

RULE MAKING ACTIVITIES

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

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

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

Education Department

EMERGENCY RULE MAKING

Parental Consent for Special Education Services

I.D. No. EDU-23-03-00006-E

Filing No. 629

Filing date: June 17, 2003

Effective date: June 20, 2003

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

Action taken: Amendment of section 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20), 3713(1) and (2), 4402(1)(b)(2), (3) and (2)(a), 4403(3) and 4404(1)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit

public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare to immediately conform the Commissioner's Regulations to the parental consent provisions of Part B of the Individuals with Disabilities Education Act (IDEA), and thereby ensure compliance with federal requirements for receipt of federal funds under the Act.

A Notice of Proposed Rule Making was published in the *State Register* on June 11, 2003. It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its September 2003 meeting, which is the first meeting scheduled after expiration of the 45-day period for public comment, relating to publication of a Notice of Proposed Rule Making, as established in State Administrative Procedure Act section 202(1).

Subject: Parental consent for special education services.

Purpose: To conform the commissioner's regulations to the Federal Individuals with Disabilities Education Act and its implementing regulations by repealing the requirement that a school district initiate an impartial hearing when a parent does not provide consent for the initial provision of special education services.

Text of emergency rule: Subdivision (b) of section 200.5 of the Regulations of the Commissioner of the Commissioner is amended, effective June 20, 2003, as follows:

(b) Consent. (1) Written consent of the parent, defined in section 200.1(l) of this Part, is required:

(i) . . .

(ii) prior to the initial provision of special education to a student who has not previously been identified as having a disability[:]. [(a) consent] *Consent* for initial evaluation may not be construed as consent for initial provision of special education services; [and

(b) Except in the case of a preschool child, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, the board of education shall initiate an impartial hearing to determine if such provision of special education services is warranted without parental consent;]

(iii) prior to initial provision of special education services in a 12-month special service and/or program[:].

[(a) except in the case of a preschool child, in the event that a parent does not grant consent for an initial provision of special education services in a 12-month program within 30 days of a notice of recommendation, the board of education shall initiate an impartial hearing to determine if such provision of services is warranted without parental consent.]

(iv) . . .

(v) . . .

(2) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule

making, I.D. No. EDU-23-03-00006-P, Issue of June 11, 2003. The emergency rule will expire September 14, 2003.

Text of emergency rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: leagal@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

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

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

Education Law section 4402 describes the duties and responsibilities of school districts for students with disabilities. Section 4402(1)(b)(2) and (3) provides that the district committee or subcommittee on special education shall identify, review and evaluate each child thought to have a disability who resides within the district and make recommendations to the child's parent or person in parental relation relating to appropriate educational programs and placement for such child. Section 4402(2)(a) requires the board of education to furnish suitable educational opportunities for children with disabilities as described in Education Law section 4401(2).

Education Law section 4403(3) authorizes the Commissioner to promulgate regulations pertaining to the physical and educational needs of children with disabilities as the Commissioner shall deem to be in their best interests.

Education Law section 4404 establishes the appeal procedures for students with disabilities.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to comply with the Individuals with Disabilities Education Act and its implementing federal regulations.

NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

COSTS:

- (a) Costs to State government: None.
- (b) Costs to local governments: None.
- (c) Costs to private regulated parties: None.
- (d) Costs to the State Education Department for implementation and continued administration of this rule: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations and does not impose any costs on the

State, local governments, private regulated parties or the State Education Department. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

PAPERWORK:

The proposed amendment does not impose any additional reporting or record keeping requirements.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations, and does not impose any additional program, service, duty or responsibility upon local governments. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

DUPLICATION:

The proposed repeal does not duplicate any existing State or federal statute or regulation and is necessary to comply with federal requirements under the IDEA.

ALTERNATIVES:

There are no alternatives to the proposed amendment. The United States Department of Education has advised the State Education Department that it must revise the Commissioner's regulations to be in compliance with the IDEA.

FEDERAL STANDARDS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education.

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations, which prohibit a school district from initiating an impartial hearing if a parent does not provide consent for the initial provision of special education services.

The proposed amendment applies to school districts, Article 81 schools and State agencies that operate an education program for students with disabilities and does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to each school district that operates an education program for students with disabilities.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act.

The proposed amendment does not impose any compliance requirements on school districts beyond those imposed by the federal statute and regulations. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations and will not impose any costs on school districts. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any new technological requirements on school districts. Since there are no additional costs, these proposed amendments are economically feasible.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent. The proposed amendment has been drafted to meet federal statutory and regulatory requirements without imposing additional requirements on school districts. Because these federal requirements directly apply to every school district in the State, it is not possible to establish different standards or to exempt them from the requirements of the proposed amendment.

LOCAL GOVERNMENT PARTICIPATION:

District, community and school superintendents will be invited to provide comments on the proposed regulations. Their input will be considered in the drafting of any revisions to the proposed amendments.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to all public school districts, Article 81 schools and other State agency programs that operate special education programs, 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 persons per square mile or less.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations. The State, school districts, Article 81

schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act.

The proposed amendment does not impose any compliance requirements or professional service requirements beyond those imposed by the federal statute and regulations. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations and will not impose any costs on school districts and other entities in rural areas. The State, school districts, Article 81 schools and other agencies providing special education services are required to comply with the IDEA as a condition to the receipt of federal funding under such Act. The proposed amendment merely conforms the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the parental consent provisions of section 614(a) of Part B of the Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.505, as clarified in recent guidance received from the U.S. Department of Education. The U.S. Department of Education has informed the State Education Department that Part B of the IDEA requires parental consent for the initial provision of special education and related services and does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to the initial provision of special education and related services.

The proposed amendment is necessary to conform the Commissioner's Regulations to federal requirements by repealing provisions in section 200.5(b)(1)(ii) and (iii) that require, in the event that a parent does not grant consent for an initial provision of special education services within 30 days of a notice of recommendation, a board of education to initiate an impartial hearing to determine if the provision of special education services is warranted without parental consent. The proposed amendment has been drafted to meet federal statutory and regulatory requirements without imposing additional requirements on school districts. Because the federal requirements apply to all public school districts, Article 81 schools and other State agency programs that operate special education programs in the State, it is not possible to establish different standards for entities in rural areas or to exempt them from the requirements of the proposed amendment.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment will be solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment applies to school districts, Article 81 schools and State agencies that operate an education program for students with disabilities and is necessary to conform the Commissioner's Regulations with the Individuals with Disabilities Education Act (IDEA) and its implementing federal regulations, which prohibit a school district from initiating an impartial hearing if a parent does not provide consent for the initial provision of special education services.

The proposed amendment will not have an adverse impact on jobs and employment opportunities in New York State. Because it is evident from the nature of the proposed amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

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

No Child Left Behind Act of 2001 – Persistently Dangerous Schools

I.D. No. EDU-26-03-00024-EP

Filing No. 613

Filing date: June 17, 2003

Effective date: June 17, 2003

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

Action taken: Amendment of section 120.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 2802(7) and 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB), Pub. L. 107-110, by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532. In order to successfully carry out these procedures consistent with State and federal requirements, additional time is needed to notify LEAs that their schools have been identified for potential designation as persistently dangerous, to allow these LEAs to present evidence as to why the identified schools should not be designated, and to notify LEAs of the final determination concerning the persistently dangerous designation. In addition, supplemental information from the Uniform Violent Incident Reporting System for the current school year is needed in order to make the final determination. The proposed amendment to section 120.5 will provide for this additional time and information, and it will enable the Department to submit a required quarterly report to the U.S. Department of Education by June 30, 2003 which confirms that appropriate steps have been taken to accomplish final implementation of the required state policy related to the Unsafe School Choice Option contained in the NCLB.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare to ensure State and local educational agency (LEA) compliance with federal requirements by immediately establishing criteria relating to the identification and designation of persistently dangerous schools under the No Child Left Behind Act of 2001 so that LEAs are timely notified, on or before July 1, 2003, that their schools have been identified for potential designation as a persistently dangerous school, and timely notified, no later than August 1, 2003, of the final determination with respect to such designation.

A Notice of Emergency Adoption and Proposed Rule Making will be published in the *State Register* on July 2, 2003. It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its September 10-12, 2003 meeting, which is the earliest scheduled meeting after expiration of the 45-day public comment period provided for in State Administrative Procedure Act section 202(1).

Subject: No Child Left Behind Act (NCLB) – persistently dangerous schools.

Purpose: To ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools.

Text of emergency/proposed rule: Paragraphs (1), (2) and (3) of subdivision (a) of section 120.5 of the Regulations of the Commissioner of Education are amended, effective June 17, 2003, as follows:

(1) [Commencing] *On or before July 1 of each year commencing in 2003, the commissioner shall annually notify the local educational agencies of those schools which the information described in this subdivision indicate may be persistently dangerous public elementary and secondary schools.*

(2) Upon notification that a school has been identified for potential designation as a persistently dangerous public elementary or secondary

school, the local educational agency shall be given the opportunity to present evidence to the commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, [or] *and* any other such evidence in support of its position that the school should not be designated as persistently dangerous. *The commissioner shall request local educational agencies to submit, by a date prescribed by the commissioner, data for the current school year that is reportable under the uniform violent incident reporting system and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If a local educational agency fails to submit such data by such date, such final determination shall be based on data on file with the commissioner.*

(3) The commissioner shall consider any evidence presented to him pursuant to paragraph (2) of this subdivision and shall notify the local educational agency no later than [July] *August 1* immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

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 14, 2003.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@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 as chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations implementing State law regarding education.

Education Law section 215 provides the Commissioner with authority to require schools to submit reports containing such information as the Commissioner may prescribe.

Education Law section 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents educational policies. Section 305(2) authorizes the Commissioner to have general supervision over schools subject to the Education Law.

Education Law section 2802(7) requires the Commissioner to annually determine which public schools are persistently dangerous in accordance with regulations developed in consultation with a representative sample of local educational agencies (LEAs) and based upon data submitted through the Uniform Violent Incident Reporting System over a period prescribed in the regulations. The amendment authorizes the Commissioner to adopt regulations to ensure LEAs implement provisions allowing any student attending a persistently dangerous public elementary or secondary school, as so determined, or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by section 9532 of the federal No Child Left Behind Act of 2001 (NCLB), Public Law 107-110.

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

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to ensure State compliance with the NCLB.

NEEDS AND BENEFITS:

The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the

requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532. In order to successfully carry out these procedures consistent with State and federal requirements, additional time is needed to notify LEAs that their schools have been identified for potential designation as persistently dangerous, to allow these LEAs to present evidence as to why the identified schools should not be designated, and to notify LEAs of the final determination concerning the persistently dangerous designation. In addition, supplemental information from the Uniform Violent Incident Reporting System for the current school year is needed in order to make the final determination. The proposed amendment to section 120.5 will provide for this additional time and information, and it will enable the Department to submit a required quarterly report to the U.S. Department of Education by June 30, 2003 which confirms that appropriate steps have been taken to accomplish final implementation of the required state policy related to the Unsafe School Choice Option contained in the NCLB.

COSTS:

Cost to the State: None. The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB. The State is required to comply with the NCLB as a condition to its receipt of federal funding under Title I of the ESEA, as amended. The amendment will not impose any costs on the State beyond those imposed by State and federal statutes.

Costs to local government: None. The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on these entities beyond those imposed by State and federal statutes.

Cost to private regulated parties: None. The rule is not applicable to private parties.

Cost to regulating agency for implementation and continued administration of this rule: None. The rule is necessary to conform the Commissioner's Regulations to the NCLB. The State is required to comply with the NCLB as a condition to its receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any additional costs on the Department beyond those imposed by State and federal statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to establish criteria and procedures to conform to the provisions of the NCLB relating to the identification and designation of persistently dangerous schools. 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 amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

The proposed amendment to section 120.5(a) provides that on or before July 1 of each year commencing in 2003, the Commissioner shall annually notify LEAs of those schools which may be persistently dangerous public elementary and secondary schools. Upon notification that a school has been identified for potential designation as a persistently dangerous school, the LEA shall be given the opportunity to present evidence to the Commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, and any other such evidence in support of its position that the school should not be designated as persistently dangerous. The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner. The Commissioner shall notify the LEA no later than August 1 immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

PAPERWORK:

The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable

under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner.

DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and federal rules or requirements, and is necessary to conform the Commissioner's Regulations to the NCLB.

ALTERNATIVES:

There were no significant alternatives to the proposed amendment, which is necessary to conform the Commissioner's Regulations to the NCLB.

FEDERAL STANDARDS:

The amendment does not exceed any minimum standards of the federal government for the same or similar subject areas. The amendment will ensure State and LEA compliance with the NCLB.

COMPLIANCE SCHEDULE:

It is anticipated that LEAs can achieve compliance with the proposed amendment by its effective date. With respect to this year's designation, notification would be provided to an LEA on or before July 1, 2003, that one or more of its schools has been identified for potential designation as a persistently dangerous school. The LEA would be given an opportunity to present evidence that the school should not be designated. In addition, the Commissioner shall request LEAs to submit current school year data that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination with respect to such designation. The Commissioner shall notify the LEA no later than August 1, 2003 of the final determination.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment establishes criteria relating to the identification and designation of persistently dangerous public schools to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB). The proposed amendment does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment 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 amendment generally applies to each local educational agency (LEA) as defined in section 9101(26) of the No Child Left Behind Act of 2001 (NCLB), including school districts, boards of cooperative educational services (BOCES) and charter schools.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532.

The proposed amendment to section 120.5(a) provides that on or before July 1 of each year commencing in 2003, the Commissioner shall annually notify LEAs of those schools which may be persistently dangerous public elementary and secondary schools. Upon notification that a school has been identified for potential designation as a persistently dangerous school, the LEA shall be given the opportunity to present evidence to the Commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, and any other such evidence in support of its position that the school should not be designated as persistently dangerous. The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such

final determination shall be based on data on file with the Commissioner. The Commissioner shall notify the LEA no later than August 1 immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on these entities beyond those imposed by State and federal statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed amendment has been carefully drafted to meet these specific federal and State requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Comments were also solicited from charter school principals. Copies of the proposed amendment were 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 School District, 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 amendment establishes criteria relating to the identification and designation of persistently dangerous public schools to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB). The proposed amendment generally applies to each school district, board of cooperative educational services (BOCES) and charter school in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to ensure State and local educational agency (LEA) compliance with the NCLB by establishing criteria relating to the identification and designation of persistently dangerous public schools. The State and LEAs are required to comply with the requirements of the NCLB as a condition to their receipt of federal Title I ESEA funds.

Section 120.5 establishes procedures to ensure that LEAs implement provisions allowing any student who attends a persistently dangerous public elementary or secondary school or who is a victim of a violent criminal offense, to attend a safe public school within the LEA to the extent required by the unsafe school choice provisions of NCLB section 9532.

The proposed amendment to section 120.5(a) provides that on or before July 1 of each year commencing in 2003, the Commissioner shall annually

notify LEAs of those schools which may be persistently dangerous public elementary and secondary schools. Upon notification that a school has been identified for potential designation as a persistently dangerous school, the LEA shall be given the opportunity to present evidence to the Commissioner that conditions in the school do not unreasonably threaten the safety of students, that it has taken appropriate action or actions to improve safety at the school, and any other such evidence in support of its position that the school should not be designated as persistently dangerous. The Commissioner shall request LEAs to submit, by a date prescribed by the Commissioner, data for the current school year that is reportable under the Uniform Violent Incident Reporting System and is deemed necessary to make a final determination that a school should be designated as persistently dangerous. If an LEA fails to submit such data by such date, such final determination shall be based on data on file with the Commissioner. The Commissioner shall notify the LEA no later than August 1 immediately following his initial notification of the final determination on whether the school has been designated as a persistently dangerous public elementary or secondary school.

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

COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on these entities beyond those imposed by State and federal statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to the identification and designation of persistently dangerous schools. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed amendment has been carefully drafted to meet these specific federal and State requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment 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 School District, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed amendment is necessary to conform section 120.5(a) of the Commissioner's Regulations, relating to the identification and designation of persistently dangerous public schools, to ensure State and local educational agency (LEA) compliance with the federal No Child Left Behind Act of 2001 (NCLB), Pub. L. 107-110.

The proposed amendment 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 amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the amendment 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.

NOTICE OF ADOPTION

Certified Athletic Trainers**I.D. No.** EDU-47-02-00013-A**Filing No.** 614**Filing date:** June 17, 2003**Effective date:** July 10, 2003

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

Action taken: Amendment of section 135.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 803(5), 917(1) and (2), 3204(2), 8351 (not subdivided) and 8352 (not subdivided)

Subject: Certified athletic trainers.

Purpose: To require athletic trainers employed by school districts to be certified by New York State pursuant to art. 162 of the Education Law; and to more specifically detail the scope of duties and responsibilities of athletic trainers employed by the school districts.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-47-02-00013-P, Issue of November 20, 2002.

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

Revised rule making(s) were previously published in the State Register on December 31, 2002 and May 14, 2003.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

Since publication of a Notice of Revised Rule Making in the *State Register* on May 14, 2003, the State Education Department has received the following comments:

COMMENT:

Support for the amendment was expressed relating to requiring Certified Athletic Trainers to be trained and certified in the use of automated external defibrillators (AED's). The respondent felt that implementing these changes would certainly provide the best possible care for student athletes should the unfortunate need arise.

DEPARTMENT RESPONSE:

The Department concurs with this comment.

NOTICE OF ADOPTION

Requirements for School Bus Drivers, Monitors and Attendants**I.D. No.** EDU-12-03-00006-A**Filing No.** 628**Filing date:** June 17, 2003**Effective date:** July 10, 2003

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

Action taken: Amendment of section 156.3(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 3624 (not subdivided); Vehicle and Traffic Law, sections 509-g(1) and 1229-d(3); and L. 2002, chs. 472, 529 and 600

Subject: Requirements for school bus drivers, monitors and attendants.

Purpose: To define and establish qualifications for the positions of school bus monitor and attendant; and enact certain technical amendments relating to school bus drivers.

Substance of final rule: The State Education Department has amended section 156.3 of the Regulations of the Commissioner of Education, effective July 10, 2003. Since publication, nonsubstantial revisions were made as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The following is a summary of the provisions of the revised rule.

Section 156.3(a) provides for general definitions applicable to section 156.3. Included are definitions of school bus, school bus driver, school bus monitor and school bus attendant.

Section 156.3(b) provides qualifications and standards for school bus drivers and instructors, and enacts certain technical amendments related to school bus drivers, some of which will provide greater flexibility, as well as, mandate and cost relief. The amendment provides that a nurse practitioner, consistent with the written practice agreement pursuant to Education Law section 6902(3), may administer the medical exam to school bus

drivers. School districts, boards of cooperative educational services or transportation contractors may apply for a temporary waiver to permit certain Department of Motor Vehicle (DMV) Certified 19A Examiners, operating under specific training and guidelines and under the general supervision of a certified school bus driver instructor, to administer the physical performance to test school bus drivers in their fleet, provided that it is established that there are insufficient certified school bus driver instructors on staff to administer the test in a timely manner. The timing of the physical performance test, and refresher training for school bus drivers is clarified, and the qualifications, standards and function of school bus driver instructors and master instructors are further defined, including the requirements of the annual Professional Development Seminar.

Section 156.3(c) provides qualifications and standards for school bus monitors and attendants. All school districts, boards of cooperative educational services and private contractors shall comply with the training and testing requirements established pursuant to Chapters 472, 529 and 600 of the Laws of 2002. The proposed amendment establishes a minimum age of 19 for school bus monitors and attendants. They shall satisfactorily complete a physical performance test, and attendants shall obtain and maintain certification in child and adult cardiopulmonary resuscitation. All monitors and attendants shall receive pre-service and annual refresher training. All such individuals hired after July 1, 2003 shall complete a Basic Course of Instruction. Upon order of the chief school administrator, monitors or attendants may be required to pass a medical examination and any diagnostic tests the examining physician requires as necessary to determine the individual's fitness for employment as a school bus monitor or attendant.

Overall, the training and testing requirements contained in the proposed rule mirror the existing training and testing requirements for school bus drivers, except those specific to the driving skills necessary for school bus drivers.

Section 156.3(d) provides that school bus drivers, monitors and attendants shall all have responsibility for ensuring the safety of the children transported. While certain responsibilities are incumbent on the school bus driver in operating the vehicle other responsibilities concerning leaving students unattended in the vehicle and checking the vehicle for children left behind at the end of the route, are also part of the responsibility of a school bus monitor or attendant.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 156.3(b)(5)(iii), (c)(3)(iii)(c) and (e)(4).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 26, 2003, the following nonsubstantial revisions were made to the rule.

Subparagraph (iii) of paragraph (5) of subdivision (b) of section 156.3 was revised to replace "pupil with a handicapping condition" with "pupil with a disability."

Clause (c) of subparagraph (iii) of paragraph (3) of subdivision (c) was revised to insert a period between "re-examination" and "the cost of such re-examination."

Paragraph (4) of subdivision (e) of section 156.3 has been revised to add "the" to read as follows: "Drivers, monitors and attendants shall not leave the school bus . . ."

The above revisions do not require any changes to the Regulatory Impact Statement previously filed herein.

Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 26, 2003, the rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The above revisions to the rule do not require any changes to the previously published Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 26, 2003, the rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The above revisions to the rule do not require any changes to the previously published Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 26, 2003, the rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The rule is necessary to implement Chapters 472, 529 and 600 of the Laws of 2002 to define and establish the qualifications, testing and training requirements for school bus monitors and attendants, and thereby ensure the safety and health of the 2.3 million students transported daily on school buses in New York State. The rule establishes requirements for those individuals who are already employed, or who seek to become employed, as monitors and attendants, but will not affect the number of jobs or employment opportunities available in such occupations. Because it is evident from the nature of the rule that it will have 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.

Assessment of Public Comment

Since publication of the Notice of Proposed Rule Making in the *State Register* on March 26, 2003 the following comments have been received:

1. COMMENT:

The statute should be amended to authorize nurse practitioners to administer the medical exam to monitors and attendants, and to require an annual medical examination.

DEPARTMENT RESPONSE:

The Department will consider a statutory amendment in the future. The Department chose not to require medical examinations for monitors and attendants to give flexibility to districts to make that decision based upon local needs, and to lessen compliance costs.

2. COMMENT:

The statute should be amended to require drug and alcohol testing for monitors and attendants as is required for bus drivers.

DEPARTMENT RESPONSE:

The requirement that bus drivers undergo random drug and alcohol testing is a federal requirement, and not mandated by the State. A statutory change at the national level would best originate with the State Department of Motor Vehicles.

3. COMMENT:

Requiring attendants to complete and maintain certification in CPR as a pre-requisite for employment is a significant time and cost burden to both districts and attendants. The Department should be flexible in administering this requirement and seek a statutory amendment to require that an attendant be CPR certified only if CPR skills are required in the IEP of a child they are transporting.

DEPARTMENT RESPONSE:

Chapter 472 of the Laws of 2002 requires the Commissioner to promulgate rules and regulations, which include instruction on special needs transportation for attendants. Such training shall consist of instruction in CPR and it shall be required by those hired after July 1, 2003, before assuming their duties. Attendants employed on or before July 1, 2003 have until July 1, 2004 to obtain the certification. In addition, it would be more difficult for districts to provide transportation to pupils and construct work schedules if only some of their attendant staff had CPR certification.

4. COMMENT:

Monitors and attendants are often called by other job titles such as: driver assistant, aide, and matron. Since the responsibilities of these individuals often overlap, the regulation should require that all monitors and attendants obtain and maintain CPR certification.

DEPARTMENT RESPONSE:

Since it may be costly for districts to obtain CPR certification for their attendant staff, the decision of whether or not to require all monitors to obtain certification is best made at the local level.

5. COMMENT:

The basic entrance training requirements for veteran monitors and attendants should be waived if the incumbent had the same or similar training during the past year, or had performed satisfactorily in the job title for the past one or two years.

DEPARTMENT RESPONSE:

The Department exercised the flexibility provided by Chapter 529 of the Laws of 2002 by deciding not to require veteran employees serving as monitors and attendants to complete a Basic Course of Instruction. However, Chapter 472 of the Laws of 2002 requires attendants hired after July 1, 2003 to receive school bus safety training, instruction relating to special needs, first aid and CPR, prior to assuming their duties.

6. COMMENT:

Section 156.3 (c)(5)(i) should be revised to change "children and special needs children" to "children and children with disabilities."

DEPARTMENT RESPONSE:

The suggestion will be kept under advisement, for possible action in the future, should substantive amendments to the regulation be required.

7. COMMENT:

Section 156.3(a)(2) should be amended for consistency to include the word "leased" between "owned" and "contracted."

DEPARTMENT RESPONSE:

The definition of "school bus" in section 156.3(a)(2) is similar to the definition of school bus contained in Vehicle & Traffic Law section 142, which does not use the word "leased."

8. COMMENT:

Only one person, the school bus driver, should be responsible for operation of the bus, the behavior of pupils on board, and checking to ensure pupils are not left on the bus. If multiple staff are held responsible then each may think the other checked the bus whereas no one may have.

DEPARTMENT RESPONSE:

Given the number of children left behind on buses and the serious jeopardy this poses for a child's health, it is imperative that all adults on board a bus be responsible for the safety of the children transported.

9. COMMENT:

Costs associated with testing and training monitors and attendants should be eligible for transportation aid to districts.

DEPARTMENT RESPONSE:

A statutory change would be necessary to make districts eligible for transportation aid for any expenses associated with monitors. However, if an attendant is employed as a condition of a pupil's IEP, then expenses associated with that person's employment are eligible for transportation aid.

10. COMMENT:

The July 1, 2003 implementation date will cause major problems for districts which do last minute hiring of attendants for the Summer in order to comply with the requirements of a pupil's IEP. It is very possible that districts will not be in compliance with the training requirements of the proposed regulation on July 1, 2003.

DEPARTMENT RESPONSE:

The implementation date of the requirements for monitors and attendants is established in statute, and the Commissioner does not have the authority to change such date.

11. COMMENT:

The criminal history test for monitors and attendants should be the same as that for school bus drivers.

DEPARTMENT RESPONSE:

The requirement for a criminal history check for new employees is part of the Safe Schools Against Violence in Education Act and is not part of the enabling legislation for this regulation. In addition, since monitors and attendants are not licensed under Article 19A, the requirements of the Vehicle and Traffic Law do not apply.

12. COMMENT:

The physical performance test for drivers, monitors and attendants should be administered only by 19A examiners and not school bus driver instructors (SBDIs). There is additional expense to districts in scheduling the physical performance test when it is given separate from the driving tests. SBDIs should concentrate on instruction.

DEPARTMENT RESPONSE:

In proposing to permit a small number of certified 19A examiners to administer the physical performance test, the Department sought to provide temporary relief to small districts and private contractors who might only employ one SBDI. 19A examiners are not trained or certified by the Department. SBDIs have received special training in how to administer the physical performance test, and are certified by the Commissioner to teach school bus driver, monitor and attendant safety training programs. They receive annual refresher training in school bus safety programs as required by regulation in order to maintain their certified status. 19A examiners do not possess or receive any school bus specific safety training. A 19A examiner is certified to administer Department of Motor Vehicle behind-the-wheel driver re-certification tests. Therefore, it would be inappropriate to transfer the responsibility of administering the physical performance test entirely to 19A examiners.

13. COMMENT:

19A examiners should not be permitted to administer the physical performance test for school bus drivers, monitors or attendants, even on a temporary basis through a waiver process.

DEPARTMENT RESPONSE:

The physical performance test requirements for school bus drivers have existed since 1997. During the past six years the number of SBDIs has grown from approximately 700 to over 1,100. Despite a 57 percent increase in the number of individuals available to administer the physical performance test, some districts and private contractors still have difficulty

with the timely compliance of the testing requirement. Small, often rural, districts and contractors have contacted the Department concerning the high cost of administering the test to one school bus driver at a time. If a district only has one SBDI on staff, and they are responsible for all testing and training, the district might be forced to hire outside help, instead of being permitted to utilize the assistance of 19A examiners on their staff. The 19A examiner would be available to assist, not take the place of an SBDI who ultimately remains responsible for the appropriate administration of the test.

14. COMMENT:

Individuals currently employed as monitors and attendants should be exempt from the 3-hour pre-service training requirement and the 10-hour Basic Course of Instruction requirement.

DEPARTMENT RESPONSE:

Individuals hired on or before July 1, 2003 as a monitor or attendant are exempt from the requirement to take a 10-hour Basic Course of Instruction. The requirement to complete a pre-service training program remains because it is required by Chapter 472 of the Laws of 2002. However, veteran employees will have until July 1, 2004 to complete the pre-service training requirements.

15. COMMENT:

Monitors and attendants should complete the 10-hour Basic Course of Instruction within the first 6 months, rather than first year, of employment.

DEPARTMENT RESPONSE:

In developing the regulation, the Department used as a model the regulatory training requirements for school bus drivers. Where the enabling legislation was specific, the proposed regulatory language followed the statutory requirement. Where the enabling legislation was permissive, the Department mirrored the model utilized for school bus drivers. The Department was also sensitive to the present budgetary crisis at the state and local levels, and worked to keep costs down by permitting more time for compliance.

16. COMMENT:

School bus drivers, monitors and attendants should never smoke, eat or drink on a school bus, whether or not pupils are being transported.

DEPARTMENT RESPONSE:

The regulation does provide that school bus drivers, monitors and attendants may never smoke while on a school bus. This requirement is meant to help insure the respiratory health of all occupants. In addition, the Department feels that there is no justification for restricting staff from eating or drinking on a bus when pupils are not being transported. Many districts operate a multiple trip schedule to transport pupils. Transportation staff may spend long hours on the bus. It is reasonable to expect that staff should be permitted to eat a meal or have a snack on the bus during the times in between trips.

17. COMMENT:

Language should be changed to require children to cross in the street in view of the driver when disembarking the bus, instead of crossing the highway at a distance of 10 feet in front of the bus, since children do not comprehend the measurement of 10 feet.

DEPARTMENT RESPONSE:

Pupils receive training in how to safely cross the street in front of a school bus, including how many steps to take away from the bus, how to wait for the bus driver's hand signal before crossing, and what to do if the horn sounds. It is not necessary or appropriate to amend the language to something less descriptive.

18. COMMENT:

The Department should provide risk assessment data to justify the regulation's adoption.

DEPARTMENT RESPONSE:

The Department is not required to prepare a risk assessment to justify the development of regulations concerning requirements for monitors and attendants. Chapter 472 and 529 of the Laws of 2002 require the Commissioner of Education to develop rules and regulations to implement the statutes. The proposed regulations have been developed to meet the statutory requirements.

19. COMMENT:

The question was raised as to the availability to the Department of concrete data on which to base cost estimates.

DEPARTMENT RESPONSE:

The Department did not have access to specific data upon which to base cost estimates. Therefore, at times an estimate was used based upon information obtained from different areas of the state.

20. COMMENT:

It did not appear feasible to assume that the anticipated additional work to be performed by the Department could be absorbed by the existing level of staff and resources.

DEPARTMENT RESPONSE:

The role of Department staff has changed over the past several years from one of many staff positions directly writing curricula and conducting training to one where fewer staff positions coordinate, review and approve the work of the SBDI Corps to write curricula and conduct training. We anticipate that this model will continue in the foreseeable future and is sufficient to address the Department's responsibilities under the proposed regulations.

NOTICE OF ADOPTION

Special Education Space Requirements Plans

I.D. No. EDU-14-03-00004-A

Filing No. 615

Filing date: June 17, 2003

Effective date: July 10, 2003

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

Action taken: Amendment of sections 155.1, 155.2, 155.12, 155.15 and 200.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 403-a(1)-(6), 1950(17), 3602(3), (6) and (10), 4402(1) and 4403(3)

Subject: Special education space requirements plans.

Purpose: To ensure the provision of appropriate long-term education space for students with disabilities in the least restrictive environment.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-14-03-00004-P, Issue of April 9, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on April 9, 2003, the State Education Department received the following comments.

COMMENT:

The membership of the planning committee described in section 200.2(g)(1) should be revised to include at least one special education and one general education teacher representatives, appointed by the collective bargaining unit, from each of the public schools represented at the planning committee to develop the initial plan and any amendments to such plan, because of their knowledge of the general education curriculum and the types of modifications and accommodations to address the needs of students with disabilities.

DEPARTMENT RESPONSE:

The Department believes that the suggested revision is unnecessary. The special education space requirement plan addresses the regional evaluation of existing space and the need for additional space for students with disabilities. Such decisions deal with the adequacy and allocation of space so that the plan provides appropriate locations to ensure access to the general education curriculum and provide for settings with nondisabled students. Decisions regarding the types of modifications and accommodations to address the unique needs of individual students with disabilities within such space are made by Committees on Special Education on which special education teachers are required members. In addition, the regulations do not limit the representatives of the planning committee to those listed, which could include teacher representatives and others, as appropriate, to assist in the development of the plan.

COMMENT:

Section 200.2(g)(3) and 200.2(g)(5)(iii) of the proposed amendment should be revised to require an opportunity for public comment at least 30 days prior to the submission of the initial plan or amendment to such plan or in the case of the school district plan, an opportunity for public comment prior to its adoption by the board of education. A summary of such comments should be submitted with each plan.

DEPARTMENT RESPONSE:

Current regulations require the planning committee to ensure that an effective process for obtaining public comment during the planning process is initiated and that the plan, submitted to the Commissioner, must

provide a description of the public comment process and a summary of public commentary received.

The Department believes that these provisions are sufficient to ensure an adequate process for obtaining public comment, while affording school districts with flexibility to meet such requirements. There is no need to revise the proposed regulations to add additional public comment requirements on school districts.

NOTICE OF ADOPTION

No Child Left Behind Act of 2001

I.D. No. EDU-15-03-00004-A

Filing No. 612

Filing date: June 17, 2003

Effective date: July 3, 2003

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

Action taken: Amendment of sections 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1), (2) and (33), 2802(7) and 3713(1) and (2)

Subject: No Child Left Behind Act of 2001 (Pub. L. 107-110).

Purpose: To conform Part 120 of the commissioner’s regulations to Federal regulations and guidance relating to implementation of the public school choice and supplemental educational services provisions of the No Child Left Behind Act of 2001.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-15-03-00004-P, Issue of April 16, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Pharmacies

I.D. No. EDU-16-03-00027-A

Filing No. 609

Filing date: June 17, 2003

Effective date: July 10, 2003

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

Action taken: Amendment of sections 29.7, 63.6 and 63.8 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6506(1), 6507(2)(a), 6509(9), 6801 (not subdivided), 6806 (not subdivided), 6808-b(2) and (6) and 6826(6)

Subject: The practice of pharmacy and the registration of pharmacies.

Purpose: To establish requirements relating to the counseling of patients by pharmacists and the maintenance of drug retail price lists by pharmacies.

Text of final rule: 1. Subparagraph (i) of paragraph (21) of subdivision (a) of section 29.7 of the Rules of the Board of Regents is amended, effective July 10, 2003, as follows:

(i) Subject to the limitations set forth in subparagraph (ii) of this paragraph, an unlicensed person may assist a pharmacist in the dispensing of drugs by:

- (a) . . .
- (b) . . .
- (c) . . .
- (d) . . .
- (e) . . .
- (f) . . .
- (g) . . .
- (h) . . .
- (i) . . .

(j) handling or delivering completed prescriptions to the patient or the person authorized to act on behalf of the patient [after the pharmacist

or pharmacy intern has met the requirements of section 63.6(b)(8) of this Title regarding the offering of counseling to such person] *and, in accordance with section 63.6(b)(8) of this Title, advising the patient or person authorized to act on behalf of the patient of the availability of counseling to be conducted by the pharmacist or pharmacy intern.*

2. Subparagraph (i) of paragraph (8) of subdivision (b) of section 63.6 of the Regulations of the Commissioner of Education is amended, effective July 10, 2003, as follows:

(i) On-premises delivery. For a prescription that is delivered to [the] a patient or [the] a person authorized to act on behalf of the patient on the premises of the pharmacy, the pharmacist or pharmacy intern shall meet the requirements of this subparagraph. For a prescription that is delivered to [the] a patient or [the] a person authorized to act on behalf of the patient off the premises of [the] a pharmacy through mail delivery, a delivery service or otherwise, the pharmacist or pharmacy intern shall meet the requirements of subparagraph (ii) of this paragraph.

(a) Prior to dispensing a prescription for the first time for a new patient of the pharmacy or a prescription for a new medication for an existing patient of the pharmacy and/or a change in the dose, strength, route of administration or directions for use of an existing prescription previously dispensed for an existing patient of the pharmacy, a pharmacist or pharmacy intern providing prescription services shall be required to personally [offer to] counsel each patient or person authorized to act on behalf of [the] a patient who presents a prescription, consistent with the provisions of section 29.1(b)(8) of this Title, in person in a face to face meeting whenever practicable, or by telephone, matters which in the exercise of the pharmacist’s or pharmacy intern’s professional judgment, the pharmacist or pharmacy intern deems appropriate, which may include:

- (1) the name and description of the medication and known indications;
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .
- (8) . . .

(b) The [offer to counsel] counseling of [the] a patient or person authorized to act on behalf of [the] a patient pursuant to clause (a) of this subparagraph shall be provided personally by the pharmacist or the pharmacy intern and shall not be delegated to an individual not authorized to practice pharmacy under a license or limited permit.

[(c) . . .]

[(d)] (c) In the event a patient [chooses not] refuses to supply information necessary for maintenance of a medication profile, or to accept counseling, as prescribed in clause (a) of this subparagraph, a pharmacist or pharmacy intern may fill a prescription as presented, without having violated the requirements of this subparagraph, provided that the refusal to provide such information or accept counseling is documented in the records of the pharmacy.

(d) In the event a patient or a person authorized to act on behalf of a patient seeks to obtain a refill of an existing prescription previously filled by the pharmacy or an authorization for continuation of an existing therapy, a pharmacist or pharmacy intern shall be available to provide counseling to the patient or person authorized to act on behalf of a patient, upon such person’s request. In such circumstances and consistent with the requirements of paragraph (21) of subdivision (a) of section 29.7 of this Title, an offer to counsel the patient or a person authorized to act on behalf of a patient may be conveyed on behalf of the pharmacist or pharmacy intern by an unlicensed assistant. Such counseling shall be conducted only by a pharmacist or pharmacy intern.

(e) . . .

3. Paragraph (9) of subdivision (b) of section 63.6 of the Regulations of the Commissioner of Education is added, effective July 10, 2003, as follows:

(9) Drug retail price lists. Every registered pharmacy that sells prescription medications at retail shall meet the requirements of section 6826 of the Education Law. In accordance with subdivision (4) of section 6826 of the Education Law, such registered pharmacies shall have a sign notifying people of the availability of the drug retail price list, conspicuously posted at or adjacent to the place in the pharmacy where prescriptions are presented for compounding and dispensing, in the waiting area for customers, or in the area where prescribed drugs are delivered. The sign shall state in bold, block letters of at least one inch in height: “Drug Retail Price List Available Upon Request”. Such registered pharmacies

that offer to dispense prescription drugs to consumers through a website on the Internet shall post on such website a notice of the availability of the drug retail price list and a toll-free telephone number to obtain the list. Such registered pharmacies that offer to dispense prescription drugs to consumers through mail order shall include a printed notice with each delivery of a prescription drug informing the consumer of the availability of the drug retail price list and a toll-free telephone number to obtain the list.

4. Paragraph (6) of subdivision (b) of section 63.8 of the Regulations of the Commissioner of Education is amended, effective July 10, 2003, as follows:

(6) Additional registration requirements for nonresident establishments that are pharmacies.

(i) [In order to be registered, nonresident] *Toll-free number.* Nonresident establishments that are pharmacies shall provide a toll-free telephone number that is available during normal business hours at least 40 hours per week, to enable communication between a patient in New York State and a pharmacist at the pharmacy who has access to the patient's records, and shall place such toll free number on a label affixed to each drug or device container.

(ii) *Drug retail price lists.* Nonresident establishments that are pharmacies that sell prescription medications at retail shall meet the requirements of subdivisions (1), (2), (3), and (5) of section 6826 of the Education Law for a drug retail price list. Such pharmacies that offer to dispense prescription drugs to consumers in New York State through a website on the Internet shall post on such website a notice of the availability of the drug retail price list and a toll-free telephone number to obtain the list. Such registered pharmacies that offer to dispense prescription drugs to consumers in New York State through mail order shall include a printed notice with each delivery of a prescription drug informing the consumer of the availability of the drug retail price list and a toll-free telephone number to obtain the list.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 29.7(a)(21)(i).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on April 23, 2003, the following nonsubstantial revision has been made to the proposed rule:

The opening sentence of subparagraph (i) of paragraph (21) of subdivision (a) of section 29.7 of the Rules of the Board of Regents is nonsubstantially revised to add the word "person" after the word "unlicensed". This change is needed to clarify the regulation. The word "person" is existing language in the regulation that was not changed by the proposed amendment. It was inadvertently omitted.

The aforementioned nonsubstantial revision does not require any changes to the Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on April 23, 2003, a nonsubstantial revision have been made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement, submitted herewith. The aforementioned nonsubstantial revision does not require any changes to the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on April 23, 2003, a nonsubstantial revision has been made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement, submitted herewith. The aforementioned nonsubstantial revision does not require any changes to the Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on April 23, 2003, a nonsubstantial revision has been made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement, submitted herewith.

The proposed amendment, as revised, establishes requirements relating to the counseling of patients by pharmacists and drug retail price lists that must be maintained and made available to consumers by pharmacies. The measure will not have a substantial adverse impact on jobs and employment opportunities in the field pharmacy or any other field. Because it is evident from the nature of the proposed amendment, as revised, that it will

have 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.

Assessment of Public Comment

The proposed rule was published in the *State Register* on April 23, 2003. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the State Education Department's assessment of the issues raised by the comments.

COMMENT: Software currently in use allows consumers to directly check the cost of a prescription before it is filled on a provider's website or over a toll-free number. This technology offers consumers the most up-to-date pricing available. It is recommended that the proposal allow Internet and mail services pharmacies that provide drugs at retail to provide consumers an electronic means or a toll-free number for consumers to price a prescription, instead of requiring such pharmacies to provide consumers with the retail price list on request.

RESPONSE: The proposed regulation implements the requirements of section 6826 of the Education Law, as amended by Chapter 284 of the Laws of 2002. This statute requires every pharmacy to compile a drug retail price list containing the 150 most frequently prescribed drugs as determined by the State Board for Pharmacy, update the list at least weekly, and provide the retail price list to any person upon request. The Memorandum in Support of Chapter 284 of the Laws of 2002, filed by the sponsors of this legislation, states: "The bill mandates that pharmacies update drug prices on a weekly basis, as well as creating a 2-3 page computer generated list. Using updated technology, pharmacies can produce a more accurate price list and consumers will have a copy they can take with them to other stores for comparison shopping."

The proposed amendment requires registered pharmacies that offer to dispense prescription drugs to consumers through a website on the Internet to post on the website a notice of the availability of the drug retail price list and a toll free number to obtain the list. The amendment requires pharmacies that offer to dispense prescription drugs to consumers through mail order to include a printed notice with each delivery of a prescription drug informing the consumer of the availability of the drug retail price list and a toll-free telephone number to obtain the list.

The amendment follows the requirements and intent of the statute by requiring Internet pharmacies and mail order pharmacies to compile the retail prices list, notify consumers about the list, and provide a copy of the list to consumers upon request. The comment maker's recommendation would not meet the requirements of section 6826 of the Education Law. Of course, Internet and mail order pharmacies may offer electronic means or a toll-free number for consumers to price a particular prescription, as a consumer service, in addition to meeting the requirements of the proposed regulation for a retail price list.

Comment: I am writing to express support for the proposed rule, which would make it mandatory for pharmacists to counsel patients on all new drug therapies and/or change in drug therapy when dispensing these medications to their patients. Requiring pharmacists to counsel a patient on changes in drug therapy will establish a minimum expected standard in the profession statewide.

Comment: I am writing in support of the proposed rule making that would make it mandatory for pharmacists to counsel patients on all new drug therapies and/or change in drug therapy when dispensing these medications to their patients. In connection with refills, the proposed language gives the patient discretion to refuse counseling. We would suggest that counseling on refills be at the discretion of the pharmacist. This language would highlight the notion that counseling after refills may indeed be necessary.

Response: The proposed regulation requires pharmacists or pharmacy interns to counsel patients prior to dispensing a prescription for the first time for a new patient of the pharmacy or a prescription for a new medication for an existing patient of the pharmacy and/or a change in the dose, strength, route of administration or directions for use of an existing prescription previously dispensed for an existing patient of the pharmacy. However, the regulation also provides that in the event that a patient refuses to supply information for a medication profile, or to accept counseling, a pharmacist or pharmacy intern may fill a prescription as presented without violating the regulation, provided that the refusal is documented in the records of the pharmacy. In addition, the regulation provides that nothing in the regulation shall prevent a pharmacist or pharmacy intern from refusing to dispense a prescription, if in his or her professional judgment, potential adverse effects, interactions, or other therapeutic complications could endanger the health of the patient. Therefore, under the regulation, a pharmacist or pharmacy intern may exercise his or her discre-

tion to refuse to fill a prescription, including a refill prescription, and would be prohibited from filling a prescription where filling the prescription would constitute professional misconduct as defined in section of 6509 of the Education Law and/or unprofessional conduct as defined in Part 29 of the Rules of the Board of Regents. It is unnecessary to prescribe additional requirements, as proposed in the comment.

NOTICE OF ADOPTION

Certified Dental Assisting and Dental Hygiene

I.D. No. EDU-16-03-00029-A

Filing No. 610

Filing date: June 17, 2003

Effective date: July 10, 2003

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

Action taken: Amendment of sections 61.9 and 61.13 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6506(1), 6507(2)(a), 6606(1) and (2), and 6608 (not subdivided)

Subject: The practice of the profession of certified dental assisting and the profession of dental hygiene.

Purpose: To establish additional dental supportive services that certified dental assistants may perform while under the direct personal supervision of a licensed dentist, and additional services that licensed dental hygienists may perform in the practice of dental hygiene while under the supervision of a licensed dentist as prescribed.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-16-03-00029-P, Issue of April 23, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The proposed rule was published in the *State Register* on April 23, 2003. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the State Education Department's assessment of the issues raised by the comments.

COMMENT: In the future, dental assistants may feel that they are capable to perform scaling of teeth if they are shown how to remove cement for the additional duty "removal of temporary cement." In regard to placing anticariogenic agents, a dental assistant may be asked to place other medications that are related to the treatment of periodontal disease in order to keep their job.

RESPONSE: The proposed amendment does not authorize a certified dental assistant to perform the scaling of teeth or to place other medications that are related to treating periodontal disease. In accordance with section 6608 of the Education Law, all services provided by licensed certified dental assistants must be supportive services to a licensed dentist while assisting a licensed dentist in the course of the dentist's performance of a particular dental service and must be performed under the direct personal supervision of a licensed dentist. The dentist and certified dental assistant are responsible for ensuring that only those functions included in the scope of practice for the profession of certified dental assisting are performed by the certified dental assistant in the dental office.

COMMENT: Allowing dental assistants to apply anticariogenic agents, pit and fissure sealants, desensitizing agents and topical anesthetic agents are clearly duties that are part of the dental hygiene practice act and should be limited to hygienists that are well educated in the theory and procedure involved.

RESPONSE: Dental hygienists may apply anticariogenic agents, desensitizing agents and topical anesthetic agents under the general supervision of a licensed dentist. General supervision means that a supervising dentist is available for consultation, diagnosis and evaluation, has authorized the dental hygienist to perform the services, and exercises that degree of supervision appropriate to the circumstances.

In accordance with section 6608 of the Education Law, all services provided by licensed certified dental assistants must be supportive services to a licensed dentist while assisting a licensed dentist in the course of the dentist's performance of a particular dental service and must be performed under the direct personal supervision of a licensed dentist. Under the direct

personal supervision of a licensed dentist means supervision of dental procedures based on instructions given by a licensed dentist in the course of a procedure who remains in the dental office where the supportive services are being performed, personally diagnoses the condition to be treated, personally authorizes the procedures, and before dismissal of the patient, evaluates the services performed by the dental assistant.

The proposed regulation appropriately provides that certified dental assistants may apply topical anticariogenic agents and desensitizing agents to the teeth as supportive services to the dentist while assisting the dentist in the dentist's performance of a particular dental service and while under the dentist's direct personal supervision. The proposed regulation does not add applying pit and fissure sealants or topical anesthetic agents to the practice of certified dental assisting.

COMMENT: We support the expansion of functions because it increases the value of the license for a dental assistant. The list could be expanded further in order to establish a definite distinction between licensed and unlicensed functions, which would create an incentive for dental assistants to become certified. Certification should be mandatory for all dental assistants.

RESPONSE: Section 6608 of the Education Law establishes the definition of the practice of certified dental assisting, and permits the Commissioner of Education to add other dental supportive services in regulation. The proposed regulation expands the allowable duties that may be performed in the practice of certified dental assisting. Section 6608-a of the Education Law provides that only a person certified under the requirements of the Education Law may practice certified dental assisting.

There is a definite distinction between functions that may be performed by certified dental assistants and those that may be performed by uncertified individuals. Uncertified individuals may not practice certified dental assisting, as defined in section 6608 of the Education Law and the accompanying Regulations of the Commissioner of Education (8 NYCRR 61.13).

COMMENT: Mandatory education for dental assistants based on the American Dental Association Accreditation Standards should be considered rather than State approved unaccredited, shorter training programs.

RESPONSE: The State Education Department requires completion of a program in dental assisting that is either registered by the State Education Department as licensure-qualifying or determined by SED to be the equivalent of such a registered program. The required components of registered programs leading to certification in dental assisting are closely aligned with programs that are accredited by the American Dental Association. These registered programs adequately prepare individuals to practice as certified dental assistants in New York State.

NOTICE OF ADOPTION

Mandatory Continuing Education for Licensed Pharmacists

I.D. No. EDU-16-03-00030-A

Filing No. 611

Filing date: June 17, 2003

Effective date: July 10, 2003

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

Action taken: Amendment of section 63.7(c)(1) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6502(1), 6504 (not subdivided), 6507(2)(a) and 6827(2)

Subject: Mandatory continuing education for licensed pharmacists.

Purpose: To require licensed pharmacists to complete, as part of the existing 45-hour continuing education requirement that they must complete in each registration period, at least three hours in the processing and strategies that may be used to reduce medication and/or prescription errors.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-16-03-00030-P, Issue of April 23, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

NOTICE OF ADOPTION

Harvest and Possession of Marine Finfish

I.D. No. ENV-11-03-00015-A

Filing No. 602

Filing date: June 16, 2003

Effective date: July 2, 2003

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

Action taken: Amendment of sections 40.1 and 40.5 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 13-0105, 13-0338, 13-0339-a, 13-0340, 13-0340-a, 13-0340-b, 13-0340-d, 13-0340-e, 13-0340-f and 13-0347

Subject: Regulation of the harvest and possession of marine finfish in New York waters.

Purpose: To control the harvest, possession and sale of various marine species, consistent with conservation requirements identified in regional fishery management plans (FMPs).

Substance of final rule: The Department is adopting amendments 6 NYCRR Part 40. The amendments are summarized below:

This rulemaking establishes annual recreational fishing regulations for summer flounder and scup consistent with the Atlantic States Marine Fisheries Commission (ASMFC) and Regional Council Fishery Management Plan (FMP). For 2003, the recreational fishing season for both of these species under the new rule will be open year round. In addition, the rule clarifies recreational fillet rules for summer flounder.

For black sea bass, this rulemaking implements fishing regulations required by the ASMFC and Regional Council FMP for this species by setting a new minimum recreational size limit of 12" total length, and by establishing an open recreational fishing season of January 1 through September 1 and September 16 through November 30. The rule also implements a state quota management system for the commercial harvest of black sea bass, including adjustable trip limits, quota periods and directed fishery thresholds, consistent with the Black Sea Bass FMP.

The rule sets a new open recreational fishing season for tautog of October 1 through May 31, as well as a 10 fish possession limit, consistent with the requirements of the Tautog FMP.

For weakfish commercial net fisheries, the rule increases to 300 pounds the amount of bycatch that can be retained during the closed season, provided that an equal poundage of other species of foodfish are taken and landed by the vessel, consistent with the provisions of the FMP.

The rule also eliminates the minimum size limit for red drum and implements a maximum size limit of 27" TL, as requested by the South Atlantic State-Federal Fisheries Management Board.

The rule also increases the minimum recreational size limit for haddock and Atlantic cod to 23" TL and sets new recreational possession limits for haddock and Atlantic cod at 10 fish per person per trip, consistent with the New England Fishery Management Council's FMP for Groundfish. At the same time, the rule increases the commercial minimum size limit for Atlantic cod to 22" TL, consistent with the New England Fishery Management Council FMP for Groundfish.

For striped bass, the rule sets the open recreational fishing season from April 15 through December 15, consistent with Environmental Conservation Law and the FMP for striped bass, and at the recommendation of the Marine Resources Advisory Council. For the striped bass commercial fishery, the rule amends striped bass commercial fishery eligibility requirements to allow striped bass commercial permit holders using gill nets with mesh sizes <6 inches or >8 inches stretched mesh a bycatch trip limit of 7 striped bass.

Finally, the rule adds a new labeling section in Part 40 for landing, possession, and shipment of quota managed species, which consolidates certain labeling provisions found in various subdivisions in Part 40 for clarity and ease of compliance.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 40.1(e)(6).

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

tion, 205-S N. Bellemeade Rd., East Setauket, NY 11733, (631) 444-0437, e-mail: amweber@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the requirements of art. 8 of the Environmental Conservation Law, a negative declaration has been prepared and is on file with the department.

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

Minor changes appear in paragraph 40.1(e)(6) of the rule as adopted when compared to the last published version of the proposed rule. These changes do not necessitate any modification of the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

A proposal to amend Part 40 of 6 NYCRR, New York's marine finfish and crustacean regulations, was published in the New York State Register on March 19, 2003. A summary of the proposed changes was mailed to all NYS Commercial Foodfish, Marine Baitfish, and Party and Charter License holders, as well as to sport and commercial fishing organizations, media contacts, and other interested parties. The proposed amendments to Parts 40 were also presented for comment at meetings of the Marine Resources Advisory Council (Council).

During the public comment period, ten written comments were received concerning the Department's proposal to amend Part 40 of 6 NYCRR. All ten comments are addressed in the summary below. In addition, the Marine Resources Advisory Council indicated its unanimous support for adoption of the entire rulemaking package.

Summer flounder and Scup Recreational Fishing

Comment: The Department received three written comments on the recreational summer flounder and scup proposals. Two were from owners of partyboats, and one written comment was received from a recreational fishing organization. All three letters indicated support for the adoption of a year round recreational open season for summer flounder and scup.

Department Response: Consistent with the Council's recommendation and the public comments received, the Department will adopt the proposed changes relating to summer flounder and scup as written.

Black Sea Bass

Comment: No comments were received on the proposal to adopt a new recreational minimum size limit and open season for black sea bass. The Department received one written comment from a recreational fishing organization which supported the adoption of the proposed changes to the black sea bass commercial regulations.

Department Response: Consistent with the Council's recommendation and the public comment received, the Department will adopt the proposed changes to the black sea bass regulations as written.

Tautog

Comment: The Department received two written comments on the proposed tautog regulations. One partyboat owner wrote in support of the proposed change to the recreational open season and possession limits for tautog. The Department also received one written comment from a recreational fishing organization who voiced general support for the proposed season but would prefer an earlier closure to protect spawning fish.

Department Response: During the development of the tautog regulatory proposal, the Department presented six alternative management options, including one alternative that would include a spawning season closure. There was little public support for this option, and the Council rejected the spawning season closure option as their preferred alternative. Consistent with the Council's recommendation, the Department will adopt the proposed changes to the tautog recreational regulations as written.

Weakfish

Comment: Four written comments were received by the Department concerning weakfish. All four letters, including one from a recreational fishing organization, two from commercial fishermen and one from a commercial fishing organization, voiced their support for the proposed changes relating to the increased bycatch allowance for net fisheries during the closed season. One commercial fisherman objected to the new requirement that an equal poundage of foodfish be taken and possessed onboard vessels landing the bycatch allowance and recommended that baitfish species be included as well. The recreational fishing organization endorsed the rule requiring an equal poundage of foodfish, not baitfish. The commercial fishing organization requested that the mesh trigger for weakfish trawl and gill net fisheries be increased to be consistent with the bycatch allowance.

Department Response: Changes to trawl and gill net mesh triggers are not within the scope of this rulemaking, but will be taken under consideration in the development of future rulemaking proposals. Consistent with the

Council's recommendation, the Department will adopt the proposed changes to the weakfish commercial regulations as written.

Red drum

Comment: The Department received two written comments on this issue, one from a commercial hook and line fisherman, and one from a recreational fishing organization. The commercial fisherman supported the proposed maximum size limit for red drum, but also recommended that the Department maintain a minimum size limit for red drum to ensure that some fish reach adulthood and to prevent the development of a fishery for the smaller fish. The recreational fishing organization supports the proposed rule.

Department Response: The South Atlantic State-Federal Fisheries Management Board and the Atlantic States Marine Fisheries Commission have requested that all states from New York through Maine prohibit the harvest, possession or sale of red drum greater than 27 inches total length to protect the overfished red drum spawning stock. Since life history accounts of red drum indicate that sub-adults and juveniles are rarely found outside southern estuaries, there is no recommendation that northern states maintain a minimum size limit. Therefore, consistent with the Council's recommendation, the Department will adopt the proposed changes to the red drum regulations as written.

Haddock and Atlantic cod

Comment: The Department did not receive any comments on these proposals.

Department Response: Consistent with the Council's recommendation, the Department will adopt the proposed changes to haddock and Atlantic cod regulations.

Striped bass

Comment: The Department received five written comments relative to the proposed changes to the striped bass regulations. Two comments addressed the proposal to open the recreational fishery on April 15th. One comment was from a partyboat owner who supported the earlier opening; the other comment was from a recreational fisherman who opposed the earlier opening, suggesting that the Department should wait several more years and until stocks improve before changing the season.

The Department also received three written comments on the proposed changes to the commercial striped bass regulations. Two commercial fishermen wrote to support the seven fish bycatch allowance for non-directed gill net fisheries. One of these fishermen also stated his support for the elimination of the prohibition on the taking of striped bass by gill nets in Great South Bay. The third letter was submitted by a recreational fishing organization which indicated support for the seven fish bycatch allowance in non-directed gill net fisheries, but objected to any rule change that would allow a gill net fishery for striped bass in Great South Bay, South Oyster Bay and Hempstead Bay. The same organization also opposes the proposal requiring income re-certification for commercial striped bass permits every five years, and supports an annual re-certification requirement.

Department response: The Atlantic States Marine Fisheries Commission (Commission) Fisheries Management Plan (FMP) for Atlantic Striped Bass provides minimum management measures required for states to remain in compliance with the stock conservation objectives of the FMP. Amendment #6 to the striped bass FMP allows a year-round open season for recreational fishing. Hence, New York's proposal to open the recreational season April 15, instead of the traditional May 8, with a season closure beginning December 15, exceeds the conservation management measures of the FMP while remaining consistent with New York State Law (ECL § 13-0347).

The proposal to allow a seven fish by-catch in non-directed gill net fisheries (*i.e.*, those using mesh <6 inches and > 8 inches) continues the prohibition on possession of striped bass tags or tagged striped bass while tending any gill net in Great South Bay, South Oyster Bay, and Hempstead Bay. The intent of the Department's proposal was to allow the by-catch, thereby reducing regulatory discard of otherwise utilizable catch, and to consolidate the regulatory provisions for gill net fisheries in a single section of the regulations under subdivision 40.5(e) of 6 NYCRR.

The Department's proposal on re-certification of full-share striped bass commercial harvest permit holders codifies the procedures for maintaining such permit. The Department considered more frequent re-certification periods, but ultimately rejected this option because the increased regulatory burden on the public was unnecessarily disproportionate to the Department's need to regulate the number of full-share permit holders.

Quota managed species

Comment: The Department received three written comments relating to labeling requirements for possession and transport of commercially har-

vested quota managed species. A recreational fishing organization and a recreational fisherman both supported the adoption of the proposed labeling requirements for commercial fisheries. The owner of a commercial packing facility wrote in opposition to the proposed changes to the labeling requirements, and suggested that the proposed regulations were placing an unreasonable enforcement burden on the shipper.

Department response: The Department added this new section on labeling requirements for landing, possession and shipment of quota managed species to consolidate and clarify labeling requirements that are currently in effect but located in various subdivisions in Part 40. After reviewing public comment, and consistent with the Council's recommendation, the Department made minor, non-substantive changes to the wording of paragraph 40.1(e)(6) of the proposed rule to further clarify the new rules.

Department of Health

EMERGENCY RULE MAKING

Environmental Testing Standards

I.D. No. HLT-26-03-00004-E

Filing No. 599

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: Addition of section 55-2.13 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 502

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

Specific reasons underlying the finding of necessity: The Department of Health finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) for this rulemaking would be contrary to the public interest. These regulations add a new section to existing Subpart 55-2, which, under the authority of Public Health Law Section 502, implements standards for examination of environmental samples containing or potentially containing agents that pose significant public health or national security risks, and for certification of laboratories performing such examinations. The proposed emergency amendment must be adopted immediately to ensure timely and reliable environmental testing for biological and chemical so-called "critical agents," including such recognized deadly agents of bioterrorism as anthrax.

Numerous unregulated firms have risen to the challenge of testing samples for agents of bioterrorism from environments such as public office buildings and private residences. These firms bring to the marketplace a broad range of analytical experience, capacity and expertise, and use various testing methods for ruling out the presence of infectious organisms such as anthrax. However, market forces alone cannot ensure the quality and reliability of critical agent testing. Therefore, emergency rules for laboratory certification must be promulgated without delay in this critically urgent emergent area of public health protection. These proposed regulations will protect the public from unqualified providers of environmental testing services for critical agents by promulgating minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; record keeping systems to track the location of isolated agents; chain-of-custody protocols to ensure the admissibility of test results as evidence in legal proceedings; test result reporting procedures; client reports content; and sample and/or isolate referral protocols.

Reliable and early identification, enhanced by this emergency filing, is crucial to appropriate public health response to biological or chemical terrorism, and/or other such incidents posing a significant public health threat. To that end, the Department of Health has established standards for a new area of certification, environmental critical agent testing, to improve New York State's preparedness for, and rapid response, to adverse public health events, including terrorist-instigated disease outbreaks. The new

certification will permit the Department and the public to quickly identify and engage laboratories to test environmental samples for microorganisms and chemical agents posing a public health or security risk, in the event of terrorist-initiated environmental contamination. Furthermore, certification in critical agent testing will provide indispensable regulatory oversight to shield the public from unproven or incorrectly applied test methods that could generate compromised or unreliable results in emergency health threat situations. Department oversight afforded by this emergency filing will also help reduce use of ineffective and unproven safety procedures that could fail to confine a dangerous agent or, in the worst case, even promote its further dissemination to threaten an even larger population.

Rule filing on a non-emergency basis, including the delay incurred from a public comment period, is unacceptable, as it would permit individuals and laboratories to test for critical agents without any assurance that testing is being performed in a safe and reliable manner.

Subject: Environmental laboratory testing standards.

Purpose: To establish minimum requisites for laboratories testing critical agents.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by Section 502 of the Public Health Law, existing Subpart 55-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is amended, to be effective upon filing with the Secretary of State, as follows:

Subpart 55-2 is amended by reserving new Section 55-2.12 for future use and adding new Section 55-2.13 as follows:

Section 55-2.12 (reserved)

Section 55-2.13 Requirements for laboratories engaged in testing for critical agents in environmental samples.

(a) *For purposes of this Subpart, critical agent shall mean an organism, chemical element or chemical compound, which is recognized as posing a risk to national security and/or requiring special action to protect the public health because the agent: can be disseminated (e.g., in air, water or food) or transmitted person-to-person with ease; causes moderate to high mortality and/or morbidity; and can have a significant public health impact. The term organism includes, but is not limited to, a virus, bacterium, or product of an organism. Critical agents shall include critical biological and chemical agents specified by the federal Centers for Disease Control and Prevention (CDC) in published documents, and other such agents as the Commissioner of Health has determined meet the above criteria.*

(b)(1) *Prior to performing testing for any critical agent in an environmental sample, a laboratory shall submit a request to the department, and receive an initial or revised certificate of approval that includes the specialty of critical agent testing. The certificate of approval shall also list the specific critical agent(s) included in the approval, the approved method(s), and the types of samples (e.g., surface swipes, powder, fluid and bulk material) the laboratory may accept for testing. No laboratory shall examine an environmental sample for a biological or chemical critical agent without certification of approval specific to each critical agent for which testing is conducted.*

(2) *The department may withhold or limit its approval if the department is not satisfied that the laboratory has in place adequate policies, procedures, facilities, equipment, instrumentation and trained personnel to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping, and disposition of all environmental samples, derivatives and related materials shall be performed in a manner that: ensures consistently correct performance of the approved methods; ensures the protection of the health, safety and welfare of the laboratory's employees and the public; and is consistent with the requirements of this Subpart, and all other applicable laws, rules and regulations. The department shall also consider a laboratory's (bio)safety level facilities and practices in its determination to approve the laboratory for critical agent testing in environmental samples.*

(c) *In addition to application and attestation requirements found elsewhere in this Subpart, a laboratory seeking approval to perform critical agent testing in environmental samples shall submit:*

(1) *a standard operating procedure manual documenting laboratory policies, procedures, facilities, equipment, supplies, instrumentation and personnel for critical agent testing, which are designed to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping, and disposition of all environmental samples, derivatives and related materials shall be performed in a manner that ensures consistently correct performance of the approved methods; ensures the protection of the health, safety and welfare of the laboratory's*

employees and the public; and is consistent with the requirements of this Subpart, and all other applicable laws, rules and regulations; and

(2) *an attestation signed by the owner(s) and director(s) that the laboratory will accept only the type(s) of samples (e.g., surface swipes, powder, fluid and bulk material) specified on the laboratory's certificate of approval, and that the owner(s) and director(s) will take whatever action is necessary to ensure that such samples are collected, labeled, accessioned, prepared, analyzed, stored, transported, shipped and disposed of, and all results are reported in a manner consistent with the approved method and with all other documentation submitted to the department.*

(d) *In addition to the preceding requirements of this Subpart, a laboratory engaged in critical agent testing in environmental samples, through its owner(s) and director(s), shall:*

(1) *establish, maintain, review periodically, and implement written policies and procedures which are designed to ensure that collection, labeling, accessioning, preparation, analysis, result reporting, storage, transportation, shipping and disposition of samples shall be performed in a manner that ensures consistently correct performance of the approved methods, ensures the protection of the health, safety and welfare of laboratory personnel, sample collectors and the public to the extent possible, and is consistent with all applicable laws, rules and regulations, as well as recognized standards of practice designed to minimize the risks associated with potential exposure to similar hazardous substances or critical agents. Such policies and procedures shall include specific procedures for containment, secured storage, decontamination, and/or disposal or destruction of the sample(s), derivatives, and related collection materials, supplies and/or equipment, as necessary and/or appropriate for the relevant suspected critical agent;*

(2) *have written policies and procedures in place to implement a chain-of-custody protocol whenever required by a law enforcement agency. Such policies and procedures shall be developed in consultation with law enforcement officials or other persons with appropriate experience and training in chain-of-custody issues, and shall at a minimum require an intact continuous record of the physical possession, storage, and disposition of the sample and any derivatives, including the signatures of all persons who access the sample and derivatives, the date of such access and other pertinent information;*

(3)(i) *ensure that all laboratory employees engaged in collecting and/or transporting environmental samples receive sufficient training in hazardous material handling techniques to ensure they will perform their responsibilities in a safe and reliable manner. Such training shall include, but not be limited to, training in sample collection, packaging, decontamination, transportation, and chain-of-custody policies and procedures established by the laboratory. The laboratory shall maintain documentation of such training for a minimum of three (3) years and take such other action as is necessary to ensure ongoing compliance with such policies and procedures;*

(ii) *develop and implement sample acceptance criteria designed to protect the health, safety and welfare of laboratory personnel, sample collectors, and the public to the extent feasible. Such criteria shall be consistent with approved methods for sample collection, handling, packaging and decontamination, and shall minimally define conditions under which a sample shall be rejected, and conditions under which a sample shall be tested and results reported with limitations. The laboratory shall make its sample acceptance criteria available to clients;*

(4) *issue reports of test results in a format and of a content required by the approved method, and necessary for interpretation of the test results, including, but not limited to, unambiguous identification of the tested environmental sample, including collection location, source and sample type, and limitations of the method. The department may restrict a laboratory's ability to report information concerning a test result whenever confirmatory or supplemental testing is required by the approved method;*

(5) *report laboratory findings to the department within twenty-four (24) hours via telephone, facsimile and/or electronic transmission, using a number or e-mail address designated by the department, whenever the findings indicate that an environmental sample contains an organism, its product or component, or a chemical, any of which exhibits characteristics or properties consistent with those of a critical agent. Whenever the department determines that supplemental testing is necessary to confirm the results of a test, and/or further identify the characteristics of a critical agent for public health protection, law enforcement or research purposes, the laboratory shall submit all or part of the sample or its derivative(s) to the department or its designee, as directed by the department; and*

(6) establish and implement a critical agent inventory and tracking system that accounts for all environmental samples and their derivatives suspected or confirmed to contain critical agents. Unless required to document chain of custody pursuant to paragraph (2) above or required by this paragraph, a laboratory may discontinue inventory and tracking of samples and derivatives, provided laboratory findings have established the absence of a critical agent. Inventory and tracking documentation shall include the identity of all individuals who access such materials and the date of access, as well as specific information regarding transfer, disposal or other disposition of the materials. Samples and their derivatives, access records, chain of custody records and records of the analyses shall be maintained in a secure manner until the statute of limitations for bringing any related criminal or civil action has expired, and the sample and its derivatives are no longer needed for evidence in any pending legal matter or by law enforcement officials. Access records, chain of custody records and records of the analyses of confirmed positive samples, shall be maintained for ten (10) years, or as required above if longer.

(e) For critical biological agents that are microbiologic organisms, an environmental laboratory's proficiency testing performance shall be evaluated based on the known presence or absence of a specific microorganism, or its product or component. Satisfactory performance shall be a result correctly indicating the presence or absence of the microorganism or its product or component. Unsatisfactory performance shall be a result incorrectly indicating the presence or absence of the microorganism, or its product or component.

(f) Personnel requirements for environmental sample testing for critical biological agents that are microbiologic organisms shall be as follows:

(1) notwithstanding the requirements of section 55-2.10 of this Subpart, the environmental laboratory shall employ, as director, one of the following:

(i) a person who holds or meets the qualifications for a New York State clinical laboratory director certificate of qualification in the applicable subspecialty of microbiology (such as bacteriology), pursuant to Part 19 of this Title;

(ii) a person with an earned doctoral degree or master's degree in the chemical, environmental, physical or biological sciences or engineering, with at least sixteen (16) college semester credit hours in the biological sciences including at least one (1) course having microbiology as a major component, and at least one year of experience in analysis of representative analytes for which the laboratory is approved or seeking approval; or

(iii) a person with a bachelor's degree in the chemical, environmental, physical or biological sciences or engineering, with at least sixteen (16) college semester credit hours in the biological sciences including at least one (1) course having microbiology as a major component, and at least two years of experience in analysis of representative analytes for which the laboratory is approved or seeking approval; and

(2) sample preparation, analysis and related responsibilities shall be performed by an analyst who shall have an associate's degree or equivalent, with at least twelve (12) college semester credit hours in the biological sciences, and at least one year of experience in analysis of representative analytes; provided, however, that a person with at least three (3) years experience in the analysis of representative analytes immediately preceding the effective date of this section shall be deemed to have met the requisite qualifications for performing critical agent analysis in the laboratory in which such experience has been obtained.

(g) This section shall not apply to bacteriologic testing for total and fecal coliform bacteria (i.e., the common form of *Escherichia coli*) in potable and non-potable water.

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 10, 2003.

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

Regulatory Impact Statement

Statutory Authority:

Public Health Law Section 502 authorizes the Commissioner of Health to issue certificates of approval to environmental laboratories, and prescribe the requirements for granting such approvals. The Commissioner is also empowered to adopt and amend regulations for implementing the

provisions and intent of Section 502, and to prescribe the educational and technical qualifications of environmental laboratory director(s).

Legislative Objectives:

Section 502 of the Public Health Law requires all laboratories performing environmental analysis on samples collected in New York State to hold certificates of approval on such analyses as issued by the Commissioner of Health. The Commissioner is authorized to establish standards for approved laboratories and technical and educational qualifications for laboratory directors to ensure that tests conducted for public health or personal health protection, or the protection of the environment or natural resources are performed in a reliable manner.

Needs and Benefits:

Accurate and reliable identification of critical agents in environmental samples is crucial to appropriate public health response to potential biological or chemical terrorism events, and/or other such incidents posing a significant public health threat. Therefore, the Department proposes the addition of a new Section 55-2.13 for the specialty of "critical agents testing" which sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for environmental sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

The proposal's definition of "critical agents" is largely based on the federal Centers for Disease Control and Prevention (CDC)'s criteria for biological and chemical agents of significant public health or national security risk. However, the rule not only encompasses agents categorized by the CDC as critical agents, but also agents that the Commissioner of Health has determined may require special action to protect the public health because they are easily disseminated, could cause high to moderate morbidity and/or mortality and can have a significant public health impact. The proposal's consistency with the federal criteria will promote communication among responsible agencies and enhance coordinated response at all levels, while permitting the Commissioner to react swiftly to local conditions and preparedness needs.

Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and a laboratory needs to comply with the new and expanded requisites only if it applies for the specialty.

The educational requirements for technical directors in microbiology have been expanded beyond those required for sewage and water treatment plant operation to include post-doctoral, master's and/or bachelor's degree credentials. The proposed amendment recognizes the expertise resident in clinical laboratories, and would allow clinical laboratory directors certified in clinical microbiology to oversee environmental critical agent testing for microbiological organisms, provided the facility is dually certified as an environmental laboratory with an approved specialty of "critical agent testing" pursuant to Subpart 55-2. Minimum qualifications for analysts performing microbiological critical agent testing in environmental samples are also set forth at the level of an associate's degree. The Department believes this degree or its equivalent is a necessary requisite because of the higher level of knowledge, expertise and experience required to handle critical agents safely, and follow the attendant complex testing, reporting and security protocols. The setting of minimum educational and experience qualifications for critical agent analysts is consistent with the Department's approach to certifying environmental laboratories in the Contract Laboratory Protocol (CLP) tier. CLP laboratories must demonstrate capability to adhere to stringent testing protocols and to issue reports of a content and organization able to withstand a high level of scrutiny by scientific and legal authorities. The analyst qualifications set forth in this proposal are also consistent with those for clinical testing personnel performing high complexity testing specified in the federal Clinical Laboratory Improvement Amendment of 1988 (CLIA). To preclude displacement of any individuals currently employed due to the new minimum qualifications, the proposed rule contains a grandfather clause allowing analysts with three years' experience conducting similar analyses to qualify for critical agent testing within his or her current employment setting.

In addition to establishing personnel qualifications for environmental laboratory directors and testing personnel, the proposed amendment protects the public and ensures high quality environmental testing for biological and chemical critical agents by requiring laboratories to: use approved methods for sample collection, handling and decontamination; limit access

to samples and sample derivatives, such as isolated organisms; and develop and maintain recordkeeping systems to track the location of samples and isolated agents. The proposed regulation also requires laboratory employees to be trained in hazardous materials handling, sample collection, packaging, decontamination, transport, disposal and chain-of-custody protocols. Furthermore, the regulation requires environmental laboratory director(s) to develop sample acceptability criteria to protect the health, safety and welfare of laboratory personnel, sample collectors and the public, and to make such criteria available to clients upon request. Such precautionary measures to be taken at the pre- and post-analytic stages are designed to reduce, to the extent feasible, submission of samples that may pose a danger to transporters and to recipient laboratory personnel.

The proposed regulation requires laboratories to employ facilities and practices for bio-safety and chemical safety as appropriate for the critical agent(s) tested, to protect the public health, safety and welfare and prevent the use of ineffective procedures that could fail to confine dangerous agents or even promote their further dissemination. Additionally, the rule effectively restricts the often complex and potentially dangerous procedures for confirmatory testing and further characterization of an agent to appropriately equipped sites.

The rule also provides for restricting the reporting of analytical results should the Department determine that limitation on report distribution, language or content is necessary to preclude dissemination of potentially misleading information, particularly for unconfirmed or preliminary results. Furthermore, the regulation requires laboratories to notify the Department of any analytical finding indicating the presence of a critical agent. This requirement will promote clear communication lines of test results for various agents, and permit the Department to make determinations regarding the need for supplemental or confirmatory testing, as well as assess the public health threat and need for further governmental intervention.

The sensitive nature of critical agent testing requires environmental laboratories to establish procedures to keep track of environmental samples and their derivatives following testing and characterization, ensure continued proper handling of samples and any derived agents, and limit inappropriate access by laboratory personnel and the public. The proposed amendment establishes requirements for a tracking and inventory control system to record and identify the exact location and disposition of environmental samples and derivatives that test positive for a critical agent. The required retention period of at least ten years for access records and analysis records is consistent with the ten-year requirement for drinking water analysis records currently in place. Samples and their derivatives, access records and records of the analyses which are needed for potential civil or criminal actions must be retained in a secure manner until the statute of limitations for bringing a civil or criminal proceeding has expired and such items are no longer needed as evidence in any pending legal matter. However, it is anticipated that in most instances where such retention is required, the Department or a law enforcement agency will assume responsibility for the sample and any derivatives. The rule's enhanced recordkeeping requirements will also ensure the availability of records pertaining to positive samples until no longer needed for evidence in pending legal matters or by law enforcement officials, and provide grounds for admissibility of test results by establishing a chain-of-custody documentation requirement for testing initiated by law enforcement officials.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures to the Department for review and approval to ensure adherence to approved methods. The amendment also details criteria for scoring of proficiency testing results for environmental bacteriologic analytes, and excludes from the proposed requirements microbiological methods for detecting and monitoring for the common form of *E. coli* in potable and nonpotable waters, for which the Department already offers certification.

Costs:

Costs to Private Regulated Parties:

The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (*e.g.* BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, a facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs.

In the three months since the regulation's initial filing, thirty facilities requested application information. However, only two environmental lab-

oratories and four clinical laboratories submitted applications and all six applicants reported needing only minor modifications to existing facilities to comply with the proposed requisites.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas. The Department expects that commercial laboratories voluntarily incurring costs by electing to establish critical agent testing capacity will be able to offset such costs with income from fee-for-service and contractual charges imposed on clients.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (*i.e.*, electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for microbiological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (*e.g.*, potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their

services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing.

Laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a biohazardous agent (e.g., a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for this purpose at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Costs for Implementation and Administration of the Rule:

Costs to State Government:

New York State, with the exception of the Department as stated below, would incur costs to the same extent as private regulated parties should any State-operated environmental laboratories, such as those operated by the Department of Environmental Conservation, take on critical agent testing. Costs to the Department:

The Department will incur costs for development and implementation of a proficiency-testing program for one or more analytes in the critical agent specialty, and for travel to conduct onsite assessments of applicable laboratory facilities. Since existing staff will coordinate the initial development and implementation, as well as periodic mailings, of any proficiency testing designed to challenge laboratories engaged in critical agent testing, the Department anticipates no new costs for personnel salaries and overhead. Costs of one proficiency-testing event challenging 25 laboratories using a surrogate organism are in the range of \$75-\$1200 for materials (depending on the organism and source); \$325 for mailing containers; \$250 for postage; and approximately \$100 for related paperwork. However, costs related to proficiency testing, as well as travel expenses for on-site assessments, would be recovered through approval fees charged to the laboratories.

Costs to Local Government:

Local government would incur no new costs, except that local government-operated facilities providing regulated services under this proposal would incur the costs described for private regulated parties.

Paperwork:

The only new paperwork requirements imposed by this regulation are: (1) development and submission of relevant policies and procedures; (2) submission of a request for approval to perform critical agent testing; (3) development of chain-of-custody policies and procedures; (4) development of a tracking system for specimens; and (5) reporting of presumptively positive results to the Department.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district, unless a county, city, town or village government; or school, fire or other special district operates an environmental laboratory, and, therefore, is subject to these regulations to the same extent as a private regulated party.

Duplication:

These rules do not duplicate any other law, rule or regulation, except that some terminology found in federal critical agent rules promulgated by the CDC has been used in this regulation to facilitate response coordination for domestic preparedness. Federal standards and recommendations for (bio) safety, sample collection, testing algorithms and reporting serve as the underpinnings of this rule, but are not duplicated therein.

This proposal is not duplicative of, but will harmonize with, anticipated Department of Environmental Conservation rules to address the treatment, handling and disposal of waste resulting from critical agent incidents and response to such incidents.

Alternative Approaches:

The alternative to adopting the proposed amendments is to apply the Department's existing standards to critical agents testing. However, because of the special issues raised by critical agent testing the Department has determined that the alternative of applying existing minimal requirements to this area is totally unacceptable.

Federal Standards:

Since there is no federal certification program in place for environmental laboratories, these regulations do not duplicate any federal standards. To the extent that the CDC, the U.S. Environmental Protection Agency, or the federal Department of Transportation have promulgated standards affecting environmental laboratory testing for evaluation of adverse public

health events, these regulations are consistent with, and complement, such standards.

Compliance Schedule:

Regulated parties which are adequately staffed and equipped to perform critical agent testing in a safe and reliable manner should be able to comply with all aspects these regulations as of their effective date, upon publication of a Notice of Emergency Adoption in the New York *State Register*, except for obtaining the approval of the Department. The Department is prepared to approve laboratories for critical agent testing for select analytes, such as anthrax, on an expedited basis. Thus, it is expected that laboratories that are fully prepared to undertake such testing may be approved within days of publication of this regulation. Laboratories that are not ready and able to meet the requirements of this regulation should not be engaged in such testing.

Regulatory Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) currently certifies 779 laboratories. Of these, 227 are located out-of-State and do not qualify as small businesses. Of the remaining 552 laboratories, 275 are governmental laboratories, and 277 are commercial entities, of which 170 are estimated to be small businesses. For the most part, governmental laboratories, which are primarily drinking water and sewage treatment plant laboratories operated by counties, municipalities and townships, are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets standards.

Of the approximately 900 facilities holding a New York State clinical laboratory permit, 135 qualify as small businesses, and 50 are owned and operated by local governments.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and small businesses and local governments need to comply with the new and expanded requirements only if they operate environmental laboratories that apply for the specialty.

Proposed Section 55-2.13 sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; record keeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

This regulation's requirement that laboratories retain records of sample tracking and access for ten years is consistent with the ten-year retention requirement for drinking water analysis records already in place. The Department has contacted numerous laboratories representing various types of ELAP-approved facilities, including commercial, industrial and government laboratories, and has determined that many of these laboratories, particularly those with electronic recordkeeping systems, are already retaining records for periods well in excess of five years.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures for Department for review and approval to ensure adherence to approved methods and the requirements of this new section. Since such information, often in the format of manuals, is a universal component of all laboratories' operation, this should not be a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

It is not expected that the cost of compliance for small businesses and local governments will be different than for other regulated parties. With the possible exception of environmental testing conducted for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a laboratory on its clients. The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (e.g. BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, a small business or

government-operated facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing.

In the three months since the regulation's initial filing, thirty facilities requested application information. However, only two environmental laboratories and four clinical laboratories submitted applications. A local government operates one applicant facility, and the Department believes that one of the three in-State applicants qualifies as a small business. All six applicants reported needing only minor modifications to existing facilities to comply with the proposed requisites.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (*i.e.*, electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems, since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for microbiological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (*e.g.*, potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bache-

lor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing.

Laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a biohazardous agent (*e.g.*, a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for this purpose at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to small businesses and local governments that are not already presented by undertaking these activities in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are currently available should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of ownership type, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation imposes requirements only on those laboratories which choose to undertake critical agent testing. Standards have been established at the absolute minimum necessary for safe and reliable testing. The department did not consider different compliance requirements or exceptions for small businesses or local governments because of the importance of this type of testing to public health, safety and welfare.

Small Business and Local Government Participation:

In the development of these regulations, the Department had informal discussions with environmental and clinical laboratories concerning their interest in and capacity to perform critical agent testing. Some of these discussions occurred with small businesses and local governments. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for extensive solicitation of regulated party input at this time.

Rural Area Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) currently certifies 779 environmental laboratories. Of these, 227 are located out-of-State and are not considered to be in rural areas. Of the remaining 552 laboratories, 374 are located in rural areas. Of these 374 rural facilities, 198 currently hold certifications in bacteriology, including 56 laboratories operated by counties, municipalities and townships local governments that only conduct procedures to monitor water treatment. For the most part, environmental laboratories affiliated with drinking water or sewage treatment are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets standards.

Of the approximately 900 facilities holding a New York State clinical laboratory permit, only 118 are located in areas designated as rural. Of these, only 85 currently hold permits in bacteriology general or virology general and would be possible candidates for testing critical agents.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity and special issues presented by critical agent testing, this regulation establishes new requirements in addition to expanding several minimum standards now in place for environmental laboratories. However, the decision to engage in critical agent testing is strictly voluntary, and a laboratory needs to comply with the new and expanded requisites only if it applies for the specialty.

Proposed Section 55-2.13 sets forth minimum standards for: laboratory director and testing personnel qualifications; use of approved methods for sample collection and decontamination; recordkeeping systems to track the location of confirmed positive samples and isolated agents; sample chain-of-custody protocols; test result reporting procedures, including ap-

appropriate notification of the Department; client result reports content; sample and/or derivative referral protocols; and proficiency testing.

This regulation's requirement that laboratories retain records of sample tracking and access for ten years is consistent with the ten-year retention requirement for drinking water analysis records already in place. The Department has contacted numerous laboratories representing various types of ELAP-approved facilities, including commercial, industrial and government laboratories, and has determined that many of these laboratories, particularly those with electronic recordkeeping systems, are already retaining records for periods well in excess of five years.

Laboratories applying for approval in the specialty of critical agent testing will be required to submit their policies and procedures for Department review and approval to ensure adherence to approved methods and the requirements of this new section. Since such information, often in the format of manuals, is a universal component of all laboratories' operation, this should not be a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

It is not expected that the cost of compliance for applicant laboratories located in rural areas will be different than for other regulated parties. With the possible exception of environmental testing for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a rural laboratory on its clients. The costs of compliance will vary significantly, primarily by a laboratory's existing biosafety level (*e.g.* BSL-2 or BSL-3) and whether it meets U.S. Centers for Disease Control and Prevention (CDC) safety and security requisites for handling the particular critical agent(s) and specimen type(s) it proposes to test. A laboratory already meeting CDC's safety and security standards is expected to incur no new costs. On the other hand, any facility minimally equipped for handling infectious agents – because it limits testing to basic microbiology testing to monitor drinking water, for instance – may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing.

In the three months since the regulation's initial filing, thirty facilities requested application information. However, only two environmental laboratories and four clinical laboratories submitted applications. Two of the three in-State applicants are located in a county having townships with population densities of 150 persons or less per square mile. All six applicants reported needing only minor modifications to existing facilities to comply with the proposed requisites.

Facilities which do not comply with these requirements currently may incur the following compliance costs: costs for purchase and installation of a state-of-the-art biological safety cabinet; costs for establishing negative air pressure conditions and adequate air filtration with space renovation or new construction; and costs for security systems, such as installation of card-key devices, and/or locks on entrances to storage and work areas.

According to manufacturers' estimates, costs for purchase and installation of a biological safety cabinet to meet minimal BSL-2 standards range from \$6,275 to \$11,365. Upgrading existing standard microbiology workspace to BSL-3 would require extensive modifications to usable space and air handling and filtration systems, and would be expected to result in costs comparable to new construction. According to vendors of modular construction, who gave estimates to public health officials in NYS and other states, costs for a 600-square foot BSL-3 building range from \$240,000 to \$500,000. Given the Department's experience thus far, it is unlikely that any commercial entity will choose to develop new BSL-3 capacity.

Relatively minor expenditures would be necessary for supplies related to sample collection, including personal protection gear, and secure storage of samples with presumptive or confirmed critical agent findings. Laboratory supply catalogues indicate that the two plastic zipper-lock bags per sample would cost less than \$1.00; a box of 100 disposable gloves costs approximately \$6.00; and a lockable refrigerator-freezer costs \$500. Costs to equip one individual sample collector or analyst with requisite personal protective equipment are estimated at a minimum of \$10 for one set of disposable outerwear comprised of gown, shoe covers and gloves, to a maximum of \$500 for a rechargeable self-contained breathing apparatus.

Costs related to security systems vary greatly, depending on the sophistication of the system (*i.e.*, electronic or manual), and costs of maintenance and service contracts. According to estimates given by two manufacturers of card-key systems, one portal with card-key entry would cost \$5,000. One manufacturer of video surveillance equipment estimated that a laboratory installing a sixteen-camera system would incur costs of \$15,000. It is not possible to estimate operating and maintenance of security systems,

since service contracts would vary according to the size of the system. Since no express requirements are in place for security equipment, a laboratory may control access to certain areas with stringent administrative controls, including sign-in logs and identification badges, at lower costs than a mechanical or electronic system.

Clinical laboratories seeking certification as environmental laboratories, as well as previously unregulated commercial concerns offering environmental testing (*e.g.*, for anthrax on surfaces), will need to pay approval fees equivalent to first-year Department Environmental Laboratory Approval Program (ELAP) fees, estimated at \$550. Clinical laboratories and previously unregulated facilities may also incur compliance costs similar to those for existing environmental laboratories described above. Based on a written survey of clinical laboratories currently licensed in the category of microbiology pursuant to Public Health Law Article 5, Title V, the Department estimates that 73 percent of these laboratories have existing capability for critical agent testing and would not need to expend significant resources for biosafety facilities unless they need to purchase personal protective equipment and related items to comply with the more stringent safety practices for critical agents testing.

Most clinical laboratories interested in testing environmental samples for microbiological critical agents already employ laboratory directors and testing personnel who qualify under the proposed educational and experiential criteria. The majority of environmental laboratories certified to perform microbiology testing limit that testing to low biosafety level work (*e.g.*, potable water testing), and generally do not employ personnel meeting the proposed requirements. While these sites would not incur additional personnel costs for analysts because of the proposal's grandfathering provision, requirements for a technical director would entail some added costs. According to a survey published in 2001 by the American Council of Independent Laboratories, the mean hiring rate for scientists with a bachelor's degree and one to three years' experience is \$38,900. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing anthrax testing on environmental samples. Since the regulation was first filed, the Department has found that none of the environmental laboratories currently limiting their services to monitoring of sewage and water treatment facilities are interested in performing critical agent testing.

Rural laboratories applying for approval under these regulations will incur costs of approximately \$3.00 to \$20.00 to copy to the Department all policies and procedures relevant to critical agent testing. On occasion, a laboratory may incur costs for shipping presumptively positive samples to the Wadsworth Center or another designated facility for further testing. The cost of shipping an isolate of a biohazardous agent (*e.g.*, a culture tube) by common carrier is estimated at between \$25 and \$50, depending on the need for keeping the agent's temperature constant with ice packs, for example. As an alternative, law enforcement officials, laboratory employees or couriers may be used for this purpose at an anticipated maximum cost of \$350, assuming an 800-mile round trip and a \$25 hourly personnel wage.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas that are not already presented by undertaking these activities in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are currently available should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of location, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation only imposes requirements on laboratories choosing to undertake critical agent testing. Standards have been established at the absolute minimum necessary for safe and reliable testing. The department did not consider different compliance requirements or exceptions for facilities located in rural areas because of the importance of this type of testing to public health, safety and welfare.

Participation by Parties in Rural Areas:

In the development of these regulations, the Department had informal discussions with environmental and clinical laboratories concerning their interest in and capacity to perform critical agent testing. Few, if any, rural laboratories chose to participate in these discussions. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for extensive solicitation of regulated party input at this time.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial

adverse impact on jobs and employment opportunities. The revision proposes minimum standards for a recently recognized specialty of environmental laboratory testing, *i.e.*, critical agent testing. No requirement is imposed that a laboratory be certified in this specialty, and the Department expects that, of the small number of laboratories anticipated to seek certification in critical agent testing, few, if any, will need to take on additional capacity in the form of hiring new personnel. Therefore, this proposed amendment has no implications for job opportunities.

Division of Housing and Community Renewal

PROPOSED RULE MAKING HEARING(S) SCHEDULED

New York State Rent and Eviction Regulations

I.D. No. HCR-26-03-00011-P

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

Proposed action: Amendment of section 2102.4 of Title 9 NYCRR.

Statutory authority: Emergency Housing Rent Control Law, L. 1946, ch. 274, subd. 4(a)

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Public hearing(s) will be held at: 2:00 p.m. to 4:00 p.m., Aug. 20, 2003 at Westchester County Supreme Court Bldg., Seventh Fl. Conference Rm., 111 Dr. Martin Luther King Jr. Blvd., White Plains, NY and 2:00 p.m. to 4:00 p.m., Aug. 20, 2003 at Nassau County Legislative Office Bldg., Fifth Fl., One West St., Mineola, NY.

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

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

Text of proposed rule: The State Rent and Eviction Regulations as promulgated and adopted by the Temporary State Housing Rent Commission, pursuant to the Emergency Housing Rent Control Law, Chap. 274 of the Laws of 1946, section 4, subdivision (4)(a), as amended by Chap. 250, Laws of 1950, as amended, and transferred to the Division of Housing and Community Renewal by Chap. 244, Laws of 1964, are amended to read as follows:

PART 2102 ADJUSTMENTS

Section 1

Section 2102.4 of this Part is amended to read as follows:

The administrator at any time, on his own initiative, or on application of the *owner* or tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(h) *There has been an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for differentiated rent controlled housing accommodations included in the 2003 Operational Bulletin governing electrical conversions issued pursuant to this subdivision and section 2109.8 of this Title by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:*

(1) *Direct Metering: Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, and as further adjusted where appropriate to re-*

flect differences in electric rates outside New York City. The charge for electricity is not part of the maximum rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the Commission. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(2) *Submetering. Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United State's Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the Residential Submetering Manual revised October 2001, published by the New York State Energy Research and Development Authority, 286 Washington Avenue Extension, Albany, New York, and available on its website at www.nyserda.org, and further adjusted where appropriate to reflect differences in electric rates outside New York City, and reflected in DHCR's 2003 Operational Bulletin governing electrical conversions. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the maximum rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the Commission. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.*

(3) *Recipients of Senior Citizen Rent Increase Exemptions (SCRIE): For a tenant who on the date of the conversion is receiving a SCRIE authorized by local law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.*

(a) *After the conversion, upon the vacancy of the tenant, the owner, without making application to the Commission, is required to reduce the maximum rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.*

(b) *After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to the Commission, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is responsible for the cost of his or her electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to the Commission, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.*

Text of proposed rule and any required statements and analyses may be obtained from: Maurice Jaimison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjaimison@dhcr.state.ny.us

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

The Emergency Housing Rent Control Law, Unconsolidated Laws § 8584(4)(a), (Subdivision 4(a) of Chap. 274 of the Laws of 1946 as amended by Chap. 250 of the Laws of 1950, as amended, as transferred to the Division of Housing and Community Renewal (DHCR) by Chap. 244 of the Laws of 1964) authorizes DHCR to amend State Rent and Eviction

Regulations (SRER) as necessary. Unconsol. Laws § 8584(5)(b) authorizes DHCR to regulate services and § 8584(4)(a)(7) authorizes DHCR to grant rent increases for major Capital Improvements under this Law.

2. LEGISLATIVE OBJECTIVES

The State of New York has long recognized the broad social and economic goal of conserving energy. Accordingly, State and City agencies have sought, wherever possible, to fashion their policies and procedures to be supportive of this goal. This proposed rule making is necessary to realize these objectives within the framework of the rent regulatory laws.

3. NEEDS AND BENEFITS

One means of conserving energy is through the conversion of multi-family buildings with master metering of electricity, where the landlord is responsible for the cost of the tenants electricity, to individual metering, where the tenant is responsible for his or her own electric bills, and therefore tends to consume less electricity. There are two kinds of conversions: (1) direct metering, whereby the tenant is billed directly by the utility, and (2) submetering, whereby the tenant is billed by the landlord or a third party, who purchases electricity at the bulk rate from the utility. Under submetering there are opportunities for savings in the cost of electricity which can be passed on to the tenants. DHCR permits owners of master-metered buildings subject to rent regulation to apply for permission to convert to individual metering subject to certain conditions, which include a rent reduction to ameliorate the financial impact of direct billing on the tenants. In order to determine the amount of the rent reduction, DHCR consulted with the New York Energy Research and Development Agency, (NYSERDA; located at 286 Washington Avenue Extension, Albany, New York, 12203) who commissioned a study by a recognized architectural and engineering firm, Wendel Duchscherer, entitled Rent Reduction Analysis, issued January 2003 (For a copy of the report, contact David Prior (518) 862-1090, ext. 3285, e-mail djp@nyserda.org). The report confirmed that data derived from the 1999 New York City Housing Vacancy Survey showing costs of electricity reported by tenants in New York City could be used to establish a schedule of rent reductions for different-sized apartments, with adjustments based on variations in electric rates in different regions, and for bulk rates in the case of submetering. Based on that report, DHCR, with the advice and guidance of NYSEDA, developed a rent reduction formula that is authorized by the proposed rule making herein. Also, DHCR included provisions to the effect that conversion work qualifies for a rent increase as a Major Capital Improvement (MCI) and must be accompanied by a general rewiring of the building unless such work is unnecessary. DHCR's long-standing practice has been to grant an MCI for rewiring, and to require rewiring in connection with electrical conversions.

4. COSTS

The proposed amendments are intended to encourage owners to undergo electrical conversions, which will reduce costs to the owners by relieving them of responsibility for payment of the tenants' electric bills where the tenant is allowed unlimited consumption of electricity. For tenants it is intended to ameliorate the financial impact of paying their own electric bills, and in the case of submetering to reduce the overall cost of electricity to the tenants. The MCI portion of the proposed amendments will also encourage owners to undergo the expense of conversions and upgrading the electrical wiring in their buildings, which will benefit the tenants with greater capacity for appliances and safer and more reliable service. Recoupment from the tenants will be through MCI rent increases under the rent regulatory laws based on the cost of the work amortized over a seventy-two month period and limited to no more than a six percent increase per year. In view of the fact that DHCR already has a long-standing practice of granting an MCI for rewiring, and requiring rewiring in connection with conversions, the net rent increase attributable to the proposed amendments would be only that portion of the cost which is associated with the conversion itself. Based on analysis of limited data from recent cases, it is estimated that such cost would result in an MCI increase of \$.36 to \$1.08 per room.

5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

6. PAPERWORK

It is not anticipated that the proposed amendments will result in any increased paperwork, except that every three years DHCR will be required to issue an operational bulletin setting forth an updated schedule of rent reductions based on a new Housing Vacancy Survey.

7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

8. ALTERNATIVES

There were no significant viable alternatives to the proposed amendments. Prior efforts to establish a schedule of dollar rent reductions for electrical conversions through issuance of an Operational Bulletin were reversed by the courts, which found that DHCR was required to proceed by regulatory amendment. Prior methods for determining rent reductions through a two-stage administrative proceeding, with both dollar rent reductions and a standard percentage rent reduction (6.6%) to remove prior electrical inclusion guidelines increases, were cumbersome and time-consuming to implement, barred by later modifications to the rent regulatory laws, and less consistent with state policy of encouraging conservation of energy in that they discouraged owners from bringing electrical conversion applications. Also, unlike prior rent reduction schedules, the proposed amendments require schedules that are supported by statistical studies and updated on a regular basis.

9. FEDERAL STANDARDS

The proposed amendments do not exceed any minimum federal standard.

10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules.

Regulatory Flexibility Analysis

1. EFFECT OF RULE

The State Rent and Eviction Regulations (SRER) apply only to housing units located in those communities outside New York City that are subject to the Emergency Housing Rent Control Law. The small businesses that would be affected by these proposed amendments are the owners of small numbers of regulated housing units, at least one of which is rent controlled.

The amended regulations are expected to have no burdensome impact on small businesses. In fact, the amended regulations will add additional incentives to small building owners to voluntarily avail themselves of the benefits of the amended regulations by converting to individual metering. In so doing they may be able to reduce their costs of operation by recouping more of the cost of the electrical work through MCI rent increases, and being relieved of responsibility for payment of tenants' electric bills where the tenants are currently allowed unlimited consumption of electricity.

These amendments to the SRER, which apply exclusively in the aforementioned communities, are expected to have no impact on the local governments thereof.

2. COMPLIANCE REQUIREMENTS

There are no new major compliance requirements in the proposed amendments. Owners will be encouraged to voluntarily undergo the expense of conversions and upgrading of electrical wiring in their buildings, and can recoup these expenses by obtaining Major Capital Improvement rent increases. The proposed amendments do not otherwise require regulated parties to perform any additional record keeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services, except that owners who do decide to undergo electrical conversions and rewiring in their buildings will need to obtain appropriate services.

4. COMPLIANCE COSTS

It is not contemplated that this action will ultimately impose any significant costs upon small businesses. Additionally, there should be no costs imposed on local governments resulting from the proposed amendments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

6. MINIMIZE ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse impact on such parties or local governments. Consequently, it was not necessary to consider the approaches suggested in SAPA Section 202-b(1).

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

DHCR consulted with the New York Energy Research and Development Agency (NYSERDA) who retained a consultant to conduct a study and make recommendations regarding the method by which rent reductions should be determined in connection with electrical conversions. Prior to developing a proposed regulatory amendment, DHCR served notices inviting recommendations and comments on groups and organizations representing owners and tenants, public officials, and other interested

parties. In response to those notices, owners recommended that the rent reductions be sufficient to encourage owners to undergo the expense of electrical conversion. Tenants recommended return to an earlier method of reducing the rents which included, in addition to dollar rent reductions based on apartment size, an across-the-board rent reduction of 6.6% of the total apartment rent. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

In addition, a Regulatory Agenda was published in the *State Register* on January 8, 2003, indicating that DHCR was considering this proposed rule making, and all interested parties were given an opportunity to comment. No comments were received in response to this notice.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the *State Register*, at which all interested parties will have an opportunity to comment. Comments will be reviewed for possible inclusion where appropriate.

Rural Area Flexibility Analysis

The proposed rules are not anticipated to impose any new adverse reporting, recordkeeping or other compliance requirements on public or private entities in any rural area that is subject to these regulations.

Job Impact Statement

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

New York City Rent and Eviction Regulations

I.D. No. HCR-26-03-00012-P

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

Proposed action: Amendment of section 2202.16 of Title 9 NYCRR.

Statutory authority: Omnibus Housing Act, L. 1983, ch. 403, section 28; and Administrative Code of the City of New York, section 26-405(g)(1)

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Public hearing(s) will be held at: 10:00 a.m. to 4:00 p.m., Aug. 20, 2003 at Department of Health, 3rd Fl. Conference Rm., Five Penn Plaza, New York, NY.

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

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

Text of proposed rule: The New York City Rent and Eviction Regulations as promulgated and adopted by the Division of Housing and Community Renewal pursuant to Omnibus Housing Act, Chap. 403, Laws of 1983, Section 28, are amended to read as follows:

PART 2202 ADJUSTMENTS; DETERMINATION OF RENT AND SERVICES

Section 1

Subdivision (e) of section 2202.16 of this Part is renumbered subdivision (f), and a new subdivision (e) is adopted to read as follows:

(e) the administrator may order a decrease of the maximum rent based on an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent controlled housing accommodations included in the 2003 Operational Bulletin governing electrical conversions issued pursuant to this subdivision and section 2209.8 of this Title by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(1) Direct Metering. Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com. The charge for electricity is not part of the maxi-

um rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the city rent agency. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(2) Submetering. Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the Residential Electric Submetering Manual revised October 2001, published by the New York State Energy Research and Development Authority, 286 Washington Avenue Extension, Albany, New York, and available on its website at www.nyserda.org, and reflected in DHCR's 2003 Operational Bulletin governing electrical conversions. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the maximum rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the city rent agency. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(3) Recipients of Senior Citizen Rent Increase Exemptions (SCRIE): For a tenant who on the date of the conversion is receiving a SCRIE authorized by section 26-405(m) of the City Rent and Rehabilitation Law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this subdivision.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to the city rent agency, is required to reduce the maximum rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to the city rent agency, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to the city rent agency, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

Text of proposed rule and any required statements and analyses may be obtained from: Maurice Jaimison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjaimison@dhcr.state.ny.us

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

The Omnibus Housing Act (Section 28 of Chap. 403 of the Laws of 1983 (not subdivided)), and Section 26-405g (1) of the Administrative Code of the City of New York, authorizes DHCR to amend City Rent and Eviction Regulations (CRER) as necessary. Unconsol. Laws § 26-405(h)(2) authorizes DHCR to regulate services and § 26-405(g)(4)(g)

authorizes DHCR to grant rent increases for major Capital Improvements under this Act.

2. LEGISLATIVE OBJECTIVES

The State of New York has long recognized the broad social and economic goal of conserving energy. Accordingly, State and City agencies have sought, wherever possible, to fashion their policies and procedures to be supportive of this goal. This proposed rule making is necessary to realize these objectives within the framework of the rent regulatory laws.

3. NEEDS AND BENEFITS

One means of conserving energy is through the conversion of multi-family buildings with master metering of electricity, where the landlord is responsible for the cost of the tenants electricity, to individual metering, where the tenant is responsible for his or her own electric bills, and therefore tends to consume less electricity. There are two kinds of conversions: (1) direct metering, whereby the tenant is billed directly by the utility, and (2) submetering, whereby the tenant is billed by the landlord or a third party, who purchases electricity at the bulk rate from the utility. Under submetering there are opportunities for savings in the cost of electricity which can be passed on to the tenants. DHCR permits owners of master-metered buildings subject to rent regulation to apply for permission to convert to individual metering subject to certain conditions, which include a rent reduction to ameliorate the financial impact of direct billing on the tenants. In order to determine the amount of the rent reduction, DHCR consulted with the New York Energy Research and Development Agency, (NYSERDA; located at 286 Washington Avenue Extension, Albany, New York, 12203) who commissioned a study by a recognized architectural and engineering firm, Wendel Duchscherer, entitled Rent Reduction Analysis, issued January 2003 (For a copy of the report, contact David Prior (518) 862-1090, ext. 3285, e-mail djp@nyserda.org). The report confirmed that data derived from the 1999 New York City Housing Vacancy Survey showing costs of electricity reported by tenants in New York City could be used to establish a schedule of rent reductions for different-sized apartments, with adjustments based on variations in electric rates in different regions, and for bulk rates in the case of submetering. Based on that report, DHCR, with the advice and guidance of NYSERDA, developed a rent reduction formula that is authorized by the proposed rule making herein. Also, DHCR included provisions to the effect that conversion work qualifies for a rent increase as a Major Capital Improvement (MCI) and must be accompanied by a general rewiring of the building unless such work is unnecessary. DHCR's long-standing practice has been to grant an MCI for rewiring, and to require rewiring in connection with electrical conversions.

4. COSTS

The proposed amendments are intended to encourage owners to undergo electrical conversions, which will reduce costs to the owners by relieving them of responsibility for payment of the tenants electric bills where the tenant is allowed unlimited consumption of electricity. For tenants it is intended to ameliorate the financial impact of paying their own electric bills, and in the case of submetering to reduce the overall cost of electricity to the tenants. The MCI portion of the proposed amendments will also encourage owners to undergo the expense of conversions and upgrading the electrical wiring in their buildings, which will benefit the tenants with greater capacity for appliances and safer and more reliable service. Recoupment from the tenants will be through MCI rent increases under the rent regulatory laws based on the cost of the work amortized over a seventy-two month period and limited to no more than a six percent increase per year. In view of the fact that DHCR already has a long-standing practice of granting an MCI for rewiring, and requiring rewiring in connection with conversions, the net rent increase attributable to the proposed amendments would be only that portion of the cost which is associated with the conversion itself. Based on analysis of limited data from recent cases, it is estimated that such cost would result in an MCI increase of \$.36 to \$1.08 per room.

5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

6. PAPERWORK

It is not anticipated that the proposed amendments will result in any increased paperwork, except that every three years DHCR will be required to issue an operational bulletin setting forth an updated schedule of rent reductions based on a new Housing Vacancy Survey.

7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

8. ALTERNATIVES

There were no significant viable alternatives to the proposed amendments. Prior efforts to establish a schedule of dollar rent reductions for electrical conversions through issuance of an Operational Bulletin were reversed by the courts, which found that DHCR was required to proceed by regulatory amendment. Prior methods for determining rent reductions through a two-stage administrative proceeding, with both dollar rent reductions and a standard percentage rent reduction (6.6%) to remove prior electrical inclusion guidelines increases, were cumbersome and time-consuming to implement, barred by later modifications to the rent regulatory laws, and less consistent with state policy of encouraging conservation of energy in that they discouraged owners from bringing electrical conversion applications. Also, unlike prior rent reduction schedules, the proposed amendments require schedules that are supported by statistical studies and updated on a regular basis.

9. FEDERAL STANDARDS

The proposed amendments do not exceed any minimum federal standard.

10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant time to comply with the proposed rules.

Regulatory Flexibility Analysis

1. EFFECT OF RULE

The City Rent and Eviction Regulations (CRER) apply only to housing units located in New York City that are subject to the City Rent and Rehabilitation Law. The small businesses that would be affected by these proposed amendments are the owners of small numbers of regulated housing units, at least one of which is rent controlled.

The amended regulations are expected to have no burdensome impact on such small businesses. In fact, the amended regulations will add additional incentives to small building owners to voluntarily avail themselves of the benefits of the amended regulations by converting to individual metering. In so doing they may be able to reduce their costs of operation by recouping more of the cost of the electrical work through MCI rent increases, and being relieved of responsibility for payment of tenants electric bills where the tenants are currently allowed unlimited consumption of electricity.

These amendments to the CRER which apply exclusively in New York City, are expected to have no impact on the local government thereof.

2. COMPLIANCE REQUIREMENTS

There are no new major compliance requirements in the proposed amendments. Owners will be encouraged to voluntarily undergo the expense of conversions and upgrading of electrical wiring in their buildings, and can recoup these expenses by obtaining Major Capital Improvement rent increases. The proposed amendments do not otherwise require regulated parties to perform any additional record keeping, reporting, or any other acts. There are no new compliance requirements placed on local government.

3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services, except that owners who do decide to undergo electrical conversions and rewiring in their buildings will need to obtain appropriate services.

4. COMPLIANCE COSTS

It is not contemplated that this action will ultimately impose any significant costs upon small businesses. Additionally, there should be no costs imposed on local government resulting from the proposed amendments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

6. MINIMIZE ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or local government. Consequently, it was not necessary to consider the approaches suggested in SAPA Section 202-b(1).

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

DHCR consulted with the New York Energy Research and Development Agency (NYSERDA) who retained a consultant to conduct a study and make recommendations regarding the method by which rent reductions should be determined in connection with electrical conversions. Prior to developing a proposed regulatory amendment, DHCR served notices inviting recommendations and comments on groups and organizations representing owners and tenants, public officials, and other interested parties. In response to those notices, owners recommended that the rent

reductions be sufficient to encourage owners to undergo the expense of electrical conversion. Tenants recommended return to an earlier method of reducing the rents which included, in addition to dollar rent reductions based on apartment size, an across-the-board rent reduction of 6.6% of the total apartment rent. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

In addition, a Regulatory Agenda was published in the *State Register* on January 8, 2003, indicating that DHCR was considering this proposed rule making, and all interested parties were given an opportunity to comment. No comments were received in response to this notice.

Local government participation in New York City was effectuated by submission of the draft regulations to the New York City Department of Housing Preservation and Development. No comments were received from that agency.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the *State Register*, at which all interested parties will have an opportunity to comment. Comments will be reviewed for possible inclusion where appropriate.

Rural Area Flexibility Analysis

The City Rent and Eviction Regulations apply exclusively to New York City, and therefore the proposed rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities located in any rural area pursuant to Subdivision 10 of SAPA Section 102.

Job Impact Statement

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Emergency Tenant Protection Regulations

I.D. No. HCR-26-03-00013-P

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

Proposed action: Amendment of section 2502.4 of Title 9 NYCRR.

Statutory authority: Emergency Tenant Protection Act of 1974 (ETPA), L. 1974, ch. 576, section 10a

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Public hearing(s) will be held at: 2:00 p.m. to 4:00 p.m., Aug. 21, 2003 at Westchester County Supreme Court Bldg., Seventh Fl. Conference Rm., 111 Dr. Martin Luther King Jr. Blvd., White Plains, NY; and 2:00 p.m. to 4:00 p.m., Aug. 21, 2003 at Nassau County Legislative Office Bldg., Fifth Fl., One West St., Mineola, NY.

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

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

Text of proposed rule: The Emergency Tenant Protection Regulations as promulgated and adopted by the Division of Housing and Community Renewal pursuant to the Emergency Tenant Protection Act of Nineteen Seventy-four, section 4 of Chap. 576, Laws of 1974, section 10(a), as amended, are amended to read as follows:

PART 2502 ADJUSTMENTS

Section 1

Subparagraph (ii) of paragraph (2) of subdivision (a) of section 2502.4 of this Part, item (22) under the Schedule of Major Capital Improvements, is amended to read as follows:

22. REWIRING:

- new copper risers and feeders extending from property box in basement to every housing accommodation; must be of sufficient capacity (220) volts to accommodate the installation of air conditioner circuits in living room and/or bedroom; and work done to effectuate conversion from master to individual metering of electricity approved by the Division pursuant to paragraph (3) of subdivision (b) of this section.

Section 2

Paragraph (3) of subdivision (b) of section 2502.4 of this Part is renumbered paragraph (4), and a new paragraph (3) is adopted to read as follows:

(3) such decrease, modification or substitution results from an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent stabilized housing accommodations included in the 2003 Operational Bulletin governing electrical conversions issued pursuant to this paragraph and section 2507.11 of this Title by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(i) **Direct Metering.** Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, and as further adjusted where appropriate to reflect differences in electric rates outside New York City. The charge for electricity is not part of the legal regulated rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the Division. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(ii) **Submetering.** Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the "Residential Electric Submetering Manual" revised October 2001, published by the New York State Energy Research and Development Authority, 286 Washington Avenue Extension, Albany, New York, and available on its website at www.nyserda.org, and further adjusted where appropriate to reflect differences in electric rates outside New York City, and reflected in DHCR's 2003 Operational Bulletin governing electrical conversions. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the legal regulated rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the Division. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(iii) **Recipients of Senior Citizen Rent Increase Exemptions (SCRIE):** For a tenant who on the date of the conversion is receiving a SCRIE authorized by local law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to the Division, is required to reduce the legal regulated rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to the Division, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is responsible for the cost of his or her electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without

making application to the Division, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

Text of proposed rule and any required statements and analyses may be obtained from: Maurice Jaimison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjaimison@dhcr.state.ny.us

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

The Emergency Tenant Protection Act of 1974 (ETPA), Unconsolidated Laws § 8630(a), (Section 10(a) of Chap. 576 of the Laws of 1974), authorizes DHCR to amend Tenant Protection Regulations (TPR) as necessary. Unconsol. Laws § 8627(a) authorizes DHCR to regulate services and § 8626(d)(3) authorizes DHCR to grant rent increases for Major Capital Improvements under this Act.

2. LEGISLATIVE OBJECTIVES

The State of New York has long recognized the broad social and economic goal of conserving energy. Accordingly, State and City agencies have sought, wherever possible, to fashion their policies and procedures to be supportive of this goal. This proposed rule making is necessary to realize these objectives within the framework of the rent regulatory laws.

3. NEEDS AND BENEFITS

One means of conserving energy is through the conversion of multi-family buildings with master metering of electricity, where the landlord is responsible for the cost of the tenants electricity, to individual metering, where the tenant is responsible for his or her own electric bills, and therefore tends to consume less electricity. There are two kinds of conversions: (1) direct metering, whereby the tenant is billed directly by the utility, and (2) submetering, whereby the tenant is billed by the landlord or a third party, who purchases electricity at the bulk rate from the utility. Under submetering there are opportunities for savings in the cost of electricity which can be passed on to the tenants. DHCR permits owners of master-metered buildings subject to rent regulation to apply for permission to convert to individual metering subject to certain conditions, which include a rent reduction to ameliorate the financial impact of direct billing on the tenants. In order to determine the amount of the rent reduction, DHCR consulted with the New York Energy Research and Development Agency, (NYSERDA; located at 286 Washington Avenue Extension, Albany, New York, 12203) who commissioned a study by a recognized architectural and engineering firm, Wendel Duchscherer, entitled Rent Reduction Analysis, issued January 2003 (For a copy of the report, contact David Prior (518) 862-1090, ext. 3285, e-mail djp@nyserda.org). The report confirmed that data derived from the 1999 New York City Housing Vacancy Survey showing costs of electricity reported by tenants in New York City could be used to establish a schedule of rent reductions for different-sized apartments, with adjustments based on variations in electric rates in different regions, and for bulk rates in the case of submetering. Based on that report, DHCR, with the advice and guidance of NYSERDA, developed a rent reduction formula that is authorized by the proposed rule making herein. Also, DHCR included provisions to the effect that conversion work qualifies for a rent increase as a Major Capital Improvement (MCI) and must be accompanied by a general rewiring of the building unless such work is unnecessary. Currently, the TPR provides that building rewiring qualifies as an MCI, and DHCR's long-standing practice has been to require rewiring in connection with electrical conversions.

4. COSTS

The proposed amendments are intended to encourage owners to undergo electrical conversions, which will reduce costs to the owners by relieving them of responsibility for payment of the tenants electric bills where the tenant is allowed unlimited consumption of electricity. For tenants it is intended to ameliorate the financial impact of paying their own electric bills, and in the case of submetering to reduce the overall cost of electricity to the tenants. The MCI portion of the proposed amendments will also encourage owners to undergo the expense of conversions and upgrading the electrical wiring in their buildings, which will benefit the tenants with greater capacity for appliances and safer and more reliable service. Recoupment from the tenants will be through MCI rent increases under the rent regulatory laws based on the cost of the work amortized over a seventy-two month period and limited to no more than a six percent increase per year. In view of the fact that rewiring is already an MCI under the TPR, and DHCR already requires rewiring in connection with conversions, the net rent increase attributable to the proposed amendments would

be only that portion of the cost which is associated with the conversion itself. Based on limited data from recent cases, it is estimated that such cost would result in an MCI increase of \$.36 to \$1.08 per room.

5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

6. PAPERWORK

It is not anticipated that the proposed amendments will result in any increased paperwork, except that every three years DHCR will be required to issue an operational bulletin setting forth an updated schedule of rent reductions based on a new Housing Vacancy Survey.

7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

8. ALTERNATIVES

There were no significant viable alternatives to the proposed amendments. Prior efforts to establish a schedule of dollar rent reductions for electrical conversions through issuance of an Operational Bulletin were reversed by the courts, which found that DHCR was required to proceed by regulatory amendment. Prior methods for determining rent reductions through a two-stage administrative proceeding, with both dollar rent reductions and a standard percentage rent reduction (6.6%) to remove prior electrical inclusion guidelines increases, were cumbersome and time-consuming to implement, barred by later modifications to the rent regulatory laws, and less consistent with state policy of encouraging conservation of energy in that they discouraged owners from bringing electrical conversion applications. Also, unlike prior rent reduction schedules, the proposed amendments require schedules that are supported by statistical studies and updated on a regular basis.

9. FEDERAL STANDARDS

The proposed amendments do not exceed any minimum federal standard.

10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules. Should the DHCR determine that delayed implementation is appropriate, proposed section 2507.11 of the Tenant Protection Regulations would authorize the agency to take such action.

Regulatory Flexibility Analysis

1. EFFECT OF RULE

The Tenant Protection Regulations (TPR) apply only to rent stabilized housing units located in those communities in Westchester, Rockland and Nassau Counties that are subject to the Emergency Tenant Protection Act. The class of small businesses affected by these proposed amendments would be limited to small building owners, those who own small numbers of rent stabilized units. The amended regulations are expected to have no burdensome impact on such small businesses. In fact, the amended regulations will add additional incentives to small building owners to voluntarily avail themselves of the benefits of the amended regulations by converting to individual metering. In so doing they may be able to reduce their costs of operation by recouping more of the cost of the electrical work through MCI rent increases, and being relieved of responsibility for payment of tenants electric bills where the tenants are currently allowed unlimited consumption of electricity.

These amendments to the TPR apply only in the aforementioned communities, and are expected to have no impact on the local governments thereof.

2. COMPLIANCE REQUIREMENTS

There are no new major compliance requirements in the proposed amendments. Owners will be encouraged to voluntarily undergo the expense of conversions and upgrading of electrical wiring in their buildings, and can recoup these expenses by obtaining Major Capital Improvement rent increases. The proposed amendments do not otherwise require regulated parties to perform any additional record keeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services, except that owners who do decide to undergo electrical conversions and rewiring in their buildings will need to obtain appropriate services.

4. COMPLIANCE COSTS

It is not contemplated that this action will ultimately impose any significant costs upon small businesses. Additionally, there should be no

costs imposed on local governments resulting from the proposed amendments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

6. MINIMIZE ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or local governments. Consequently, it was not necessary to consider the approaches suggested in SAPA Section 202-b(1).

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

DHCR consulted with the New York Energy Research and Development Agency (NYSERDA) who retained a consultant to conduct a study and make recommendations regarding the method by which rent reductions should be determined in connection with electrical conversions. Prior to developing a proposed regulatory amendment, DHCR served notices inviting recommendations and comments on groups and organizations representing owners and tenants, public officials, and other interested parties. In response to those notices, owners recommended that the rent reductions be sufficient to encourage owners to undergo the expense of electrical conversion. Tenants recommended return to an earlier method of reducing the rents which included, in addition to dollar rent reductions based on apartment size, an across-the-board rent reduction of 6.6% of the total apartment rent. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

In addition, a Regulatory Agenda was published in the *State Register* on January 8, 2003, indicating that DHCR was considering this proposed rule making, and all interested parties were given an opportunity to comment. No comments were received in response to this notice.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the *State Register*, at which all interested parties will have an opportunity to comment. Comments will be reviewed for possible inclusion where appropriate.

Rural Area Flexibility Analysis

The proposed rules are not anticipated to impose any new adverse reporting, recordkeeping or other compliance requirements on public or private entities in any rural area that is subject to these regulations.

Job Impact Statement

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Rent Stabilization Code

I.D. No. HCR-26-03-00014-P

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

Proposed action: Amendment of section 2522.4 of Title 9 NYCRR.

Statutory authority: Administrative Code of the City of New York, section 26-511(b)

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Public hearing(s) will be held at: 10:00 a.m. to 4:00 p.m., Aug. 20, 2003 at Department of Health, 3rd Fl. Conference Rm., Five Penn Plaza, New York, NY.

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

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

Text of proposed rule: The Rent Stabilization Code as amended and adopted pursuant to the powers granted to the Division of Housing and Community Renewal by section 26-511(b) of the Administrative Code of the City of New York, as recodified by Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.0[b] as amended by Laws of 1985, Chap. 888, section 2), and section 26-518(a) of such Code, as recodified by Laws of 1985, Chap. 507, section 1 (formerly section YY51-6.1[a] as added by Laws of 1985, Chap. 888, section 8) is amended to read as follows:

PART 2522 RENT ADJUSTMENT

Section 1

Paragraph (3) of subdivision (a) of section 2522.4 of this Part, item 22 under the Schedule of Major Capital Improvements, is amended to read as follows:

22. REWIRING:

- new copper risers and feeders extending from property box in basement to every housing accommodation; must be of sufficient capacity (220 volts) to accommodate the installation of air conditioner circuits in living room and/or bedroom; and work done to effectuate conversion from master to individual metering of electricity approved by DHCR pursuant to paragraph (3) of subdivision (d) of this section.

Section 2

Paragraph (3) of subdivision (d) of section 2522.4 of this Part is renumbered paragraph (4), and a new paragraph (3) is adopted to read as follows:

(3) such decrease results from an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent stabilized housing accommodations included in the 2003 Operational Bulletin governing electrical conversions issued pursuant to this paragraph and Section 2527.11 of this Code by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(i) *Direct Metering:* Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com. The charge for electricity is not part of the legal regulated rent and is not subject to this Code. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the DHCR. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(ii) *Submetering:* Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "1999 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the "Residential Electric Submetering Manual" revised October 2001, published by the New York State Energy Research and Development Authority, 286 Washington Avenue Extension, Albany, New York, and available on its website at www.nyserda.org, and reflected in DHCR's 2003 Operational Bulletin governing electrical conversions. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the legal regulated rent and is not subject to this Code. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the DHCR. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(iii) *Recipients of Senior Citizen Rent Increase Exemptions (SCRIE):* For a tenant who on the date of the conversion is receiving a SCRIE authorized by section 26-509 of the Rent Stabilization Law of Nineteen Hundred Sixty-nine, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to DHCR, is required to reduce the legal regulated rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in DHCR's 2003 Operational Bulletin governing electrical conversions, and thereafter the tenant is

responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to DHCR, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in the Operational Bulletin applicable to electrical conversions then in effect, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to DHCR, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

Text of proposed rule and any required statements and analyses may be obtained from: Maurice Jaimison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjaimison@dhcr.state.ny.us

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

Section 26-511b of the Administrative Code of the City of New York, Unconsolidated Laws as recodified by Section 1 of Chap. 907 of the Laws of 1985 (formerly Section yy51-6.0 [b], as amended by Section 2 of Chap. 888 of the Laws of 1985) and Section 26-518(a) of such Code, as recodified by Section 1 of Chap. 907 of the Laws of 1985 (formerly Section yy51-6.1 [a] as added by Section 8 of Chap. 888 of the Laws of 1985), authorizes DHCR to amend the Rent Stabilization Code (RSC) as necessary. Unconsol. Laws § 26-511(c)(8) authorizes DHCR to regulate services and § 26-511(c)(6)(b) authorizes DHCR to grant rent increases for major Capital Improvements under the Code.

2. LEGISLATIVE OBJECTIVES

The State of New York has long recognized the broad social and economic goal of conserving energy. Accordingly, State and City agencies have sought, wherever possible, to fashion their policies and procedures to be supportive of this goal. This proposed rule making is necessary to realize these objectives within the framework of the rent regulatory laws.

3. NEEDS AND BENEFITS

One means of conserving energy is through the conversion of multi-family buildings with master metering of electricity, where the landlord is responsible for the cost of the tenants electricity, to individual metering, where the tenant is responsible for his or her own electric bills, and therefore tends to consume less electricity. There are two kinds of conversions: (1) direct metering, whereby the tenant is billed directly by the utility, and (2) submetering, whereby the tenant is billed by the landlord or a third party, who purchases electricity at the bulk rate from the utility. Under submetering there are opportunities for savings in the cost of electricity which can be passed on to the tenants. DHCR permits owners of master-metered buildings subject to rent regulation to apply for permission to convert to individual metering subject to certain conditions, which include a rent reduction to ameliorate the financial impact of direct billing on the tenants. In order to determine the amount of the rent reduction, DHCR consulted with the New York Energy Research and Development Agency (NYSERDA; located at 286 Washington Avenue Extension, Albany, New York, 12203) who commissioned a study by a recognized architectural and engineering firm, Wendel Duchscherer, entitled Rent Reduction Analysis, issued January 2003 (For a copy of the report, contact David Prior (518) 862-1090, ext. 3285, e-mail djp@nyserd.org). The report confirmed that data derived from the 1999 New York City Housing Vacancy Survey showing costs of electricity reported by tenants in New York City could be used to establish a schedule of rent reductions for different-sized apartments, with adjustments based on variations in electric rates in different regions, and for bulk rates in the case of submetering. Based on that report, DHCR, with the advice and guidance of NYSERDA, developed a rent reduction formula that is authorized by the proposed rule making herein. Also, DHCR included provisions to the effect that conversion work qualifies for a rent increase as a Major Capital Improvement (MCI) and must be accompanied by a general rewiring of the building unless such work is unnecessary. Currently, the RSC provides that build-

ing rewiring qualifies as an MCI, and DHCR's long-standing practice has been to require rewiring in connection with electrical conversions.

4. COSTS

The proposed amendments are intended to encourage owners to undergo electrical conversions, which will reduce costs to the owners by relieving them of responsibility for payment of the tenants electric bills where the tenant is allowed unlimited consumption of electricity. For tenants it is intended to ameliorate the financial impact of paying their own electric bills, and in the case of submetering to reduce the overall cost of electricity to the tenants. The MCI portion of the proposed amendments will also encourage owners to undergo the expense of conversions and upgrading the electrical wiring in their buildings, which will benefit the tenants with greater capacity for appliances and safer and more reliable service. Recoupment from the tenants will be through MCI rent increases under the rent regulatory laws based on the cost of the work amortized over a seventy-two month period and limited to no more than a six percent increase per year. In view of the fact that rewiring is already an MCI under the RSC, and DHCR already requires rewiring in connection with conversions, the net rent increase attributable to the proposed amendments would be only that portion of the cost which is associated with the conversion itself. Based on limited data from recent cases, it is estimated that such cost would result in an MCI increase of \$.36 to \$1.08 per room.

5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

6. PAPERWORK

It is not anticipated that the proposed amendments will result in any increased paperwork, except that every three years DHCR will be required to issue an operational bulletin setting forth an updated schedule of rent reductions based on a new Housing Vacancy Survey.

7. DUPLICATION

The proposed amendments do not duplicate any known State or federal requirements.

8. ALTERNATIVES

There were no significant viable alternatives to the proposed amendments. Prior efforts to establish a schedule of dollar rent reductions for electrical conversions through issuance of an Operational Bulletin were reversed by the courts, which found that DHCR was required to proceed by regulatory amendment. Prior methods for determining rent reductions through a two-stage administrative proceeding, with both dollar rent reductions and a standard percentage rent reduction (6.6%) to remove prior electrical inclusion guidelines increases, were cumbersome and time-consuming to implement, barred by later modifications to the rent regulatory laws, and less consistent with state policy of encouraging conservation of energy in that they discouraged owners from bringing electrical conversion applications. Also, unlike prior rent reduction schedules, the proposed amendments require schedules that are supported by statistical studies and updated on a regular basis.

9. FEDERAL STANDARDS

The proposed amendments do not exceed any minimum federal standard.

10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules. Should the DHCR determine that delayed implementation is appropriate, section 2527.11 of the RSC authorizes the agency to take such action.

Regulatory Flexibility Analysis

1. EFFECT OF RULE

The Rent Stabilization Code (RSC) applies only to rent stabilized housing units in New York City. The class of small businesses affected by these proposed amendments would be limited to small building owners, those who own limited numbers of rent stabilized units. The amended regulations are expected to have no burdensome impact on such small businesses. In fact, the amended regulations will add additional incentives to small building owners to voluntarily avail themselves of the benefits of the amended regulations by converting to individual metering. In so doing they may be able to reduce their costs of operation by recouping more of the cost of the electrical work through MCI rent increases, and being relieved of responsibility for payment of tenants electric bills where the tenants are currently allowed unlimited consumption of electricity.

These amendments to the RSC, which applies exclusively in New York City, are expected to have no impact on the local government thereof.

2. COMPLIANCE REQUIREMENTS

There are no new major compliance requirements in the proposed amendments. Owners will be encouraged to voluntarily undergo the ex-

pense of conversions and upgrading of electrical wiring in their buildings, and can recoup these expenses by obtaining Major Capital Improvement rent increases. The proposed amendments do not otherwise require regulated parties to perform any additional record keeping, reporting, or any other acts. There are no new compliance requirements placed on local government.

3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services except that owners who do decide to undergo electrical conversions and rewiring in their buildings will need to obtain appropriate services.

4. COMPLIANCE COSTS

It is not contemplated that this action will ultimately impose any significant costs upon small businesses. Additionally, there should be no costs imposed on local government resulting from the proposed amendments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

6. MINIMIZING ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore have no adverse economic impact on such parties or the local government. Consequently, it was not necessary to consider the approaches suggested in SAPA section 202-b(1).

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

DHCR consulted with the New York Energy Research and Development Agency (NYSERDA) who retained a consultant to conduct a study and make recommendations regarding the method by which rent reductions should be determined in connection with electrical conversions. Prior to developing a proposed regulatory amendment, DHCR served notices inviting recommendations and comments on groups and organizations representing owners and tenants, public officials, and other interested parties. In response to those notices, owners recommended that the rent reductions be sufficient to encourage owners to undergo the expense of electrical conversion. Tenants recommended return to an earlier method of reducing the rents which included, in addition to dollar rent reductions based on apartment size, an across-the-board rent reduction of 6.6% of the total apartment rent. All issues raised by concerned parties were carefully reviewed and considered by DHCR.

In addition, a Regulatory Agenda was published in the *State Register* on January 8, 2003, indicating that DHCR was considering this proposed rule making, and all interested parties were given an opportunity to comment. No comments were received in response to this notice.

Local government participation in New York City was effectuated by submission of the draft regulations to the New York City Department of Housing Preservation and Development. No comments were received from that agency.

Finally, prior to adoption of the amendments, a public hearing will be held, as described in this issue of the *State Register*, at which all interested parties will have an opportunity to comment. Comments will be reviewed for possible inclusion where appropriate.

Rural Area Flexibility Analysis

The Rent Stabilization Code applies exclusively to New York City, and therefore the proposed rules will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities located in any rural area pursuant to Subdivision 10 of SAPA Section 102.

Job Impact Statement

It is apparent from the text of the rule, that there will be no adverse impacts on jobs and employment opportunities.

Insurance Department

EMERGENCY RULE MAKING

Rules Governing Individual and Group Accident and Health Insurance Reserves

I.D. No. INS-26-03-00010-E

Filing No. 604

Filing date: June 17, 2003

Effective date: June 17, 2003

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

Action taken: Repeal of Part 94 and addition of new Part 94 (Regulation 56) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217 and 4517

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

Specific reasons underlying the finding of necessity: Regulation No. 56 was originally effective August 18, 1971 in its present form and has not been substantively amended since that time. In the intervening 31 years, the National Association of Insurance Commissioners has adopted new reserving tables for individual and group disability income insurance policies, popularly referred to as the Commissioners' Disability Tables ("CDT"). The current CDT was adopted in 1986 and is used widely across the country as the standard for holding reserves for individual and group disability insurance policies. It reflects both modern morbidity and claims experience and the judgement of actuaries and regulators who are knowledgeable about the current state of the disability insurance market.

However, New York authorized insurers are required to use the 1964 CDT because it was required by Regulation No. 56 (see, e.g., 11 NYCRR Part 94.1 (a)(4)(iii)(A)). Also, Regulation No. 56 did not apply to group insurance, providing little or no guidance to New York insurers that write this important form of protection. The effect of the application of this outdated regulation is that New York authorized insurers are required to hold reserves far in excess of the national standard for disability insurance active lives reserves, but below the prevailing standard for claims reserves. Most New York authorized insurers hold reserves in excess of the amount needed to pay claims due to the required use of the outdated tables. For these insurers, the adoption of the more recent tables will significantly reduce the cost of doing business and allow them to compete more effectively with insurers that are not subject to New York standards and to pass the cost savings on to consumers. For some insurers, this regulation may require an increase in reserves especially for coverages such as group health insurance for which there had been no standards previously. The adoption of these standards will help to ensure that such insurers remain financially capable of paying claims as they come due.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on December 31, 2002. The filing date for the June 30, 2003 quarterly statement is August 15, 2003. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this new Regulation No. 56 is necessary for the general welfare.

Subject: Rules governing individual and group accident and health insurance reserves.

Purpose: To prescribe rules and regulations for valuation of minimum individual and group accident and health insurance reserves including standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

Substance of emergency rule: The following is a summary of the substance of the rule:

Section 94.1 lists the main purposes of the regulation including implementation of sections 4217(d), 4517(d) and 4517(f) of the Insurance Law and prescribing rules for valuing certain accident and health benefits in the life insurance policies.

Section 94.2 is the applicability section. This section applies to both individual policies and group certificates. The regulation applies to all life insurers, fraternal benefit societies, and accredited reinsurers doing busi-

ness in the State of New York. It applies to all statutory financial statements filed after its effective date.

Section 94.3 is the definitions section.

Section 94.4 sets forth the general requirements and minimum standards for claim reserves, including claim expense reserves and the testing of prior year reserves for adequacy and reasonableness using claim runoff schedules and residual unpaid liability.

Section 94.5 sets forth the general requirements and minimum standards for unearned premium reserves.

Section 94.6 sets forth the general requirements and minimum standards for contract reserves.

Section 94.7 concerns increases to, or credits against reserves carried, arising from reinsurance agreements.

Section 94.8 prescribes the methodology of adequately calculating the reserves for waiver of premium benefit on accident and health policies.

Section 94.9 provides that a company shall maintain adequate reserves for all individual and group accident and health insurance policies that reflect a sound value being placed on its liabilities under those policies.

Section 94.10 provides the specific standards for morbidity, interest and mortality.

Section 94.11 allows for a three-year period for grading into the higher reserves beginning with year-end 2003 for insurers for which higher reserves are required because of this Part.

Section 94.12 establishes the severability provision of the regulation.

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 14, 2003.

Text of emergency rule and any required statements and analyses may be obtained from: Joanna Rose, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: jrose@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation No. 56 (11 NYCRR 94) is derived from sections 201, 301, 1304, 1308, 4217, and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise to make regulations.

Section 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

Section 4217(d) provides that reserves for all individual and group accident and health policies shall reflect a sound value placed on the liabilities of such policies and permits the superintendent to issue, by regulation, guidelines for the application of reserve valuation provisions for these types of policies.

For fraternal benefit societies, section 4517(d) provides that reserves for all individual accident and health certificates shall reflect a sound value placed on the liabilities of such certificates and permits the superintendent to issue, by regulation, standards for minimum reserve requirements on these types of certificates. Additionally, section 4517(f) provides that reserves for unearned premiums and disabled lives be held in accordance with standards prescribed by the superintendent for certificates or other obligations which provide for benefits in case of death or disability resulting solely from accident, or temporary disability resulting from sickness, or hospital expense or surgical and medical expense benefits.

2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is through requiring all insurers licensed to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

3. Needs and benefits:

The regulation is necessary to help ensure the solvency of life insurers doing business in New York. The Insurance Law does not specify mortality, morbidity, and interest standards used to value individual and group accident and health insurance policies and relies on the superintendent to specify the method. Without this regulation, there would be no standard

method for valuing such products and, in fact, the current regulation, absent the emergency regulation, provides no guidance related to certain coverages such as group accident and health policies. This could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

Additionally, the current regulation, absent the emergency regulation, requires higher reserves than necessary for certain individual accident and health insurance policies. This emergency regulation, by lowering such reserves for individual policies, will result in a lower cost of doing business in New York.

4. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The regulation imposes no new reporting requirements.

7. Duplication:

The regulation does not duplicate any existing law or regulation.

8. Alternatives:

The only significant alternative to be considered was to keep the current version of Regulation No. 56, without adopting this emergency regulation, which would result in different reserve requirements for those life insurers licensed in New York.

9. Federal standards:

There are no federal standards in the subject area.

10. Compliance schedule:

The regulation applies to financial statements commencing with December 31, 2002, which must be filed by March 1, 2003. Where the requirements of this regulation produce reserves higher than those calculated at year-end 2001, insurers may hold reserves at such lower level prior to year-end 2003. Beginning with year-end 2003, the regulation allows a four year grade-in period for the holding of higher reserves. Insurers must be in full compliance with this Part by year-end 2006. This allows insurers subject to the regulation ample time to achieve full compliance, since this regulation has been adopted on an emergency basis since December 31, 2002.

Regulatory Flexibility Analysis

1. Small Businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies licensed to do business in New York State, none of which fall within the definition of "small business" as found in Section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurance companies covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

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

The regulation establishes reserve requirements for individual and group accident and health policies and establishes standards for valuing certain accident and health benefits in life insurance policies and annuity contracts.

3. Costs:

Costs to most insurers licensed to do business in New York State will be minimal, including the cost to develop computer programs which calculate reserves for accident and health insurance due to several changes in the underlying reserve methodology and new morbidity tables. Companies that are domiciled in New York and are not licensed to do business in other states will be impacted the most by this adoption. Most insurers that are domiciled in New York and licensed to do business in other states already have in place identical or similar procedures for reserve requirements and morbidity tables due to adoption by many states of the Health Insurance Reserves Model Regulation of the National Association of Insurance Commissioners (NAIC). The adoption of this regulation by New York State improves reserve uniformity throughout the insurance industry. Therefore, minimal additional costs will be incurred in most cases. For some insurers doing business only in New York or in other states that have not adopted the NAIC model regulation, the adoption for the first time of standards for certain coverages such as group health insurance may require an increase in reserves and would therefore increase the insurer's cost of capital. In addition, an insurer that needs to modify its current systems could produce modifications internally or purchase software from a consultant, who would typically charge \$5,000 to \$10,000. Once the program has been developed, no additional systems costs should be incurred due to those requirements.

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with member companies of the Life Insurance Council of New York (LICONY). A copy of the draft was distributed to LICONY in November, 2002. In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the January 2003 issue of the *State Register*.

Job Impact Statement

Nature of impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for setting reserves for insurers. Most insurers will be able to reduce reserves and a few may need to increase reserves but this is unlikely to impact jobs and employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-26-03-00003-P

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

Proposed action: This is a consensus rule making to amend sections 83.2 and 83.4(s) and repeal section 83.4 (Regulation 172) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327, and 6404; Public Health Law, sections 4403, 4403-a, 4403-(c)(12), and 4408-a; and L. 2002, ch. 599

Subject: Financial statement filings and accounting practices and procedures.

Purpose: To update a citation; make a technical amendment; and delete an obsolete provision.

Text of proposed rule: Subdivision (c) of Section 83.2 of Part 83 is amended to read as follows:

(c) To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy, procedures and instruction manuals. The latest of these manuals, the Accounting Practices and Procedures Manual as of March [2002*] 2003* ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs").

The footnote to subdivision (c) of Section 83.2 is amended to read as follows:

*ACCOUNTING PRACTICES AND PROCEDURES MANUAL AS OF MARCH [2002] 2003. Copyright 1999, 2000, 2001, 2002, 2003 by National Association of Insurance Commissioners, in Kansas City, Missouri.

Section 83.4(s) is amended to read as follows:

(s) Paragraphs 10, 11 and 14 of SSAP No. 65 Property and Casualty Contracts are not adopted. In accordance with Section 4117(d)(1) and (2) of the Insurance Law, non-tabular *known case* reserves for *indemnity* and medical claims [shall] *may* be discounted [, and]; Incurred But Not Reported reserves and unpaid loss adjustment expenses shall not be discounted.

Section 83.5 is repealed.

Text of proposed rule and any required statements and analyses may be obtained from: Joanna Rose, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: jrose@ins.state.ny.us

Data, views or arguments may be submitted to: John Gemma, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5276, e-mail: jgemma@ins.state.ny.us

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

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

Consensus Rule Making Determination

This Part is being amended to update a citation in Section 83.2(c) referring to the publication date of the accounting manual entitled Accounting Practices and Procedure Manual as of March 2003 (instead of 2002), and to delete Section 83.5 containing an obsolete reference to a special report for filings made in 2001. The change in Section 83.2(c) regarding the citation for the accounting manual will have the effect of including in the regulation technical modifications made in the accounting manual since the publication of the 2002 manual. These modifications are technical changes in accounting practices and procedures which were proposed, discussed, commented upon, and adopted by the National Association of Insurance Commissioners in the past year, in accordance with the procedure described in Section 83.2(g). It is unlikely that any person will object to these technical changes.

The technical amendment to Section 83.4(s) makes no substantive change. It merely clarifies the language of subdivision (s) so that its intent is stated more clearly and precisely.

Job Impact Statement

The proposed rule changes should have no impact on jobs and employment opportunities in New York State. The changes merely delete obsolete language set forth in Section 83.5; clarify the wording of Section 83.4(s); and update a citation in Section 83.2(c) to the publication date of the accounting manual entitled Accounting Practices and Procedure Manual as of March 2003 (instead of 2002). The change in the publication date reference includes technical amendments in the accounting manual, none of which have any impact on jobs or employment opportunities.

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

Standards of Records Retention by Insurance Companies

I.D. No. INS-26-03-00006-P

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

Proposed action: This is a consensus rule making to amend section 243.1 (Regulation 152) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 309, 310 and 2344

Subject: Standards of records retention by insurance companies.

Purpose: To correct obsolete language and references in the definition of "insurer," in order to reflect current statutory provisions.

Text of proposed rule: Section 243.1(a) of Part 243 is amended to read as follows:

(a) "Insurer" means an authorized insurer, as such term is defined in Insurance Law Section 107(a)(10); a joint underwriting association; [the life insurance department of a savings bank, as such term is defined in Banking Law Section 261;] the state insurance fund; the medical malpractice insurance [association] plan; the New York property insurance underwriting association; the New York automobile insurance plan; the motor vehicle accident indemnification corporation; a health maintenance organization subject to Public Health Law Article 44; an employee welfare fund; a charitable annuity society, pension fund, retirement system, fraternal benefit society, or other entity exempt from the doing of an insurance business pursuant to Insurance Law Section 1108 or other section of the Insurance Law and which is subject to examination by the superintendent; a viatical settlement company; or a licensed rate service organization.

Text of proposed rule and any required statements and analyses may be obtained from: Joanna Rose, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: jrose@ins.state.ny.us

Data, views or arguments may be submitted to: John Gemma, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5276, e-mail: jgemma@ins.state.ny.us

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

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

Consensus Rule Making Determination

This Part is being amended to delete an obsolete reference to the life insurance department of a savings bank, since such life insurance departments no longer exist, as provided by Chapter 540 of the Laws of 1998.

The amendment also changes an obsolete reference to the Medical Malpractice Insurance "Association" to read Medical Malpractice Insurance "Plan", in accordance with Chapter 147 of the Laws of 2000 providing for the dissolution of the Association. The Medical Malpractice Insurance Plan was organized pursuant to provisions of 11 NYCRR Part 430 (Regulation 170).

Since these amendments merely delete or change obsolete references in order to reflect statutory changes, no person is likely to object to them.

Job Impact Statement

The proposed rule changes should have no impact on jobs and employment opportunities in New York State. The changes merely delete obsolete language and substitute a reference to the Medical Malpractice Insurance "Plan" (rather than "Association"), in order to reflect current statutory provisions.

Office of Mental Health

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

Outpatient Programs

I.D. No. OMH-26-03-00008-EP

Filing No. 603

Filing date: June 16, 2003

Effective date: June 16, 2003

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

Action taken: Amendment of sections 592.3, 592.4, 592.7, 592.8 and 588.14 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b), 31.04(a), 41.13(3), 41.15(a) and 43.02(a); Social Services Law, sections 364(3) and 364-a(1); and L. 2001, ch. 54, L. 2002, ch. 54

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

Specific reasons underlying the finding of necessity: These amendments allow additional deficit to be converted to supplemental reimbursement consistent with the 2001-2002 and 2002-2003 enacted state budgets. These amendments will avoid a reduction in services that would otherwise take place.

Subject: Comprehensive outpatient programs and medical assistance payment for outpatient programs.

Purpose: To allow for the conversion of net deficit financing for intensive psychiatric rehabilitation treatment (IPRT) programs and partial hospitalization programs and allow for adjustments in the comprehensive outpatient programs (COPs) rates and increase the community support program unit of service ceiling.

Text of emergency/proposed rule: Part 592 of the Regulations of the Commissioner of Mental Health is amended as follows:

Subdivision 592.3(a) is amended to read as follows:

(a) This Part applies to any provider of services which has been licensed to operate [a clinic treatment program for adults with mental illness and/or children with serious emotional disturbance or day treatment, continuing treatment or continuing day treatment programs,] *an outpatient mental health program* in accordance with Part [585 or] 587 of this Title and which is designated as a comprehensive outpatient program.

Subdivision 592.4(a) is amended to read as follows:

(a) Comprehensive outpatient program means a provider of services which has been licensed to operate [a clinic treatment program for adults with mental illness and/or children with serious emotional disturbance or a day treatment, continuing treatment or continuing day treatment programs for adults with mental illness] *an outpatient mental health program* in accordance with Part [585 or] 587 of Title 14 and has been annually designated by a local governmental unit to be eligible to receive supplemental medical assistance reimbursement for a specific program or specific programs under its auspice which agrees to provide the services required in this Part.

Subdivision 592.4(e) is deleted in its entirety and replaced by:

(e) *Comprehensive outpatient program allocation means the maximum amount of comprehensive outpatient program reimbursement that a provider is allowed to retain in each local fiscal year.*

Subdivision 592.7(a) is amended to read as follows:

(a) In order to be designated as a comprehensive outpatient program, a provider of services:

(1) shall currently be receiving or have received during local fiscal year ended in 1989 for upstate and Long Island based providers and local fiscal year ended in 1990 for New York City a State aid grant pursuant to Article 41 of the Mental Hygiene Law or supplemental reimbursement under the Medical Assistance Program pursuant to this Part; [or] *and*;

(2) shall have been designated as a comprehensive outpatient program pursuant to subdivision 592.8(j) of this Part and shall:

(i) ensure that access and admission to services is based upon service availability, and not based on an individual's ability to pay for such services;

(ii) provide priority access to adults with serious mental illness or children with serious emotional disturbance, as applicable. Each program shall establish policies and procedures to ensure priority access to such individuals;

(iii) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting, *except that for partial hospital programs the requirement shall be within two business days*;

(iv) agree to provide in each year at least the same percentage of visits under the medical assistance program as were provided in 1990. The local governmental unit, with the approval of the commissioner, may negotiate a different percentage with the provider if the provider shows that it will not reasonably be able to maintain the percentage of visits provided in 1990. This shall not affect the calculation of the provider's rate of reimbursement pursuant to section 592.8 of this Part;

(v) agree to provide a reasonable percentage of visits under the medical assistance program if designated on or after January 1, 1992. Such percentage shall be agreed upon annually with the local governmental unit, but in no case shall the agreed upon percentage in any local fiscal year commencing in or after 1992 be lower than the percentage served by the program in 1990. The local governmental unit, with the approval of the commissioner, may negotiate a different percentage with the provider if the provider shows that it will not reasonably be able to maintain the percentage of visits provided in 1990. This shall not affect the calculation of the provider's rate of reimbursement pursuant to section 592.8 of this Part.]

(vi)(iv) agree to engage in annual mental health planning activities with the local governmental unit;

(vii)(v) assure that services are provided to all individuals who are part of a designated geographic area or target population for whom the comprehensive outpatient program is responsible as designated in the current local government plan;

(viii)(vi) arrange for the provision of or directly provide 24 hour emergency services. For newly designated providers, this must be completed no later than 90 days from the time of designation;

(ix)(vii) develop formal agreements with all levels of inpatient care which will:

(a) assure immediate and planned patient access to inpatient services; and

(b) clearly identify responsibility for coordinating treatment and accepting responsibility for treatment and after care from the referring hospital. For newly designated providers, these agreements must be completed no later than 90 days from time of designation.

(x)(viii) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment. For newly designated providers, this must be completed no later than 90 days from the time of designation;

(xi)(ix) *except for partial hospital programs*, review, at least annually, the treatment services, support services and recovery status of each patient. Such review shall be documented;

(xii)(x) submit, upon request by the Office of Mental Health or the local governmental unit, in a timely fashion and consistent with the Mental Hygiene Law, Section 33.13 which governs the confidentiality of patient records, all cost, utilization, programmatic or clinical reports and/or documentation required;

(xiii)(xi) create a consumer advisory board and/or include consumers on the governing body of the program. For newly designated providers, this must be completed no later than 90 days from the time of designation; and

(xiv)(xii) develop staffing patterns which take into account the cultural and ethnic backgrounds of patients.

Subdivision 592.8(c) is amended to read as follows:

(c) The supplemental rate, for providers with at least one comprehensive outpatient program, shall be calculated as follows:

(1) For [eligible clinic, continuing day treatment and day treatment programs] outpatient mental health programs which are designated providers pursuant to this Part, grants received for the local fiscal year ended in [1995] 2001 for upstate and Long Island based providers, and for the local fiscal year ended in [1996] 2001 for New York City based providers, shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the [initial] *previous* supplemental rate.

(2) the sum of grants received by the provider, as recalculated under paragraph (1) of this subdivision, shall be divided by the projected number

of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

(i) *The combined total of outpatient mental health program visits reimbursed by Medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent.* [For the purpose of this section, the projected number of annual] These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare. Providers, who [for the local fiscal year ended in 1994] *in the three most recent fiscal years* earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the [local fiscal year ended in 1994] *three most recent fiscal years* and the number of dually eligible visits provided in the [federal fiscal year ended in 1994] *three most recent fiscal years*. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the [local fiscal year ended in 1994] *three most recent fiscal years*;

(ii) For providers whose volume of visits reimbursed by Medicaid in 1994 was greater than or equal to 110% of the number of Medicaid visits projected by the OMH for the local fiscal year ended in 1994, the projected number of annual visits shall be 90.9% of visits reimbursed by Medicaid in 1994. Providers, who for the local fiscal year ended 1994 earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of visits adjusted as set forth in subparagraph (2)(i) of this subdivision.

(iii) For providers whose volume of visits reimbursed by Medicaid in 1994 was less than 110% of the number of Medicaid visits projected by the Office of Mental Health for the local fiscal year ended in 1994, the projected number of annual visits shall be the total number of Medicaid units projected by the Office of Mental Health for the local fiscal year 1994. Providers, who for the local fiscal year ended in 1994 earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted as set forth in subparagraph (2)(i) of this subdivision;

(iv) For providers who were initially designated after April 1, 1995, the number of annual visits shall be 90.9% of visits reimbursed by Medicaid in 1994; and]

(v)(ii) Rates calculated pursuant to subparagraph[s] (i) [(ii), (iii) and (iv)] of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within one year after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph (3) of this subdivision.

(3) The supplemental rate for a provider operating an [licensed] outpatient mental health [clinic, day treatment or continuing day treatment] program shall be the lesser of the rate calculated in paragraph (2) of this subdivision or [\$100.00] *a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget* provided, however, the supplemental rate of an Article 31 provider which operates a comprehensive outpatient program shall not be less than an amount that, when added to the base fee, yields an amount that is less than the total of the corresponding fee and supplemental reimbursement for any provider which is not eligible to be designated as comprehensive outpatient program.

Subdivision 592.8(h) is amended to read as follows:

The Office of Mental Health may amend the supplemental rate *and/or the comprehensive outpatient program allocation* to account for program changes required by the Office of Mental Health, *local governmental unit*, or other administrative agency, or approved by the commissioner pursuant to Part 551 of this Title.

(1) *When a provider receives reimbursement under this part which is less than its comprehensive outpatient program allocation in a local fiscal year (beginning with Calendar Year 2001 for upstate or Long Island based providers or Local Fiscal Year 2000-01 for New York City based providers), the local governmental unit may, subject to the approval of the Commissioner of the Office of Mental Health and the Director of the Division of Budget, allocate any amount of the provider's comprehensive outpatient program reimbursement which is less than its comprehensive*

outpatient program allocation to one or more designated comprehensive outpatient programs within the same county beginning in the following fiscal year. In making such adjusted allocations, the local governmental unit shall consider the extent to which a provider receiving an additional allocation is in compliance with the program requirements set forth in Section 592.7 of this Part. This adjusted allocation process shall be accomplished through the revision of each affected provider's comprehensive outpatient program allocations for the previous fiscal year. In no case shall such adjusted allocation be less than the amount of comprehensive outpatient program reimbursement received by a provider consistent with its applicable comprehensive outpatient program allocation received in either the 2000 local fiscal year or the local fiscal year before the year in which such reimbursement is received, whichever amount is less.

(2) When a provider closes down one or more program location, but continues to operate the other locations of the designated program the supplemental revenue to the designated program shall be reduced proportionately by the number of Medicaid visits associated with the closed location(s). The State share of the reduced Medicaid supplemental revenue may be allocated to the county in the form of additional local assistance grants, or the visits previously reimbursed to the closed program location(s) may be added to the visits of one or more other designated outpatient programs of the same outpatient category in the same county.

Part 588 of the Regulations of the Commissioner of Mental Health is amended as follows:

Subdivision 588.14(d)(4) is amended as follows:

4. Grants, as recalculated pursuant to paragraph (2) of this subdivision, shall be divided by the average annual units of service calculated pursuant to paragraph (3) of this subdivision. [In no event shall such calculation exceed \$101.50.] *The community support program rate cap will be established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget.*

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 August 14, 2003.

Text of rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.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 7.09(b) of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction.

Section 31.04(a) of the Mental Hygiene Law provides that the Commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of Article 31.

Section 41.13(3) of the Mental Hygiene Law provides that a local government shall direct and administer a local comprehensive plan for mentally disabled residents of its area.

Section 41.15(a) of the Mental Hygiene Law provides that net operating costs of programs incurred pursuant to an appropriate plan and approved by the Commissioner shall be eligible for the state aid.

Section 43.02(a) of the Mental Hygiene Law provides that payments under the medical assistance program for outpatient services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget.

Sections 364(3) and 364-a (1) of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Chapter 54 of the Laws of 2001, the enacted budget for New York State Fiscal Year 2001-2002 and Chapter 54 of the Laws of 2002, the enacted budget for Fiscal Year 2002-2003, provide for payment, by the Office of Mental Health, of state financial assistance, net of disallowances, for community mental health programs pursuant to Article 41 and other provisions of the Mental Hygiene Law.

2. Legislative objectives: Articles 7, 31 and 41 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs, address the role of local governments and provide direction regarding state aid for local assistance.

Sections 364 and 364-a of the Social Service Law reflect the objective that the Office of Mental Health shall be responsible for establishing and maintaining standards for Medicaid reimbursed mental health programs.

Chapter 54 of the Laws of 2001, the enacted budget for New York State Fiscal Year 2001-2002, included a Medicaid initiative to reduce net deficit financing with a commensurate increase in Medicaid and no impact on gross program levels. This initiative, intended to begin on July 1, 2001, includes converting net deficit financing to Medicaid for Intensive Psychiatric Rehabilitation Programs and Partial Hospital Programs and maximizing Comprehensive Outpatient Programs (COPS) revenue by a conversion of additional net deficit financing and increasing the COPS rate cap as established by the Commissioner of Mental Health and approved by the Division of the Budget.

Chapter 54 of the Laws of 2002, the enacted budget for New York State Fiscal Year 2002-2003, provides for an increase by the Office of Mental Health to the COPS rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget and for an increase in the community support program unit of service rate cap established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget. These changes are intended to begin December 1, 2002.

3. Needs and benefits: The amendments to these regulations streamline and update the COPS methodology consistent with the 2001-2002 enacted state budget; permit Intensive Psychiatric Rehabilitation Programs (IPRT) and Partial Hospitalization Programs that meet the additional requirements placed upon Comprehensive Outpatient Programs (COPS) to receive supplemental Medicaid payment; convert net deficit financing for IPRT and Partial Hospitalization programs meeting these requirements to Medicaid, in recognition of the reimbursable costs associated with COPS program requirements; and eliminate the need for yearly amendments to the COPS regulations by changing rate cap reference to a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget. These changes continue to allow providers to achieve efficiencies in the operation of their outpatient treatment programs without a need for a reduction of services.

4. Costs:

a) Costs of regulated parties: Providers designated by counties as operating Comprehensive Outpatient Programs will continue to be required to achieve efficiencies in order to maintain service levels in their outpatient treatment programs.

There are no costs associated with replacing additional net-deficit with supplemental Medicaid reimbursement.

b) Costs to State and Local government and the agency: Implementation of these amendments is consistent with the 2001-2002 and 2002-2003 enacted state budgets and is expected to save New York State \$8,736,000 annually. This includes replacing additional deficits with supplemental Medicaid reimbursement. OMH State aid appropriations will be reduced by approximately \$16,067,000 annually. Expenditures for the State share of the supplemental Medicaid reimbursement of eligible providers will total approximately \$7,331,000 annually.

Implementation of these regulations is expected to save local governments \$2,785,000. Local grants will be reduced by approximately \$9,553,000 while expenditures for the local share of the supplemental Medicaid reimbursement of eligible providers will total approximately \$6,768,000.

The above cost analysis addresses all changes to the COPS programs made to comply with the 2001-2002 and 2002-2003 enacted state budget.

The above analysis also does not include the fiscal impact of increasing the community support program rate cap from \$101.50 to \$104.55 as required by the 2002-2003 enacted state budget. That \$3.05 rate change will increase the state share by \$8,300 annually and the state wide local share by \$7,600 annually.

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

6. Paperwork: This rule should not increase the paperwork requirements of affected providers.

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

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative would have been contrary to the Legislative intent as set forth in the 2001-2002 and 2002-2003 enacted state budgets and would have resulted in reduction in services and program closures, since sufficient funding would no longer be available for existing programs. This alternative was rejected.

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

10. Compliance schedule: These regulatory amendments will be effective upon their adoption, and shall be deemed to have been effective on and after July 1, 2001. These regulations allow for an increase in the COPS rate ceiling from \$100 per visit to \$200 per visit effective from July 1, 2001 to November 30, 2002 and from \$200 per visit to \$206 per visit effective on and after December 1, 2002. They also allow for an increase in the community support program rate ceiling from \$101.50 to \$104.55, effective on and after December 1, 2002. This compliance schedule is consistent with the 2001-2002 and 2002-2003 enacted state budgets.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas Comprehensive Outpatient Program (COPS) funding for rural and other counties will not be reduced and additional flexibility regarding the funding will be available to rural and other county officials.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves adjustments to financing mechanisms for existing programs and will not have a substantial adverse impact on jobs and employment activities.

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

Operation of Outpatient Programs

I.D. No. OMH-26-03-00007-P

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

Proposed action: This is a consensus rule making to amend section 587.4 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b) and 31.04(a)

Subject: Operation of outpatient programs.

Purpose: To delete outdated references to the credentialed alcoholism counselor and credentialed substance abuse counselor and replace them with a single reference to credentialed alcoholism and substance abuse counselor.

Text of proposed rule: Part 587 is amended to read as follows:

Items (iii) through (xiv) of subparagraph (2) of subdivision (d) of Section 587.4 of this Part are renumbered items (ii) through (xiii) and items (i) and (ii) are deleted and a new item (i) is added to read as follows:

(i) *Credentialed alcoholism and substance abuse counselor is an individual who is currently credentialed by the New York State Office of Alcoholism and Substance Abuse Services in accordance with 14 NYCRR Part 853.*

Text of rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

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

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

Consensus Rule Making Determination

No person is likely to object to this amendment because it merely removes outdated references to credentialed alcoholism counselor and credentialed substance abuse counselor and replaces them with the current and correct reference to credentialed alcoholism and substance abuse counselor. Credentialed alcoholism counselor and credentialed substance abuse counselor were formerly separately credentialed by the New York State Office of Alcoholism and Substance Abuse Services. Under Part 853 of this Title, effective March 19, 1997, they were replaced by credentialed alcoholism and substance abuse counselor, or C.A.S.A.C.

Job Impact Statement

Because the purpose of this amendment is merely to update out of date references, it is apparent that it will not have any impact on jobs and employment activities.

**Office of Mental Retardation
and Developmental Disabilities**

**EMERGENCY
RULE MAKING**

Health Care Decisions Act for Persons with Mental Retardation

I.D. No. MRD-26-03-00005-E

Filing No. 600

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: Amendment of section 633.10 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07 and 13.09; and Surrogate's Court Procedure Act, section 1750-b

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

Specific reasons underlying the finding of necessity: The Health Care Decisions Act for Persons with Mental Retardation establishes a specific process that can only occur in accordance with regulations promulgated by the commissioner of OMRDD. These regulations are necessary to fully implement the safeguarding processes of the new law to ensure that in accordance with the new law, appropriate health care decisions can be made for persons with mental retardation who are terminally ill or have other extremely serious medical conditions

Subject: Regulations to implement the Health Care Decisions Act for Persons with Mental Retardation.

Purpose: To establish a process for OMRDD to determine whether physicians and psychologists are qualified to make decisions or provide consultation to the attending physician. In addition, the regulations include additional delineation of the responsibility of OMRDD and agencies operating OMRDD-certified residences when they receive notification of health care decisions that involve the withdrawal or withholding of life-sustaining treatment.

Text of emergency rule: A new paragraph (7) is added to 14 NYCRR 633.10(a) to read as follows:

(7) *Provisions relevant to implementation of the Health Care Decisions Act for Persons with Mental Retardation*

(i) *Parties involved in decisions to withdraw or withhold life-sustaining treatment.*

(a) *Pursuant to § 1750-b of the surrogate's court procedure act (SCPA), in addition to parties specified by the statute, parties may seek the approval of the commissioner to be authorized to perform the following duties:*

(1) *serve as the attending physician to confirm, with a reasonable degree of medical certainty, that the person with mental retardation lacks capacity to make health care decisions (if the consultant lacks specified additional qualifications); or*

(2) *serve as a consulting physician or psychologist regarding confirmation, with a reasonable degree of medical certainty, that the person with mental retardation lacks capacity to make health care decisions (if the attending physician lacks specified additional qualifications); or*

(3) *serve as the attending physician to determine that, to a reasonable degree of medical certainty, the person with mental retardation would suffer immediate and severe injury from notification regarding implementation of a decision to withdraw or withhold life-sustaining treatment from such person (if the consultant lacks specified additional qualifications); or*

(4) *serve as a consulting physician or psychologist regarding a determination that, to a reasonable degree of medical certainty, the person with mental retardation would suffer immediate and severe injury from notification regarding implementation of a decision to withdraw or withhold life-sustaining treatment from such person (if the attending physician lacks specified additional qualifications).*

(b) *In order to obtain the approval of the commissioner, physicians and licensed psychologists shall either possess specialized training in the provision of services to persons with mental retardation or have at*

least three years experience in the provision of such services, and shall satisfy any other criteria established by the commissioner.

(ii) Upon receipt of notification of a decision to withdraw or withhold life-sustaining treatment in accordance with § 1750-b(4)(e)(ii) of the surrogate's court procedure act (SCPA), the chief executive officer (see § 633.99) of the agency (see § 633.99) shall confirm that the person's condition meets all of the criteria set forth in SCPA § 1750-b(4)(a) and (b). In the event that the chief executive officer is not convinced that all of the necessary criteria are met, he or she may object to the decision and/or initiate a special proceeding to resolve such dispute in accordance with SCPA § 1750-b(5) and (6).

(iii) For purposes of communicating the notification required by § 1750-b(4)(e)(iii) of the surrogate's court procedure act (SCPA), the commissioner (see § 633.99) designates the directors of each of the DDSOs (see § 633.99) to receive such notification from an attending physician. In any such case, the DDSO director shall confirm that the person's condition meets all of the criteria set forth in SCPA § 1750-b(4)(a) and (b). In the event that the director is not convinced that all of the necessary criteria are met, he or she may object to the decision and/or initiate a special proceeding to resolve such dispute in accordance with SCPA § 1750-b(5) and (6).

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 10, 2003.

Text of emergency rule and any required statements and analyses may be obtained from: Barbara Brundage, Acting Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09.

c. OMRDD's authority under the New York State Surrogate's Court Procedure Act Section 1750-b to promulgate regulations to implement the statutory provisions.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in Section 1750-b of the New York State Surrogate's Court Procedure Act, which provide for regulations of the Commissioner of OMRDD as a prerequisite to implement specific aspects of safeguarding processes established by the law.

3. Needs and benefits: The newly enacted Health Care Decisions Act for Persons with Mental Retardation (Chapter 500 of the Laws of 2002), which added a new § 1750-b to the Surrogate's Court Procedure Act, establishes procedures whereby health care decisions involving life-sustaining treatment may be made for persons with mental retardation by guardians appointed pursuant to Article 17-A of the Surrogate's Court Procedure Act.

The new law is intended to be applicable during a health care crisis so that appropriate health care decisions can be made to avoid needless pain and suffering.

Specific processes in the new law are explicitly made subject to regulations of the Commissioner of OMRDD. According to Chapter 500, OMRDD may promulgate regulations to establish a process for OMRDD approval of physicians and psychologists. Only OMRDD-approved clinicians and other clinicians meeting specifications in the statute can perform functions required by the law, such as serving as a consultant to confirm the person's lack of capacity to make health care decisions (if the attending physician is not an OMRDD-approved clinician or does not meet specifications). The law provides that in order for approval to be granted by

OMRDD, physicians or psychologists must possess specialized training or three years experience in providing services to persons with mental retardation. The proposed regulations closely track the statutory language.

The regulations also include additional delineation of the responsibility of OMRDD and agencies operating OMRDD-certified residences when they receive notification of health care decisions that involve the withdrawal or withholding of life-sustaining treatment.

Without these regulations, it may be difficult or impossible to implement the safeguarding provisions of the law in some situations. If the protections required by the law cannot be implemented because qualified physicians or psychologists are not available, desperate health care emergencies may continue to be unrelieved and pain and suffering may be needlessly prolonged.

The regulations are being adopted as an emergency rulemaking for the preservation of the public health. If OMRDD did not adopt these regulations as an emergency rule, there would be a period of time during which some physicians and psychologists would not be able to provide the services required by law to protect the person, and pain and suffering may be needlessly prolonged. It is therefore important to promulgate the new regulations on an emergency basis.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There are no additional costs associated with this new regulation.

There will be no costs to local governments as a result of the proposed amendments. Local governments do not play a role in either implementation of the new regulation or the new law.

OMRDD will incur no additional costs associated with processing applications from physicians and psychologists and, from confirming that a person's condition meets the criteria of the law when notice is received of the intention to implement a decision to withdraw or withhold life-sustaining treatment. No additional personnel will be required to perform these minimal new functions.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs of any significance associated with implementation and continued compliance with the rule.

Physicians and psychologists who meet the qualifications will need to apply to OMRDD for approval. The time and paperwork involved in the application process is minimal.

In addition, residential agencies which receive notices pursuant to the law are required by the regulation to confirm that the person's condition meets all of the relevant criteria. Since notifications will occur only in rare circumstances, and the amount of time available for compliance is restricted (as implementation of the decision to withdraw life-sustaining treatment may occur 48 hours after notification), required compliance activities are expected to be minimal and are expected to be performed by existing personnel.

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

6. Paperwork: Physicians and psychologists who meet the qualifications and seek OMRDD approval will need to provide documentation of their qualifications to OMRDD. Otherwise, no new paperwork is required of any party.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements. However, the regulations reiterate some provisions of § 1750-b of the Surrogate's Court Procedure Act, as necessary to provide a context for the regulatory concepts.

8. Alternatives: OMRDD had considered not filing regulations. However, OMRDD believes that it is crucial to take this step and to adopt the regulations on an emergency basis so as to continue to expand the pool of qualified physicians and psychologists that may be available to provide the services necessary to implement the new law and to provide guidance regarding the responsibility of residential providers who receive notification of decisions to withdraw or withhold life-sustaining treatment.

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

10. Compliance schedule: The emergency rule is adopted effective June 13, 2003. OMRDD intends to file the rule as a Notice of Proposed Rule Making in the future, pending approval of the proposal by the Governor's Office of Regulatory Reform, so that it can be adopted on a permanent basis within the time frames mandated by the State Administrative Procedure Act.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted because the amendments will not impose any adverse economic impact or significant reporting, recordkeeping or other compliance requirements on small businesses or local governments. This is because the amendments only establish the minimum regulations necessary to implement specific provisions of recently enacted Chapter 500 of the Laws of 2002, or section 1750-b of the Surrogate's Court Procedure Act. As discussed more thoroughly in the Regulatory Impact Statement, the process contemplated by the new law and these emergency regulations is so minimal, and is expected to be invoked so rarely, that it will not impose a burden on OMRDD or its regulated small business provider agencies. Neither the new law nor the regulations involve local government participation. Since the emergency regulations very closely track the language of this provision of recently enacted section 1750-b of the Surrogate's Court Procedure Act, any compliance activities associated with the rule will be the absolute minimum, consistent with the legislation.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted because the amendments will not impose any adverse economic impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This is because the amendments only establish the minimum regulations necessary to implement specific provisions of recently enacted Chapter 500 of the Laws of 2002, or section 1750-b of the Surrogate's Court Procedure Act. As discussed more thoroughly in the Regulatory Impact Statement, the process contemplated by the new law and these emergency regulations is so minimal, and is expected to be invoked so rarely, that it will not impose a burden on any party, public or private. It should be noted that clinicians wishing to participate in the process established by the law and these amendments do so voluntarily. Further, neither the law nor the regulations disadvantage any party to this process because of its geographic situation (rural or urban).

Job Impact Statement

A Job Impact Statement is not being submitted because it is evident from the subject matter of the amendments that the rule will have no impact on jobs or employment opportunities. This is because the amendments only establish the minimum regulations necessary to implement specific provisions of recently enacted Chapter 500 of the Laws of 2002, or section 1750-b of the Surrogate's Court Procedure Act. As discussed more thoroughly in the Regulatory Impact Statement, the process contemplated by the new law and these emergency regulations is so minimal, and is expected to be invoked so rarely, that it is reasonable to expect that it will not affect jobs or employment opportunities in New York State.

urer of Livingston County is the appropriate fiscal officer, except that the County Attorney is the appropriate legal officer of Livingston County referred to in this Part. The tax due on passenger motor vehicles for which the registration fee is established in paragraph (a) of subdivision (6) of Section 401 of the Vehicle and Traffic Law shall be \$5.00 per annum on such motor vehicles weighing 3500 lbs. or less and \$10.00 per annum for such motor vehicles weighing in excess of 3500 lbs. The tax due on trucks, buses and other commercial motor vehicles for which the registration fee is established in subdivision (7) of Section 401 of the Vehicle and Traffic Law used principally in connection with a business carried on within Livingston County, except when owned and used in connection with the operation of a farm by the owner or tenant thereof shall be \$10.00 per annum.

Text of proposed rule and any required statements and analyses may be obtained from: Michele Welch, Legal Bureau, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen, Associate Counsel, Legal Bureau, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

Consensus Rule Making Determination

This proposed regulation would create a new 15 NYCRR Part 29.12(t) to provide for the collection of a Livingston County motor vehicle use tax by the Department of Motor Vehicles. Pursuant to the authority contained in Tax Law section 1202(c) and Vehicle and Traffic Law section 401(6)(d)(ii), the Commissioner must collect a motor vehicle use tax if a county has enacted a local law requiring the collection of such tax.

On May 14, 2003, the Livingston County Legislature enacted a local law requiring that a motor vehicle use tax be imposed on passenger and commercial vehicles. Pursuant to this local law, the Commissioner is required to collect the tax on behalf of the county and transmit the revenue to the County, minus the administrative costs required to process the tax. The tax is five dollars per annum on a passenger vehicle weighing 3,500 pounds or less, ten dollars per annum on a passenger vehicle weighing more than 3,500 pounds, and ten dollars per annum on all commercial vehicles. There are certain exempt vehicles, such as vehicles used by non-profit religious, charitable, or educational organizations, and vehicles used only in connection with the operation of a farm by the owner or tenant of the farm.

This is a consensus rule because the Commissioner has no discretion about whether to collect the tax, i.e., it must be collected per the mandate of the Livingston County local law. The merits of the tax may have been debated before the County Legislature, but are no longer the subject of debate—it is now the law. DMV is merely carrying out the will expressed by the County Legislature.

Job Impact Statement

A Job Impact Statement is not submitted with this regulation because the collection of the Livingston County Use Tax by DMV shall have no impact on job opportunities in New York State.

Department of Motor Vehicles

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

Livingston County Motor Vehicle Use Tax

I.D. No. MTV-26-03-00015-P

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

Proposed action: This is a consensus rule making to add section 29.12(t) to Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

Subject: Livingston County motor vehicle use tax.

Purpose: To impose the tax.

Text of proposed rule: Part 29.12 is amended by adding a new subdivision (t) to read as follows:

(t) *Livingston County. The Livingston County Board of Supervisors adopted Local Law Number 3 of 2003 on May 14, 2003, to establish a Livingston County Motor Vehicle Use Tax. The Chairman of the Livingston County Board of Supervisors entered into an agreement with the Commissioner of Motor Vehicles for the collection of the tax in accordance with the provisions of this Part, for the collection of such tax on original registrations made on and after October 1, 2003 and upon the renewal of registrations expiring on and after December 1, 2003. The County Treas-*

Public Service Commission

NOTICE OF ADOPTION

Calculation of Franchise Fees by Cablevision Systems Long Island Corp.

I.D. No. PSC-41-02-00017-A

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: The commission, on April 16, 2003, adopted an order in Case 02-V-1048 granting Cablevision Systems Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To permit Cablevision Systems Long Island Corporation d/b/a Cablevision to exclude the amount of franchise fees collected in the Village of Roslyn Estates from inclusion in the company's calculation of gross receipts.

Substance of final rule: The Commission granted Cablevision Systems Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR, Section 595.1(o)(2) to allow the exclusion of franchise fees collected in the Village of Roslyn Estates from inclusion in the company's calculation of gross receipts, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (02-V-1048SA1)

NOTICE OF ADOPTION

Calculation of Franchise Fees by Cablevision Systems Long Island Corporation

I.D. No. PSC-43-02-00014-A

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: The commission, on April 16, 2003, adopted an order in Case 97-V-0367 granting Cablevision Systems Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To permit Cablevision Systems Long Island Corporation d/b/a Cablevision to exclude the amount of franchise fees collected in the Village of Brookville from inclusion in its calculation of gross receipts.

Substance of final rule: The Commission approved Cablevision Systems Long Island Corporation's d/b/a Cablevision request for a waiver of 9 NYCRR, Section 595.1(o)(2) to allow the exclusion of franchise fees collected in the Village of Brookville from inclusion in the company's calculation of gross receipts, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (97-V-0367SA1)

NOTICE OF ADOPTION

Calculation of Franchise Fees by Cablevision Systems Huntington Corp.

I.D. No. PSC-43-02-00015-A

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: The commission, on April 16, 2003, adopted an order in Case 98-V-0924 granting Cablevision Systems Huntington Corporation d/

b/a Cablevision a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2)

Purpose: To exclude the amount of the franchise fees collected in the Village of Asharoken from inclusion in Cablevision Systems Long Island Corporation's d/b/a Cablevision calculation of gross receipts.

Substance of final rule: The Commission approved Cablevision Systems Huntington Corporation's d/b/a Cablevision request for a waiver of 9 NYCRR, Section 595.1(o)(2) to allow the exclusion of franchise fees collected from subscribers in the Village of Asharoken from inclusion in the company's calculation of gross receipts, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (98-V-0924SA1)

NOTICE OF ADOPTION

Calculation of Franchise Fees by Cablevision Systems Long Island Corp.

I.D. No. PSC-01-03-00018-A

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: The commission, on April 16, 2003, adopted an order in Case 97-V-0287 granting Cablevision Systems Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2)

Purpose: To permit Cablevision Systems Long Island Corporation d/b/a Cablevision to exclude the amount of franchise fees collected in the Village of East Hills from inclusion in the company's calculation of gross receipts.

Substance of final rule: The Commission granted Cablevision Systems, Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR, Section 595.1(o)(2) to allow the exclusion of franchise fees collected in the Village of East Hills from inclusion in the company's calculation of gross receipts, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (97-V-0287SA1)

NOTICE OF ADOPTION

Franchise Fees by Cablevision Systems Long Island Corp.

I.D. No. PSC-06-03-00027-A

Filing date: June 13, 2003

Effective date: June 13, 2003

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

Action taken: The commission, on April 16, 2003, adopted an order in Case 97-V-1555 granting Cablevision Systems Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 9 NYCRR section 595.1(o)(2).

Purpose: To permit Cablevision Systems Long Island Corporation d/b/a Cablevision to exclude the amount of franchise fees collected in the Village of Oyster Bay Cove from inclusion in the company's calculation of gross receipts.

Substance of final rule: The Commission granted Cablevision Systems Long Island Corporation d/b/a Cablevision a waiver of 9 NYCRR, Section 595.1(o)(2) to allow the exclusion of franchise fees collected in the Village of Oyster Bay Cove from inclusion in the company's calculation of gross receipts, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (97-V-1555SA1)

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

Amendment of Certificate of Incorporation by Warwick Valley Telephone Company

I.D. No. PSC-26-03-00018-P

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

Proposed action: The Public Service Commission is considering whether to endorse its consent and approval on the certificate of amendment to the certificate of incorporation of Warwick Valley Telephone Company, to be filed with the Department of State.

Statutory authority: Public Service Law, section 108

Subject: Certificate of amendment to certificate of incorporation.

Purpose: To endorse approval prior to filing.

Substance of proposed rule: The Commission is considering whether to endorse its consent and approval on the Certificate of Amendment to the Certificate of Incorporation of Warwick Valley Telephone Company, to be filed with the Department of State.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or argument may be submitted to: Janet H. Deixler, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-C-0762SA1)

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

Rehearing by New York State Electric and Gas Corporation

I.D. No. PSC-26-03-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a petition for rehearing

and clarification of the order modifying economic development plan and tariffs and denying rehearing issued on May 9, 2003 by New York State Electric and Gas Corporation.

Statutory authority: Public Service Law, section 22

Subject: Rehearing before the commission.

Purpose: To allow a rehearing of commission orders.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a petition for rehearing of the Order Modifying Economic Development Plan and Tariffs and Denying Rehearing, issued May 9, 2003, by New York State Electric and Gas Corporation.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or argument may be submitted to: Janet H. Deixler, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (01-E-0359SA11)

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

Gas Meters and Accessories by KeySpan Energy Delivery

I.D. No. PSC-26-03-00020-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, or modify, in whole or in part, an application by KeySpan Energy Delivery for the approval of the continuous mechanical temperature compensator manufactured by American Meter Company.

Statutory authority: Public Service Law, section 67(1)

Subject: Approval of types of gas meters and accessories.

Purpose: To approve the use of American Meter Company's continuous mechanical temperature compensator in New York State.

Substance of proposed rule: The Public Service Commission will consider whether to grant a request filed by KeySpan Energy Delivery, to approve the Continuous Mechanical Temperature Compensator (CMTC) for use by residential natural gas customers in New York State. The CMTC device is an ancillary device designed to measure the temperature of flowing gas and is to be used in conjunction with the Commission approved American Meter RPM rotary meter.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or argument may be submitted to: Janet H. Deixler, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-G-0771SA1)

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

Lease of Real Property by The Brooklyn Union Gas Company and Consolidated Edison Company of New York, Inc.

I.D. No. PSC-26-03-00021-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KeySpan) and Consolidated Edison Company of New York, Inc. (Con Edison) for: (1) approval under section 70 of the Public Service Law of a lease and lease renewal of a portion of a KeySpan building to Con Edison; (2) approval of the proposed accounting and rate treatment for the transaction; and (3) related relief.

Statutory authority: Public Service Law, sections 5(b) and (c), 65(1), 66(1), (2), (5), (8), (9), (10), (11), (12) and 70

Subject: Lease of real property, accounting and rate treatment for the transaction, and related matters.

Purpose: To consider the proposed lease of a building, accounting and rate treatment (associated with the transaction), and related matters.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, the lease and lease renewal of a portion of a building located in Jamaica, New York, used by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KeySpan) as a customer service center, to Consolidated Edison Company of New York, Inc. (Con Edison). Con Edison proposes to collocate its customer service office in the leased premises, thereby facilitating the ability of customers to transact business with the two companies. The Commission is also considering KeySpan's proposed accounting and rate treatment for the transaction, including the company's proposal to use the revenues generated from this transaction to defray operation and maintenance expenses, and other related issues.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or argument may be submitted to: Janet H. Deixler, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-M-0865SA1)

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

Water Rate Increase by Fishers Island Water Works Corporation

I.D. No. PSC-26-03-00022-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by Fishers Island Water Works Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 1—Water, to become effective Jan. 1, 2004.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Water rates.

Purpose: To increase annual revenues by about \$185,407 or 43.1 percent.

Substance of proposed rule: On May 29, 2003 Fishers Island Water Works Corporation (the company) filed a request for approval to increase the company's annual revenues by about \$185,407 or 43.1% to become effective January 1, 2004. The company provides water service to 629 customers (508 customers are seasonal) in Fishers Island, Suffolk County, New York. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or argument may be submitted to: Janet H. Deixler, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-W-0867SA1)

Department of State

**EMERGENCY
RULE MAKING**

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-26-03-00001-E

Filing No. 597

Filing date: June 12, 2003

Effective date: June 12, 2003

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

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

Specific reasons underlying the finding of necessity: Based on testimony received at a public hearing, the Secretary of State has determined that some owners of residential property in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitation by real estate brokers and real estate salespersons and that such solicitations seek to have the owners place their home for sale with the real estate brokers and real estate salespersons. The Secretary of State has further determined that the homeowners have no practical means of stopping the unwanted and intrusive solicitations and that those homeowners need immediate relief. Therefore, compliance with section 201(1) of the State Administrative Procedure Act would be contrary to the public interest of providing for the general welfare of those homeowners who seek immediate relief from the continuation of the unwanted and unwelcome solicitations by real estate brokers and salespersons.

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in the Brooklyn communities of Mill Basin, Mill Islands, Bergen Beach, Futurama and Marine Park.

Text of emergency rule: Paragraph (c)(2) of section 175.17 of Title 19 of the NYCRR is amended to add the following cease and desist zone:

*Cease and Desist Zone
(Mill Basin/Brooklyn)*

<i>Zone:</i>	<i>Expiration date:</i>
<i>County of Kings (Brooklyn)</i>	<i>November 30, 2007</i>

Within the County of Kings as follows:

All that area of land in the County of Kings, City of New York, otherwise known as the communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park, bounded and described as follows: Beginning at a point at the intersection of Flatlands Avenue and the northern prolongation of Paerdegat Basin, thence southwesterly along Flatlands Avenue to Avenue N; thence westerly along Avenue N to Nostrand Avenue; thence southerly along Nostrand Avenue to Gerritsen Avenue; thence southeasterly along Gerritsen Avenue and the southern prolongation of Gerritsen Avenue to Shore Parkway; thence northeasterly, northerly, northeasterly, and northerly along Shore Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin and the northern prolongation of Paerdegat Basin to Flatlands Avenue and the point of beginning.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 9, 2003.

Text of emergency rule and any required statements and analyses may be obtained from: Bruce Stuart, Division of Licensing Services, Department of State, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3)(a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list”.

Section 442-h(3)(a) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on February 13, 2003, the Secretary of State has determined that some homeowners within the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generated panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

A public hearing was held in P.S. 236 in Mill Basin on February 13, 2003. At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included a Congressman, two State Senators, a Member of the Assembly, the President of the Borough of Brooklyn, members of Community Board 18, representatives of civic associations for each of the communities and homeowners. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the affected communities. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park. There are approximately 1,200 real estate brokers and approximately 1,800 real estate salespersons with offices in Brooklyn.

The Department of State will have the cease-and-desist list available, at no cost, on its web site, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

We expect that most licensees who do business in the affected communities will access the list, at no cost, on the Department’s web site. We expect that some licensees will purchase one or more copies. Some will

share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the affected communities.

In addition, some real estate brokers may use commercial mailing lists to solicit. For those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list. The list will have to be checked against the addresses in the cease-and-desist list, and the broker will have to delete the addresses that appear in the homeowner list. The Department of State is not able to estimate the cost to those brokers because the cost will depend on a number of factors, such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology to the licensee, and the licensee’s cost for technology and labor. On the other hand, there may be some reductions in the total cost of the mailing when the “unproductive addresses” are eliminated from the list.

Also, if a licensee uses the telephone, delivery services and personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person at an address listed. There is, of course, an expense associated with that expenditure of time. On the other hand, there may be savings associated with elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each licensee. Therefore, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200	
Mailing owners statements	640	
Processing statements:		
Staff: SG-14 @ \$29,110		
10 weeks	5,600	
Data entry:		
Staff: SG-6 (NYC) @		
\$23,385		
10 days	900	
Fringe benefits @ 36.5%	2,372	
Total:		\$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department’s website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

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

6. Paperwork:

Homeowners who do not want to be solicited will have to file an “owner’s statement” with the Department of State. The owner’s statement will indicate the owner’s desire not to be solicited and will set forth the owner’s name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner’s statements will be provided to community leaders for distribution to their constituents. In addition, owner’s statements will be available from the Department of State on request, as well as available on the Department’s web site. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner’s statement. The list will be available, at no cost, on the Department’s website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the

Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies to an areas generally known as Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park in the Borough of Brooklyn. There are approximately 1,170 real estate brokers and approximately 1,852 real estate salespersons in the Brooklyn. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who do not deal in residential properties, and those who do not deal in properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Brooklyn but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears of a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted an open public hearing on February 13, 2003, at P.S. 326, in the Brooklyn community of Mill Basin. The time, date and place of the public hearing was well advertised within the affected communities. Testifying at the hearing on behalf of their constituents were a Congressman, two State Senators, a Member of the Assembly, the

President of the Borough of Brooklyn, members of Community Board 18, representatives of civic associations for the affected communities, and homeowners.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park, and this rule only affects those real estate brokers and salespersons who do business in those communities.

Brooklyn is not a rural area and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the designated community can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

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

Landings at Required Exit Doors

I.D. No. DOS-26-03-00016-P

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

Proposed action: This is a consensus rule making to add section 1220.3 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Landings at required exit doors.

Purpose: To amend the Uniform Fire Prevention and Building Code to allow greater distance between the threshold and a landing at an exit door.

Text of proposed rule: Part 1220 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new section 1220.3 to read as follows:

1220.3 Landings at required exit doors. In lieu of compliance with section R312.1.2 of the Residential Code of New York State, an exit door required by section R311.1 of the Residential Code of New York State may have an exterior landing which is not more than 8 1/4 inches (209 mm) below the top of the threshold.

Text of proposed rule and any required statements and analyses may be obtained from: Ronald Piester, Department of State, Division of Code Enforcement and Administration, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: rpiester@dos.state.ny.us

Data, views or arguments may be submitted to: Richard DiGiovanna, Department of State, Office of Counsel, 41 State St., Albany, NY 12231, (518) 474-6740

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

Consensus Rule Making Determination

The State Fire Prevention and Building Code Council has determined that this rule making is non-controversial and therefore no person is likely to object to its adoption. The proposed rule would provide an alternative to a provision of the Residential Code of New York State that sets the maximum height of the threshold of a required exterior exit doorway from the surface of an exterior landing at 1 1/2 inches. The proposed rule would allow the distance between the threshold and an exterior landing to be no more than 8 1/4 inches which is standard construction practice. The 8 1/4

inches height is set as a maximum distance so regulated parties could continue to comply with the 1½ inch requirement currently specified in the Residential Code.

The Residential Code of New York State (part of the New York Uniform Fire Prevention and Building Code) regulates the construction of detached one- and two-family dwellings and attached one-family dwellings (townhouses) not more than three stories in height. Former provisions of the Uniform Fire Prevention and Building Code ("Uniform Code"), now repealed, permitted exterior doorways to have an exterior landing which was 8¼ inches below the top of the threshold. The purpose of providing a "step" down from an exterior door to an exterior landing is to prevent snow and ice from accumulating to a level at or above the threshold of the doorway. If snow or ice accumulates above the level of a threshold, the exterior door swing could be blocked, or the snow or ice may infiltrate into the dwelling when it melts. Providing a step down from an exterior door has been a standard construction practice for many years in areas subject to severe weather conditions during the winter.

The New York State Builders Association, representing residential contractors and developers statewide, has expressed its support for this rule making that would revise a specific requirement of the Uniform Code. The endorsement of the Builders Association leads the Code Council to conclude that those businesses and individuals represented by the association are unlikely to object to the rule making. Furthermore, it is unlikely that other persons will object to adoption of the rule making as the proposed rule will provide for a design which is a standard construction practice and which was previously available as an option under now repealed provisions of the Uniform Code. The proposed rule would not impose any new requirements upon regulated parties but instead expand the permissible distance between the top of the threshold of a exit doorway and the surface of an adjacent exterior landing.

Job Impact Statement

The State Fire Prevention and Building Code Council has concluded after reviewing the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs and employment opportunities in New York. The proposed rule would provide an alternative to a provision of the Residential Code of New York State that sets the maximum height of the threshold of a required exterior exit doorway from the surface of an exterior landing at 1½ inches. The proposed rule would allow the distance between the threshold and an exterior landing to be no more than 8¼ inches which is standard construction practice. The Residential Code of New York State, a part of the New York Uniform Fire Prevention and Building Code, regulates the construction of detached one- and two-family dwellings and attached one-family dwellings (townhouses) not more than three stories in height.

The proposed rule would not impose any new requirements upon regulated parties but instead expand the permissible distance between the top of the threshold of a exit doorway and the surface of an adjacent exterior landing. The Code Council finds that it is evident from the subject matter of the rule that it could only have a positive impact or no impact on jobs and employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Dampproofing and Waterproofing of Foundation Walls

I.D. No. DOS-26-03-00025-P

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

Proposed action: This is a consensus rule making to add section 1220.4 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Dampproofing and waterproofing of foundation walls.

Purpose: To amend the Uniform Fire Prevention and Building Code to revise requirements pertaining to the dampproofing and waterproofing of concrete and masonry foundation walls.

Substance of proposed rule: Part 1220 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new section 1220.4 to read as follows:

1220.4 Foundation wall dampproofing and waterproofing. (a) Compliance with the provision of section R406.1 of the Residential Code of New York State that masonry walls shall have not less than ¾ inch (9.5 mm) portland cement parging applied to the exterior of the wall shall not be required where the masonry wall is dampproofed, in accordance with section R406.1 of the Residential Code of New York State, or water-

proofed, in accordance with section R406.2 of the Residential Code of New York State, by material that is specified for direct application to the masonry in accordance with the manufacturer's installation instructions.

(b) In lieu of compliance with section R406.2 of the Residential Code of New York State, exterior foundation walls that retain earth and enclose habitable or usable spaces located below grade in areas where a high water table or other severe soil-water conditions are known to exist may be dampproofed in accordance with section R406.1 of the Residential Code of New York State provided foundation drainage is installed in accordance with section R405 of the Residential Code of New York State.

Text of proposed rule and any required statements and analyses may be obtained from: Ronald Piester, Department of State, Division of Code Enforcement and Administration, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: rpiester@dos.state.ny.us

Data, views or arguments may be submitted to: Richard DiGiovanna, Department of State, Office of Counsel, 41 State St., Albany, NY 12231, (518) 474-6740

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

Consensus Rule Making Determination

The State Fire Prevention and Building Code Council has determined that this rule making is non-controversial and therefore no person is likely to object to its adoption. The proposed rule provides alternatives to compliance with certain provisions of the Residential Code of New York State that require waterproofing or dampproofing of concrete or masonry foundation walls. The Residential Code of New York State, part of the New York Uniform Fire Prevention and Building Code, regulates the construction of detached one- and two-family dwellings and attached one-family dwellings (townhouses) not more than three stories in height. Sections R406.1 or R406.2 of the Residential Code require concrete or masonry foundation walls to be dampproofed or waterproofed depending on the soil-water conditions at the particular building site. Dampproofing and waterproofing materials are applied to foundation walls to resist infiltration of moisture from the soil into the basement of a building.

Section R406.1 of the Residential Code further requires that the exterior surface of masonry foundation walls shall be prepared for the application of dampproofing or waterproofing material with a layer of portland cement parging. A masonry wall consists of concrete masonry units (CMU) which are individual "blocks" approximately 16" wide x 8" high x 8" deep. They are assembled with concrete mortar joints and reinforcing to form structural foundation walls upon which the structure of a building is supported. The purpose of parging a CMU foundation wall is to provide a continuous monolithic layer of material upon which dampproofing or waterproofing material is applied. The combination of parging and dampproofing or waterproofing material resists infiltration of moisture from the soil through the CMU's and the mortar joints between the CMU's into the basement of a building.

Many dampproofing and waterproofing materials are specifically intended to be applied directly to the surface of masonry foundation walls, without the need for additional preparation of the exterior surface of the wall. In those instances, the specification for direct application of the product is included in the manufacturer's installation instructions which regulated parties are required to follow when using such materials. Where such dampproofing or waterproofing materials are applied directly to the surface of masonry foundation walls, there is no need to provide the continuous layer of material that would be created through applying portland cement parging to the masonry wall. Although good construction practice includes the protection of masonry foundation walls to resist hydrostatic pressure and infiltration of moisture from soil into the basements of buildings, it is unnecessary to require both parging and dampproofing or waterproofing where dampproofing or waterproofing alone will effectively achieve the code's intent.

Section R406.2 of the Residential Code of New York State requires (without exception) waterproofing of foundation walls that retain earth and enclose habitable or usable spaces located below grade, when such walls are constructed in areas where a high water table or other severe soil-water conditions are known to exist. Dampproofing installations generally consist of the application of one or more coatings of impervious compounds that are intended to prevent the passage of moisture through the foundation wall into the basement of the building. Waterproofing installations, on the other hand, generally consist of the application of a combination of sealing materials (typically applied in the form of a flexible or semi-rigid membrane, mechanically fastened with joints permanently fused or sealed) and impervious coatings. Waterproofing is a much more extensive application, both in material and labor cost. Although it is appropriate to require

waterproofing where severe soil-water conditions exist and there is no foundation drainage, dampproofing is an acceptable application if foundation drainage is provided. Foundation drainage provides a means for water adjacent to the foundation to drain down and away from the foundation, reducing hydrostatic pressure at the foundation surface and eliminating the need for a membrane based system.

The proposed rule would eliminate the requirement for parging where the dampproofing or waterproofing material is specified for direct application to the masonry wall. Eliminating that requirement will simplify the construction process and reduce construction costs without compromising the quality of construction or the safety of the building occupants. In addition, the proposed rule would allow exterior foundation walls that retain earth and enclose habitable or usable space located below grade in areas where a high water table or other severe soil-water conditions are known to exist, to be dampproofed when foundation drainage is also provided. This would relieve regulated parties from the requirement to waterproof a foundation wall when an alternate solution (dampproofing accompanied by foundation drainage) will provide adequate protection.

The proposal is supported by the New York State Concrete Masonry Association which represents masonry contractors and suppliers, and the New York State Builders Association which represents residential contractors throughout New York. These organizations assert that the proposed rule will provide significant economic relief to the home building industry without affecting the quality of the homes constructed. The endorsement of these associations leads the Code Council to conclude that the businesses and individuals represented by the associations are unlikely to object to adoption of the rule making.

Furthermore, it is unlikely that other persons will object to the rule making. Prior to 2003, masonry foundation walls that were dampproofed or waterproofed by materials applied directly to the masonry surface were not required to be protected by parging. Direct application of dampproofing or waterproofing to masonry foundation walls has been an accepted construction practice for many years. The proposed rule would restore an option previously available under now repealed provisions of the Uniform Code. The proposed rule would not impose any new requirements upon regulated parties as compliance with the existing provisions of the Residential Code regarding dampproofing and waterproofing of concrete and masonry foundation walls would still be an option.

Job Impact Statement

The State Fire Prevention and Building Code Council has concluded after reviewing the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs and employment opportunities in New York. The proposed rule provides alternatives to compliance with certain provisions of the Residential Code of New York State that require waterproofing or dampproofing of concrete or masonry foundation walls. The Residential Code of New York State, part of the New York Uniform Fire Prevention and Building Code, regulates the construction of detached one- and two-family dwellings and attached one-family dwellings (townhouses) not more than three stories in height.

The proposed rule would excuse regulated parties from the requirement that the exterior surface of masonry foundation walls shall be prepared for the application of dampproofing or waterproofing material with a layer of portland cement parging, when the dampproofing or waterproofing material is specified for direct application to the surface of the masonry wall. Eliminating the parging application will simplify the construction process and reduce construction costs. In addition, the proposed rule would allow exterior foundation walls that retain earth and enclose habitable or usable space located below grade in areas where a high water table or other severe soil-water conditions are known to exist, to be dampproofed when foundation drainage is also provided. This would relieve regulated parties from the requirement to waterproof a foundation wall when an alternate solution (dampproofing accompanied by foundation drainage) will provide adequate protection.

The proposed rule would not impose any new requirements upon regulated parties as compliance with the existing provisions of the Residential Code regarding dampproofing and waterproofing of concrete and masonry foundation walls would still be an option. The Code Council finds that it is evident from the subject matter of the rule that it will have no adverse impact on jobs and employment opportunities.

State University of New York

EMERGENCY RULE MAKING

Responsibilities and Duties of the State University Trustees

I.D. No. SUN-26-03-00023-E

Filing No. 606

Filing date: June 17, 2003

Effective date: June 17, 2003

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

Action taken: Addition of section 604.5 to Title 8 NYCRR.

Statutory authority: Education Law, sections 355(1)(c) and 6306(6)

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

Specific reasons underlying the finding of necessity: The State University of New York finds that immediate adoption of this amendment of the Code of Standards and Procedures for the Administration and Operation of Community Colleges (the code) is necessary for the preservation of the general welfare and to provide an enhanced mechanism whereby the State University trustees may exercise their general supervisory authority with respect to the administration and operation of community colleges. Compliance with the requirements of subdivision 1, section 202 of the State Administrative Procedure Act would be contrary to the public interest.

Subject: The chancellor's authority to appoint a fact finding panel to gather information concerning the fiscal, academic, and/or administrative status and viability of a community college.

Purpose: To provide a uniform process by which the chancellor may engage in an orderly and thorough review of a situation at a community college that threatens the college's viability to determine what action, if any, should be taken by the State University trustees.

Text of emergency rule: 604.5 Responsibilities and Duties of the State University Trustees

The State University Trustees are charged with oversight responsibility for the operation and administration of the community colleges operating under the program of the State University of New York.

(a) Panel of Review and Assessment: When the Chancellor determines that there are serious issues affecting the fiscal, academic or administrative viability of a community college, for example when a college's accreditation is at risk, or that a community college's governance or compliance with applicable laws, regulations, or policy is in question, the Chancellor, at his/her discretion, may appoint a Panel of Review and Assessment.

(1) Purpose. The purpose of the Panel of Review and Assessment is to visit the designated campus, gather information and report to the Chancellor on the college's fiscal, academic, or administrative status and viability, and on the college's governance and compliance with laws and regulations as defined by the Chancellor's instructions.

(2) Composition. The panel shall consist of up to nine members to be designated by the Chancellor, and shall include at least two representatives of the college, when appropriate.

(3) Compliance. The president, the local board of trustees, administrators, faculty and staff of any community college for which the Chancellor has convened a Panel of Review and Assessment, shall cooperate with the Panel and provide all information and documents in whatever form requested by the Panel.

(4) Report and Recommendations: Upon conclusion of the review, the Panel shall issue a report to the Chancellor with findings and recommendations.

(5) Upon review of the Panel's report, the Chancellor may take action deemed appropriate given the totality of the circumstances.

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 14, 2003.

Text of emergency rule and any required statements and analyses may be obtained from: Dona S. Bulluck, Office of University Counsel, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5101, e-mail: Bullucdo@sysadm.suny.edu

Regulatory Impact Statement

1. **STATUTORY AUTHORITY:** Education Law, section 355(1)(c), which authorizes the state university trustees to provide a code of standards and regulations for the community colleges, that cover the organization and operation of their programs, curricula, course, financing arrangements, tuition and fees, state financial assistance, and any other matter relating to their operation.

Education Law, section 6306 is titled "Administration of community colleges—boards of trustees." This section of the Education sets for the various duties of the local trustees. These duties range from the appointment of the president, which is subject to the approval of the state university trustees [§ 6306(2)] to the hiring of staff, to the adoption of curricula, budget preparation. Section 6303(2) also provides that "subject to the general supervision of the state university trustees, the local trustees are to discharge any duties necessary for the effective operation of the college.

Education Law, section 6303(6), states that the trustees shall have other powers and perform other duties as provided for by law or by the state university trustees.

2. **LEGISLATIVE OBJECTIVES:** The enabling legislation creating community colleges was passed in 1948. Community colleges were created to offer two-year terminal degrees and general and technical education. From the outset, it appears that the legislative sponsors intended that the State University would exercise control over the organization and operation of community colleges.

The proposed amendment will provide the Chancellor and the State University Trustees with a uniform mechanism by which the Chancellor can dispatch a team of experts to assess the programmatic and fiscal viability of a community college when indicators dictate that such intervention is warranted. One such indicator would be when an institution's accreditation is in jeopardy.

3. **NEEDS AND BENEFITS:** Although the Education Law delegates the administration of the college to the local trustees, they to so under the supervision of the State University Trustees. The proposed regulation seeks establish a framework by which the State University Trustees can fulfill their statutory mandate.

In put was received from the Community College Trustees, the Community College Presidents, Senior Staff at System Administration, and the SUNY Trustees. The proposed amendment went through at least three rounds of complete editing and drafting, as well as minor revisions thereafter. Thus, the individuals who would be directly affected by this regulation were given an opportunity to review and comment upon it.

This amendment is designed to provide for the efficient operation of community colleges as a system and provides a uniform means by which the Chancellor and the State University Trustees can fulfill their supervisory duties.

4. **COSTS:** The proposed regulation seeks to clarify existing law and does not impose any new costs on community colleges or local sponsors.

5. **LOCAL GOVERNMENT MANDATES:** The proposed regulations do not impose any new requirements on local governments. This regulation merely codifies authority that the Chancellor and the State University Trustees currently possess.

6. **PAPERWORK:** The proposed regulation does not impose any new paperwork requirements on any of the parties.

7. **DUPLICATION:** The proposed amendments carry out specific requirements of the Education Law. The amendments are not redundant with other State requirements nor do they have any relationship with existing Federal requirements.

8. **ALTERNATIVES:** None.

9. **FEDERAL STANDARDS:** The proposed amendments do not exceed any maximum standards of the federal government for the same or similar subject areas.

10. **COMPLIANCE SCHEDULE:** There is no mandatory compliance schedule however the SUNY Trustees would like to adopt the regulations in their final form at their September 2003 meeting. Since this is an emergency and notice of proposed rule making, the regulation will become effective upon filing with the Department of State.

Regulatory Flexibility Analysis

The State University finds that the proposed regulation will have no adverse impact on small businesses. This regulation concerns the operation and administration of community colleges under the program of the State University of New York. This regulation seeks to provide a uniform method by which the Chancellor and the State University Trustees may assess the academic, programmatic, and fiscal stability of a community college in keeping with the supervisory authority bestowed upon the State University Trustees by the Education Law.

This regulation only affects those local governments that currently sponsor community colleges. In preparing the proposed regulations, input was received from the Community College Trustees, the Community College Presidents, Senior Staff at System Administration, and the SUNY Trustees. The proposed amendment went through at least three rounds of complete editing and drafting, as well as minor revisions thereafter. Thus, the individuals who work most closely with the Code were given every opportunity to be a part of the review and revision process.

Accordingly, the proposed regulation will have no impact on small businesses. It does not impose any new reporting or recordkeeping requirements on small businesses nor does it impose any new recordkeeping or fiscal obligations on local sponsors of community colleges.

Rural Area Flexibility Analysis

1. **Types and estimated number of rural areas:** There are thirty (30) community colleges operating under the program of the State University of New York. These community colleges are located throughout the state, and some of them are located in and/or service rural areas. However, the rural areas that may be impacted by these regulations are those areas that already sponsor a community college.

2. **Reporting, recordkeeping and other compliance requirements and professional services:** These regulations do not impose any new recordkeeping or reporting obligations on rural areas. The proposed regulations will affect those rural areas where community colleges already exist or are serviced by a community college.

3. **Costs:** The proposed regulations do not have any impact on nor impose any fiscal obligations on rural areas. Only entities that currently sponsor a community college operating under the program of the State University are subject to this rule making.

4. **Minimizing adverse impact:** The proposed regulations have no adverse impact on rural areas. This rule making only applies to community colleges operating under the program of the State University. In preparing the proposed regulations, input was received from the Community College Trustees, the Community College Presidents, Senior Staff at System Administration, and the SUNY Trustees. These individuals are located throughout the state. The proposed amendments went through at least three rounds of complete editing and drafting, as well as minor revisions thereafter. Thus, the individuals who work most closely with the Code were given every opportunity to be a part of the review and revision process.

5. **Rural area participation:** As noted, input was received from various groups and representatives from the community colleges and the State University. Those who would be directly impacted by this regulation were given an opportunity to provide input. These individuals are located through the State, including rural areas.

Job Impact Statement

No job impact statement is submitted with this notice because the emergency and proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This rule making governs the authority of the Chancellor and the Trustees of the State University of New York with respect to their oversight responsibility for the community colleges operating under program of the State University.

Department of Taxation and Finance

EMERGENCY RULE MAKING

New York State and City of Yonkers Withholding Tables

I.D. No. TAF-26-03-00002-E

Filing No. 598

Filing date: June 12, 2003

Effective date: June 12, 2003

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

Action taken: Amendment of sections 171.4(b)(1) and 251.1(b); repeal of Appendixes 10 and 10-A; and addition of new Appendixes 10 and 10-A to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 671(a)(1); 697(a); 1329(a); 1332(a); section 7 of the Model Local Law found in section 1340(c); Codes and Ordinances of the City of Yonkers, sections 15-105, 15-108(a), 15-121 and 15-130

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

Specific reasons underlying the finding of necessity: The Commissioner of Taxation and Finance is required by a chapter of the Laws of 2003, amending the Tax Law and other laws as proposed in legislative bill numbers A.8388 and S.4968, to adjust the New York State and City of Yonkers withholding tables and other methods by July 1, 2003. This chapter became law on May 19, 2003. An emergency action is the only way for the commissioner to adopt regulatory amendments to accomplish these adjustments and comply with both this statutory requirement and the requirements of the State Administrative Procedure Act.

Subject: New York State and City of Yonkers withholding tables and other methods.

Purpose: To provide New York State and City of Yonkers withholding tables and other methods and reflect the revision of some tax rates and the tax table benefit recapture for wages and compensation paid on or after July 1, 2003.

Substance of emergency rule: Section 671(a)(1), section 1329(a), and section 7 of the Model Local Law contained in section 1340(c) of the Tax Law mandate that employers withhold from employee wages amounts that are substantially equivalent to the amount of New York State personal income tax, City of Yonkers income tax surcharge, and City of Yonkers earning tax on nonresidents reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule repeals Appendixes 10 and 10-A of Title 20 NYCRR and enacts new Appendixes 10 and 10-A of such Title to provide new New York State and City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after July 1, 2003. The new tables and other methods reflect the revision of the New York State and City of Yonkers tax tables and the tax table benefit recapture which were enacted by a chapter in the Laws of 2003. This rule also reflects the increases of the New York State and City of Yonkers supplemental withholding tax rates to be applied to supplemental wage payments.

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 9, 2003.

Text of emergency rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Regulatory Impact Statement

1. **Statutory authority:** Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations that are necessary to enforce the personal income tax; section 1329(a) of the Tax Law and section 15-105 of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be withheld in the same manner and form as that required by sections 671 through 678 of the Tax Law, except where noted; section 1332(a) of the Tax Law and section 15-108(a) of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law, except where noted; Section 7 of the Model Local Law found in section 1340(c) of the Tax Law and sections 15-121 and 15-130 of the Codes and Ordinances of the City of Yonkers provide with respect to the withholding of the City of Yonkers nonresident earnings tax, that the provisions of Part V of Article 22, as described above, shall have the same force and effect as if they were incorporated into the Codes and Ordinances of the City of Yonkers, except where noted.

2. **Legislative objectives:** New Appendixes 10 and 10-A of Title 20 NYCRR contain the revised New York State and City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after July 1, 2003. The amendments reflect the revision of the tax tables and the tax table benefit recapture in a chapter of the Laws of 2003, and the requirement in the new law that the withholding rates for the remainder of tax year 2003 reflect the full amount of tax liability for tax year 2003 as accurately as practicable. The revised tax tables include two new brackets for taxpayers at the highest levels of taxable income and an increase in the tax rates for taxpayers whose taxable income reaches these levels. The rule also reflects the increase, to 9.05 percent, for the New York State supplemental withholding rate, and the increase, to .4525 percent, for the City of Yonkers supplemental withholding rate, both to be applied to supplemental wage payments. Although the City of Yonkers Earnings Tax on Nonresidents withholding tables and other methods are included as part of the new Appendix 10-A, no revision was required for these tables and other methods included therein by the Laws of 2003.

3. **Needs and benefits:** This rule sets forth New York State and City of Yonkers withholding tables and other methods, applicable to wages and other compensation paid on or after July 1, 2003, reflecting the revision of the tax tables and the tax table benefit recapture contained in a chapter of the Laws of 2003. This rule benefits taxpayers by providing New York State and City of Yonkers withholding rates that more accurately reflect the current income tax rates. If this rule was not promulgated, the use of the existing withholding tables would cause some under withholding for some taxpayers.

4. **Costs:** (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Codes and Ordinances of the City of Yonkers already mandate withholding in amounts that are substantially equivalent to the amounts of New York State and City of Yonkers personal income tax on residents, and City of Yonkers nonresident earnings tax reasonably estimated to be due for the taxable year, and (ii) this rule merely conforms Appendixes 10 and 10-A of Title 20 NYCRR to the rates of the New York State income tax, the City of Yonkers income tax surcharge on residents and the City of Yonkers nonresident earnings tax, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to revise the New York State withholding tables and other methods, and the City of Yonkers income tax surcharge on residents and earnings taxes on nonresidents withholding tables and other methods, arises due to the statutory change in the rates of New York State personal income tax, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) **Information and methodology:** This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Management Services Bureau, Operations Support Bureau and Bureau of Fiscal Management.

5. **Local government mandates:** Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. **Paperwork:** This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers will be sent copies of the new tables and other methods as part of the employer's guide which is routinely revised.

7. **Duplication:** This rule does not duplicate any other requirements.

8. **Alternatives:** Since section 671(a) of the Tax Law mandates New York State withholding tables be promulgated, and Sections 1309 and 1329(a) of the Tax Law, Section 7 of the Model Local Law contained in section 1340(c) of the Tax Law, and section 92-88 of the Codes and Ordinances of the City of Yonkers mandate that City of Yonkers withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods. The only alternative to promulgating this rule would be to allow the existing tables to remain in effect. That alternative, however, would require that employers continue to withhold at rates that no longer reflect the personal income tax rates of New York State and the City of Yonkers which will be in effect for the 2003 tax year.

9. **Federal standards:** This rule does not exceed any minimum standards of the federal government for the same or similar subject area.

10. **Compliance schedule:** Affected employers will be receiving the required information in sufficient time to implement the revised New York

State and City of Yonkers withholding tables and other methods for wages and other compensation paid on or after July 1, 2003.

Regulatory Flexibility Analysis

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, which are currently subject to the New York State and City of Yonkers withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the New York State and City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised New York State and City of Yonkers withholding tables and other methods. The promulgation of this rule will not require small businesses or local governments to submit any new information, forms or other paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any of such services.

4. Compliance costs: Small businesses and local governments are already subject to the New York State and City of Yonkers withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Sections 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local governments with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(13) of the State Administrative Procedure Act, who is currently subject to the New York State and City of Yonkers withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. The number of employers that are also public or private interests in rural areas cannot be determined with any degree of certainty. According to information supplied by the former New York State Office of Rural Affairs, there are 44 counties throughout New York State that are rural areas (having a population of less than 200,000) and 71 towns in the remaining 18 counties of New York State that are rural areas (with population densities of 150 people or less per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the New York State and City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the re-

vised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms or other paperwork.

Further, many employers currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the New York State and City of Yonkers withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Sections 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. These amendments provide new New York State and City of Yonkers withholding tables and other methods, applicable for compensation paid on or after July 1, 2003, which reflect the revision of the tax tables and the tax table benefit recapture in a chapter of the Laws of 2003. The rule also reflects the increases of the New York State and City of Yonkers supplemental withholding rates applied to supplemental wage payments.

Thruway Authority

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transportation of Explosives

I.D. No. THR-26-03-00009-P

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

Proposed action: Amendment of section 102.1(a)(17) of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5) and (15) and 361(1)(a); 49 USC, sections 5112(a)(2)(A) and (B)

Subject: Transportation of explosives on the New York State Thruway system.

Purpose: To update the classification of explosives in the existing regulation to correspond with the new explosive classification contained in the Federal regulations and delete other obsolete references.

Text of proposed rule: 102.1 Prohibited uses of the Thruway

(a) Use of the Thruway system by the following is prohibited at all times, with the noted exceptions:

(17) Vehicles carrying explosives [class A or B (other than fireworks not in excess of 10 pounds or blasting caps not in excess of 1,000 caps)] found in division 1.1-1.3 as defined in United States Department of Transportation regulations title 49, Code of Federal Regulations section 173.53

as amended December 21, 1990, except under such procedures as may be adopted by the Thruway Authority board, and as thereafter amended, from time to time, by the Thruway Authority's department of operations with the approval of the chairman. Department of Transportation regulations shall mean those safety regulations of the United States Department of Transportation [which were in effect on December 31, 1968, or as hereafter amended, and] which are included in parts [170-189, inclusive,] 100-185 and parts 390-397 of title 49, amended August 28, 2001, Code of Federal Regulations, and sections [831-835 of title 18, chapter 39, of the United States Code, pursuant to section 9 of the Department of Transportation Act, 49 U.S.C. 1657] 5101-5127 of title 49 U.S.C. chapter 51, amended October 31, 1994, which deal with motor carrier safety and the transportation of explosives and other dangerous articles by motor carriers by highway.

Text of proposed rule and any required statements and analyses may be obtained from: Marcy Pavone, New York State Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2867, e-mail: marcy_pavone@thruway.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:

Subdivision 5 of section 354 of the Public Authorities Law authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction." Subdivision 15 of the same section authorizes the Thruway Authority to "do all things necessary or convenient to carry out its purposes and exercise the powers expressly given." In addition, subdivision 1(a) of section 361 of the Public Authorities Law authorizes the Authority "to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience, for the preservation of its property and for the collection of tolls." Furthermore, subdivision a of section 5112 of Title 49 of the United States Code authorizes the Thruway Authority to "establish, maintain and enforce – designations of specific highway routes over which hazardous material may and may not be transported by motor vehicle; and limitations and requirements related to highway routing."

Inherent in these powers is the administrative discretion to make effective and rational rules regarding prohibited uses of the Thruway, especially as they relate to the transportation of explosives, for the benefit of the motoring public.

2. Legislative Objectives:

The amendment of Part 102.1(a)(17) of Title 21 NYCRR is intended to update the classification of explosives in the existing regulation to correspond with the new explosive classification contained in the Federal Regulations and delete other obsolete references.

3. Needs and Benefits:

The existing State regulations were modeled after the Federal regulations concerning the classification of explosives found in 49 C.F.R. 173.53. The Federal regulations were the subject of non-substantive changes in that the class system was changed to a division system. The purpose of this rulemaking request is to amend the Thruway classification system to match the Federal system. This change is needed to bring the Thruway Authority rules and regulations regarding the transportation of explosives on the Thruway System into conformance with the new Federal international classification system being used on explosives placarding under the Federal guidelines. Further, many other states have already switched to the new classification system. The change to the Thruway regulations is non-substantive and will benefit explosives haulers by preventing possible confusion due to the Authority's use of the outdated classification system.

The change also deletes the obsolete reference to "parts 170-189. . . of title 49, Code of Federal Regulations" since Hazardous Materials Regulations and Procedures are now found in title 49 of the Code of Federal Regulations, parts 100-185. The change adds to the reference to "part 397 of title 49, Code of Federal Regulations" to include parts 390-397, the entire section that covers Federal Motor Carrier Safety Regulations. In addition, the change deletes the obsolete reference to "sections 831-835 of title 18, chapter 39, of the United States Code, pursuant to section 9 of the Department of Transportation Act, 49 U.S.C. 1657" which were the federal statutory sections that governed the transportation of explosives. Sections 832-835 of title 18, chapter 39 and section 1657, of Title 49 have been repealed and replaced by sections 5101-5127 of Title 49 U.S.C., chapter 51. The reference to section 831 may be deleted as it deals only

with the transportation of nuclear materials, which is covered by 21 NYCRR 102.1(a)(18). This change will benefit explosives haulers by deleting references to obsolete sections and replacing them with updated references.

There will be no change to how the loads are transported through the State.

4. Costs:

(a) The costs to regulated parties for implementation of and continuing compliance with the rule: this rule will impose no costs on regulated parties for implementation or compliance.

(b) The costs to the agency, the state and local governments for implementation and continuation of the rule: there are no significant costs associated with this rule because it is a simple linguistic change.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: this analysis is based upon an examination of the rule and the Federal Regulations.

5. Local Government Mandates:

None.

6. Paperwork:

None.

7. Duplication:

None.

8. Alternatives:

There were no alternatives to be considered.

9. Federal Standards:

None.

10. Compliance Schedule:

Ongoing.

Regulatory Flexibility Analysis

This regulation will have no negative impact on small businesses. The change in the regulations is a mere linguistic change and will not have any effect on small businesses beyond the effect that the current regulations already have on them.

Rural Area Flexibility Analysis

This regulation does not impose any adverse impact on rural areas whether through compliance, reporting or in any other way, and as such, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

It is apparent from the nature and purpose of the proposed rule that it will have no impact on jobs and employment opportunities. The proposed action is to replace the antiquated explosives Class classifications with the new Division classifications. As such, there is no employment impact.