Suite 501, Albany, NY 12205, (518) 485-2394

Regulatory Impact Statement

1. Statutory authority:

Article 12 of the Executive Law, specifically Section 243(1), authorizes the State Director of Probation and Correctional Alternatives to "regulate methods and procedure in the administration of probation services, including investigation of defendants prior to sentence, and children prior to adjudication... so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state." Such rules are binding and have the force and effect of law. Further, Article 12-A of such law, specifically Section 256(1), requires probation agencies to perform investigations and reports assigned to them pursuant to law. Additionally, Section 252-a of the Family Court Act establishes parameters by which a probation department, whose jurisdiction has adopted a local law, may collect an investigation fee for Family Court custody investigations and also specifies that the schedule for payment shall be fixed by the court pursuant to guidelines issued by the State Director of Probation and Correctional Alternatives.

2. Legislative objectives:

These regulatory amendments are consistent with legislative intent that the Director adopt regulations in areas relating to critical probation functions, to promote professional standards governing the administration, conducting, and delivery of probation services in the area of investigation and report preparation for courts, as well as to enhance numerous measures enacted into law to provide the courts and dispositional agencies with relevant and reliable information in a succinct, analytical presentation for decision-making. By vesting the State Director with rule making authority, the Legislature has authorized the Division of Probation and Correctional Alternatives (DPCA) to set minimum standards in the area of probation investigations and reports.

3. Needs and benefits:

These amendments align with and conform to statutes that have been enacted since the last rule revision, clarifying rule language, and establishing and codifying elements of good probation practice to assist practitioners in fulfilling their legal responsibilities. Additional rule language specifies essential information elements as the field of probation: 1) increases its expertise concerning victims and victims' issues; 2) incorporates research-supported strategies related to the gathering and reporting of information relevant to assessing risk of recidivism and criminogenic need areas; 3) provides information necessary to develop specific intervention strategies to target higher risk populations; 4) moves forward in the electronic compilation, storage, and exchange of information across the full spectrum of the justice system; 5) integrates new technologies utilized in community corrections. More comprehensive provisions will prove beneficial in terms of compliance with existing laws, promoting consistent communication for public safety and/or case management purposes, and incorporating best practices.

More specifically, there are a number of new provisions to ensure that important legal information and considerations are documented and conveyed to the court and all necessary parties. For criminal cases, the Criminal Justice Tracking Number (CJTN) and the New York State Identification Number (NYSID) are required to be obtained as part of the investigation as they are critical, person and event specific identifiers that ensure legal history is correctly associated with the subject of the investigation. Further, Sex Offender Registration Act (SORA) eligibility, persistent and predicate felony status, immigration and alien status, and juvenile placement considerations must be specifically documented in conformance with law and good probation practice.

There are new provisions related to victims of crime. These amendments: clarify that a victim impact statement is always relevant to the recommendation or court disposition; address who can speak on the vic-

tim's behalf; require victim information in all cases where there is a victim; and include specification of types of information to be sought from and about the victim. Further, it requires that information related to orders of protection be included in the report, and that address(es) of the victim or victim family member not be included. The amendments require probation to communicate with the victim as to their right to seek restitution and to attempt to secure a victim impact statement. It also requires probation to include any information regarding reimbursement from the Crime Victims Board. These changes are intended to support victim safety and the victim's right to be heard, and to provide victim opportunity for input in this critical phase of the legal proceeding against their offender.

Where the defendant is in custody of the NYS Department of Correctional Services (DOCS) and is not reasonably accessible for interview, the amendments refer to procedures approved by DPCA and the NYS Division of Parole (DOP) for gathering of information by the institutional parole officer. Such procedures provide greater flexibility in obtaining information from the subject of the investigation.

For juvenile cases, a new provision requires probation to interview parents/guardians for the purpose of gathering information relative to their perspective of the youth's legal and social circumstances, as well as their perceived ability and willingness to assist in meeting the goals of supervision of the youth. This requirement ensures that parents/guardians have an opportunity for input into the assessment and decision-making process. Further, as parents/guardians tend to have valuable information and insight regarding their children, the requirement that the probation officer interview the parent(s) contributes significantly to investigations involving juveniles. For defendants eligible to receive youthful offender treatment, the amendments encourage such interviews, as appropriate.

As probation has traditionally been responsible to advise the court relative to the respondent/defendant's capacity to lead a law-abiding life in the investigation report, it is essential that formal risk assessment be conducted at this stage. Further, for probation-bound cases, formal assessment is critical to develop recommendations for special conditions that target criminogenic risk and needs to effectively manage the offender and reduce the risk of recidivism. These amendments add a requirement to assess respondent/defendant risk and needs.

New requirements strengthen the justice system's ability to accurately identify populations of concern to promote local, state, and national security. Additional items to be verified include citizenship, place of birth, current address, alien status; also, when likely to have a bearing on recommendation, the names of household members and their relationship to the respondent/defendant. These amendments also require the probation officer to document sources of information.

The evaluative analysis section is expanded to specify the primary elements requiring probation officer analysis. This ensures that key findings relative to decision-making are incorporated. There is a new requirement that when probation or conditional discharge is recommended, special conditions shall address public safety, reparation, DNA collection, and offender accountability. Where restitution is sought, there will be a recommendation for restitution that acknowledges the defendant's potential earnings/allowances while in the community or in prison. Where prison is anticipated, it further requires that the rate of payment not be specified, and that the start date for payment not be recommended for deferral. Collectively, these changes are intended to promote consistency and good practice.

Recognizing the laws governing access to and confidentiality of the investigative report, a new provision requires probation to recommend exception of any portion of the report where disclosure of information would endanger the safety of any person.

There are a series of amendments to address finalization of the report, use of it at disposition/sentencing, and attention to transfer cases. These amendments recognize electronic document preparation while ensuring the security and integrity of the report by providing for electronic signatures and date stamping. For potential supervision transfer cases, language has been added to secure all information necessary to affect timely transfer. This provision is intended to assure that such individuals do not leave the court's jurisdiction without obtaining necessary authorizations. Finally, there is a provision to promote the consistency of pre-plea reports for use after conviction, which requires that the investigation and body of the reports conform to pre-sentence reports and the recommendation takes into account that there is no conviction.

Overall, these regulatory amendments strengthen and promote effective probation practice by affording greater consistency through specific guidance in the investigation and report process. They establish appropriate guidelines to guarantee more uniform application, incorporate changes

in law, address and optimize public and victim safety and reparation, and promote greater offender accountability by ensuring the gathering and reporting of accurate and relevant information to inform the decision-making process and post-dispositional service providers. It is in the best interests of state and local government that these regulatory amendments be adopted.

4. Costs:

These changes articulate specific requirements of effective probation investigation and reporting practices. DPCA does not foresee that these reforms will lead to significant additional costs. The majority of probation departments are already participating or intend to participate in DPCA's efforts to deploy the Caseload Explorer/ ProberWeb case management software, which makes available all DPCA-issued forms. Further, DPCA has made available at no costs to jurisdictions, risks and needs assessment tools for purposes of intake, investigation and supervision. Those few departments with locally developed caseload management systems may incur certain costs in modifying an automatically generated form (DPCA-220) to include the new data elements required through these amendments. However, departments instead can choose to utilize DPCA's forms which are available electronically. As to any anticipated in-service costs of educating staff, DPCA believes that orientation can be readily accomplished through a written memorandum by the probation department and supervisory oversight without incurring any direct costs. In conclusion, any minimal costs are outweighed by the significant benefits of increased public safety interests.

5. Local government mandates:

These emergency regulatory amendments establish provisions for effective investigation and reporting protocols consistent with both traditional and emerging probation practices. We do not anticipate these new requirements will be burdensome. While this regulatory reform requires specific attention to particular key areas for investigation, it provides flexibility in determining which informational elements are relevant for presentation in the written report to the court and recognizes the role of professional judgment during the interview process. It further provides relief from an in-person interview of defendant/respondent on a case-by-case basis where an individual resides in a distant jurisdiction and the probation director has determined exigent circumstances exist.

Noteworthy, DPCA constituted a workgroup to initially draft a revised investigation and report rule, which was comprised of several representatives from local probation departments across all levels of staffing: director, supervisor, and line probation officers. DPCA circulated two refined drafts to all probation directors/commissioners, the Council of Probation Administrators, (the statewide professional association of probation administrators) which assigned it to a specific committee for review, and the State Probation Commission, DPCA's advisory body. Throughout, DPCA incorporated numerous suggestions and sought to clarify several additional issues raised, including greater recognition of flexibility in certain instances. Overall, DPCA has received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice.

6. Paperwork:

The emergency rule, while requiring additional data elements as part of comprehensive investigation and report preparation, will not require the completion of additional forms or other paperwork.

7. Duplication:

This emergency rule does not duplicate any State or Federal law or regulation. It clarifies and reinforces certain laws with respect to crime victims, juveniles, illegal aliens, DNA collection, restitution, and disposition/sentencing to promote and facilitate compliance.

8. Alternatives:

Establishing stronger and more specific minimum standards relative to the core probation function of investigation and report preparation, promotes public and victim safety as well as offender and systems accountability by ensuring the provision of relevant and accurate information to the court for decision-making, and to post-dispositional agencies for appropriate service interventions. Additionally, DPCA is the state regulatory agency with respect to probation services and the Director has authority and responsibility to establish regulations in this area to achieve effective and consistent minimum standards for practice. Accordingly, it is not a viable alternative to have no investigation and report rule governing this important probation function.

9. Federal standards:

There are no federal standards governing the probation investigation process.

10. Compliance schedule:

Through past agency communication with probation departments on content of two earlier drafts and involvement of a cross-section of probation departments in the initial workings leading to the original draft, DPCA believes that these regulatory changes will not prove difficult to achieve. Through prompt dissemination to staff of the new rule and its summary, local departments should be able to promptly implement these amendments and comply with its provisions. These regulatory amendments shall take effect as soon as they are published in the State Register under a Notice of Adoption.

Regulatory Flexibility Analysis

A regulatory flexibility analysis for small businesses is not required by Section 202-a of the State Administrative Procedure Act; no small business record keeping requirements, needed professional services, or compliance requirements will be imposed on small businesses.

Any impact a local government is addressed in both the Regulatory Impact Statement and the Rural Area Flexibility Analysis.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Forty-four local probation departments are located in rural areas and will be affected by the emergency rule amendments.

2. Reporting, recordkeeping, and other compliance requirements, and professional services:

There are no current reporting requirements to our state agency, the Division of Probation and Correctional Alternatives (DPCA) associated with this new rule. While the emergency rule more comprehensively delineates the areas of investigation supporting the preparation of the probation report, DPCA believes new provisions update requirements of law as well as codify good probation practice. The emergency rule, while requiring additional data elements as part of comprehensive investigation and report preparation, will not require the completion of additional forms or other paperwork.

Any changes to specific local written policies and procedures governing probation investigation and report preparation are normal business activities and in keeping with good professional practice. There are no professional services necessitated in any rural area to comply with this rule. Lastly, DPCA does not believe that these regulatory changes will prove difficult to achieve. Through prompt dissemination to staff of this new rule and its summary, local probation departments should be able to promptly implement these amendments and comply with its provisions.

3. Costs:

These changes articulate specific requirements of effective probation investigation and reporting practices. DPCA does not foresee that these reforms will lead to significant additional costs. The majority of probation departments already are participating or intending to participate in DPCA's efforts to deploy the Caseload Explorer/ ProberWeb case management software which makes available and retrievable all DPCA issued forms in this area. Further, DPCA has made available, at no cost to jurisdictions, risks and needs assessment tools for purposes of intake, investigation and supervision. Those few departments with locally developed software assisted caseload management systems may incur certain costs in modifying one automatically generated form (DPCA-220) to include the new data elements required through these amendments. However, alternatively, they can choose to utilize DPCA's forms which are available electronically. As to any anticipated in-service costs of educating staff, DPCA believes that orientation can be readily accomplished through a written memorandum by the probation department and supervisory oversight without incurring any direct costs. In conclusion, any minimal costs are outweighed by the significant benefits of increased public safety interests in all jurisdictions, including rural counties. These emergency regulatory amendments establish provisions for effective investigation and reporting protocols consistent with both traditional and emerging probation practices. We do not anticipate these new requirements will be burdensome.

4. Minimizing adverse impact:

DPCA foresees that these regulatory amendments will have no adverse impact on rural areas and as indicated below, our agency collaborated with jurisdictions across the state in developing the emergency rule and incorporated numerous suggestions to clarify or address issues raised and to reflect good probation practice. DPCA embraced flexibility where consistent with good probation practice. Further details are more fully defined in the regulatory impact statement. While this regulatory reform requires specific attention to particular key areas for investigation, it provides flexibility in determining which informational elements are relevant for presentation in the written report to the court and recognizes the role of professional judgment during the interview process.

5. Rural area participation:

DPCA constituted a workgroup to initially draft a revised investigation and report rule, which was comprised of several representatives from local probation departments across all levels of staffing: director, supervisor, and line probation officers and included rural county representatives. DPCA also circulated two refined drafts to all probation directors/commissioners, the Council of Probation Administrators, (the statewide professional association of probation administrators) which assigned it to a specific committee for review which includes rural representation, and the State Probation Commission, DPCA's advisory body. Throughout, DPCA incorporated numerous suggestions and sought to clarify several issues raised, including greater recognition of flexibility in certain instances. Overall, DPCA has received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice.

The emergency regulatory amendments incorporate many verbal and written suggestions from probation professionals, including rural entities, across the state to address problems which probation departments experience in the area of investigation and report preparation. Brief details of some of these changes are highlighted in the regulatory impact statement. Moreover, DPCA did not find significant differences among urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

Job Impact Statement

A job impact statement is not being submitted with these emergency regulations because it will have no adverse effect on private or public jobs or employment opportunities. The revisions are procedural in nature clarifying law and conforming with good probation practice as to investigations and reports. These changes are not onerous and can be implemented through correspondence and in-service training of probation staff.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION**Pole Attachment Rates by Bath Electric, Gas and Water Systems**

I.D. No. PSC-15-05-00017-A

Filing date: Nov. 17, 2006

Effective date: Nov. 17, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order approving, in part, Bath Electric, Gas and Water Systems' petition for rehearing of the commission's Feb. 10, 2005 order regarding pole attachment rates.

Statutory authority: Public Service Law, section 89-c(1)

Subject: Request for rehearing of the commission's Feb. 10, 2005 order.

Purpose: To approve Bath Electric, Gas and Water Systems' request for rehearing of the commission's Feb. 10, 2005 order regarding pole attachment rates.

Substance of final rule: The Public Service Commission adopted an order approving, in part, Bath Electric, Gas and Water Systems' request for rehearing of the Commission's February 10, 2005 Order regarding pole attachment rates, subject to the terms set forth in the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-E-1471SA2)

NOTICE OF ADOPTION**Lightened Regulation by Caithness Long Island, LLC**

I.D. No. PSC-22-05-00003-A

Filing date: Nov. 15, 2006

Effective date: Nov. 15, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order granting Caithness Long Island, LLC lightened regulation of it as an electric corporation for its electric generating facility in the Town of Brookhaven, Suffolk County.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Request for lightened regulation as a competitive wholesale electric generator.

Purpose: To approve Caithness Long Island, LLC's request for a lightened regulatory regime.

Substance of final rule: The Public Service Commission adopted an order granting Caithness Long Island, LLC a Certificate of Public Convenience and Necessity, for the construction and operation of a 326 MW electric generating facility in the Town of Brookhaven, Suffolk County, and providing for lightened regulation, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(05-E-0098SA1)

NOTICE OF ADOPTION**Submetering of Electricity by The Lofts at City Center**

I.D. No. PSC-52-05-00021-A

Filing date: Nov. 16, 2006

Effective date: Nov. 16, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order in Case 05-E-1550 approving the petition filed by The Lofts at City Center to submeter electricity at 23, 25 and 27 City Place, White Plains, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of The Lofts at City Center to submeter electricity at 23, 25 and 27 City Place, White Plains, NY.

Substance of final rule: The Commission approved a request by The Lofts at City Center to submeter electricity at 23, 25, and 27 City Place, White Plains, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(05-E-1550SA1)

NOTICE OF ADOPTION

Issuance of Long Term Securities by Caithness Long Island, LLC**I.D. No.** PSC-12-06-00009-A**Filing date:** Nov. 15, 2006**Effective date:** Nov. 15, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order granting Caithness Long Island, LLC approval to issue and sell long term securities to finance the construction of an electric generating facility in the amount up to \$495 million.

Statutory authority: Public Service Law, section 69

Subject: Issuance of long term securities of up to \$495 million.

Purpose: To approve Caithness Long Island, LLC's request to issue and sell long term securities to finance the construction of an electric generating facility.

Substance of final rule: The Public Service Commission adopted an order granting Caithness Long Island, LLC approval to issue and sell long term securities to finance the construction of an electric generating facility in the amount of up to \$495 million, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-0098SA2)

NOTICE OF ADOPTION

Prescription Drug and Medicare Improvement Act of 2003**I.D. No.** PSC-27-06-00013-A**Filing date:** Nov. 16, 2006**Effective date:** Nov. 16, 2006

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

Action taken: The commission on Nov. 8, 2006, adopted an order concerning protocols for accounting and rate making relating to implementation of the Prescription Drug and Medicare Improvement Act of 2003.

Statutory authority: Public Service Law, sections 64, 65(1), 66(1), (4), (5), (9) and (10), 78, 79(1), 80(1), (3), (4), (7) and (8), 89-a, 89-b(1), 89-c(1), (3), (4), (7) and (8), 90(1), 91(1), 94(1), (2) and (3), 95(2)

Subject: Accounting and rate making relating to implementation of the Prescription Drug and Medicare Improvement Act of 2003.

Purpose: To adopt protocols for accounting and rate making.

Substance of final rule: The Commission adopted the Staff Straw Proposal with modification, for accounting, for the 2003 Medicare Act impacts under the requirements of the OPEB Statement and Order which establishes the accounting for pension and post-retirement benefit expenses other than pensions (OPEB), subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-M-1693SA2)

NOTICE OF ADOPTION

Submetering of Electricity by Gumley-Haft Real Estate, on behalf of Katz Park Avenue Corporation**I.D. No.** PSC-31-06-00019-A**Filing date:** Nov. 17, 2006**Effective date:** Nov. 17, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order in Case 06-E-0788 approving the petition filed by Gumley-Haft Real Estate, on behalf of Katz Park Avenue Corporation to submeter electricity at 530 Park Ave., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Gumley-Haft Real Estate, on behalf of Katz Park Avenue Corporation to submeter electricity at 530 Park Avenue, New York, NY.

Substance of final rule: The Commission approved a request by Gumley-Haft Real Estate, on behalf of Katz Park Avenue Corporation to submeter electricity at 530 Park Avenue, New York, New York, in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0788SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Bellevue South Associates, LP**I.D. No.** PSC-33-06-00024-A**Filing date:** Nov. 17, 2006**Effective date:** Nov. 17, 2006

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

Action taken: The commission, on Nov. 8, 2006 adopted an order in Case 06-E-0842 approving the petition filed by Bellevue South Associates, LP to submeter electricity at 460-520 Second Ave., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Bellevue South Associates, LP to submeter electricity at 460-520 Second Ave., New York, NY.

Substance of final rule: The Commission approved a request by Bellevue South Associates, LP to submeter electricity at 460-520 Second Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-0842SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Cabrini Towers**I.D. No.** PSC-33-06-00026-A**Filing date:** Nov. 17, 2006**Effective date:** Nov. 17, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order in Case 06-E-0874 approving the petition filed by Cabrini Towers to submeter electricity at 900 W. 190th St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Cabrini Towers to submeter electricity at 900 W. 190th St., New York, NY.

Substance of final rule: The Commission approved a request by Cabrini Towers to submeter electricity at 900 West 190th Street, New York, New York, in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(06-E-0874SA1)

NOTICE OF ADOPTION

Submetering of Electricity by Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC**I.D. No.** PSC-34-06-00013-A**Filing date:** Nov. 16, 2006**Effective date:** Nov. 16, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order in Case 06-E-0891 Petition of Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC to submeter electricity at 67 Wall St., New York, NY, located in the territory of Consolidated Edison Company of New York, Inc.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the request of Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC to submeter electricity at 67 Wall St., New York, NY.

Substance of final rule: The Commission approved a request by Metro Loft Management, on behalf of RBNB 67 Wall Street Owner, LLC to submeter electricity at 67 Wall Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(06-E-0891SA1)

NOTICE OF ADOPTION

Water Rates and Charges by Southside Water Inc.**I.D. No.** PSC-38-06-00013-A**Filing date:** Nov. 15, 2006**Effective date:** Nov. 15, 2006

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

Action taken: The commission, on Nov. 8, 2006, adopted an order approving Southside Water Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 1—Water.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To approve the recovery of the cost of purchased water.

Substance of final rule: The Commission adopted an order approving Southside Water Inc.'s request to recover the cost of purchased water and a new electronic tariff schedule PSC No. 1, to go into effect on December 1, 2006, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(06-W-1062SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**Interconnection Agreement between Verizon New York Inc. and VCI Company d/b/a Vilaire Communications****I.D. No.** PSC-49-06-00006-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and VCI Company d/b/a Vilaire Communications for approval of an interconnection agreement executed on Oct. 10, 2006.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of the networks between Verizon New York Inc. and VCI Company d/b/a Vilaire Communications for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Verizon New York Inc. and VCI Company d/b/a Vilaire Communications have reached a negotiated agreement whereby Verizon New York Inc. and VCI Company d/b/a Vilaire Communications will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until October 9, 2008, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaelyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-C-1338SA1)

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

Interconnection Agreement between Verizon New York Inc. and ConnectTo Communications, Inc.

I.D. No. PSC-49-06-00007-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and ConnectTo Communications, Inc. for approval of an interconnection agreement and Amendment No. 1 executed on Aug. 30, 2006.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of the networks between Verizon New York Inc. and ConnectTo Communications, Inc. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Verizon New York Inc. and ConnectTo Communications, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and ConnectTo Communications, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement and Amendment establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until August 29, 2008, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-C-1339SA1)

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

Interconnection Agreement between Ogden Telephone Company and PWT of New York, Inc.

I.D. No. PSC-49-06-00008-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Ogden Telephone Company and PWT of New York, Inc. for approval of an interconnection agreement executed on July 14, 2006.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of the networks between Ogden Telephone Company and PWT of New York, Inc. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Ogden Telephone Company and PWT of New York, Inc. have reached a negotiated agreement whereby Ogden Telephone Company and PWT of New York, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective

customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until July 17, 2007, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-C-1360SA1)

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

Interconnection Agreement between Frontier Communications of Seneca-Gorham, Inc. and PWT of New York, Inc.

I.D. No. PSC-49-06-00009-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Frontier Communications of Seneca-Gorham, Inc. and PWT of New York, Inc. for approval of an interconnection agreement executed on Aug. 14, 2006.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of the networks between Frontier Communications of Seneca-Gorham, Inc. and PWT of New York, Inc. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Frontier Communications of Seneca-Gorham, Inc. and PWT of New York, Inc. have reached a negotiated agreement whereby Frontier Communications of Seneca-Gorham, Inc. and PWT of New York, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-C-1361SA1)

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

Submetering of Electricity by Bay City Metering Company, Inc.

I.D. No. PSC-49-06-00010-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 in part, the petition filed by Bay City Metering Company, Inc., on behalf of 430 Realty Company, LLC, to submeter electricity at 430 E. 86th St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Bay City Metering Company, Inc., on behalf of 430 Realty Company, LLC, to submeter electricity at 430 E. 86th St., New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Bay City Metering Company, Inc., on behalf of 430 Realty Company, LLC, to submeter electricity at 430 East 86th Street, New York, New York.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-E-1391SA1)

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

Solid State Meter by Sensus Metering Systems

I.D. No. PSC-49-06-00011-P

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

Proposed action: The commission is considering whether to approve or reject, in whole or in part, a petition filed by Sensus Metering Systems for the approval of the Sensus APX solid state commercial and industrial metering line.

Statutory authority: Public Service Law, section 67(1)

Subject: Approval of new types of electricity meters, transformers, and auxiliary devices.

Purpose: To permit electric utilities in New York State to use the Sensus solid state meter in commercial and industrial metering applications.

Substance of proposed rule: The Commission will consider a request from Sensus Metering Systems for the approval to use the Sensus APX polyphase solid-state commercial and industrial meter line in New York State. According to Sensus, the APX commercial and industrial meter line is capable of providing ANSI 0.2% revenue metering class accuracy, and has been tested to meet the compliance accuracy requirements as stated in ANSI C12.1 and ANSI C12.20 test specifications. In accordance with 16 NYCRR Part 93, National Grid New York has submitted a letter of intent to use the Sensus APX commercial and industrial meter line in its customer billing and metering applications, if approved.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-E-1408SA1)

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

Load Aggregation Service by Niagara Mohawk Power Corporation

I.D. No. PSC-49-06-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 219 to become effective March 1, 2007.

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

Subject: Service Classification No. 11—Load aggregation service.

Purpose: To revise Niagara Mohawk Power Corporation's (the company) Service Classification No. 11 security requirements applicable to direct customers participating in the company's daily balancing program; request a limited waiver of the uniform business practices; and provide human needs customers an alternative to certifying 100 percent dual fuel capacity in order to participate in the company's daily balancing program.

Substance of proposed rule: The Commission is considering Niagara Mohawk Power Corporation's (the company) request to increase the security requirements applicable to direct customers participating in Daily Balancing who have been dropped by their Marketer, either through a voluntary or involuntary action, and are not able to demonstrate the ability to deliver gas. Niagara Mohawk also requests a limited waiver of the requirements of the Uniform Business Practices and proposed to allow Human Needs Customers who elect to participate in Daily Balancing an alternative to certifying 100% dual fuel capacity. These customers would have the alternative of certifying five winter months (November - March) of primary firm capacity from a receipt point acceptable to the company into the company's east/west city gate order to participate in Daily Balancing.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-G-1406SA1)

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

Delaware Interconnection Project by United Water New Rochelle

I.D. No. PSC-49-06-00013-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a proposal filed by United Water New Rochelle (UWNR) addressing the size, estimated costs and financing of the Delaware Interconnection Project (DIP) project.

Statutory authority: Public Service Law, sections 2, 4(1), 5(1)(f), and 89-c(1), (2), (7) and (10)

Subject: Size, estimated costs and financing of the DIP project.

Purpose: To review the size, estimated costs and financing of the DIP project.

Substance of proposed rule: On August 21, 2006, United Water New Rochelle filed a proposal addressing the size, estimated cost and financing of the Delaware Interconnection Project. The Commission may approve or reject, in whole or in part, or modify the company's proposal.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-1016SA1)

Office of Real Property Services

NOTICE OF ADOPTION

Training Requirements for New York City Assessors

I.D. No. RPS-27-06-00006-A

Filing No. 1392

Filing date: Nov. 20, 2006

Effective date: Dec. 6, 2006

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

Action taken: Addition of Subpart 188-8 to Title 9 NYCRR.

Statutory authority: Real Property Tax Law, art. 3, title 3, and section 202(1)(l)

Subject: Training requirements for New York City assessors.

Purpose: To establish a program for the training, certification and minimum qualifications for New York City assessors.

Text of final rule:

SUBPART 188-8
NEW YORK CITY ASSESSORS

Section 188-8.1 Certification requirements for New York City assessors, generally. (a) This subpart applies to all individuals who perform professional appraisal duties relating to the assessment of property for the real property tax. On or before April 1 each year ORPS will provide the Department of Citywide Administrative Services with a list of those agencies of the City government and the job titles within those agencies that are subject to the provisions of this subpart. Additions to or deletions from that list may be made at any time.

(b) Each assessor serving on the effective date of this subpart must attain certification by April 1, 2008.

(c) A State certified assessor must be recertified upon a reappointment where there has been an interruption of continuous service of at least four years.

Section 188-8.2 Minimum qualification standards for New York City assessors. (a) The minimum qualification standards for appointed assessors are as follows:

(1)(i) graduation from high school, or possession of an accredited high school equivalency diploma; and

(ii) two years of satisfactory full-time paid experience in an occupation involving the valuation of real property, such as assessor, appraiser, valuation data manager, real property appraisal aide or the like. Such experience shall be deemed satisfactory if it is demonstrated that the experience primarily was gained in the performance of one or more of the following tasks: collection and recording of property inventory data, preparation of comparable sales analysis reports, preparation of signed valua-

tion or appraisal estimates or reports using cost, income or market data approaches to value. Mere listing of real property for potential sale, or preparation of asking prices for real estate for potential sale, using multiple listing reports or other published asking prices is not qualifying experience; or

(2) graduation from an accredited two-year college and one year of the experience described in subparagraph(1)(ii) of this subdivision; or

(3) graduation from an accredited four-year college and six months of the experience described in subparagraph (1)(ii) of this subdivision; or

(4) certification by the State Board as a candidate for assessor.

(b) In evaluating the experience described in subparagraph (1)(ii) of subdivision (a), the following conditions shall apply:

(i) for the purpose of crediting full-time paid experience, a minimum of 30-hour per week shall be deemed as full-time employment;

(ii) three years of part-time paid experience as sole assessor or as chairman of the board of assessors shall be credited as one year of full-time paid experience, and five years of part-time paid experience as a member of a board of assessors shall be credited as one year of full-time paid experience. Additional paid part-time experience in excess of these amounts shall be credited proportionately;

(iii) volunteer experience in an assessor's office may be credited as paid experience to the extent that it includes tasks such as data collection; calculation of value estimates; preparation of preliminary valuation reports; providing routine assessment information to a computer center; public relations; and review of value estimates, computer output and exemption applications; and

(iv) in no case shall less than six months of the experience described in subparagraph (1)(ii) of subdivision (a) be acceptable.

Section 188-8.3 Basic course of training for New York City assessors.

(a) The basic course of training shall include the following components:

(1) assessment administration (New York City);

(2) fundamentals of data collection;

(3) fundamentals of real property appraisal;

(4) income approach to valuation;

(5) advanced income approach to valuation;

(6) ethics;

(7) fundamentals of mass appraisal; and

(8) computer assisted mass appraisal modeling.

(b) Successful completion of the basic course of training shall be demonstrated by fulfilling the requirements for all required components and passing all of the prescribed examinations for the components.

(c) An individual who has successfully completed a training session not conducted or approved by ORPS, which presented topics similar to those in one or more of the components of the basic course of training, may request that this session be accepted as satisfaction of such component or components. The individual must submit the same supporting material as required by section 188-2.8 of this Part for obtaining continuing education credit. In no event will any training be accepted that was successfully completed more than three years prior to the date that the assessor became subject to the provisions of this Subpart.

(d) If ORPS determines that the training session is not an acceptable substitute for successful completion of a component or components of the basic course of training, ORPS shall provide written notification of that determination to the individual. Such notice shall set forth the reasons for the determination and state that the person may request a review of such determination.

(e) An individual adversely affected by a determination may request a review within 15 days of such determination. Such request must be made in writing and be addressed to the executive director.

(f) The executive director shall provide the applicant with written notification of his or her affirmation or reversal of the initial determination, including the reasons for such decision.

(g) An individual shall have up to two opportunities through examinations to successfully complete a component of the basic course of training without attending classroom instruction. A failure of the examination or failing to attend an examination is considered an opportunity.

Section 188-8.4 Interim certification for New York City assessors.[reserved]

Section 188-8.5 Continuing education requirement for New York City assessors.[reserved]

Section 188-8.6 Reimbursement of expenses for New York City assessors. (a) Certain expenses incurred by an assessor in successfully completing a component of the basic course of training set forth in section 188-8.3 of this Subpart, or while attending a training course, conference or semi-

nar with the approval of ORPS shall be a State charge subject to audit by the State Comptroller, subject to the following:

(1) The course or seminar and the expenses must be approved by ORPS.

(2) The assessor must successfully complete the course or seminar, as demonstrated by passing the examination for the course or seminar, or, if no such examination was offered, by proof of attendance at the course or seminar.

(b) Where the conditions in subdivision (a) of this section have been satisfied, reimbursement shall be in the same manner and to the same extent that employees of the State of New York who are members of the Professional, Scientific and Technical unit are reimbursed for travel expenses except as provided below:

(1) Reimbursement for non-overnight travel mileage shall be limited to a maximum of one hundred miles per day, unless either the component is not offered within fifty miles of the official station of the assessor, or ORPS approves attendance at a component offered beyond 50 miles where attendance is found by ORPS to be more practicable;

(2) Expenses for room and board shall be allowed if an assessor can demonstrate that commuting to and from the location of a component will create undue hardship or a component is not offered within 50 miles of the official station of the assessor;

(3) Tuition fees will be reimbursed at a rate that is usual and reasonable for that type of training;

(4) Reimbursement for completing components of the basic course of training for attaining certification as a State Certified Assessor and for satisfaction of continuing education requirements shall be made only upon claims submitted no later than 30 days following completion of such training. Submissions by mail shall be deemed to have been submitted when postmarked. Claims submitted more than 30 days following the completion of such training will be reviewed for possible payment on or before the first day of June of the succeeding fiscal year. If funds remain from the appropriation for training reimbursement in the fiscal year in which the assessor completed such training, claims will be paid in full or, if the remaining funds are insufficient, prorated.

(c) Requests for reimbursement shall be made on a State of New York standard voucher (AC92) and any other form required by the State Office.

(d) Reimbursement shall be dispersed as follows:

(1) Upon appropriation of an amount for reimbursement of expenses pursuant to this Part in the State Budget, this appropriation shall be divided into three allotments, an allotment of one-half of the total appropriation, to be referred to as the first allotment, an allotment of one-third of the total appropriation, to be referred to as the second allotment, and an allotment of one-sixth of the total appropriation, to be referred to as the third allotment.

(2) Reimbursement for successful completion of one or more components of the basic course of training shall be made in the full amount due under this Part as vouchers are received.

(3) Reimbursement for training completed between April 1 and July 31 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts due shall be totaled and compared to the first allotment minus all payments of reimbursement for basic training; this constitutes the net first allotment. If the total of possible reimbursement is equal to the net first allotment, the full amount due shall be paid for each voucher. If the total of possible reimbursement is less than the net first allotment, the full amount due shall be paid for each voucher and the remainder shall be added to the second allotment. If the total of possible reimbursement is more than the net first allotment, the total of possible reimbursement shall be divided into the net first allotment. The resulting fraction is the first proration factor. The first proration factor shall be applied to each continuing education voucher to determine the reimbursement payment to be made for each of these vouchers.

(4) Reimbursement for training completed between August 1 and November 30 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts shall be totaled and compared to the second allotment, minus all payments of reimbursement for basic training plus any addition resulting from paragraph (3); this constitutes the net second allotment. If the total of possible reimbursement is equal to or less than the net second allotment, the full amount shall be paid for each voucher and any remainder shall be added to the third allotment. If the total of possible reimbursement is more than the net second allotment, the total of possible reimbursement shall be divided into the net second allotment. The resulting fraction is the second proration factor. The second proration factor

shall be applied to each continuing education voucher amount to determine the reimbursement payment to be made for each of these vouchers.

(5) Reimbursement for training completed between December 1 and March 31 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts shall be totaled and compared to the third allotment, minus all payments of reimbursement for basic training plus any addition resulting from paragraph (4); this constitutes the net third allotment. If the total of possible reimbursement is equal to or less than the net third allotment, the full amount shall be paid for each voucher. If the total of possible reimbursement is more than the net third allotment, the total of possible reimbursement shall be divided into the net third allotment. The resulting fraction is the third proration factor. The third proration factor shall be applied to each continuing education voucher amount to determine the reimbursement payment to be made for each of these vouchers.

(e) Whenever any training is deemed to satisfy the requirements of this subpart, for purposes of reimbursement pursuant to this section, the training shall be deemed to have been completed on the date upon which it is deemed to satisfy the appropriate training requirement. The local official receiving credit for the training shall be provided with the necessary voucher and information which must be returned completed within thirty days.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 188-8.3.

Text of rule and any required statements and analyses may be obtained from: James J. O'Keeffe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

Regulatory Impact Statement

There have been no substantive changes made to the proposal. The rules adopted are identical to those proposed, except for the correction of a misnumbering in section 188-8.3. Paragraph 188-8.3(b) was mistakenly numbered in the proposal as 188-8.3(c). This has been changed, and the following paragraph designations have likewise been corrected.

Regulatory Flexibility Analysis

There have been no substantive changes made to the proposal. The rules adopted are identical to those proposed, except for the correction of a misnumbering in section 188-8.3. Paragraph 188-8.3(b) was mistakenly numbered in the proposal as 188-8.3(c). This has been changed, and the following paragraph designations have likewise been corrected.

Rural Area Flexibility Analysis

There have been no substantive changes made to the proposal. The rules adopted are identical to those proposed, except for the correction of a misnumbering in section 188-8.3. Paragraph 188-8.3(b) was mistakenly numbered in the proposal as 188-8.3(c). This has been changed, and the following paragraph designations have likewise been corrected.

Job Impact Statement

There have been no substantive changes made to the proposal. The rules adopted are identical to those proposed, except for the correction of a misnumbering in section 188-8.3. Paragraph 188-8.3(b) was mistakenly numbered in the proposal as 188-8.3(c). This has been changed, and the following paragraph designations have likewise been corrected.

Assessment of Public Comment

At a hearing held on July 24, 2006, comments were made by ten individuals. Nine of those ten individuals submitted written statements. The following individuals spoke at the hearing: Thomas Frey, Executive Secretary of the New York State Assessors' Association and the Institute of Assessing Officers; David Moog, President, Local 1757, District Council 37; John W. Parris, Jr., Chair, Assessor chapter, Local 1757; Paul Geylmeyer, Assessor 2; Kirk O'Neal, Assessor; Robert Dunn, Assessor; Matthew Joseph, IAO, Assessor; Francine Schloss, Assessor; David Rudin, Assessor; Anthony J. Gatto, Assessor. Mr. Frey submitted no written statement. After the hearing, Mr. Joseph submitted an expanded version of his July 24 submission. The issues raised in the statements may be summarized as follows.

Applicability of the rules:

Mr. Joseph and Mr. Gatto questioned the exclusion of certain City employees from the training requirements.

It is clear that the program was precipitated by the scandal involving the assessors in the Department of Finance, in particular those assessing commercial buildings in Manhattan. However, by its terms Title 3 requires certification for "any person appointed to the office of chief assessor or inferior assessor" (§ 354[1]).

Section 188-8.1(a) requires New York State Office of Real Property Services staff to determine annually which City employees are subject to

the training requirements. By letter of May 10, 2006, Paul Rephen, Executive Assistant Corporation Counsel, requested that the assessors in the City of New York Department of Law not be subject to Subpart 188-8. On May 30, 2006, Donald C. DeWitt, Executive Director of the New York State Office of Real Property Services, notified the Corporation Counsel that the "assessors working in the Department of Law do not appear to be directly involved in the appraisal of real property for purposes of taxation" and hence would not be subject to Subpart 188-8. By letter of May 10, 2006, Glenn Newman, President of the New York City Tax Commission, requested that the assessors in the Tax Commission not be subject to Subpart 188-8. On May 30, 2006, Mr. DeWitt notified President Newman that the "assessors working in the Commission do not appear to be directly involved in the appraisal of real property for purposes of taxation" and hence would not be subject to Subpart 188-8.

Mr. Joseph also questioned whether the Assistant Commissioner, Chief Assessor and Assistant Assessors in the Department of Finance should be covered by the requirements. In response to a request for information, the Department provided the names of the Chief Assessor (Finance) and six administrative assessors as being subject to the requirements. The name of the Assistant Commissioner was not included. Subsequently, an Acting Assistant Commissioner was appointed whose name is included on the list of assessors subject to the requirements.

The State Board of Real Property Services made no changes to the proposal as a result of these comments.

Credit for prior training:

Mr. Frey, Mr. Moog, Mr. O'Neal, Ms. Schloss, Mr. Rudin and Mr. Gatto questioned the limitation of three years on prior training.

Section 188-8.2(d) allows credit for training taken up to three years before an individual becomes subject to the Subpart's requirements. Three years was considered more reasonable than the suggestion by the Department of Finance that no credit be given for previous training. Chapter 139 provides for two years for assessors to become certified. Had the Legislature intended to merely grandfather assessors for prior training and experience, it could have done so. Rather, the Legislature envisioned active participation in a training program by incumbent assessors to address the scandals that had come to light. When the Legislature wished to waive the training requirements, it was clear. Section 354(3)(b) allows the agency "in its discretion" to grant certification in specified limited circumstances.

The State Board made no changes to the proposal as a result of these comments.

Content of the basic course of training:

Mr. Moog, Mr. Gehlmeyer, Mr. Dunn, Mr. Joseph, Ms. Schloss, and Mr. Rudin questioned the content of the proposed basic course of training.

Prior to the passage of Chapter 139, the New York State Office of Real Property Services had little contact with the Department of Finance concerning the duties and responsibilities of the City's assessors. After consultation with the City, this proposal was drafted to establish a basic course of training for assessors that would mirror the program prescribed in 9 NYCRR 188-2 for assessors subject to the provisions of Title 2 of Article 3 of the Real Property Tax Law in both content and length.

There are basic differences between New York City and other assessing units in the State. Assessors in most of the state's 1200 assessing units must assess all parcels, of whatever type, in the locality. New York City, with 20% of the State's parcels and more parcels than the next four largest assessing units combined, is able to specialize the assessment function. In addition, individual parcels are extremely valuable. There are literally hundreds of parcels in the City worth more than entire assessing units. Finally, the City experienced the scandal with some of the assessors in the Department of Finance.

The representatives of the Department of Finance wanted a program that would replace those components of the existing basic course not relevant to the City with components that would provide training in more sophisticated valuation techniques. It was their expressed intention to create a more uniform and transparent assessment process, open and clear to the public, in order to avoid the previous situation in which assessors were left to their own, individual, devices in valuing property.

There were several comments that the training requirements will present information that cannot be used in the performance of the assessors' duties. This may refer to material covered in various advanced income courses offered by appraisal organizations. These courses discuss, inter alia, mortgage equity and discounted cash flow techniques.

It must be reiterated that the components were established with the cooperation of the Department of Finance, the agency of New York City government responsible for valuing property at amounts that can be supported in judicial review of assessments pursuant to Article 7 of the Real

Property Tax Law. While certain valuation techniques presented in existing training may have not been accepted in various judicial proceedings involving the City, there is no guarantee that these techniques will not be accepted in future litigation.

In addition, some comments imply that assessors can only use valuation techniques in valuing property that are acceptable in an appraisal prepared for litigation. Other valuation techniques may be useful as checks against values determined by assessors.

Should the City or the New York State Office of Real Property Services arrange for an existing course to be presented to satisfy the requirement for the Advanced Income Approach component, instructors hired can be expected to be aware of controlling case law. Techniques might be presented as of only theoretical use by assessors to judge their value estimates. All of this is speculative. The comments assume that courses that have not yet been offered will fail to properly train assessors.

In addition, some comments may be questioning the applicability of other components, e.g., Advance CAMA Modeling, to their employment responsibilities. Since the components were selected in consultation with their employer, the Department of Finance, the question of relevance should not arise.

Finally, staff of the New York State Office of Real Property Services have not yet determined what actions will be taken about the much-criticized Data Collection component offered by the Department of Finance. When additional information is received from the Department, decisions will be made. It should be noted that the particular presentation does not argue against inclusion of the requirement in the rules.

The State Board made no changes to the proposal as a result of these comments.

Legislative purpose:

Several of the comments, particularly Ms. Schloss's request to extend the time to obtain certification, were directed at the statute rather than the proposal. Several comments, in particular those of Mr. Moog, Ms. Schloss and Mr. Rudin, implicitly questioned the connection between the scandals and the training requirement. Whatever the validity of these comments, the State Board is directed to establish a training program for these assessors. The Department of Finance has suggested training to enable the assessment function to be more uniform, professional and transparent, in the belief that this professionalism and transparency will make future scandals less likely.

The State Board made no changes to the proposal as a result of these comments.

Conclusion:

The State Board adopted the proposed rules by Resolution 06-29. The rules adopted were identical to those proposed, except for the correction of a misnumbering in § 188-8.3. Paragraph 188-8.3(b) was mistakenly numbered as 188-8.3(c). This has been changed, and the following paragraph designations have likewise been corrected.

NOTICE OF ADOPTION

License Fees

I.D. No. RPS-38-06-00001-A

Filing No. 1394

Filing date: Nov. 20, 2006

Effective date: Dec. 6, 2006

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

Action taken: Amendment of section 190-3.2 of Title 9 NYCRR.

Statutory authority: Real Property Tax Law, section 202(1); and State Finance Law, section 97-kk

Subject: License fees for users of the Real Property System (RPS).

Purpose: To amend the annual license fees.

Text or summary was published in the notice of proposed rule making, I.D. No. RPS-38-06-00001-P, Issue of September 20, 2006.

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

Text of rule and any required statements and analyses may be obtained from: James J. O'Keefe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

Assessment of Public Comment

At a hearing held on October 10, 2006, John Arnold, Chairman of the Board of Assessors, Town of Maryland, Otsego County, was the only member of the public to attend the hearing. Mr. Arnold specifically acknowledged the assistance he and other Otsego County assessors received

from regional staff of the New York State Office of Real Property Services. He said he represented both the Maryland Town Board and the Otsego County Assessors' Association. He stated the Town Board had passed a resolution that the 50% increase was excessive and asked for a lesser increase. He stated that the County Assessors' Association had also passed a resolution against the increase. Mr. Arnold submitted both of these documents subsequent to the hearing. He noted that RPS provides the New York State Office of Real Property Services with a large data base of information that could be used as a sales tool. He said that the County assessors do not mind being on RPS but they do consider the increase to be excessive.

Sen. James L. Seward, in a letter dated September 20, 2006, objected strongly to the increase. He described the increase as ill-timed and counter productive. He noted the benefits of RPS to this agency and stated that local governments cannot pay more money to State agencies for the privilege of assisting those agencies.

Andrea Nilon, Assessor, Town of Chester, Orange County, in a letter dated October 3, 2006, objected to the increase, describing it as excessive. She noted the value of the system to ORPS. The Town of Chester already subscribes to another system, TSL, so that the only benefit it receives is the County's processing of tax bills. She noted the number of large assessing units that do not use RPS. She suggested that the increase in fees may drive subscribers to other systems, necessitating additional fee increases.

Mario R. Arevalo, IAO, Assessor, City of Oneonta, Otsego County, in a letter dated October 18, 2006, described the 50% increase as "tremendous", "frivolous" and "unnecessary".

Dennis R. Ketcham, IAO, submitted three identical memoranda dated October 20, 2006, in his capacities as Assessor, Town of Mount Hope, Orange County, Assessor, Town of Wawayanda, Orange County, and President of the Orange County Assessors' Association. These memoranda are very similar to the submission by Ms. Nilon, describing the increase as excessive, noting the value of RPS to the agency, referring to the number of large assessing units that do not use RPS and suggesting that the fee increase may drive subscribers to other vendors.

Cheryl A. Clinton, Assessor, Town of Montgomery, County, submitted a letter dated October 20, 2006, that was very similar to the submissions of Ms. Nilon and Mr. Ketcham. Eileen Kelly, Assessor, Town of Minisink, Orange County, submitted a letter dated October 24, 2006, that was very similar to the submissions of Ms. Nilon and Mr. Ketcham. Molvina A. Wanat, Assessor, Town of Wallkill, Orange County, submitted a letter dated October 26, 2006, that was very similar to the submissions of Ms. Nilon and Mr. Ketcham. These three identical letters note the larger municipalities that do not subscribe to RPS, the article 18 and 19 municipalities that do not subscribe to RPS and posit that increased fees may drive away subscribers.

The Otsego County Board of Representatives submitted Resolution 302-2006, dated November 1, 2006, which opposes the increases and urged the members of the State Board to reject the proposal. The Resolution contains the statement that "the licenser fees that the State charges to private entities is less than what is charged to public entities", which is incorrect. The private fee is an initial payment of \$2,500 and an annual fee equal to the highest municipal payment (190-3.2[c][3]).

By a letter dated November 3, 2006, Hon. Ruben Diaz, Jr., Assembly Chair of the Administrative Regulations Review Commission, and Hon. David Koon, Assembly Vice-chair of the Commission, objected to the provision on the proposal increasing the fee for school districts from the lowest municipal charge to the highest municipal charge.

The bulk of the comments thus basically noted the usefulness of RPS to the programs of the New York State Office of Real Property Services and the size of the increase. There is no question that RPS facilitates our programs. However, the increasing number of municipal subscribers, particularly in light of the existence of competition, is evidence that RPS is serving municipal as well as State needs. The amount of the increase was under discussion for two years in a forum that included local government representatives. This was not a unilateral decision by the New York State Office of Real Property Services. Within the financial parameters established, this is the proper increase. Perhaps Ms. Nilon's comment, repeated by others, will prove prescient. If the increase is too much, alternatives are available from the private sector.

The issue of the increase for school districts discussed in the letter of the two Assemblymen is a separate matter. During the period for public comment staff discovered an error in the material prepared for this rule making. The Regulatory Impact Statement (RIS) prepared for this proposal said that a provision putting school licensees at the highest rather than the lowest charge would have no immediate effect because there are no school

licensees. Staff discovered that in fact there are five current school district licensees. Rather than postpone this rule making, which is needed for the Marshall and Swift initiative mentioned in the RIS, staff have prepared a second proposal to return the school district license fee to the lowest municipal fee. Resolution 06-30, by which the State Board adopted this proposal, directs staff not to file this rule making with the Secretary of State until the new proposal is filed with GORR. Assemblymen Diaz and Koon were informed of this prior to the State Board's November 14, 2006 meeting. Since the next bills will not be issued until the Summer of 2007, staff expect to have the lower charge of the second proposal in place to prevent the unwarranted increase.