

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Firewood (all Hardwood Species), Nursery Stock, Logs, Green Lumber, Stumps, Roots, Branches and Debris

I.D. No. AAM-26-09-00012-E

Filing No. 690

Filing Date: 2009-06-16

Effective Date: 2009-06-16

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

Action taken: Addition of Part 139 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

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

Specific reasons underlying the finding of necessity: The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, was first detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities detected infestations of this pest in other areas of Brooklyn as well as in and about Amityville, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend the existing quarantine area on Staten Island. This rule contains the needed modification.

The Asian Long Horned Beetle (ALB) is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); and Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash), Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the quarantine imposed by this rule has been determined to be the most effective means of preventing the spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

Based on the facts and circumstances set forth above the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately modify the quarantine area and restrict the movement of trees and materials from the areas of the State infested with Asian Long Horned Beetle could result in the spread of the pest beyond those areas and damage to the natural resources of the State and could result in a federal quarantine and quarantines by other states and foreign countries affecting the entire State. This would cause economic hardship to the nursery and forest products industries of the State. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare. Given the potential for the spread of the Asian Long Horned Beetle beyond the areas currently infested and the detrimental consequences that would have, it

appears that the rule modifying the quarantine area should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Firewood (all hardwood species), nursery stock, logs, green lumber, stumps, roots, branches and debris.

Purpose: To modify the Asian Long Horned Beetle quarantine to prevent the spread of the beetle to other areas.

Text of emergency rule: Subdivision (d) of section 139.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and a new subdivision (d) is added to read as follows:

(d) *That area in the Borough of Richmond in the City of New York bound by a line beginning at a point along the State of New York and the State of New Jersey border due north of the intersection of Richmond Terrace and Morningstar Road; then south to the intersection of Morningstar Road and Richmond Terrace; then southwest along Morningstar Road to its intersection with Forest Avenue; then east along Forest Avenue to its intersection with Willow Road East; then south and then southeast along Willow Road East to its intersection with Victory Boulevard; then west along Victory Boulevard to its intersection with Arlene Street; then south along Arlene Street until it becomes Park Drive North; then south on Park Drive North to its intersection with Rivington Avenue; then east along Rivington Avenue to its intersection with Mulberry Avenue; then south on Mulberry Avenue to its intersection with Travis Avenue; then northwest on Travis Avenue until it crosses Main Creek; then along the west shoreline of Main Creek to Fresh Kills Creek; then along the north shoreline of Fresh Kills Creek to Little Fresh Kills Creek; then along the north shoreline of Little Fresh Kills Creek to the Arthur Kill; then west to the border of the State of New York and the State of New Jersey in the Arthur Kill; then north along the borderline of the State of New York and the State of New Jersey; then east along the borderline of the State of New York and New Jersey excluding Shooters Island to the point of beginning.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 13, 2009.

Text of rule and any required statements and analyses may be obtained from: Robert J. Mungari, Director, Division of Plant Industry, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087.

Regulatory Impact Statement

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Section 167 also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Asian Long Horned Beetle.

3. Needs and benefits:

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States was detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, Queens, Manhattan and Staten Island.

As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend by approximately two square miles, the existing quarantine area on Staten Island. The proposed rule contains the needed modifications.

The Asian Long Horned Beetle is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually

killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); and Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash), Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the extension of the quarantine on Staten Island imposed by this rule has been determined to be the most effective means of preventing the further spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

4. Costs:

(a) Costs to the State government: none.

(b) Costs to local government: none.

(c) Costs to private regulated parties:

Nurseries exporting host material from the quarantine area established by this rule, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.

Most shipments will be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the quarantine area established by this rule may not move outside that area due to the fact that it is not practical at this time to determine for certification purposes that the material is free from infestations.

The extension of the existing quarantine area on Staten Island would affect eight nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area.

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None.

(ii) It is anticipated that the Department will be able to administer the proposed quarantine with existing staff.

5. Local government mandate:

Yard waste, storm clean-up and normal tree maintenance activities involving twigs and/or branches of 1/2" or more in diameter of host species will require proper handling and disposal, *i.e.*, chipping and/or incineration if such materials are to leave the quarantine area established by this rule. An effort is underway to identify centralized disposal sites that would

accept such waste from cities, villages and other municipalities at no additional cost.

6. Paperwork:

Regulated articles inspected and certified to be free of Asian Long Horned Beetle moving from the quarantine area established by this rule will have to be accompanied by a state or federal phytosanitary certificate and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The failure of the State to extend the existing quarantine on Staten Island where the Asian Long Horned Beetle has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Asian Long Horned Beetle that could result from the unrestricted movement of regulated articles from the areas covered by the modified quarantine. In light of these factors there does not appear to be any viable alternative to the modification of quarantine proposed in this rulemaking.

9. Federal standards:

The amendment does not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the rule immediately.

Regulatory Flexibility Analysis

1. Effect on small business:

The small businesses affected by extending the existing quarantine area on Staten Island are the nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area. There are eight such businesses within that area. Since there is already a quarantine area on Staten Island, the City of New York and the borough of Staten Island will remain involved in the proposed extension of this quarantine.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same quarantine requirements as other regulated parties.

2. Compliance requirements:

All regulated parties in the new quarantine area on Staten Island established by this amendment will be required to obtain certificates and limited permits in order to ship regulated articles from those areas. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

3. Professional services:

In order to comply with the rule, small businesses and local governments shipping regulated articles from the new quarantine area on Staten Island will require professional inspection services, which would be provided by the Department and the United States Department of Agriculture (USDA).

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule:

Nurseries exporting host material from the new quarantine area on Staten Island, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most such inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most shipments would be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the new quarantine areas may not move outside those areas due to the fact that it is not practical at this time to determine for certifications purposes that the material is free from infestation.

Local governments shipping regulated articles from the new quarantine areas would incur similar costs.

5. Minimizing adverse impact:

The Department has designed the rule to minimize adverse economic impact on small businesses and local governments. This is done by limiting the new quarantine area to only those parts of Staten Island where the Asian Long Horned Beetle has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Asian Long Horned Beetle and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact

statement, the rule provides for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

6. Small business and local government participation:

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of Asian long horned beetle quarantines. The Department has also had extensive consultation with the USDA on the efficacy of such quarantines. Most recently, the Department has had discussions with the City of New York and the borough of Richmond concerning this amendment to extend the existing quarantine on Staten Island. Representatives of the city and borough governments expressed support for the amendment.

7. Economic and technological feasibility:

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping host materials from the new quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, will be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

The rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the extension of the existing quarantine area established by this rule is situated on Staten Island, which does not fall within the definition of "rural areas" set forth in section 481(7) of the Executive Law.

Job Impact Statement

The rule will not have a substantial adverse impact on jobs and employment opportunities. The extension of the existing quarantine area on Staten Island is designed to prevent the spread of the Asian Long Horned Beetle to other parts of the State. A spread of the infestation would have very adverse economic consequences to the nursery, forestry, fruit and maple product industries of the State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government, other states and foreign countries. By helping to prevent the spread of the Asian Long Horned Beetle, the rule will help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry, fruit and maple product industries.

Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

As set forth in the regulatory impact statement, the cost of the rule to regulated parties is relatively small. The responses received during the Department's outreach to regulated parties indicate that the rule will not have a substantial adverse impact on jobs and employment opportunities.

Department of Audit and Control

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Harmonize Regulation with Recent Amendments to the State Finance Law and Resolve Ambiguities in the Law

I.D. No. AAC-26-09-00006-P

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

Proposed Action: Repeal of Part 22 and addition of new Part 22 to Title 2 NYCRR.

Statutory authority: State Finance Law, sections 8 and 179-y

Subject: To harmonize regulation with recent amendments to the State Finance Law and resolve ambiguities in the law.

Purpose: To harmonize the regulation with recent statutory amendments made to the State Finance Law and resolve ambiguities in the law.

Text of proposed rule: Part 22 of 2 NYCRR is repealed and replaced as follows:

TITLE 2. DEPARTMENT OF AUDIT AND CONTROL
CHAPTER I. AUDIT OF REVENUES AND ACCOUNTS PAYABLE
FROM STATE FUNDS AND FUNDS UNDER ITS CONTROL

PART 22. PROMPT CONTRACTING AND INTEREST PAYMENTS
FOR NOT-FOR-PROFIT ORGANIZATIONS

Section 22.1 Purpose

The purpose of this Part is to implement the provisions of Article XI-B of the State Finance Law as added by Chapter 166 of the Laws of 1991 and as amended by chapter 648 of the Laws of 1992 and chapter 292 of the Laws of 2007.

Section 22.2 Definitions

All terms shall have the meaning prescribed to them pursuant to section 179-q of the State Finance Law unless otherwise provided for in this Part.

Section 22.3 Agency notification with respect to renewal contracts

A State agency administering a contract subject to this Part, shall, as required by section 179-t of the State Finance Law, provide written notice by mail to the not-for-profit organization of its preliminary determination whether or not to renew the contract. Such notification must be provided no later than ninety days prior to the end of the contract or thirty days after an appropriation providing funding for continued payments shall become law, whichever is later. Where a State agency fails to provide such notice by the required date, the existing contract shall be deemed to be extended until ninety days after the date the State agency provides the not-for-profit organization with the required notice. The not-for-profit organization shall be entitled to payment consistent with the terms of the existing contract and may submit invoices or vouchers to the State agency on billing cycles consistent with those applicable to the existing contract. The State agency shall then submit the necessary documentation to the Comptroller in order for payment to be processed. The not-for-profit organization shall be entitled to interest under Article IX-A of the State Finance Law to the extent that payment is not timely made as provided in such Article IX-A, which relates to the prompt payment of contracts.

Section 22.4 Comptroller's determination whether unusual circumstances warrant denial of interest

1. If a State agency believes that it is unable to comply with the timeframes established by section 179-t of the State Finance Law due to unusual circumstances beyond its control, and that such unusual circumstances warrant the denial of interest, in whole or in part, to the not-for-profit organization, the State agency shall so advise the Comptroller, the Division of the Budget and the not-for-profit organization and shall provide the basis for such assertion in writing on or before ninety days prior to the end of the contract or thirty days after an appropriation providing funding for continued payments shall become law, whichever is later.

(2) "Unusual circumstances" does not mean a State agency's (a) failure to plan for implementation of a program; (b) failure to assign sufficient staff resources to implement a program; (c) failure to establish a schedule for the implementation of a program; or (d) failure to anticipate any other reasonably foreseeable circumstance.

(3) Not more than twenty days after receipt of the State agency's written notice, the Comptroller shall determine whether unusual circumstances exist and whether such circumstances warrant the denial of interest in whole or in part; and inform the State agency. If the Comptroller determines that the denial of interest is not warranted, in whole or in part, the Comptroller shall notify the State agency, the Division of the Budget, and the not-for-profit organization of such determination. Thereafter, the State agency shall, if the contract is then fully executed, immediately submit for the Comptroller's approval a voucher requesting payment of the interest, if any, due under section 22.7. If the contract is not then fully executed, the State agency shall immediately submit a voucher for the Comptroller's approval requesting payment of interest, if any, due under section 22.7 once the contract is fully executed.

Section 22.5 Written directives

(a) Upon receipt of a written directive a not-for-profit organization may begin to provide the services required by a State agency on the date provided for by such written directive. A "written directive" means a written request by a State agency to a not-for-profit organization authorizing such organization either to begin providing services during the negotiation of a contract or to continue providing services during the negotiation of a renewal contract. For purposes of this section, a State agency shall be deemed to have issued a written directive where: (i) with respect to a renewal contract it has provided notice to the not-for-profit

organization of its intent to renew the contract; or (ii) with respect to new contracts, it has provided the not-for-profit organization with a proposed contract containing a start date, in which case such start date shall be deemed the date of the written directive.

(b) Any not-for-profit organization receiving a written directive to perform services under a new contract between such not-for-profit organization and a State agency that has not been fully executed by the contract start date shall be eligible for interest payments to the extent authorized by section 22.7 of this Part.

(c) In order for a State agency to exercise an option in an existing contract to provide for an additional quarter of financing or any advance payment to such not-for-profit organization in accordance with section 22.6 of this Part, the State agency shall provide a written directive to such organization.

(d) Any not-for-profit organization in receipt of a written directive from a State agency with an existing contract which does not contain an optional financing quarter may be eligible for an advance payment in accordance with section 22.6 of this Part.

(e) A written directive shall only be executed by State agency personnel duly authorized to sign contracts on behalf of such State agency.

Section 22.6 Advance payments for renewal contracts

(a) Where a State agency administering a contract has advised a not-for-profit organization of the State agency's intention to renew the contract, the State agency may authorize an advance payment to the not-for-profit organization pursuant to this section pending execution of the renewal contract, if such contract is not fully executed by the commencement date of the renewal contract.

(b) Existing or renewal contracts that do not contain an optional financing or fifth quarter financing provision shall be eligible for an advance payment providing such organization receives a written directive from a State agency.

(c) An advance payment under this section shall not exceed one quarter of the amount paid or to be paid to the not-for-profit organization pursuant to the existing contract.

(d) Any advance payment shall offset the amount of money due to the organization for services provided during the period for which payment was made.

(e) Any State agency that wishes to provide an advance payment pursuant to this section shall submit to the Comptroller a written directive, a voucher and such other documents as may be required by the Comptroller. The Comptroller shall review such written directive and either approve or disapprove such written directive. Such written directive shall include language indicating that if the agency subsequently determines pursuant to section 179-w of the State Finance Law that substantive and significant differences exist between the State agency and the not-for-profit organization in the negotiation of the contract or that the not-for-profit organization is not negotiating the renewal contract in good faith, the written directive shall be deemed suspended and the not-for-profit organization shall not be eligible for subsequent advance payments thereunder.

Section 22.7 Interest payments

(a) (1) A not-for-profit organization that provides services to a State agency pursuant to a written directive prior to the date that the contract for such services has been fully executed, shall, once such contract has been approved and become fully executed, be entitled to interest in accordance with, and to the extent authorized by, this section on those moneys that would be due under the terms of a contract or a renewal contract prior to the date on which the contract became fully executed.

(2) For purposes of this section, a State agency shall be deemed to have issued a written directive where: (i) with respect to a renewal contract it has provided notice to the not-for-profit organization of its intent to renew the contract; or (ii) with respect to new contracts, it has provided the not-for-profit organization with a proposed contract containing a start date, in which case such start date shall be deemed the date of the written directive.

(b) A not-for-profit organization that has borrowed funds to provide services pursuant to a written directive may receive interest under this section where the not-for-profit organization has: (i) been denied an advance payment pursuant to section 22.6 of this Part; and (ii) did not obtain a loan from the Not-For-Profit Short Term Revolving Loan Fund.

(c) A not-for-profit organization may not receive interest payments pursuant to this section where the not-for-profit organization received an advance payment pursuant to section 22.6 of this Part, provided however that if the contract has not been fully executed at the end of the period covered by such advance payment, the not-for-profit organization shall be eligible for interest payments pursuant to this section in respect to services performed after such period; or

(d) (1) Except as provided in paragraph (2) in this subsection, any not-for-profit organization eligible to receive an interest payment pursuant to subdivision (a) or (b) of this section shall receive such interest payments at a rate equal to the rate set by the Commissioner of Taxation and

Finance for corporation taxes pursuant to paragraph 1 of subsection (e) of section 1096 of the Tax Law.

(2) A not-for-profit organization eligible to receive interest pursuant to subdivision (b) of this section shall submit to the State agency the interest rate at which it borrowed funds and such other documentation as prescribed under subdivision 2 of 179-v of the State Finance Law. Such not-for-profit organization shall receive interest pursuant to this section at a rate of interest equal to the rate it is paying on such borrowed funds, provided the State agency has approved of such rate and the Comptroller determines such rate is reasonable.

(e)(1) Interest shall be due a not-for-profit organization for each payment that would have been due if the contract had been fully executed before the scheduled commencement date. Interest shall be calculated for the period commencing thirty days after the end of each billing period as specified in the contract and ending on the date payment is actually made, except where under the terms of the contract the not-for-profit organization is entitled to a payment or payments on specified dates without the submission of an invoice or voucher, in which case interest shall run from each such specified date or dates. Interest shall be calculated separately with respect to each payment due under the contract. For purposes of this section, if a contract does not specify billing periods or a payment schedule, it shall be presumed that the not-for-profit is authorized to submit invoices or vouchers at the end of each month for a pro rata portion of the total contract amount. The State agency is responsible for calculating interest due and preparing a separate voucher to pay such interest consistent with this section. A State agency may not deny interest to a not-for-profit organization on the basis that it failed to submit invoices or vouchers during the period prior to final execution of the contract. However, where the not-for-profit fails to submit an invoice or voucher for such payment by the thirtieth day after the date the contract became fully executed, no additional interest shall accrue after such thirtieth day.

(2) Once a late contract is fully executed, interest on any late payments due subsequent to the date the contract is fully executed shall be made in accordance with the requirements of the Article XI-A of the State Finance Law which relates to the prompt payment of contracts.

(f) Any interest payments made pursuant to subdivision (a) or (b) of this section shall be made from appropriations for State operations that are available for the administrative programs for the State agency which contracted with the not-for-profit organization. Interest payments shall not be made from amounts appropriated for program purposes. Any interest payments made to a not-for-profit organization shall not reduce the amount of money that otherwise would be payable to the not-for-profit organization under the terms of the contract.

(g) No interest shall be payable pursuant to the provisions of this section with respect to any contract or renewal contract where such contract is required to be approved by the Attorney General and the Comptroller, but is never approved.

(h) No interest shall be payable under this section where a State agency and a not-for-profit organization have entered into an agreement under section 179-v subdivision (7) waiving interest, and the Comptroller has determined that the waiver of interest is warranted. If the Comptroller determines the waiver of interest is unwarranted the State agency shall immediately submit for the Comptroller's approval a voucher requesting payment of interest to such not-for-profit organization. If such voucher is not received within 30 days after the date of the Comptroller's written determination, the Comptroller will calculate the amount of unpaid interest due to the not-for-profit organization pursuant to section 179-v of the State Finance Law and this Part, and pay such amount to the not-for-profit organization as a charge against the agency's appropriations.

(i)(1) Interest payable pursuant to the provisions of this section shall be suspended where the State agency has, in accordance with section 179-w of the State Finance Law, determined that significant and substantive differences exist between the State agency and the not-for-profit organization in the negotiation of a contract or renewal contract or that the not-for-profit organization is not negotiating in good faith; and the State agency has provided written notice of such determination to the not-for-profit organization and the Comptroller, as required by section 179-w.

(2) Interest shall be suspended only for the period during which the State agency has determined that the significant and substantive differences existed or the not-for-profit was not negotiating in good faith. Any State agency that has made a determination under paragraph (1) of this subdivision shall, when it submits the contract to the Comptroller for approval, provide notice to the Comptroller and the not-for-profit organization of the date on which the conditions that justified the suspension of interest, ceased to exist.

(j) A determination that extenuating circumstances exist pursuant to section 179-w shall not suspend the accrual of interest unless the State agency also determines, and such determination is approved by the Comptroller, that the circumstances are unusual which warrant the denial of interest as prescribed by section 22.4 of this Part.

(k) No State agency shall be liable for interest payments under this section on contracts executed pursuant to appropriations made in whole or in part for liabilities incurred in a prior fiscal year that were awarded without the use of competitive process.

Section 22.9 Reports

(a) On or before March thirty-first, each State agency shall, for each annual period beginning January second and ending the following January first prepare and transmit a report to the Office of the State Comptroller in relation to such State agency's contracting activities with not-for-profit organizations. The Office of the State Comptroller shall make such report available to the public.

(b) Such report shall include, but not be limited to:

(i) information regarding the number of programs affected by Article XI-B of the State Finance Law;

(ii) the ability of the State agency to meet the time frames described within Article XI-B of the State Finance Law and the regulations;

(iii) the number of programs, contracts, renewal contracts both complying and failing to comply with the time frames set forth in Article XI-B of the State Finance Law;

(iv) the number of contracts on which interest was paid;

(v) the amount of interest paid by each State agency; and

(vi) any other information deemed relevant in relation to the implementation of prompt contracting and payments affecting not-for-profit organizations.

(c) On or before May thirty-first of each year, the Comptroller shall prepare an annual report examining the effectiveness and implementation of prompt contracting; and make any recommendations deemed necessary to improve existing contracting and payment methods between State agencies and not-for-profit organizations. Such report shall be transmitted to the temporary president and minority leader of the Senate, the speaker and minority leader of the Assembly, the director of the Division of the Budget, the chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee.

Text of proposed rule and any required statements and analyses may be obtained from: Jamie Elacqua - Legislative Counsel, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: JElacqua@osc.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

1. Statutory Authority: State Finance Law Sections 8 and 179-y.

2. Legislative Objectives: This rule will harmonize the regulatory scheme with the recent amendments to the Prompt Contracting Law and resolve ambiguities in the law. Additionally, the Prompt Contracting Law provides that the Comptroller promulgate regulations to develop and implement procedures for the Prompt Contracting Law.

3. Needs and Benefits: As stated above, the rules are necessary to harmonize recent amendments to the Law to the regulations and resolve ambiguities in the law. As to the latter, specifically, the Prompt Contracting Law provides time frames for the execution of contracts between state agencies and Not-for-profit organizations ("NFP's"). Section 179-v provides that a NFP shall be entitled to interest payments in certain instances. It is generally accepted that the interest runs under this section only where the time frames established are not met and contract is not in place prior to the date when the NFP is required to begin providing services. The statutory language is somewhat ambiguous concerning the date when such interest begins to accrue. State agencies have adopted conflicting interpretations. Since it is the Comptroller's duty to interpret and implement procedures relating to this Law, these rules are necessary for uniformity.

4. Costs: a. There will be no associated costs of compliance for NFP's.

b. It is likely there will be increased costs to State agencies since a recent study conducted by the Comptroller revealed that no State agencies in the sample had paid the interest statutorily required. We do not believe that this cost can be reasonably calculated since it is dependent on future events; however OSC believes that had State agencies in its recent sample study been in compliance with the relevant law that in the 2007-2008 year that a total of \$44,411 of interest should have been paid for renewal grant contracts and \$55,816 of interest should have been paid for new grant contracts and these regulations will clarify their obligation to do so in certain circumstances.

c. A Review of State Agency Compliance with Prompt Contracting

Statute by the Office of the State Comptroller's Bureau of State Expenditures examined a random sample of 95 grant contracts from a population of 1,788 grant contracts received by OSC after the contract start date during the period of January 1 through April 30, 2008. The sample included 67 new grant contracts (including member items) and 28 renewal grant contracts. The corresponding contract files, vouchers and accompanying documents were reviewed and State agency officials were interviewed. It should be noted that cost is premised on the fact that State agencies are being penalized for their failure to execute these contracts in a timely manner; if State agencies were to execute these contracts in a timely manner there would be no cost associated with this rule.

5. Local Government Mandates: The Prompt Contracting Law governs State agencies; there will be no impact on local governments.

6. Paperwork: The rules would require a written directive, if work is to be continued under the old contract. Additionally, when interest is due vouchers must be submitted to OSC.

7. Duplication: None.

8. Alternatives: There are no alternatives for the portion of the rule that merely harmonizes the regulations to the recent amendments to the Law. There are several alternatives to the interpretation given to the time frames for the calculation of interest for late contracts. First, if read literally the language of section 179-v of the State Finance Law could be read to require interest from the scheduled commencement dated or the date that the NFP began to provide services (whichever later). Such interpretation ignores the fact that interest only accrues on amounts that would have been payable under the contract, and therefore should not accrue before the date when such payments could have been made if the contract had been timely. This interpretation would place the NFP in a better position where the contract is late; than it would have been in if the contract had been timely. Specifically, it would provide interest to the NFP for periods before it could ever have expected payment if the contract had been timely executed and in place prior to the date the NFP began providing services.

Another alternative is that the interest does not begin to run under 179-v until 30 days after the date or dates when the NFP actually submits vouchers for services under the proposed contract. This interpretation is based upon the theory that interest only accrues on amounts that would be due under the contract, and that since no payment can be made until a voucher is submitted, no interest can accrue until a voucher has been submitted. This interpretation is flawed since it would provide for interest only where a voucher is submitted which could not be at that time. Accordingly, the alternative adopted in this rule requires payment of interest, once a contract is fully executed and approved, from the date(s) when, consistent with the terms of the contract, the NFP could reasonably have expected payment(s), if the contract had been fully executed and approved before the date when the NFP began providing services under such contract. Since the Prompt Payment Law requires State agencies generally to make payment within 30 days of the date of the submission of an invoice or voucher, it follows that interest should run on each payment covered by section 179-v from the 30th day after each date on which the NFP could have submitted an invoice or voucher if the contract had been fully executed.

9. Federal Standards: None.

10. Compliance Schedule: It is expected that all State agency should comply immediately upon this rules adoption.

Regulatory Flexibility Analysis

1. Effect of rule: This rule will not effect local governments. This rule will effect small businesses which are not-for-profit businesses that have a contract with a State agency.

2. Compliance requirements: In order to comply with this rule, small businesses under the purview of the rule must submit invoices or vouchers, which they are already statutorily required to do if they have a contract with a State agency.

3. Professional services: It is not likely that a small business would be required to hire professional services to comply with this rule.

4. Compliance costs: There will be no new costs associated with this rule.

5. Economic and technological feasibility: Compliance will not require any new technological requirements and the economic impact will be minimal. In fact, it appears that this clarification will confer an economic benefit to small businesses since in the past State agencies have not paid interest on these types of contracts.

6. Minimizing adverse impact: This rule will have no adverse impact on local governments. This rule may adversely impact small businesses if such businesses have a contract with a State agency and fail to provide a voucher for work performed within thirty days after the contract has been fully executed. In such instances, the small business will lose its right to additional interest payments for periods after such thirtieth day. It is believed to be reasonable and necessary since it provides the small business an additional reasonable time period to submit the voucher and it appears that all businesses should have ample time to comply with such requirement. Small businesses should not encounter any issues in complying with this rule. Additionally, the clarification contained in this rule as stated above, will confer an economic benefit to small businesses since in the past State agencies have not paid interest on these types of contracts.

7. Small businesses and local government participation: This rule will not effect local governments. This rule will effect small businesses which are not-for-profit businesses that have a contract with a State agency.

Rural Area Flexibility Analysis

This action will not effect local governments in rural areas. This rule will effect small businesses which are not-for-profit businesses in rural areas that have a contract with a State.

Department of Correctional Services

NOTICE OF ADOPTION

Alcohol and Substance Abuse Treatment Correctional Annexes (ASATCA)

I.D. No. COR-13-09-00003-A

Filing No. 660

Filing Date: 2009-06-15

Effective Date: 2009-07-01

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

Action taken: Amendment of section 100.126(a) of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Alcohol and substance abuse treatment correctional annexes (ASATCA).

Purpose: Amend designation of Marcy Correctional Facility.

Text or summary was published in the April 1, 2009 issue of the Register, I.D. No. COR-13-09-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Definition of Unprofessional Conduct and the Licensure Requirements for Certified Public Accountants and Public Accountants

I.D. No. EDU-26-09-00003-P

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

Proposed Action: Amendment of sections 29.10 and 52.13; repeal of sections 70.1-70.7; and addition of new sections 70.1-70.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6501(not subdivided), 6504(not subdivided), 6506(1), (2) and (6), 6507(2)(a), (3), (4)(a), 6508(1), 7401, 7401-a, 7402, 7404, 7406, 7406-a, 7408, 7409 and 7410; and L. 2008, ch. 651

Subject: Definition of unprofessional conduct and the licensure requirements for certified public accountants and public accountants.

Purpose: To implement Chapter 651 of the Laws of 2008.

Substance of proposed rule (Full text is posted at the following State website: www.op.nysed.gov): The Commissioner of Education proposes to amend section 29.10 of the Rules of the Board of Regents and section 52.13 of the Regulations of the Commissioner of Education and repeal and add a new Part 70 to the Regulations of the Commissioner of Education, relating to the education, examination and experience requirements for licensure of certified public accountants; endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits; registration of accounting firms; continuing education requirements and the definition of unprofessional conduct. The following is a summary of the proposed amendment:

A new paragraph 13 is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents to define as unprofessional conduct in the practice of public accountancy a licensee's failure to meet certain competency requirements when supervising attest or compilation services or signing or authorizing someone to sign an accountant's report on financial statements. Required competencies include at least 1,000 hours of experience in the preparation or review of financial statements or reports on financial statements within the last five years; at least 40 hours of continuing education in the area of accounting, auditing or attest during the three years immediately prior to the performance of such services; and maintaining the level of education, experience and professional conduct required by generally accepted accounting standards.

A new paragraph (14) is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents defining as unprofessional conduct a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA". Any certified public accountant or public accountant licensed in New York State who is not practicing public accountancy pursuant to Education Law section 7401 and does not use the title "certified public accountant" or the designation "CPA" or the title "public accountant" or designation "PA" may request an inactive status from the Department and will not be required to register with the Department.

A new subdivision (h) is added to section 29.10 of the Rules of the Board of Regents, defining as unprofessional conduct any willful or grossly negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of public accountancy by a CPA licensed in another state or any firm that employs such CPA to perform non-attest services pursuant to Education Law section 7406-a.

A new subdivision (i) is added to section 29.10 of the Rules of the Board of Regents to amend the definition of unprofessional conduct to prohibit a licensee or the public accounting firm employing such licensee to directly or indirectly, offer, give, solicit, or receive or agree to receive, a commission for the referral of any product or service to a client if the licensee is performing: attest services; compilation services when the licensee expects, or reasonably might expect that a third party will rely upon the financial statements and the licensee's compilation report does not disclose a lack of independence; an examination of prospective financial information; and/or any other service that may require a licensee to utilize

independent judgment. This subdivision does not prohibit the receipt of a payment by a licensee or firm for the purchase of a public accounting practice or retirement payments paid to individuals presently or formerly engaged in the practice of public accountancy or payments to their heirs or estates. The prohibitions apply during the period in which the licensee is engaged to perform any of the services defined in the subdivision and the period covered by any financial, accounting or related statements involved in such services. A licensee providing services other than those described in this subdivision may accept a commission for recommending products or services of a third party to a client, provided that the licensee discloses the receipt of the commission to the client. The provisions of this subdivision do not apply to licensees who perform accounting, management advisory, financial advisory, consulting or tax services for an entity that is not required to register with the department under Education Law section 7408.

Paragraph (1) of subdivision (b) of section 52.13 of the Regulations of the Commissioner of Education is amended to define specific curricular content in the professional accounting content area that is required for licensure and those subjects that may be taken to fulfill the credit hour requirement in this area for licensure. This paragraph is also amended to eliminate the requirement for mandatory subjects in the general business content area and replaces these requirements with a list of content areas that may be used to meet the credit hour requirement in this area for licensure.

Section 70.1 of the Regulations of the Commissioner of Education defines the practice of public accountancy and defines the professional skills and competencies used by a licensee when he/she performs accounting, management advisory, financial advisory, and tax services.

Section 70.2 defines the professional study requirements for licensure and requires an applicant to submit evidence of completion of a baccalaureate or higher degree in accountancy that is either registered with the Department; accredited by an acceptable accrediting body; or a degree that the Department has determined to be the substantial equivalent of a registered or accredited program. An applicant who applies for licensure on or after August 1, 2009 must have satisfactorily completed a curriculum of at least 150 semester hours in a program described above unless the applicant was licensed in another state prior to August 1, 2009, in which case, they may meet the education requirements through completion of at least 120 semesters in a program described above. An applicant who applies to the Department for licensure prior to August 1, 2009 is required to have satisfactorily completed a curriculum of at least 120 semester hours in a program prescribed in this section prior to August 1, 2009 and have submitted the required application forms for licensure to the Department prior to August 1, 2009. In lieu of meeting these education requirements and any experience requirements, the applicant may meet the following requirement: at least 15 years of full-time experience in the practice of public accountancy satisfactory to the State Board.

A new section 70.3 broadens acceptable experience for licensure to include providing any type of service or advice involving the use of accounting, attest, compilation, management advisory, financial advisory, tax or consulting skills under the direct supervision of a certified public accountant licensed in the United States or a public accountant licensed in New York. Two years of acceptable experience are required for applicants who meet the education requirement through completion of 120 semester hours and one year of acceptable experience is required for applicants who complete the education requirement through completion of 150 semester hours. Experience may be gained through employment in public practice, government, private industry or educational institutions. An applicant is required to obtain the necessary experience within 10 years of having passed the licensing examination or they will be required to complete continuing professional education, in an amount determined by the State Board for Public Accountancy.

A new section 70.4 defines the content, passing score and retention of credit criteria for the licensing examination. The proposed amendment provides students with the opportunity to apply for admission to the Uniform CPA Examination upon completion of 120 semester hours of professional study in a regionally accredited college or university which shall include at least one course in each of the mandatory professional accountancy content areas: financial accounting, cost or managerial accounting, taxation, and auditing and attestation services.

A new section 70.5 provides that a license as a certified public accountant in New York may be issued to an applicant licensed in another state or foreign country if the applicant has met licensure requirements significantly comparable to New York. An applicant licensed by a state with significantly comparable licensure requirements, meaning those states recognized by the Department to have significantly comparable requirements, is eligible for a license through endorsement. If the applicant was licensed in a state that did not have significantly comparable licensing requirements, the individual's credentials will be evaluated to determine if his or her credentials are significantly comparable to New York's

requirements. In either case, the applicant shall demonstrate four years of professional experience in public accounting in the last 10 years immediately preceding the application for licensure by endorsement.

This section also permits licensure by endorsement of a foreign applicant with an acceptable license, certificate or degree from a foreign country with significantly comparable licensure requirements provided that the applicants meets certain requirements.

Section 70.6 authorizes the Department to issue a two-year limited permit to practice public accountancy in this State to a foreign credentialed accountant if the applicant meets certain requirements described in the proposed amendment. The regulation requires a \$250 fee for issuance of the limited permit.

Section 70.7 authorizes CPAs licensed in another state, with a principal place of business in another state, to apply for a temporary practice permit in order to provide attest and compilation services in New York. The temporary practice permit is valid for up to 180 days during a twelve-month period and would be renewable no more than three times. The proposed regulations also require the submission of application materials and the payment of a \$125 application fee and renewal fee.

Section 70.8 requires all firms, including sole proprietorships, partnerships, LLPs, LLCs, and PCs, to maintain a registration with the Department if the firm is performing attest or compilation services or using the title "CPA" or "CPA firm" or the title "PA" or "PA firm". Firms performing only non-attest services described in Education Law § 7401(3) are not required to, but may, register with the Department.

Section 70.9 implements statutory changes, deletes prior exemptions from mandatory continuing education for individuals who work in private industry or government and specifies that all registered CPAs and PAs are required to pay a \$50 continuing education fee. Any licensee who does not engage in professional practice as defined in § 7401 may file a written request for an exemption from mandatory continuing education.

The proposed amendment also implements a statutory change in the tracking year for continuing education credit from a September 1 – August 31 year to a January 1 – December 31 year. The proposed amendment also allow licensees to meet their continuing education requirement by completing either 40 credits in any combination of the following subject areas: accounting, attest, auditing, taxation, advisory services, specialized knowledge and applications related to specialized industries, and such other areas appropriately related to the practice of accounting as may be acceptable to the Department or by completing 24 credits concentrated in any one subject area. Before this change, licensees were required to complete 40 credits in a combination of the following areas: accounting, auditing or taxation, or 24 credits concentrated, in either accounting, auditing or taxation.

Text of proposed rule and any required statements and analyses may be obtained from: Christine Moore, New York State Education Department, 89 Washington Avenue, Room 148, Albany, New York 12234, (518) 473-4921, email: cmoore@mail.nysed.gov

Data, views or arguments may be submitted to: Frank Munoz, Office of the Professions, New York State Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-4921, email: opopr@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that in order for an applicant to qualify for a professional license, the requirements prescribed in the article for each particular profession must be met.

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

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules in the supervision of the practice of the professions.

Subdivision (2) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules relating to pre-professional, professional other educational qualifications required for licensure in the professions.

Subdivision (6) of section 6506 of the Education Law authorizes the Board of Regents to endorse a license issued by a licensing board of another state or country.

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

Subdivision (3) of section 6507 of the Education Law authorizes the State Education Department, assisted by the board for each profession, to

establish standards for pre-professional and professional education, experience and licensing examinations as required to implement the article governing each profession, review qualifications in connection with licensing requirements and provide for licensing examinations and re-examinations.

Paragraph (a) of subdivision (4) of section 6507 of the Education Law authorizes the State Education Department to register or approve educational programs designed for the purpose of providing professional preparation which meet standards established by the Department.

Subdivision (1) of section 6508 of the Education Law authorizes the Board of Regents to appoint a State Board for Public Accountancy for the purpose of assisting the Board of Regents and the State Education Department on matters of professional licensing, practice, and conduct.

Chapter 651 of the Laws of 2008 amended sections 7401, 7402, 7404, 7406, 7407, 7408 and 7409 of the Education Law and adds new sections 7401-a and 7406-a and 7410 to the Education Law.

Section 7401 of the Education Law defines the practice of public accountancy.

Section 7401-a defines attest, certified public accountant or CPA, compilation, firm, principal place of business, public accountant or PA and State.

Section 7402 of the Education Law provides that only an individual licensed or otherwise authorized to practice shall practice public accountancy or use the title certified public accountant or public accountant.

Section 7403 of the Education Law establishes and defines the duties and responsibilities of the State Board for Public Accountancy.

Section 7404 of the Education Law defines the requirements for licensure as a certified public accountant.

Section 7406 of the Education Law authorizes the State Education Department to issue a limited permit to certain applicants licensed by another state which the Board of Regents has determined to have significantly comparable certified public accountant licensure requirements and to issue temporary permits to certified public accountants licensed by another state which the Board of Regents has determined to have significantly comparable licensure requirements, or whose individual licensure qualifications are verified by the Department to be significantly comparable to New York State's requirements. Temporary permits allow the holder to practice in New York State for an aggregate total of 180 days during a twelve month period beginning on the effective date of the permit.

Section 7406-a of the Education Law authorizes certified public accountants, licensed by another state and in good standing, to perform non-attest services in New York without a license or temporary practice permit and provides that certified public accountants performing such services agree to be subject to the disciplinary authority of the Board of Regents.

Section 7407 of the Education Law provides individual and corporate exemptions to the provisions of Article 149.

Section 7408 of the Education Law establishes a registration requirement for public accounting firms that perform attest and/or compilation services and professional services that are incident to attest and/or compilation services or that use the title CPA or CPA firm or the title PA or PA firm, including authorizing the Board of Regents to establish a registration process for public accounting firms. This section also restricts the use of certain titles and designations by non-licensed accountants and establishes reporting requirements for non-licensed accountants issuing financial statements.

Section 7409 of the Education Law establishes mandatory continuing education requirements for certified public accountants and public accountants and authorizes the Board of Regents to establish a registration process for continuing education sponsors.

2. LEGISLATIVE OBJECTIVES:

The proposed amendments to the Rules of the Board of Regents and to the Regulations of the Commissioner of Education are necessary to implement Chapter 651 of the Laws of 2008, which becomes effective on July 26, 2009.

3. NEEDS AND BENEFITS:

The proposed amendment is needed to implement Chapter 651 of the Laws of 2008. This legislation enhances public protection by ensuring that certified public accountants (CPAs) and public accountants (PAs) are professionally accountable for all of the business functions they currently perform by clarifying and expanding the statutorily regulated scope of practice. The law expands the scope of practice to include the types of services that involve the use of professional skills and competencies in matters related to accounting concepts, the recording of financial data or information, and the preparation or presentation of financial statements, including but not limited to management advisory, financial advisory, and tax preparation and advisory services. The proposed amendment would enhance public protection by requiring all licensees and firms to be registered with the Department when providing attest and compilation services; providing for temporary practice permits when out-of-state licensed CPAs perform attest and compilation services in New York and providing

an exemption from participation in continuing professional education only for licensees who are not engaged in the practice of public accountancy.

Public protection is also enhanced by providing greater clarity regarding the issuance of foreign limited permits and requiring participation in mandatory continuing education for all CPAs, even if employed in private industry, government or academia and changes the requirement for complying with mandatory continuing education from a registration year to a calendar year. The law expands the recognized areas of continuing education study to those that contribute to professional practice and growth in professional knowledge, professional competence and ethics.

The existing law was also amended to specifically allow out-of-state licensed CPAs to perform non-attest services such as accounting, management advisory, financial advisory, and tax in New York without a temporary practice permit. As a condition of practicing in New York under this provision, the CPA and the firm that employs him or her agrees to be subject to the disciplinary authority of the Board of Regents.

The expanded definition of the scope of practice includes non-attest services provided by a licensed CPA or PA to one's employer not otherwise required to register with the Department. CPAs and PAs working for business corporations may be employed in positions that result in the payment of commissions or referral fees. The Rules of the Board of Regents need to be amended to clearly define unprofessional conduct for those instances when the acceptance of a commission or referral fee would impair a licensee's independence to perform attest and compilation services.

4. COSTS:

(a) Cost to State government: None.

(b) Cost to local government: There are no additional costs to local government.

(c) Cost to private regulated parties: The proposed amendment does not impose any costs beyond those imposed by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is (1) \$50 for each office of the firm located in New York; and an additional; (2) \$10 for the sole proprietor or each general partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is New York or who is otherwise authorized to practice in New York through a temporary practice permit. There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404 any licensee who is required to register triennially with the Department at the beginning of each triennial registration period.

(d) Costs to the regulatory agency: As stated above in "Costs to State Government," the proposed amendment will impose additional costs on the State Education Department to implement new provisions of Education Law.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the registration and use of a professional title or designation by certified public accountants (CPAs) and public accountants (PAs); to the performance of non-attest services by out-of-state licensed CPAs; the receipt of commissions and referral fees by CPAs and PAs; the registration of curricula in public accountancy programs. The amendment does not impose any programs, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment requires public accounting firms that are established for the business purpose of lawfully engaging in the practice of public accountancy pursuant to Education Law section 7401(1) and (2) or that uses the title "CPA" or "CPA firm" or the title "PA" or "PA firm" to register with the Department.

The proposed amendment also requires any licensee that may accept a commission for recommending the products or services of a third party to the client to disclose the receipt of the commission to the client by way of a written disclosure statement to describe the product or service recommended the amount of the commission.

The proposed amendment also requires applicants seeking a limited permit or temporary permit to submit an application form to the Department.

7. DUPLICATION:

The proposed amendment does not duplicate any other existing State or Federal requirements, except as discussed below in the Federal Standards section.

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

There are no Federal standards that relate to the registration of public accounting firms and/or the use of a professional title or designation by certified public accountants (CPAs) and public accountants (PAs); to the performance of non-attest services by out-of-state licensed CPAs or to the licensure requirements of CPAs and PAs.

However, the Sarbanes-Oxley Act of 2002 does address commission and referral fees for audit partners in public accounting firms.

Section 210-2.01(c)(8) of the Code of Federal Regulations provides, in pertinent part, as follows:

(8) Compensation. An accountant is not independent of an audit client if, at any point during the audit and professional engagement period, any audit partner earns or receives compensation based on the audit partner procuring engagements with that audit client to provide any products or services other than audit, review or attest services. Any accounting firm with fewer than ten partners and fewer than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f))) shall be exempt from the requirement stated in the previous sentence.

The proposed amendment prohibits licensed public accountants and certified public accountants from receiving a commission or referral fee for the product or service of a third party to a client when performing services that require a licensee's independent judgment. The proposed amendment is more restrictive than the federal law. The federal law only applies to a small segment of the engagements performed by CPAs and PAs employed by publicly traded companies and it only prohibits audit partners from receiving a commission fee, as opposed to the proposed amendment which prohibits all licensees performing certain audit and attest services from receiving commissions. The proposed amendment is needed to ensure public protection by maintaining the independent judgment of licensees when performing certain engagements that require independence.

10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its effective date. No additional period of time is necessary to enable regulated parties to comply with the regulation.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants (CPAs) and public accountants (PAs) and to add provisions relating to the endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits and temporary practice permits, and to amend the definition of unprofessional conduct for CPAs and PAs licensed in New York State.

It is estimated that approximately 2,000 individuals apply for licensure as CPAs each year. As of January 2009, there are approximately 27,300 registered CPAs in New York, 160 registered PAs in New York, and 3,200 registered public accounting firms in New York State. Demographic information provided by the national membership organization of CPAs indicates that approximately 42% of its membership is employed in public accounting and approximately 48.5% of its members are employed in small firms with nine or fewer owners. Based on these statistics, approximately 5,500 CPAs and PAs are likely to be employed by approximately 1,550 small firms.

2. COMPLIANCE REQUIREMENTS:

The purpose of the proposed amendment is to establish in the definition of unprofessional conduct in the practice of public accountancy: (1) a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy pursuant to Education Law section 7401 or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA"; (2) any willful violation of any State, federal or local law by out-of-state licensed CPA performing non-attest services; and (3) a licensee's failure to meet certain competency requirements when a licensed CPA or PA supervises and signs or authorizes someone to sign the accountant's report on financial statements; and defines those instances when a licensed CPA or PA may accept a commission or referral fee and establishes disclosure requirements when such a fee is received.

The proposed amendment also amends the education, examination and experience requirements for licensure as a CPA in New York; the continuing education requirements for CPAs in New York; the registration process for public accounting firms and establishes, with limited exceptions; a process to issue limited permits to foreign credentialed accountants and temporary practice permits to CPAs licensed and in good standing in another state; and amends the process used to issue a license as a CPA to an

individual licensed as a CPA in another state or a foreign country who substantially meets New York's licensure requirements.

3. PROFESSIONAL SERVICES:

The proposed regulation will not require any licensee or firm to hire any professional services to comply, including those that are considered "Small Businesses".

4. COMPLIANCE COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is (1) \$50 for each office of the firm located in New York; and an additional; (2) \$10 for the sole proprietor or each general partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is New York or who is otherwise authorized to practice in New York through a temporary practice permit. There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law Section 7404.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and is economically feasible. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the requirements should apply to all firms, regardless of size, to ensure a uniformly high standard of professional practice in the practice of public accountancy. It is not unusual for small entities, including firms, not-for-profit organizations and local governments to contract with small accounting firms for audit services. Failure to apply the provisions of these regulations on a uniform basis could harm these small entities and the public by allowing small CPA firms to provide a lower standard of professional services than larger CPA firms.

7. SMALL BUSINESS PARTICIPATION:

The State Board for Public Accountancy, which includes members who have experience in a small business environment, assisted in the development of the proposed regulation. In addition, the State Education Department provided the New York State Society of Certified Public Accountants, which includes members who own and operate small businesses, with draft regulatory language concerning the proposed regulation and engaged in an ongoing conversation with this organization to ensure that their comments were addressed.

(b) Local Governments:

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants and public accountants and add provisions relating to endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits, and to amend the definition of unprofessional conduct for certified public accountants and public accountants licensed in New York State. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect individuals who apply for licensure as certified public accountants (CPA), including those that are 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. Each year about 1,750 individuals apply for licensure as a CPA. The Department estimates that about eight percent or about 140 of these individuals come from a rural county of New York State.

The proposed amendment also affects licensed CPAs and PAs who practice in a rural county in New York. As of January 13, 2009, the Department's records indicate that 2,206 licensed CPAs and 9 licensed PAs come from a rural county of New York State. In addition, the Department estimates that approximately 260 public accounting firms are located in a rural county in New York State.

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

The purpose of the proposed amendment is to establish in the definition of unprofessional conduct in the practice of public accountancy: (1) a

licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy pursuant to Education Law section 7401 or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA"; (2) any willful violation of any State, federal or local law by out-of-state licensed CPA performing non-attest services; and (3) a licensee's failure to meet certain competency requirements when a licensed CPA or PA supervises and signs or authorizes someone to sign the accountant's report on financial statements; and defines those instances when a licensed CPA or PA may accept a commission or referral fee and establishes disclosure requirements when such a fee is received.

The proposed amendment also amends the education, examination and experience requirements for licensure as a CPA in New York; the continuing education requirements for CPAs in New York; the registration process for public accounting firms and establishes, with limited exceptions; a process to issue limited permits to foreign credentialed accountants and temporary practice permits to CPAs licensed and in good standing in another state; and amends the process used to issue a license as a CPA to an individual licensed as a CPA in another state or a foreign country who substantially meets New York's licensure requirements.

The proposed amendment does not require any licensee or firm to hire any professional services to comply.

3. COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is (1) \$50 for each office of the firm located in New York; and an additional; (2) \$10 for the sole proprietor or each general partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is New York or who is otherwise authorized to practice in New York through a temporary practice permit. There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; a \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404.

4. MINIMIZING ADVERSE IMPACT:

The Department believes that these requirements should apply to all licensees and firms, regardless of whether or not they are located in a rural area, to ensure a uniform standard of professional practice in the practice of public accountancy. Failure to apply the provisions of these regulations on a uniform basis could harm the public by allowing certain CPA firms and licensees to provide a lower standard of professional services than other licensees or firms.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments from the State Board for Public Accountancy and the Society of Certified Public Accountants, which includes members located in all areas of New York State, including rural areas of the State.

Job Impact Statement

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants (CPAs) and public accountants (PAs) and add provisions relating to endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits, and to amend the definition of unprofessional conduct for CPAs and PAs licensed in New York State.

Because it is evident from the nature of the rule that it could only have a positive impact or no impact on jobs 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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

No Child Left Behind Act of 2001(NCLB) - School Accountability

I.D. No. EDU-26-09-00004-P

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

Proposed Action: Amendment of sections 100.2(p), 120.2, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2) and (20), 309(not subdivided) and 3713(1) and (2)

Subject: No Child Left Behind Act of 2001(NCLB) - school accountability.

Purpose: To implement the NCLB Differentiated Accountability Pilot Program.

Substance of proposed rule (Full text is posted at the following State website:<http://www.emsc.nysed.gov/deputy/regs/home.html>): The State Education Department proposes to amend subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, subdivisions (g)-(i) of section 120.2; subdivisions (a) and (g) of section 120.3; and subdivisions (b) and (f) of section 120.4 of the Regulations of the Commissioner of Education, effective October 8, 2009, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress (AYP) for two consecutive years and be returned to Good Standing.

The substantive amendments to the regulations are as follows:

Section 100.2(p)(2)(ii)(a) is amended to replace the term "identified" with "designated" and to replace the phrase "school requiring academic progress" with "school in Improvement, Corrective Action or Restructuring."

Section 100.2(p)(5)(vii) is amended to replace the term "identified" with "designated" and to replace the phrase "a school requiring academic progress" with "a school in Improvement (year 1)."

The current paragraph 100.2(p)(6), School Requiring Academic Progress, is repealed and a new paragraph 100.2(p)(6), Differentiated Accountability for Schools, is added, beginning with the 2009-2010 school year. More specifically, the new paragraph 100.2(p)(6) will:

- (1) integrate federal and State accountability systems;
- (2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;
- (3) collapse identifications for improvement into three simplified accountability phases; Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress on an accountability performance criterion and/or accountability indicator;
- (4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make adequate yearly progress in an accountability performance criterion and/or accountability indicator for which a school has been identified;
- (5) determine a school's accountability designation for the 2009-2010 school year based upon the school's accountability status for the 2008-2009 school year and the school's AYP for the 2007-2008 and 2008-2009 school years;
- (6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;
- (7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement two-year school improvement/corrective action/restructuring plans that best match a school's designation;
- (8) better align the School Under Registration Review (SURR) and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;
- (9) maximize SED's limited resources and utilize the resources of the University of the State of New York (USNY) to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) for providing for SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

Section 100.2p(9) is amended to reference subparagraph 100.2(p)(5)(vi) rather than 100.2(p)(5)(vii) due to general reorganization of the section.

Section 100.2p(10) is amended to set forth the action that is to be taken when a school has been designated as Improvement, Corrective Action, or Restructuring and has been placed on registration review. More specifically, under the amended regulations, a school designated as Improvement (year 1) or Corrective Action (year 1) shall modify its plan to meet the requirements of a restructuring plan for implementation no later than the beginning of the next school year following the year identified for registration review. The amended regulations also provide that a school designated as Restructuring (advanced) may be warned of revocation of registration unless an acceptable plan for closure or phase out has been submitted. In addition, a school identified for registration review may be identified for

phase out or closure if after two full academic years of implementing a restructuring plan progress has not been demonstrated.

Section 100.2p(11) is amended to eliminate the provision allowing a board of education to replace a school under registration review with a redesignated school, and to provide for the phase out or closure of such.

Conforming amendments are also made to section 120.2(g), (h) and (i), section 120.3(a) and (g) and section 120.4(b) and (f), for purposes of ensuring consistency with the above amendments to section 100.2(p).

Text of proposed rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Comm of Educ. P-16, State Education Department, State Education Building Annex Room 875, 89 Washington Avenue, Albany, NY 12234, (518) 474-5915, email: p16education@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner of Education as the Department's Chief Administrative Officer, which is charged with the general management and supervision of all public schools and the educational work of the State.

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

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

Education Law section 215 authorizes the Commissioner to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides the Commissioner shall have such further powers and duties as charged by 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) authorize the State and school districts to accept federal law making appropriations for educational purposes and authorize the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority and is necessary to establish criteria and procedures ensuring State and local educational agency (LEA) compliance with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the U.S. Department of Education (USDE).

NEEDS AND BENEFITS:

Section 100.2(p) is amended to establish criteria and procedures ensuring State and LEA compliance with the NCLB school accountability provisions. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

The Differentiated Accountability Pilot Program requires the State to implement a new method of categorizing schools identified for improvement; to use differentiated diagnostic tools to assist schools and districts to develop and implement appropriate plans to address the needs of students; to vary the intensity and interventions to match the academic reasons that led to a school's identification; to compress the length of time a school is supported through improvement; to merge elements of the State and NCLB accountability systems; and to reverse the order of Supplemental Educational Services and Public School Choice.

On January 8, 2009, former USDE Secretary Margaret Spellings approved New York's request to participate in the Differentiated Accountability Pilot Program. The proposed rule will conform the Commissioner's Regulations with the approved Pilot Program to:

- (1) integrate federal and State accountability systems;
- (2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;

(3) collapse identifications for improvement into three simplified phases: Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress (AYP) on an accountability performance criterion and/or accountability indicator for which it has been identified;

(4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make AYP;

(5) determine a school's accountability designation for the 2009-2010 school year on the school's accountability status for the 2008-2009 school year and the school's AYP status for the 2007-2008 and 2008-2009 school years;

(6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;

(8) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(9) maximize SED's limited resources and utilize the resources of USNY to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

COSTS:

Cost to the State: None.

Costs to local government: The rule is necessary to conform the Commissioner's Regulations with the State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA.

The proposed amendment may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately \$900 to \$40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$57/hour, resulting in costs totaling \$912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$72/hour, resulting in costs totaling \$7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of \$102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of \$112/hour, resulting in costs totaling \$42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

PAPERWORK:

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

DUPLICATION:

The rule does not duplicate, overlap or conflict with State and federal requirements, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

ALTERNATIVES:

There were no significant alternatives and none were considered. The rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

FEDERAL STANDARDS:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

COMPLIANCE SCHEDULE:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA.

It is anticipated that regulated parties may achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local government:

EFFECT OF RULE:

The proposed rule 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 (ESEA), as amended.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth [by] in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional

costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately \$900 to \$40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$57/hour, resulting in costs totaling \$912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$72/hour, resulting in costs totaling \$7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of \$102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of \$112/hour, resulting in costs totaling \$42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program as granted by the United States Department of Education, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts. In addition, copies of the proposed rule will be provided to 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 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.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule 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 (ESEA), as amended, 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.

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

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of

revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately \$900 to \$40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is antici-

pated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$57/hour, resulting in costs totaling \$912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$72/hour, resulting in costs totaling \$7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of \$102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of \$112/hour, resulting in costs totaling \$42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent approval granted by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements. Because these requirements are uniformly applicable State-wide to school districts, BOCES and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. 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 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 rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education. The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools, and implements the NCLB Differentiated Accountability Pilot Program in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF WITHDRAWAL

Deer Hunting Regulations

I.D. No. ENV-13-09-00011-W

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

Action taken: Notice of proposed rule making, I.D. No. ENV-13-09-00011-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on April 1, 2009.

Subject: Deer hunting regulations.

Reason(s) for withdrawal of the proposed rule: The Department of Environmental Conservation is reconsidering its policies on antler restriction regulations for deer hunting.

NOTICE OF ADOPTION

Amendment of Wildlife Management Unit Boundaries

I.D. No. ENV-12-09-00007-A

Filing No. 658

Filing Date: 2009-06-11

Effective Date: 2009-07-01

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

Action taken: Amendment of Parts 1, 2, 4 and 6 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0903, 11-0905, 11-0907 and 11-1103

Subject: Amendment of wildlife management unit boundaries.

Purpose: To amend wildlife management unit boundaries and make associated revisions to game species hunting and trapping seasons.

Substance of final rule: The Department of Environmental Conservation (the department) proposes to amend the boundaries for wildlife management unit (WMU) boundaries. Wildlife management units are the geographic areas within which hunting and trapping season dates are established. Wildlife management units are also the areas in which hunters apply for deer management permits (DMPs). Since DMP quotas are established on a WMU basis, the proposed changes may affect the geographic distribution of DMPs as well. The last revision of WMU boundaries was completed in 1998. The proposed changes will result in a reduction from the current 96 WMUs to 92 WMUs. Several of the proposed changes will also result in minor changes to game species regulations (both hunting and trapping) incidental to the WMU boundary changes. The proposed changes primarily occur in the department's Regions 4, 5, 6 and 7. Minor changes are also made in parts of Region 3 and Region 8.

Final rule as compared with last published rule: Nonsubstantial changes were made in section 4.1(a)(41) and (42).

Text of rule and any required statements and analyses may be obtained from: Gordon Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: grbatche@gw.dec.state.ny.us

Additional matter required by statute: A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

Revised Regulatory Impact Statement

1. Statutory authority:

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (department) to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to: ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. Environmental Conservation Law sections 11-0903 and 11-0905 provide for the establishment of small game species harvest regulations. Environmental Conservation Law section 11-0907 provides for the regulation of deer and black bear hunting seasons. The regulation of open trapping seasons is authorized by ECL Law section 11-1103.

2. Legislative objectives:

The legislative objective behind the statutory provisions listed above is to authorize the department to establish, by regulation, certain basic wildlife management tools, including the setting of open areas via described "wildlife management unit" (WMU) boundaries, and restrictions on methods of take and possession. These tools are used by the department to maintain desirable wildlife species in ecological balance, and to protect public health and welfare.

3. Needs and benefits:

The department proposes to amend WMU boundaries. The current WMU boundaries were adopted in 1998. This proposal would reduce the total number of WMUs to 92 (from 96) through the consolidation of units that no longer serve a significant management purpose as stand-alone units. Also, several units are redrawn primarily to address management needs pertaining to deer. In some cases, these changes also mean that season dates for other species are altered.

WMU 4N will be eliminated and combined with WMU 4F. These WMUs have similar forest land cover, similar land use practices, and similar deer management objectives. There is no management need to keep these areas separate.

WMU 4M will be eliminated and combined with parts of existing WMU 4K and 4L. A citizens task force recommended that deer populations be increased in the Taconic Mountains portion of WMU 4M, but decreased in those parts of WMU 4M with significant farm land use. Consequently, the Taconic Mountain portion of WMU 4M would be combined with WMU 4L to form a new unit managed for a higher deer population. The remaining portions will be managed for a lower deer density to protect agricultural interests. The western boundary of WMU 4L will be redrawn (moved east) to better distinguish between an intensively-farmed area and a heavily-forested area.

WMU 4X will be eliminated and included in WMU 3A. These two areas have similar land use and habitat conditions. There is no benefit to keeping them separate.

Existing WMUs 5K, 5N, and 5P (primarily Washington County) will be eliminated and redrawn to form new WMUs 5S and 5T. WMU 5P is a very small unit that is ecologically similar to areas to the north and south currently comprising WMU 5N. There is no management reason to keep these areas separate, so WMU 5P should be combined with the adjacent areas. Wildlife Management Unit 5K is a very long and narrow unit within the Hudson River Valley that was originally defined to allow for a closed river otter trapping and bobcat hunting/trapping season. However, river otter and bobcat populations in this area are considered secure and similar to populations in the northern section of current WMU 5N. This area will be redrawn as WMU 5T while the remaining area of WMU 5N and 5P will be designated WMU 5S. The boundary between the two new proposed units is based on differences in land use, topography, and deer density. The reconfiguration of WMUs in this area will result in the opening of the river otter trapping season (November 25-March 15) and the bobcat hunting and trapping season (October 25 - February 15) in the area of current WMU 5K. Wildlife management unit 5K is a narrow unit that is between WMUs 5J (to the west) and 5N (to the east). Bobcat harvest in these neighboring WMUs has been consistent in recent years. Additionally, the Northern Taconics, of which WMU 5N is a part, contain high quality bobcat habitat and harvest rates are among the highest in the State. Similarly, river otter harvest in WMUs 5J and 5N has been consistent in recent years. Therefore, opening the bobcat and river otter season in existing WMU 5K should not have a significant impact to these populations. Eliminating this small, narrow WMU will also alleviate law enforcement issues resulting from having a small unit that is closed to bobcat and river otter harvest bordered by two larger units that have open seasons on these species.

The north boundary of WMU 5C will be moved northward into current WMU 5A. (WMU 5C will be larger and WMU 5A smaller.) This is needed to better define a primarily wooded area (WMU 5C) from the heavily-farmed area within WMU 5A, thereby facilitating deer management.

In the final rule making, the department has adjusted the boundaries of WMUs 5H and 5J because it was determined that a portion of these WMUs was delineated incorrectly. The area between Sacandaga Lake and Caroga Lake has been moved out of WMU 5J and into WMU 5H. This change results in more uniform habitat conditions within each respective WMU.

A portion of WMU 6K will be expanded north into WMU 6G, adjacent to WMU 6N. Presently, the deer population in WMU 6G is well above management objectives. The adjacent unit, WMU 6N (the Tug Hill Plateau) has very low deer densities. The new boundaries will create a "transition" zone allowing for more effective deer management in the three bordering units.

A portion of WMU 6C will be expanded east into current 6J to improve deer management in the Black River Valley. The deer population within the Black River Valley has increased significantly in recent years, and a more aggressive management strategy is required. The department currently uses nuisance deer permits and deer management assistance permits to reduce conflicts with farming. However, this approach is inadequate and the use of deer management permits is necessary within the newly defined unit, WMU 6C.

The small portion of WMU 6G that would become part of WMU 6K would change from a three week-long season with a bag limit of two turkeys to a three week-long season with a bag limit of one turkey, resulting in less hunting opportunity. However, the harvest of turkeys via the two bird limit in this location is very small, and the region believes that a reduction to one bird per season in this location will be inconsequential.

The portion of WMU 6J that would become part of WMU 6C means that a new area with a more liberal fall turkey hunting bag limit (two turkeys vs. one turkey) would be created, resulting in more hunting opportunity. This is consistent with the fact that the affected area, the Black River Valley, has high turkey densities. The region predicts a minimal change in total turkey harvest for this area.

The expansion of WMU 6C into part of WMU 6J means that land trapping seasons will close later in a small area of the Northern Zone. Currently, WMU 6J has a December 10 closing date. With the proposed change, the closing date will extend to February 15. Trappers in the Northern Zone have long called for a lengthened trapping season, and they are expected to strongly support this change to a portion of the land trapping season. While this will result in a longer trapping season, we do not expect to see a significant increase in harvest of these species, with the possible exception of coyote which are widespread and abundant in many areas of New York.

Bobcat hunting and trapping is currently not allowed in WMU 6K, therefore the small portion of WMU 6G that will become WMU 6K will result in some loss of opportunity. Department records of historical harvest from this area indicate that few bobcat have been harvested, and the effects of this change will be minimal.

Since WMU 6J would become smaller, and marten trapping is currently allowed in this unit, the proposed changes would result in a small loss of marten trapping opportunity in the Northern Zone. The department's records of marten harvest in the affected area show that very few martens are taken, and the effects of this change on trappers will be minimal. There will be two additional weeks of trapping for beaver and river otter in the area of WMU 6J that will become part of WMU 6C.

A new unit WMU 7P will be created primarily to provide more flexibility for bear and deer management. The bulk of the area from which 7P will be formed currently lies in WMU 7M. A small area from existing WMU 7S is also involved. The new unit more closely aligns with, or encompasses, areas with well established bear populations and will provide flexibility for future bear management decisions, specifically changes in season dates. Deer program interests, largely constituent interests, are also addressed with the proposed change. WMU 7M is the largest southern zone WMU and as such, generates a considerable amount of discontent from deer hunters, who believe that the unit is too diverse to be treated uniformly and that management efforts would be enhanced by subdividing the unit. The part of WMU 7M being realigned into WMU 7S differs from the remainder of WMU 7M in having significantly less State Forest land and thus different access opportunity for deer hunting. In combination with existing units, creation of WMU 7P will provide greater ability to align bear seasons with the likely gradient of bear populations in the region and will also address a long standing complaint from sportsman that WMU 7M is too large. It will also provide more flexibility to manipulate deer populations in response to concerns about deer effect on forest regeneration on State Forest or other forested lands.

The creation of WMU 7P will have a localized effect on goose season dates and bag limits. For Canada goose hunting areas and seasons, the East Central boundary will be moved to the southern border of the newly created WMU 7P to limit harvest of migrant Atlantic Population Canada geese whose breeding population is currently

below target. The goose hunting season length would be reduced from 80 to 45 days and the daily bag limit would be reduced from 5 to 3 geese after September. While the affected area is less than 70 square miles in size, the change would apply to lands along approximately 25 river miles on the Tioughnioga and Chenango Rivers, as well as in Chenango Valley State Park, thus reducing the ability to harvest nuisance geese in these areas. Consequently, the proposed change may result in more complaints of nuisance geese compared to the current levels.

WMU 8K will be eliminated (and combined in the current WMU 8J). WMU 8K was originally defined to accommodate special deer management needs at the Seneca Army Depot. With the availability of deer management assistance permits, this is no longer needed.

4. Costs:

None, except administrative costs associated with rule making, and production of a new map.

5. Local government mandates:

This rule making imposes no mandates upon local governments.

6. Paperwork:

No additional paperwork is associated with this rule making.

7. Duplication:

None.

8. Alternatives:

Continuation of the current WMU boundaries would fail to address the necessary changes described above.

9. Federal standards:

There are no federal standards associated with this rule making.

10. Compliance schedule:

Hunters and trappers will need to comply with the new WMU boundaries beginning with the early bear season in the northern bear range (September 2009).

Revised Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement

The department made minor changes to the final rule to correct an error in the boundary descriptions for Wildlife Management Units 5H and 5J. These minor technical changes do not have an impact on the regulatory effects of the proposed rule. Therefore, revisions to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not needed.

Assessment of Public Comment

The department received comments on the proposed amendments. A summary of these comments and the department's response follows:

Comment:

Deer hunters and turkey hunters will be negatively impacted by the proposal. In particular, concern was expressed about the loss of muzzleloading opportunity for deer in Region 6.

Response:

Muzzleloading seasons in the Northern Zone are adjusted on a regular basis to reflect deer herd condition, largely based on prior winters as well as an assessment of hunter harvest. Muzzleloading opportunities in Region 6 will be adjusted accordingly, and future season dates will conform to the new Wildlife Management Unit (WMU) boundaries. A small portion of Jefferson and Lewis Counties (formerly in WMU 6G) will now be part of WMU 6K and thereby will not have a late muzzleloading season during the 2009-2010 hunting season. However, the boundary change extending WMU 6C into the Black River Valley will provide additional late muzzleloading season opportunity in this area.

The fall wild turkey season will change from a two-bird fall bag limit to a one-bird bag limit in portions of eight townships in Jefferson and Lewis Counties. In addition, portions of eight townships in Lewis County will change from a one-bird bag limit to a two-bird bag limit. The more conservative bag limit (2-bird bag to 1-bird bag) in the expanded portion of WMU 6K will occur in the Tug Hill Transition ecozone. This area has low hunting pressure and can have severe winter conditions, so the impacts to turkeys and turkey hunters should be minimal here. The more liberal bag limit in the expanded portion of

WMU 6C will occur in the Black River Valley. Again, participation in fall turkey hunting in this area is low, so impacts to local populations should be minimal. In addition, the preponderance of agricultural activities such as dairy farms in this area has been beneficial to local turkey populations and birds are abundant.

Comment:

Support was expressed for the changes to WMU 6C.

Response:

The department agrees that the proposed change to the boundary for WMU 6C is sensible and appropriate.

Comment:

The WMU boundaries should be based on county boundaries because (1) Most people know where the county boundaries are located; and (2) It is hard to set a WMU boundary with uniform topographic features and land use.

Response:

Whenever possible, WMU boundaries follow major highways or bodies of water. These are easily identified in the field, facilitating both compliance with hunting and trapping laws, and law enforcement. County boundaries, on the other hand, are political boundaries and rarely follow identifiable features on the ground. For this reason, county boundaries are not a practical basis for designating WMUs, since hunters and trappers would be unable to easily determine where they were located when afield.

Comment:

Regarding WMUs 7M, 7P, 7R, 7S: these descriptions refer to "State Route 81" and "State Route 88." The "Interstate" designation should be used for these highways, not "State Route."

Response:

The department has corrected this error.

Comment:

The boundary for WMU 7M should be broken down even further. Even with the proposed change to designate a new WMU 7P, WMU 7M remains too large to manage.

Response:

The department believes that the proposed split of WMU 7M into two WMUs (7M and 7P) is both practical and consistent with deer and bear management needs. Wildlife Management Unit boundaries are established because of similar land use and ecological conditions, and the proposed boundaries reflect those standards.

Comment:

Creation of WMU 7P for bear and deer management will reduce Canada goose hunting opportunity for an area that was previously in WMU 7S. Any loss of opportunity to harvest and help control the growth of local-nesting or "resident" Canada geese should be avoided, and the rationale that it will help simplify hunting regulations is not sufficient.

Response:

The affected area is quite small (about 70 square miles), and there will still be substantial opportunity for hunter harvest of resident Canada geese in that area. In addition to the 45-day regular season (typically between late October and mid-December, when geese are likely found throughout that area), there is a 25-day September goose hunting season that specifically targets resident Canada geese. The reduced season length will primarily affect hunting opportunity in late December, early January and early March. During this period of time, there will be few geese in the newly defined WMU 7P. Therefore, there will be minimal impacts on goose hunting opportunity in this area. The boundaries of the new unit are simpler and more distinct (Interstate Routes 81 and 88) than the current line (NYS Route 79, with more complicated connections to I-81 and I-88). Regardless how goose hunting areas are delineated, we will continue to seek expanded opportunities to harvest resident geese in all areas of the state, while ensuring adequate protection of migratory goose populations that occur in New York during fall and winter.

In finalizing the WMU boundaries in this notice of adoption, the department has corrected an error involving WMUs 5H and 5J. The

boundary for WMU 5H has been moved slightly southward in the vicinity of the west side of the Sacandaga Reservoir in parts of Fulton and Hamilton Counties. This area is ecological similar to most of the habitats in WMU 5H, and should not be included in WMU 5J, as originally proposed. The remaining portions of the proposal have been adopted without modification.

Hudson River - Black River Regulating District

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Hudson River - Black River Regulating District publishes a new notice of proposed rule making in the NYS Register.

Great Sacandaga Lake Access Permit System

I.D. No.	Proposed	Expiration Date
HBR-24-08-00008-P	June 11, 2008	June 11, 2009

Department of Labor

EMERGENCY/PROPOSED

RULE MAKING

NO HEARING(S) SCHEDULED

Provision of Safety Rope and System Components for Firefighters at Risk of Being Trapped at Elevations

I.D. No. LAB-26-09-00007-EP

Filing No. 689

Filing Date: 2009-06-16

Effective Date: 2009-06-16

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

Proposed Action: Addition of section 800.7 to Title 12 NYCRR.

Statutory authority: Labor Law, art. 2, section 27; art. 2, section 27-a; art. 7, section 200

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

Specific reasons underlying the finding of necessity: To give fire departments sufficient time to conduct risk assessments regarding the types of safety ropes and rescue system needed, to purchase needed equipment, and to train firefighters in their effective use before the date of the statutory requirement.

Subject: Provision of safety rope and system components for firefighters at risk of being trapped at elevations.

Purpose: To insure that firefighters are provided with appropriate ropes and system components for self-rescue and emergency escape.

Text of emergency/proposed rule: 12 NYCRR Section 800.7

Emergency Escape and Self Rescue Ropes and System Components for Firefighters

(a) *Title and Citation:* Within and for the purposes of the Department of Labor, this part may be known as Code Rule 800.7, *Emergency Escape and Self Rescue Ropes and System Components for Firefighters, specifying the requirements for safety ropes and associated system components.*

(b) *Purpose and Intent:* This rule is intended to ensure that firefighters are provided with necessary escape rope and system components for self rescue and emergency escape and to establish specifications for such ropes and system components.

(c) *Application:* This part shall apply throughout the State of New York to the State, any political subdivision of the State, Public Authorities, Public Benefit Corporations or any other governmental agency or instrumentality thereof employing firefighters within the meaning of § 27-a of the Labor Law.

This Part shall not apply to such employers located in a city with a population of over one million.

SECTION 800.7(d) DEFINITIONS. Within this part, the following terms shall have the meanings indicated:

(1) "System Components" means safety harnesses, belts, ascending devices, carabiners, descent control devices, rope grab devices, and snap links.

(2) "Escape Rope" means a single purpose, single use, emergency escape (Self-rescue) rope.

(3) "Interior Structural Fire Fighting" means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage.

(4) "Interior Structural Fire Fighter" means a firefighter who is designated by their employer to perform interior structural firefighting duties in an immediately dangerous to life and health (IDLH) atmosphere and is medically qualified to use self-contained breathing apparatus (SCBA) as defined in 29 CFR 1910.134.

(5) "Entrapment at Elevations" means a situation where a firefighter finds the normal route of exit is made unusable by fire, or other emergency situation, that requires the firefighter to immediately exit the structure from an opening not designed as an exit, that is above the ground floor and at an elevation above the surrounding terrain which would reasonably be expected to cause injury should the firefighter be required to exit.

SECTION 800.7(e) Specifications for Escape Ropes and System Components

Escape ropes and system components provided to firefighters shall conform to the requirements of "The National Fire Protection Association Standard 1983, Standard on Fire Service Life Safety Rope and Equipment for Emergency Services" in effect at the time of their manufacture. Escape ropes and system components purchased after the effective date of this Part shall conform to the 2006 edition (NFPA1983- 2006) of such standard.

SECTION 800.7(f) Risk Assessment and Equipment Selection

(1) Each employer who employs firefighters shall develop a written risk assessment to be used to determine under what circumstances escape ropes and system components will be required and what type will be required to protect the safety of firefighters in its employ. In performing the assessment, the employer shall:

(i) Identify the types and heights of buildings and other structures in the area the firefighters are expected to work. Such area shall include the regular scope of the fire district or other area covered by the fire department in question as well as any other districts or communities to which the fire department provides mutual aid with a reasonably predictable frequency.

(ii) Assess the standard operating procedures followed by the department with regard to rescue of firefighters from elevations.

(iii) Identify the risks to firefighters of being trapped at an elevation during structural fire fighting operations given the types of buildings or other structures located in the area(s) in which firefighters are expected to work. Identification of the risk in question shall include an assessment of:

(a) the extent to which standard operating procedures already in place will mitigate the risks identified;

(b) the type of escape ropes and system components that will be necessary to protect the safety of firefighters if operating procedures do not sufficiently mitigate the risk.

(2) Should the risk assessment establish that firefighters employed by the department performing interior structural firefighting are reasonably expected to be exposed to the risk of entrapment at elevations, the employer shall provide to each interior structural firefighter in its employ a properly fitted escape rope and those system components which meet the specifications for such rope and system components set forth in Section 800.7(e) and which would mitigate the danger to life and health associated with such risk.

SECTION 800.7(g) Training

(1) The employer shall ensure that each firefighter who is provided with an escape rope and system components is instructed in their proper use by a competent instructor. Instruction shall include the requirements of paragraph (h) of this Part and the user information provided by the manufacturer as required by NFPA 1983 Chapter 5.2 for each rope and system component.

(2) Instruction shall include hands-on use of the equipment in a controlled environment.

(3) A record of such instruction including the name of the individual being trained, the name of the individual delivering the training, and the date on which the training was provided shall be maintained by the employer until such time as the firefighter is no longer employed by the

employer or the employer delivers a subsequent training on this topic, whichever comes first.

SECTION 800.7(h) Employer Duties. In addition to the duties set forth in Parts 800.7(f) and (g), employers covered by this Part shall have the following duties:

(1) To ensure the adequacy of the safety ropes and system components, the employer shall routinely inspect and ensure that:

(i) Existing safety ropes and system components meet the codes, standards, and recommended practices adopted by the Commissioner;

(ii) Existing safety ropes and system components still perform their function by taking precautions to identify any of their limitations through reasonable means, including, but not limited to:

(a) Checking the labels or stamps on the equipment; and

(b) Checking any documentation or equipment specifications;

and

(c) contacting the supplier or approval agency.

(iii) Firefighters are informed of the limitations of any safety rope or system components;

(iv) Firefighters are not allowed or required to use any safety rope or system components beyond their limitations;

(v) Existing or new safety ropes and system components have no visible defects that limit their safe use;

(vi) Safety ropes and system components are used, cleaned and maintained according to the manufacturer's instructions;

(vii) Firefighters are instructed in identifying to the employer any defects the firefighter may find in safety ropes and system components; and

(viii) Any identified defects are corrected or immediate action is taken to eliminate the use of the equipment by:

(a) Ensuring that escape rope and system components with defects which are repairable are tagged as unsafe and stored in such a manner that they cannot be used until repairs are made;

(b) Ensuring that escape rope and system components that cannot be repaired are immediately destroyed or rendered unusable as an escape rope and system components; and

(c) Ensuring that any escape rope that has been utilized under load for the purpose of self rescue / emergency escape is immediately removed from service, destroyed, or rendered unusable as an escape rope and immediately replaced.

(2) The employer's routine inspection cycle required by this paragraph shall be based upon the volume of activity the Department undertakes but, in no case, any less frequently than once each month.

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 September 13, 2009.

Text of rule and any required statements and analyses may be obtained from: Thomas J. Mc Govern, NYS Department of Labor, Counsel's Office, State Office Campus, Building 12, Rm. 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority: The legislature placed the amendment in Article 2, Section 27-a of the Labor Law, Public Employee Safety and Health Act. Section 4 (c) of the Act directs the Commissioner to promulgate rules to provide for the enforcement of the amendment and require that the latest edition of the National Fire Protection Association's standard on Life Safety Ropes and System Components be adopted. Chapter 47 of the Laws of 2008 extended the period of time for the Commissioner to promulgate regulations under the Act and for fire departments subject to the rule to come into compliance.

In addition to the statutory authority set forth above, the Commissioner also has broad authority to promulgate rules and regulations governing public employee safety and health under Article 2, Section 27-a of the Labor Law.

Legislative Objective: The intent of the Legislature was to insure that firefighters are provided with the appropriate ropes and system components to allow self-rescue from upper stories of buildings should they become trapped. The Legislature also specified the national consensus standard to which life safety ropes and system components must conform.

Needs and Benefits: Firefighters occasionally become trapped on upper stories during fire suppression activities. Many times the firefighter is rescued by ladders or aerial apparatus; however, there are cases where the trapped fire fighter cannot be reached or the rapid development of the emergency situation does not allow for rescue by other means and those

cases could result in death or serious injury. One such case involved 6 trapped firefighters who were forced to jump from a fourth story. Four were seriously injured and two died of their injuries. Some of these injuries and deaths were attributable, in part, to either the lack of rescue ropes or the failure of the rope involved. The proposed rule addresses this risk by requiring employers of individuals engaged in interior structural firefighting to perform an assessment of the risk of entrapment of such individuals and to determine what rescue ropes and system components would be appropriate to mitigate or eliminate such risk. The rule, if properly implemented, would substantially reduce the risk of entrapment, serious injury, or death to firefighters trapped on upper stories of buildings while fighting fires.

Costs: The ropes and system components needed to equip a firefighter for self rescue can be obtained for as little as \$60.00 to \$100.00. (prices taken from internet sites). New York City has provided each of its firefighters with a system that costs more than \$400.00. The proposed rule contains no minimum cost threshold. This allows the employer to take appropriate steps to reduce the cost of providing the equipment required by the rule, so long as the employer provides equipment that meets the NFPA standards appropriate for the risks identified in its risk assessment. Moreover, the equipment need only be provided to interior structural firefighters who work in areas where they could become trapped. Employers need not purchase or provide ropes and rescue devices to apparatus drivers and fire policemen or other employees not expected to perform interior structural firefighting.

The NYS Office of Fire Prevention and Control reports that there are approximately 96,593 volunteer firefighters in New York State. This number is misleading in that it includes members who do not perform interior structural firefighting, Fire Police members, apparatus operators, Rescue Squad members and the elderly members who no longer attend fires. There is no way for the Department to estimate the number of volunteers who will require the equipment. In one volunteer department which lists a roster of over 200, only 30 are interior structural firefighters and then there is only equipment to allow less than 20 to enter a burning structure.

Ropes and Components need only be provided to firefighters at risk of entrapment and then only at the instant of the risk. This equipment is not required to be individually issued, but must only be available for use when a firefighter enters a structure. An employer could limit the cost by not making an individual issue or by partnering with other fire departments to purchase equipment in quantity and combine training costs.

In attempting to determine costs, the Department contacted three dissimilar fire departments. A suburban volunteer department purchased a harness for \$150.00 which is not only suitable for emergency escape but also for other technical rope rescues that the department performs. The Chief stated that he had purchased escape rope in bulk and cut it into prescribed lengths. He estimates that the rope cost about \$30.00 per member. He also purchased "Crosby Hooks" (an anchoring device designed for this purpose) at \$40.30 each. He estimates that it cost \$230.30 to equip each member with individual equipment assigned to them. 50 sets were purchased for a total of \$11,015.00. Since the Chief and one other member are OFPC Level 2 instructors certified to teach rope work no cost was incurred for training.

Albany Fire Department, a career fire department, reports that after conducting a risk assessment they chose a "Manufactured System" which costs \$410.00. The Fire Department Training Division will be trained by FDNY in the use of the system. Additional costs will be incurred in sending the trainers to NYC and time away from duty for each firefighter to receive training. Albany FD has opted to issue each firefighter a system for their exclusive use. They will require 260 sets at a cost of \$106,600.00. The City has applied for a grant to finance the cost. Outside of NYC there are an estimated 5500 career firefighters in NYS. Following Albany FD's assessment of the risks (which is representative of the majority of areas covered by career fire departments), the statewide cost could be \$2,255,000 for equipment alone.

On the other hand, a volunteer fire department in a rural area consisting of one and two story homes and agricultural buildings conducted a risk assessment and determined that a Belt, 30 feet of rope, and two carabineers were all that was necessary. The department already has a number of harnesses which are serviceable and utilized for high angle rescue. These harnesses will be issued to interior structural firefighters at no additional cost. The cost of the escape rope was set at \$30.00, and two carabineers at \$8.99 each. The rope and the Carabineers will be attached to the firefighters' airpacs. This department has 12 airpacs. Training in rope work has consistently been provided by a member who is certified to teach rope work. As a result, this department can be adequately equipped for \$552.00.

Since the determination of what equipment is necessary under the rule and the numbers of firefighters who will need the equipment will be based on the department assessment, such figures will be inexact. However, other potential costs under the rule are standardized, for example, the

requirement that the equipment purchased meet the NFPA standards. If each local government bought one copy of the NFPA Standard at \$34.50 per copy, the cost would be \$55,441.50.

Paperwork: The paperwork requirements contained in the proposed rule are minimal. The employer must conduct a hazard assessment, maintain a copy of the assessment, and make it available to the Department upon request. The employer must also keep the training record (i.e. sign in sheet) identifying all employees trained under the rule. Since other standards and laws already require that training records be maintained, this provision will have minimal impact on the employer. These standards include 29 CFR 1910.156 (Fire Brigade Standard), 29 CFR 1910.134 (Respiratory Protection Standard), and 29 CFR 1910.120 (Emergency Response Standard).

Local Government Mandates: Fire protection is a function of local government and as such the monetary burden of providing this equipment will be borne by the local government responsible for fire protection. The legislature did not provide funding for mandate relief. However, the Department has attempted to mitigate the cost of compliance by limiting the requirement for equipment and training to firefighters at risk of being trapped at elevations based upon a hazard assessment conducted by the employer. This approach provides significant regulatory flexibility and mitigates local government costs.

Duplication: This rule does not duplicate any state or federal regulations.

Alternatives: The legislation requiring promulgation of the rule provided little room for any alternative to be considered. The amendment specifically identifies and requires equipment that meets a defined national consensus standard for specific purposes. The Department has, however, provided regulated parties with alternatives under the regulations by allowing local fire departments to individually assess the hazards posed to their employees, assess the risks presented by the hazards, and identifying the need for the protective equipment required by the statute. The Department determined that the employer would be best suited to assess hazards faced by its employees and select appropriate protective equipment rather than imposing its own stringent requirements specifying the type of equipment needed.

This rule was prepared following consultation with the Executive Director of the New York State Association of Fire Chiefs and the NYS Department of State, Office of Fire Prevention and Control (OFPC). An initial meeting was held in the summer of 2007 and corrected or improved copies of the proposed rule were circulated among the agencies for consensus. The expertise of these two organizations was indispensable to the Department. The Proposed rule was also reviewed by the Department of State Counsel and their comments were incorporated into the proposed rule. Input was also solicited from the NYS Professional Firefighters Association, the NYS AFL CIO, and the Counsel for the Firemen's Association of the State of New York. The Department's Public Employee Safety and Health program staff also conducted outreach and information sessions at a dozen different meetings of fire departments and fire-related associations around the state and feedback received at these sessions was also considered by the Department in arriving at this final language.

Federal Standards: There are no federal standards with like requirements.

Compliance Schedule: The provisions of the statute required regulations to be in place on May 18, 2008 and employers to be in compliance by November 1, 2008. The rule became effective by an emergency adoption on June 30, 2008. Therefore, employers had several months in which to conduct hazard assessments, obtain equipment, and train employees prior to the effective date of the statutory requirement. Moreover, under normal inspection protocols utilized by the Department, an employer found to be out of compliance with the requirement would be given thirty (30) days to comply with the rule if they were found to be out of compliance during an inspection.

Regulatory Flexibility Analysis

Effect of the Rule: The proposed rule does not apply to small businesses. The rule will apply to all local governmental entities that employ a firefighter except for the City of New York. Not all governmental entities employ firefighters. With regard to fire departments that will be affected by this rule, the rule requires them to conduct an assessment of the potential risk of entrapment at elevations faced by their employees, identify those employees subject to this risk, obtain protective equipment for these employees, and train them in its proper use. There should be little or no cost to performing the risk assessment. Basically a fire department must identify a responsible party to determine whether there are buildings or other structures within the district or in neighboring districts where the department provides mutual aid firefighting services which are of sufficient height that they pose a risk of entrapment at elevations. The individual must then identify those firefighters within their department who perform interior structural firefighting to determine how much equipment needs to be purchased, and must then review available equipment and determine which equipment to purchase. This process should, at most,

take a couple of hours to conduct. It should ideally be conducted by an officer of the fire department, not a consultant, so no professional services should be needed. The most significant potential effect of the rule will be the costs associated with purchasing protective equipment. In some areas of the state, compliance costs are expected to be less than \$100.00 per firefighter. For all governmental entities that do employ firefighters, the effect of the rule would be limited by the results of the hazard assessment conducted by the fire department; costs would accrue depending on the nature of the hazard identified and the number of firefighters that would require the protective equipment addressed in the rule. Further details regarding potential costs are discussed below under the section entitled "Compliance Costs."

Local Governments with hazards requiring the provision of protective equipment and training for firefighters may collaborate on the training and use quantity buying practices to reduce costs. Training requirements could also be met by utilizing free training provided by the Department of State, Office of Fire Prevention and Control, although that agency does not have the resources to train every firefighter affected by this rule.

Compliance Requirements: The enabling legislation requires that each employer that employs firefighters must provide emergency escape rope and system components appropriate for the risk to which firefighters in their employ are exposed. To determine this, the employer must conduct an assessment of the types of structures in the fire protection area, determine what the hazard to employees would be and then provide the appropriate harnesses, ropes and equipment so that employees may perform self rescue should they become trapped at an elevation expected to cause injury should the individual be required to jump. The law also requires that the employer provide training in the use of the provided equipment and inspect and assure the safety of the equipment. The authorizing legislation was also specific as to the design and testing of the provided equipment citing a national consensus standard, The National Fire Protection Association Standard 1983, "Life Safety Rope and Equipment for Emergency Responders". The law requires the commissioner to adopt the latest edition which is the 2006 edition. NFPA 1983-2006 established the design, construction and testing requirements for emergency escape and life safety ropes and system components and all such equipment must bear a label attesting to its conformance.

To meet the statutory compliance requirements the proposal includes the following steps that the employer must take:

- 1 Conduct a hazard assessment to establish the risk.
2. Identify employees subject to the risk.
- 2 Select the appropriate ropes and system components.
- 3 Provide properly fitted ropes and system components (many belts and harnesses are sized) to each employee at risk.
- 4 Train each employee in the use of the selected rope and system components.
- 5 Inspect the ropes and system components at least once each month to assure they are safe for use.

Professional Services: Training on the required subject matter is provided free of charge by the Office of Fire Prevention and Control. OFPC classes are limited and would not meet the needs of all employers. There are also many experts in the field who provide rope training and smaller employers could collaborate and share the expense of training. Under provisions of the executive law, career departments must have a Municipal Training Officer who would be capable of providing the training. See New York Executive Law § 156(6).

Compliance Costs: Purchase of the ropes and system components would be relatively inexpensive in suburban fire protection areas. As the height and complexity of structures increase, the equipment will become more expensive and the required training more comprehensive. Many suppliers can provide ropes and attachment devices at a price range from \$ 20.00 to \$50.00. Harnesses or escape belts can run from \$50.00 to \$100.00. On the high end of the cost spectrum, the system developed and used by FDNY costs approximately \$400.00 per firefighter and the Manufacturer (Petzl) requires that the employer participate in their training program at \$250.00 per person. They will provide train-the-trainer services.

In an effort to estimate the cost of compliance with the proposed rule, the Department contacted three fire departments of different size. A suburban volunteer department purchased a harness for \$150.00 which is suitable for not just emergency escape but for other technical rope rescues that the department performs. The Chief stated that he had purchased escape rope in bulk and cut it into prescribed length. He estimates that the rope cost about \$30.00 per member. He also purchased "Crosby Hooks" (an anchoring device designed for this purpose) at \$40.30 each. He estimates that it cost \$230.30 to equip each member with individual equipment assigned to them. 50 sets were purchased for a total of \$11,015.00. Since the Chief and one other member are OFPC Level 2 instructors certified to teach rope work no cost was incurred for training.

Albany Fire Department, a career fire department, reports that after conducting a risk assessment they chose a "Manufactured System" which

costs \$410.00. The Fire Department Training Division will be trained by FDNY in the use of the system. Additional costs will be incurred in sending the trainers to NYC and time away from duty for each firefighter to receive training. Albany FD has opted to issue each firefighter a system for their exclusive use. They will require 260 sets at a cost of \$106,600.00. The City has applied for a grant to finance the cost. Outside of NYC there are an estimated 5500 career firefighters in NYS. Following Albany FD's assessment of the risks (which is representative of the majority of areas covered by career fire departments), the statewide cost could be \$2,255,000 for equipment alone.

On the other hand, a volunteer fire department in a rural area consisting of one and two story homes and agricultural buildings conducted a risk assessment and determined that a Belt, 30 feet of rope, and two carabineers were all that was necessary. The department already has a number of harnesses which are serviceable and utilized for high angle rescue. These harnesses will be issued to interior structural firefighters at no additional cost. The cost of the escape rope was set at \$30.00, and two carabineers at \$8.99 each. The rope and the Carabineers will be attached to the firefighters' airpacs. This Department has 12 airpacs. Training in rope work has consistently been provided by a member who is certified to teach rope work. As a result, this department can be adequately equipped for \$552.00.

Since the determination of what equipment is necessary under the rule and the numbers of firefighters who will need the equipment will be based on the department assessment, such figures will be inexact. However, other potential costs under the rule are standardized, for example, the requirement that the equipment purchased meet the NFPA standards. If each local government bought one copy of the NFPA Standard at \$34.50 per copy, the cost would be \$55,441.50.

Economic and Technological Feasibility: The emergency regulation does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

Minimizing Adverse Impact: The regulation is necessary to implement Labor Law, Section 27-a(4)(c), as enacted by chapter 433 of the Laws of 2007 and amended by chapter 47 of the Laws of 2008, and to that extent, does not exceed any minimum State standards. Section 27-a(4)(c) requires the Commissioner to adopt the codes, standards and recommended practices promulgated by the most recent edition of the National Fire Protection Association 1983, Standard on Fire Service Life Safety Ropes and System Components, and as are appropriate to the nature of the risk to which the firefighter shall be exposed. This regulation has been carefully drafted to minimize the potential impact of the statute by allowing employers to assess risks based upon individual needs of their fire departments, by identifying those firefighters who are subject to such risk, and by identifying the types and quantity of equipment necessary to address the risk. Once the risk assessment has been performed, the regulation requires distribution of ropes and rescue equipment only to those interior structural firefighters who the assessment identifies as being at risk of entrapment. Moreover, the regulation requires that written training records be made available to the Department only upon request, limits required hands-on training only to those firefighters identified as being at risk through the risk assessment, and limits the inspection of the life safety rope systems to one time each month. These requirements help minimize potential adverse impacts. For example, if the proposal required every fire fighter to be provided equipment and undergo training, costs and record keeping requirements would have increased; if inspection was required more than once a month, it may have been unnecessarily burdensome, if less than once a month, it may have compromised the suitability of the equipment or the safety of the firefighters.

Small Business and Local Government Participation: This regulation will have no impact on small business. The regulation applies to all governmental entities that employ a firefighter. This rule reflects input obtained through consultation with the Executive Director of the New York State Association of Fire Chiefs and the NYS Department of State, Office of Fire Prevention and Control (OFPC). An initial meeting was held in the summer of 2007 and corrected or improved copies of the proposed rule were circulated among the agencies for consensus. The Proposed rule was also reviewed by the Department of State Counsel and their comments were incorporated into the proposed rule. Input was also solicited from the NYS Professional Firefighters Association, the NYS AFL CIO, and the Counsel for the Firemen's Association of the State of New York. The Department's Public Employee Safety and Health program staff also conducted outreach and information sessions at a dozen different meetings of fire departments and fire-related associations around the state and feedback received at these sessions was also considered by the Department in arriving at this final language.

The Department also posted the proposed rule on the Division of Safety and Health web page and filed it as an emergency rule.

Comments received through all these outreach efforts primarily requested that the document include direction to employers with regard to the selection of appropriate equipment and with regard to the identifica-

tion of employees who might be at risk of entrapment such that they would require ropes and system components. As a result of these comments, the rule was altered to include additional guidance on conducting a risk assessment and the definitions were changed to make it clear who would need to be equipped and what job duties would require ropes and system components.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule will apply to all public employers who employ firefighters. As many as 800 employers in rural or suburban areas will be affected by this rule.

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

The rule will require the employer to maintain training records to show that the firefighters have been trained. Employers are already required to maintain training records by other rules such as the OSHA requirements promulgated under 12NYCRR Part 800. The proposed rule does not appear to impose an additional recordkeeping burden on the employer and will require a minimum amount of effort to comply. The training record must be maintained until the training is repeated, for a period of one year.

Compliance with the overall rule will be less and less burdensome as the size of the employer decreases. The employer must perform a hazard assessment to determine the level of risk to which its employees are exposed and use that information to select the appropriate equipment to be provided. Depending on the height and types of structures in the area where the employer provides fire protection, the equipment could be a little as a rope, belt, and attachment devices.

The employer must also train employees in the techniques of self rescue. Many Fire Departments have the expertise in-house to provide this service, particularly in rural areas where building size and configurations may limit the risks addressed by the rule. Moreover, in rural areas rope work is part of high angle rescue work which a number of fire departments in mountainous areas provide. Individuals trained in high angle rescue techniques would require little or no extra training to meet the requirements of this proposed rule.

Training provided by the State Office of Fire Prevention and Control also covers the criteria involved. However, this office does not have sufficient staff resources to provide the training on a statewide basis. Some rope and rescue system manufacturers will provide training in their equipment; there will typically be a cost associated with this service, however.

Another option open to employers is to group together and hire a professional trainer to provide a train-the-trainer course for individuals from a number of departments who would then train the members of their own department. This method would make the expense of hiring a contractor a shared expense.

3. Costs:

There are two primary areas of cost imposed by the rule: the cost of purchasing and maintaining the equipment and the cost of providing the required training. The cost of the equipment would fluctuate by department, depending upon the risks identified in the risk assessment conducted by the Department and the equipment needed to address the risk. Each firefighter who is at risk of entrapment at elevation must be provided with properly fitted (belts and harnesses come in different sizes) self-rescue rope and other components such as a belt and carabiners. A rural fire department employer could reasonably outfit each employee covered by the rule for as little as \$100.00; if employers were to coordinate purchases and buy these items in bulk that cost could be reduced substantially. We should note that some of the manufactured systems cost as much as \$400.00. In most rural areas such expensive systems should not be necessary.

Costs associated with the provision of training in systems are discussed above. If training is provided in-house, costs would be minimal or none at all. A professional trainer could be provided by a manufacturer "free of charge" if the employer purchases a sufficient number of units of equipment. [Note: although this is classified as a free service, it is really a service whose cost is included in the equipment purchase cost.] If the professional trainer's services are not provided along with the purchase, the charges for the trainer's time could range up to \$500.00.

4. Minimizing adverse impact:

The only adverse impact resulting from the proposed rule are the costs associated with compliance. As discussed previously, covered employers can try to minimize such costs through coordination with other fire departments to purchase equipment in bulk and through train the trainer sessions which will allow one or more members to deliver the training to their fellow firefighters.

5. Rural area participation:

The proposed rule was posted on the department web site along with a contact. Numerous emails and phone calls were taken during the 6 months it was posted.

Meetings were held with employer groups such The New York State

Association of Fire Chiefs and Regional Fire Administrators from around the state. The rule was discussed with the Counsel for The Firemen's Association of the State of New York.

Meetings were also held with representatives of the Office of Fire Prevention and Control and with Department of State Counsel.

Comments from these meetings and contacts were used to develop the rule.

Job Impact Statement

This rule concerns the provision of safety ropes and system components for public sector Fire Fighters. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Dealer Document Fee

I.D. No. MTV-26-09-00013-P

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

Proposed Action: Amendment of Parts 77, 78 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 415(9)(d)

Subject: Dealer document fee.

Purpose: Raises the dealer document fee from \$45 to \$75.

Text of proposed rule: Subdivision (c) of section 77.8 is amended to read as follows:

(c) Such a dealer may charge a person who purchases a vehicle from such dealer a fee for assisting in securing a registration and/or certificate of title for such vehicle provided the dealer actually performs the service of filing the application for title and/or registration with the Commissioner of Motor Vehicles or his issuing agent. The fee charged by the dealer may not exceed [\$45] \$75. Such fee does not include the fee required to be paid to the Department of Motor Vehicles for issuance of the registration or for issuance of a certificate of title, nor shall such fee include the fee charged for the motor vehicle inspection of the vehicle.

Paragraph (2) of subdivision (c) and subdivision (d) of section 78.19 are amended to read as follows:

(2) Such a dealer may charge a person who purchases a vehicle from such dealer a fee for assisting in securing a registration and/or certificate of title for such vehicle, provided the dealer actually performs the service of filing the application for title and/or registration with the Commissioner of Motor Vehicles or his issuing agent. The fee charged by the dealer may not exceed [\$45] \$75. Such fee does not include the fee required to be paid to the Department of Motor Vehicles for issuance of the registration or for issuance of a certificate of title, nor shall such fee include the fee charged for the motor vehicle inspection of the vehicle.

(d) If a fee is charged by the dealer for assisting in securing a registration and/or title or securing special or distinctive plates, the dealer shall print the following statement and asterisked statement on all copies of the invoice or bill of sale in a type size not smaller than the type size used for other charges on such document:

"Dealer's optional fee for processing application for registration and/or certificate of title, and for securing special or distinctive plates (if applicable). THIS IS NOT A DMV FEE. *\$_____,"

The asterisk and the following language shall be printed below the above statement:

*The optional dealer registration or title application processing fee ([\$45.00] \$75.00 maximum) and special plate processing fee (\$5.00 maximum) are not New York State or Department of Motor Vehicles fees. Unless a lien is being recorded or the dealer issued number plates, you may submit your own application for registration and/or certificate of title or for a special or distinctive plate to any motor vehicle issuing office.

Text of proposed rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, Counsel's Office, Room 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.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

1. Statutory authority: Section 215(a) of the Vehicle and Traffic Law authorizes the Commissioner to promulgate regulations which regulate and control the exercise of the powers of the Department of Motor Vehicles. VTL Section 415(9)(d) provides that the Department may take action against a dealer who fails to comply with the rules and regulations of the Commissioner for the enforcement of Article 16 or with any provision of the VTL applicable thereto. Thus, under such section, the Department may promulgate rules regulating dealer activities and procedures.

2. Legislative objectives: The Legislature enacted Article 16 of the Vehicle and Traffic Law, *Registration of Dealers and Transporters*, to both protect consumers from fraudulent business practices and to assist the dealers in the sale of motor vehicles. Implicit in VTL Section 415(9)(d) is the authority of the Commissioner to promulgate regulations governing the sale of motor vehicles.

This proposal accords with the legislative objective of assisting dealers in the sale of motor vehicles by permitting an increase in the fee dealers may charge customers for processing registration and title documents. Since the fee was increased to \$45 dollars in 2004, not only have dealer costs increased substantially, but dealers are operating at a competitive disadvantage with neighboring states. This proposal also accords with the legislative objective of protecting consumers by placing a cap on the fee that dealers may charge.

3. Needs and benefits: This proposed regulation is necessary primarily to assist the dealer industry in meeting the increasing cost of processing DMV registrations and titles and to compete with dealers in neighboring states. Since 1972, the Department has allowed the industry to impose a discretionary fee to cover the cost of processing registration and title work. This is known as the "dealer document fee." If a vehicle is bought with a lien attached, the dealer must process the registration and title paperwork. If there is no lien, the consumer may choose to process the paperwork himself or herself at a DMV Office.

A dealer is not required to charge the document fee. However, most dealers have chosen to charge the fee due to the cost of doing business. In 1972, the fee was set at a maximum of \$10. This was increased to a maximum of \$20 in 1991. In 2004, the fee was increased to a maximum of \$45. At the current rate, the fee is substantially less than that charged in other states. In our neighboring states, the fees are much higher: up to \$200 in Massachusetts, up to \$125 in Vermont and between \$199 and \$299 in New Jersey. By increasing the fee to \$75, New York would come within 50% of the national average of dealer document fees, without imposing an onerous burden on consumers.

In addition to competitive concerns, dealer-related statutes and regulations have become more abundant and complex. As the law and procedures evolve, titling and registration processing has become more involved, with some transactions requiring particularized, detailed attention. It is estimated that there are about 15 documents associated with each motor vehicle sale, and that at least six employees are involved in a motor vehicle sale, including the salesperson, the finance and insurance manager, the billing clerk, the sales manager, the accounts payable clerk and the accounts receivable clerk.

Many states do not regulate the dealer documentation fee. New York, however, believes that without a cap, consumers could be subject to exorbitant fees; thus, a cap remains in place in order to protect consumers. The regulation represents a balance between the business needs of dealers and consumer protection imperatives.

4. Costs: There would be no cost to regulated parties. There are 1,937 new car dealers, 9 qualified dealers and 9,621 used car dealers in New York State. Dealers sold about 1.5 million vehicles in the past year. Assuming that all purchasers were assessed a maximum document fee, such dealers would have collected an additional \$45 million dollars in 2008.

Purchasers of motor vehicles will assume the costs noted above by paying the increased dealer documentation fee.

5. Local government mandates: There are no local government mandates associated with this proposal.

6. Paperwork: There are no new reporting or paperwork requirements associated with this proposal. Dealers shall be required to revise their forms that list the dealer document fee. Until such revisions are made, they may continue to use their current stock and simply write or type in the new document fee.

7. Duplication: This rule does not duplicate any State or Federal regulation.

8. Alternative: Several dealer groups requested that the Department increase the dealer document fee, including the Greater New York Dealers Association, the New York State Automobile Dealers Association, the Eastern New York Coalition of Automotive Retailers, the Niagara Frontier Automobile Dealers Association, the Rochester Automobile Dealers Association and the Syracuse Automobile Dealers Association. In light of the concerns expressed by the groups and balancing those concerns with the interests of consumers, the Department considered various document

fee increase proposals. This proposal represents a reasonable increase to meet industry needs without imposing an undue burden on consumers. A no action alternative was considered, but it was rejected in light of the economic and fiscal needs of the industry.

9. Federal standards: This rule does not exceed any minimum standards of the Federal government.

10. Compliance schedule: Immediate.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this proposed rule because it will have no adverse impact on small business or local governments. This proposal permits dealers to increase the dealer document fee charged to customers for the processing of registration and title transactions. Dealers will collect the increased document fee to cover their increased business costs. Thus, the proposal benefits dealers and will have no adverse impact.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposed rule because it has no adverse or disproportionate impact on rural areas of New York State.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because it will have no adverse impact on job creation and development in New York State. This proposal concerns an increase in the dealer document fee collected by dealers upon the sale of a motor vehicle.

Public Service Commission

ERRATUM

A Notice of Proposed Rule Making, I.D. No. PSC-17-09-00008-P, pertaining to Purchase of Accounts Receivable Program to be Implemented by KEDLI, published in the April 29, 2009 issue of the *State Register* contained an incorrect SAPA number. The correct SAPA number is 06-G-1186SP5.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

National Grid NY Proposes to Retain a Portion of the Property Tax Refund for Its Shareholders

I.D. No. PSC-26-09-00010-P

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

Proposed Action: The Commission is considering the petition of the Brooklyn Union Gas Company d/b/a National Grid NY regarding the disposition of property tax refunds received from New York City.

Statutory authority: Public Service Law, section 113(2)

Subject: National Grid NY proposes to retain a portion of the property tax refund for its shareholders.

Purpose: To allow National Grid NY to retain a portion of the property tax refund for its shareholders.

Public hearing(s) will be held at: 10:30 a.m., September 16, 2009 at Three Empire State Plaza, Albany, NY.

There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Web Site (www.dps.state.ny.us) under Case No. 08-M-1445SP1.

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

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

Substance of proposed rule: Brooklyn Union Gas Company d/b/a National Grid NY obtained a Real Property Tax refund in the amount of \$4,654,996.77 and a Special Franchise Tax refund in the amount of \$23,416,408. When a public utility obtains a property tax refund, Public Service Law Section 113(2) provides that the Commission, after hearing, may determine the extent to which the refund will be passed on to the utility's customers. National Grid NY maintains that it undertook

considerable effort, expense and risk in seeking the tax refunds, and should be allowed to retain a portion of the refunds for its shareholders. National Grid NY proposes to retain 100% of the Real Property Tax refund, and 50% of the Special Franchise Tax refund, for its shareholders. The Commission will consider the petition of National Grid NY and may grant or modify the relief sought in the petition or take other measures authorized by law.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-M-1445SP1)

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

Specific Commercial and Industrial Electric and Gas Energy Efficiency Programs

I.D. No. PSC-26-09-00008-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 commercial and industrial electric and gas energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Specific commercial and industrial electric and gas energy efficiency programs.

Purpose: To encourage electric and gas energy conservation in the State.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, (a) commercial and industrial electric energy efficiency program proposals made in response to an order in Case 07-M-0548 entitled "Order Establishing Energy Efficiency Portfolio Standard and Approving Programs" issued by the Public Service Commission on June 23, 2008 [see Ordering Clauses 8, 10 & 17]; and (b) commercial and industrial gas energy efficiency program proposals made in response to a notice in Case 07-M-0548 entitled "Notice Requesting Proposals" issued by the Secretary to the Public Service Commission on April 20, 2009. For potential independent program administrators that submitted updated proposals for programs in accordance with Ordering Clause 8 of the aforementioned June 23, 2008 Order, such submissions shall be considered as pre-filed comments responsive to this notice to the degree that they relate to the provision of energy efficiency programs for commercial and industrial customers. The program proposals under consideration for this rule include the following:

1. Cases 08-E-1135 and 09-G-0363 - Central Hudson Gas & Electric Corporation, Petition letter from Thompson Hine, Robert J. Glasser, Esq., dated September 22, 2008 and "Updated Small Commercial Gas Efficiency Program Description" dated June 5, 2009: (a) MidSize Commercial Business Program (electric and gas); and (b) Small Commercial Gas Efficiency Program (gas).

2. Cases 08-E-1127 and 09-G-0363 - Consolidated Edison Company of New York, Inc., "Residential and Commercial Energy Efficiency Programs" dated September 22, 2008 and "Commercial Gas Efficiency Programs" dated June 5, 2009: (a) C&I Equipment Rebate Program (electric), (b) C&I Custom Efficiency Program (electric), (c) Targeted Demand Side Management Program (electric), (d) Steam Cooling Program (electric), (e) Commercial Gas Efficient Equipment Rebate Program (gas), and (f) Commercial Custom Gas Efficient Equipment Program (gas).

3. Cases 08-E-1129/08-E-1130 and 09-G-0363 - New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation, "Electric Program Plan of New York State Electric & Gas Corporation

and Rochester Gas and Electric Corporation" dated September 22, 2008, Updates dated April 30, 2009, and Updates dated May 15, 2009 (corrected June 11, 2009): (a) Non-residential Small Business Direct Installation Program (electric and gas), (b) Non-residential Commercial & Industrial (C&I) Rebate Program (electric and gas), and (c) Block Bidding Program (electric).

4. Cases 08-E-1132 and 09-G-0363 - New York State Research and Development Authority, "Energy Efficiency Portfolio Program Administrator Proposal" dated September 22, 2008, Updates dated November 21, 2008, Updates dated June 2, 2009, and Updates dated June 5, 2009: (a) Statewide Combined Heat and Power Performance Program (electric), (b) Benchmarking and Operations Efficiency Program (electric), (c) New York Energy Smart Business Partners Program (electric), (d) Existing Facilities Program (electric and gas), (e) Commercial Loan Fund and Finance Program (electric and gas), (f) [Institutional Block RFP] Bidding Program (electric and gas), (g) Waste Energy Recovery Program (electric and gas), (h) FlexTech Program (gas), (i) Industrial and Process Efficiency Program (gas), (j) High Performance New Construction Program (gas), and (k) Advanced Burners Program (gas).

5. Cases 08-E-1133 and 09-G-0363 - Niagara Mohawk Power Corporation d/b/a National Grid, "Electric and Gas Energy Efficiency Program Proposals" dated September 22, 2008 and "Updated Gas Energy Efficiency Proposals for EnergyWise and Energy Initiative Programs" dated May 28, 2009: (a) Energy Initiative Program (electric and gas), (b) Commercial and Industrial Energy Efficiency Program (gas), (c) Commercial High-Efficiency Heating and Water Heating Program (gas), and (d) Building Practices and Demonstrations Program (gas).

6. Case 08-E-1128 - Orange and Rockland Utilities, Inc., "Residential and Commercial Energy Efficiency Portfolio Programs" dated September 22, 2008: (a) Commercial [C&I] Existing Building Program (electric).

7. Case 09-G-0363 - The Brooklyn Union Gas Company/KeySpan Gas East Corporation, "Gas Energy Efficiency Program Proposals" dated September 22, 2008, Updates dated September 26, 2008, and Updates dated June 5, 2009: (a) Commercial, Industrial and Multi Family Energy Efficiency Program (gas), (b) Commercial High-Efficiency Heating and Water Heating Program (gas), and (c) Building Practice and Demonstration Program (gas).

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-E-1127SP3)

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

Notification Concerning Tax Refunds

I.D. No. PSC-26-09-00009-P

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

Proposed Action: The PSC is considering Verizon New York Inc.'s petition seeking retention of a portion of a property tax refund related to its regulated, intrastate New York operations.

Statutory authority: Public Service Law, section 113(2)

Subject: Notification concerning tax refunds.

Purpose: To consider Verizon New York Inc.'s request to retain a portion of a property tax refund.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, Verizon New York Inc.'s request to retain the portion of a property tax refund received that is allocable to Verizon's regulated, intrastate New York operations. Verizon proposes to retain such tax refund in accordance with earlier Commission Orders involving previous Verizon tax refunds.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-C-0478SP1)

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

Minor Rate Filing

I.D. No. PSC-26-09-00011-P

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

Proposed Action: The Commission is considering a proposed filing by the Village of Richmondville to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 1—Electricity.

Statutory authority: Public Service Law, section 66(12)

Subject: Minor Rate Filing.

Purpose: To increase annual electric revenues by approximately \$111,824 or 9.69%.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a filing by the Village of Richmondville to increase its electric revenues by approximately \$111,824 or 9.69%. The proposed filing has an effective date of September 1, 2009.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@dps.state.ny.us

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-E-0482SP1)

Department of State

NOTICE OF ADOPTION

Continuing Education for Licensed Home Inspectors

I.D. No. DOS-16-09-00004-A

Filing No. 678

Filing Date: 2009-06-15

Effective Date: 2009-07-01

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

Action taken: Addition of Subpart 197-3 to Title 19 NYCRR.

Statutory authority: Real Property Law, section 444-f

Subject: Continuing education for licensed home inspectors.

Purpose: To establish standards of continuing education for licensed home inspectors.

Text or summary was published in the April 22, 2009 issue of the Register, I.D. No. DOS-16-09-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, Division of Licensing Services, 80 South Swan Street, P.O. Box 22001, Albany NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

Assessment of Public Comment

The agency received no public comment.

**Urban Development
Corporation**

**EMERGENCY
RULE MAKING**

Economic Development and Job Creation Throughout New York State and Preservation of Public Health and Public Safety

I.D. No. UDC-26-09-00002-E

Filing No. 603

Filing Date: 2009-06-11

Effective Date: 2009-06-11

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

Action taken: Addition of Part 4245 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 2006, ch. 109; L. 1968, ch. 174

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

Specific reasons underlying the finding of necessity: Effective provision of economic development assistance in accordance with the enabling legislation (including recent amendments thereto) requires the creation of the Rule to address dangers posed by vacant, abandoned, surplus or condemned buildings.

Subject: Economic development and job creation throughout New York State and preservation of public health and public safety.

Purpose: The Rule provides the framework for administration of the Restore New York's Communities Initiative.

Text of emergency rule: RESTORE NEW YORK'S COMMUNITIES INITIATIVE

Section 4245.1 Purpose

These regulations set forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in section 16-n of the Urban Development Corporation Act (the "Act"). The initiative promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing financial assistance to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

Section 4245.2 Definitions

For purposes of these regulations, the terms below will have the following meanings:

(a) "deconstruction" shall mean the careful disassembly of buildings of architectural or historic significance with the intent to rehabilitate, reconstruct the building or salvage the material disassembled from the building;

(b) "economically distressed community" shall mean communities determined by the Commissioner of Economic Development based on criteria that are indicative of economic distress including numbers of persons receiving public assistance, poverty rates, unemployment rates, rate of employment decline, population loss, per capita income change, decline in economic activity and private investment to the extent that they

are measurable at the municipal level and such other criteria indicators as the Commissioner deems appropriate to be in need of economic assistance;

(c) "municipality" shall mean a municipal subdivision that is a city, town, or village;

(d) "property assessment list" shall mean a list (in such form as the Corporation may require) compiled by a municipality containing description (location, size and residential or commercial nature of each building, and whether the building is proposed to be demolished, deconstructed, rehabilitated or reconstructed) and an assessment of whether each building is vacant, abandoned, surplus or condemned within its jurisdiction;

(e) "reconstruction" shall mean the construction of a new building which is similar in architecture, size and purpose to a previously existing building at such location, provided, however, to the extent possible, all such reconstruction program real property shall be architecturally consistent with nearby and adjacent properties or in a manner consistent with a local revitalization or urban development plan;

(f) "rehabilitation" shall mean structural repairs, mechanical systems repair or replacement, repairs related to deferred maintenance, emergency repairs, energy efficiency upgrades, accessibility improvements, mitigation of lead based paint hazards, and other repairs which result in a significant improvement to the property, provided, however, to the extent possible, all such rehabilitation program real property shall be architecturally consistent with nearby and adjacent properties or in a manner consistent with a local revitalization or urban development plan;

Section 4245.3 Request for Proposals

The Corporation may, within available appropriations, issue requests for proposals to municipalities at least once per fiscal year to provide grants to municipalities, for demolition, deconstruction, reconstruction, and rehabilitation projects set forth in a property assessment list submitted by the municipality.

Section 4245.4 Eligibility

(a) To be eligible for the demolition and deconstruction program or rehabilitation and reconstruction program assistance, as described in sections 4245.5 and 4245.6 of this Part, municipalities must conduct an assessment of vacant, abandoned, surplus or condemned buildings in communities within their jurisdiction. Such real property may include both residential and commercial real properties. Such properties shall be selected for the purpose of revitalizing urban centers, encouraging commercial investment and adding value to the municipal housing stock. Such information shall be set forth in the property assessment list.

Such properties shall be published in a local daily newspaper for no less than three consecutive days. Additionally, the municipality shall conduct a public hearing in the municipality where the buildings identified on the property assessment list are located. Such public hearing shall be held before the Corporation accepts an application.

(b) No full-time employee of the State or full-time employee of any agency, department, authority or public benefit corporation (or any subsidiary of a public benefit corporation) of the State shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

Section 4245.5 Demolition and Deconstruction Projects

Demolition and deconstruction projects for real property in need of demolition or deconstruction on the property assessment list may receive grants of up to twenty thousand dollars per residential real property. The Corporation shall determine the cost of demolition and deconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly, and such costs and maximum grant award amounts shall be made available to eligible municipalities. The Corporation shall also consider geographic differences in the cost of demolition and deconstruction in the establishment of maximum grant awards.

Section 4245.6 Rehabilitation and Reconstruction Projects

Rehabilitation and reconstruction projects for real property in need of rehabilitation or reconstruction on the property assessment list may receive grants of up to one hundred thousand dollars per residential real property. The Corporation shall determine the cost of rehabilitation and reconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly, and such costs and maximum grant award amounts shall be made available to eligible municipalities. The Corporation shall also consider geographic differences in the cost of rehabilitation and reconstruction in the establishment of maximum grant awards. Provided, however, to the extent possible, all such rehabilitation and reconstruction projects real property shall be rehabilitated or reconstructed in a manner that is architecturally consistent with nearby and adjacent properties or consistent with a local revitalization or urban development plan. Provided, further, such grants may be used for site development needs including but not limited to water, sewer and parking as specified in the grant agreement entered into between the Corporation and the municipality.

Section 4245.7 Required Considerations and Priorities

In considering the awarding of initiative grant assistance, the Corporation:

(a) shall review all qualified applications to determine the awards to be made pursuant to sections 4245.5 and 4245.6 of this Part and shall, to the fullest extent possible, provide such assistance in a geographically proportionate manner throughout the State based on the qualified applications received pursuant to this section.

(b) shall give priority in granting such assistance to eligible properties that have approved applications or are receiving grants pursuant to other state or federal redevelopment, remediation or planning programs including, but not limited to, the brownfield opportunity areas program adopted pursuant to section 970-r of the General Municipal Law or empire zone development plans pursuant to article 18-B of the General Municipal Law.

(c) shall give priority to properties in economically distressed communities.

Section 4245.8 Required Matching Contribution

A municipality that is granted an award or awards under this section shall provide a matching contribution of no less than ten percent of the aggregated award or awards amount. Such matching contribution may be in the form of a financial and/or in kind contribution by the municipality, a government entity, or a private entity. In establishing the matching contribution, a municipality's financial contribution may include grants from federal, state and local entities. In kind contributions may include but shall not be limited to the efforts of municipalities to conduct an inventory and assessment of vacant, abandoned, surplus, condemned, and deteriorated properties and to manage and administer grants pursuant to sections 4245.5 and 4245.6 of this Part.

Section 4245.9 Application and Approval Process

(a) Promptly after receipt of the application, including the property assessment list, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Part. Applications shall be processed in full compliance with the applicable provisions of section 16-n of the Act as it may be in effect from time to time.

(b) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project is approved for funding and if it involves the demolition or deconstruction or rehabilitation or reconstruction of any property, the Corporation will schedule a public hearing in accordance with the Act and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ("PACB"), which also generally meets once a month, in accordance with PACB requirements and policies. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

Section 4245.10 Confidentiality

To the extent permitted by law and regulations, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting initiative assistance from the Corporation, which is submitted by or on behalf of such person or entity to the Corporation in connection with an application for initiative assistance, shall be confidential and exempt from public disclosures.

Section 4245.11 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's Affirmative Action Department, which shall, in consultation with the applicant and/or proposed recipient of the Program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the Public Authorities Law, article 15-A of the Executive Law, and section 6254(11) of the Unconsolidated Laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires September 8, 2009.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Chapter 109, Laws of 2006 (Unconsolidated Laws, section 6266-n. Another Unconsolidated Laws section 6266-n was added by another act) au-

thorized the Urban Development Corporation, d/b/a Empire State Development Corporation (the "Corporation") to implement the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities. Section 5(4) of the New York State Urban Development Corporation (UDC) Act (Unconsolidated Laws, section 6255(4)), which was originally enacted as Chapter 174 of the Laws of 1968, authorizes the Corporation to make rules and regulations with respect to its projects, operations, properties and facilities, in accordance with section 102 of the Executive Law.

2. Legislative Objective:

The objective of the statute authorizing the Program is to revitalize urban areas and stabilize neighborhoods to attract industry and people to urban areas thereby improving municipal finances, giving municipal governments the wherewithal to grow their tax and resource base and attract individuals, families, industry and commercial enterprises, and lessen distressed municipalities' reliance on state aid, achieving stable and diverse economies and vibrant communities.

3. Need and Benefits:

The Program's legislation assists the revitalization of urban areas and stabilization of neighborhoods throughout the State by providing the following types of assistance:

a) Demolition and Deconstruction Grants of up to twenty thousand dollars per residential real property in need of demolition or deconstruction on the property assessment list.

b) Rehabilitation and Reconstruction Grants of up to one hundred thousand dollars per residential real property in need of rehabilitation or reconstruction on the property assessment list.

c) Demolition and Deconstruction Grants and Rehabilitation and Reconstruction Grants for commercial properties. The Corporation shall determine the cost of demolition/deconstruction and rehabilitation/reconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly. The Corporation shall also consider geographic differences in the establishment of maximum grant awards.

The proposed new Rule sets forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in section 16-n of the UDC Act. The initiative promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing the financial assistance mentioned above to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

1. Evaluation Criteria - The Corporation will review and evaluate applications for assistance pursuant to eligibility requirements and criteria set forth in the UDC Act and the Rule.

2. Application procedure - Approval of applications shall be made only upon a determination by the Corporation:

(i) that the proposed project would promote the economic health of the State by facilitating the revitalization of urban areas and the stabilization of neighborhoods within a political subdivision or region of the State or would enhance or help to maintain the economic viability of the State.

(ii) that the project would be unlikely to take place in the State without the requested assistance; and

(iii) that the project is reasonably likely to accomplish its stated objectives and that the likely benefits of the project exceed costs.

4. Costs:

The funding source is appropriation funds (2006-07 Supplemental Bill (S8470/A12044) page 227, lines 8-14). \$150,000,000 is available for 2008. Discussions regarding funds were conducted by Ray Richardson on behalf of the Corporation and Andrew Kennedy on behalf of the Division of Budget.

5. Local Government Mandates:

There is no imposition of any mandates upon local governments by the amended rule.

6. Paperwork:

As instructed by the legislation, a Request for Proposal was developed for this program.

7. Duplication:

There are no duplicative, overlapping or conflicting rules or legal requirements, either federal or state.

8. Federal Standards:

There are no applicable federal government standards which apply.

9. Alternatives:

The Corporation considered the alternative of not promulgating this

rule. However, this rulemaking was necessary in order to complete aspects of the Program that were not addressed by the enacting legislation.

10. Compliance Schedule:

No significant time will be needed for compliance.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The proposed Rule will provide the framework for administration of the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities.

The objective of the statute authorizing the Program is to promote the economic health of New York State by facilitating the creation or retention of jobs or increasing business activity within municipalities or regions of the State.

The proposed new Rule sets forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in Section 16-n of the Urban Development Corporation Act. The Program promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing the financial assistance mentioned above to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

The Program emphasizes the effective provision of economic development throughout New York State. Program funds are available only to municipalities. Small business will benefit from the aid to municipalities provided for this economic development. Therefore, the effect of the Rule on small business and local government will be beneficial.

2. Compliance Requirement:

No affirmative acts will be needed to comply.

3. Professional Services:

No professional services will be needed to comply.

4. Compliance Costs:

No initial costs will be needed to comply with the proposed Rule.

5. Economic Feasibility:

The Rule makes the Program assistance feasible for local governments, by expressly stating that municipalities are eligible for certain types of Program assistance while permitting local governments access to all other types of Program assistance for which they may be eligible. It is also economically feasible for local governments to coordinate their respective economic development and job retention and attraction efforts.

6. Minimizing Adverse Impact:

The revised rule will have no adverse economic impact on small business or local governments.

7. Small Business and Local Participation:

Program funds are available only to municipalities. Comments were received from applicants under the Program including Albany, Syracuse, Yonkers, Buffalo, Utica, Watervliet, Rochester, Binghamton, Elmira, Wappingers Falls and Amherst. The response was overwhelmingly positive. There were some requests to reduce the requirements of the application process. However, given that the Rule's application requirements are prescribed by the enabling legislation, the corporation has determined that this is not possible.

There were also requests to expand the types of property covered and the types of entities eligible for assistance. However these are legislative matters beyond the scope of the corporation's powers.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis Statement is not submitted because the amended rule will not impose any adverse economic impact, reporting requirements, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A JIS is not submitted because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. In fact, the proposed amended rule should have a positive impact on job creation because it will facilitate administration of and access to the Empire State Economic Development Fund, which should improve the opportunities for the creation of jobs throughout the State by encouraging business expansion and attraction.

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-26-09-00005-E

Filing No. 674

Filing Date: 2009-06-15

Effective Date: 2009-06-15

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of Independent Medical Examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the Board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires September 12, 2009.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Special Counsel to the Chair, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation

Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will

be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in

a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.