

# RULE MAKING ACTIVITIES

---

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

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

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

---

---

## Banking Department

---

---

### EMERGENCY RULE MAKING

#### Community Reinvestment Act Requirements

**I.D. No.** BNK-24-06-00002-E

**Filing No.** 662

**Filing date:** May 24, 2006

**Effective date:** May 25, 2006

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

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

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

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

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

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

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

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

**Subject:** Compliance with Community Reinvestment Act requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire August 21, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

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

##### 2. Legislative objectives:

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

##### 3. Needs and benefits:

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

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

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

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

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

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

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

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

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

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

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

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

#### 4. Costs:

Costs to State Government: None.

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

Costs to Local Government: None.

Costs to the Regulated Entities

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

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

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

#### 5. Local government mandates:

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

#### 6. Paperwork:

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

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

#### 7. Duplication:

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

#### 8. Alternative approaches:

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

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

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

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

#### 9. Federal standards:

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

#### 10. Compliance schedule:

Compliance with the rule is required upon its becoming effective.

#### **Regulatory Flexibility Analysis**

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

#### Effect of the rule:

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

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

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

#### **Rural Area Flexibility Analysis**

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

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

#### **Job Impact Statement**

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

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

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

## Department of Correctional Services

### EMERGENCY RULE MAKING

#### **Packages and Articles Sent or Brought to Institutions**

**I.D. No.** COR-24-06-00017-E

**Filing No.** 677

**Filing date:** May 30, 2006

**Effective date:** May 30, 2006

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

**Action taken:** Repeal of Part 724 and adoption of new Part 724 of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

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

**Specific reasons underlying the finding of necessity:** Packages have represented a window through which inmates and their external sources have attempted to transmit contraband items such as drugs, money and articles which can be used as or converted to weapons. Because of technological advances, seemingly innocuous consumer items may conceal sinister capabilities, and advances in packaging have sometimes aided in disguising and concealing dangerous products. When such items are successfully smuggled into a correctional facility, they become an instant threat to the safety and security of staff, inmates, visitors, volunteers and the public at large.

Accordingly, the Department has concluded that it must have the capability of making immediate changes to the list of items allowed to be received via packages. For this reason, the listing, previously presented at section 724.4 of this regulation, has been removed. The listing, which has always been printed as part of the Department's internal directive #4911, "Packages and Articles Sent or Brought to Institutions," will henceforth be viewable on the Department's website and, as before, posted in facilities and available to inmates at facility libraries. The department will be able, thereby, to quickly alter the list whenever it becomes evident that an item presents a security risk. Likewise, public access to the up-to-date list will help to minimize the likelihood that someone might purchase and send to an inmate an article that would not be allowed.

Concurrently, the remainder of Part 724 is amended to reflect procedures designed to enhance security, guard against abuse of package privileges and prevent importation of contraband into correctional facilities.

In view of the potential harm to public safety which may arise from abuse of inmate package privileges, the Department has concluded that this rule should be implemented on an emergency basis.

**Subject:** Packages and articles sent or brought to institutions.

**Purpose:** To update procedures consistent with security needs.

**Substance of emergency rule:** PACKAGES AND ARTICLES SENT OR BROUGHT TO INSTITUTION

This Part formerly consisted of four sections, 724.1 through 724.4. It now consists of five sections with the addition of a new section 724.2 on applicability, identifying which inmates and facilities may receive packages in accordance with this Part.

Section 724.3, "Policy" (formerly 724.2), has been greatly expanded. New material is summarized as follows:

Subdivision (a).

- Paragraph (3) restricts received articles to those which will be for the inmate's personal use and will not cause the inmate to exceed in-cell limits;

- Paragraph (4) defines the value of an article as the actual purchase price, excluding tax, shipping or handling costs;

- Paragraphs (5) and (6) clarify procedures for disposition of previously received package items which subsequently become disallowed;

- Paragraph (7) specifies that the department is not responsible for articles damaged in shipping or received in spoiled condition;

- Paragraph (8) provides for a record of return-to-sender transactions.

Subdivision (b).

- Paragraphs (1) through (4) specify search procedures, including a procedure for handling items of religious significance;

- Paragraphs (5) and (6) define contraband and articles not permitted and include procedures for disposition;
- Paragraph (7) prohibits alteration of items once received;
- Paragraph (8) provides for review and disposition of items withheld by staff because of non-conformance with specifications.

Subdivision (d).

- Paragraph (1) adds procedures for disposition of packages not having return addresses;

- Paragraph (2) expands procedures for sending a package out of a facility at an inmate’s request.

Subdivision (e) – limits receipt of art and handicraft supplies.

- Subdivision (f) – explains procedures for handling packages brought by visitors.

Subdivision (g).

- Paragraph (2) requires that a received article valued at over \$20 must be accompanied by a receipt or bill;

- Paragraph (4) establishes special watch procedures to guard against importation of contraband in packages addressed to inmates who have been identified with contraband or drug-related misbehavior;

Subdivision (h).

- Paragraph (2) specifies that an inmate who orders a package while under a “loss of package” disciplinary disposition must pay to have it returned to sender.

- Subdivision (i) provides for disposition of packages received for inmates in SHU.

- Subdivision (j) provides for processing and forwarding or disposition of packages received for inmates who have been transferred or are temporarily away from a facility.

Section 724.4, “Local permits” (formerly 724.3), has not changed except for the following addition at paragraph (5): “If a permit is revoked, the article will be confiscated and disposed of at the inmate’s expense in accordance with the departmental directive on inmate personal property limits.”

Section 724.5, “Listing of approved items” (formerly 724.4, “Allowable Items”) is completely changed. The department will no longer list items in this regulation because of the necessity of making changes as security needs require and on an expeditious basis. The new section is printed here in its entirety.

§ 724.5 Listing of approved items.

(a) The department shall promulgate a detailed listing of items approved for receipt by inmates through facility package rooms. This listing shall be appended to the departmental directive #4911, “Packages and Articles Sent or Brought to Institutions,” made available to inmates in all facility libraries, posted in all facility package rooms and visiting rooms, and posted on the department’s website at [www.docs.state.ny.us/directives/4911.pdf](http://www.docs.state.ny.us/directives/4911.pdf)

(b) This listing only identifies items which may be received through the package room and sets forth the conditions and restrictions for receipt of those items; this listing is not a comprehensive list of all items that an inmate may be authorized to possess.

(c) This list will be periodically updated and amended, consistent with the needs of the department.

**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 August 27, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

**Regulatory Impact Statement**

Statutory Authority:

Section 112 of the Correction Law assigns to the commissioner of correction the powers and duties of management and control of correctional facilities and inmates, and the responsibility to make rules and regulations for the government of correctional facilities and discipline of inmates.

Legislative Objective:

By vesting the commissioner with this rule making authority, the legislature intended the commissioner to determine if inmates may receive packages from family members and other outside sources and, if allowed, to implement procedures to ensure that the privilege is not abused.

Needs and Benefits:

Inmates have long enjoyed the privileges of receiving packages from family and visitors and of ordering consumer goods from a list of approved

articles. Packages, however, have represented a window through which inmates and their external sources have attempted to obtain contraband items such as drugs, money and articles which can be used or converted to weapons. Needless to say, when such items are successfully smuggled in, they become an instant threat to the safety and security of staff, inmates, visitors, volunteers and the public at large.

The Department has preserved these privileges despite the increasing sophistication of those who would attempt to smuggle contraband via packages. Because of technological advances, seemingly innocuous consumer items may conceal sinister capabilities, and advances in packaging have sometimes aided in disguising and concealing dangerous products.

Accordingly, the Department has concluded that it must have the capability of making immediate changes to the list of items allowed to be received via packages. For this reason, the listing, which has always been presented at section 724.4, has been removed and is being published in more rapidly changeable venues, including posting at the Department’s website. The department will be able, thereby, to quickly alter the list whenever it becomes evident that an item presents a security risk. Likewise, public access to the up-to-date list will help to minimize the likelihood that someone might purchase and send to an inmate an article that would not be allowed.

The remaining text has been thoroughly overhauled to ensure that package privileges are maintained for most inmates and that all related procedures serve the department’s security interests. These detailed policies and procedures are currently implemented at department facilities and are posted and available to inmates.

Significant changes from the repealed text include: addition of a section on applicability, clarifying which inmates and facilities may receive packages in accordance with this Part; restriction of received articles to those which will be for the inmate’s personal use and will not cause the inmate to exceed in-cell limits; clarification of procedures for disposition of disallowed items; enhanced package-related record keeping; clarification of package and item search procedures; definitions of contraband and articles not permitted; a procedure for review of items withheld by staff because of non-conformance with specifications; procedures for sending packages out of a facility; procedures for handling packages brought with visitors; special watch procedures to guard against importation of contraband; procedures for handling packages for inmates in special housing units and for inmates who have been transferred or are temporarily away from a facility.

Costs:

- a. To State government: None.
- b. To local governments: None. The proposed amendment does not apply to local governments.
- c. Costs to private regulated parties: None. The proposed amendment does not apply to private regulated parties.
- d. Costs to the regulating agency for implementation and continued administration of the rule:

(i) Initial expenses: None.

(ii) Annual cost: None.

Paperwork:

- a. New reporting or application forms: None.
- b. Additions to existing reporting or application forms: None.
- c. New or addition recordkeeping that will be required of the regulated party to comply with the rule or prove compliance with the rule: None.

Local Government Mandates:

There are no new mandates imposed upon local governments by this proposal. The proposed amendment does not apply to local governments.

Duplication:

This proposed amendment does not duplicate any existing State or Federal requirement.

Alternatives:

The department has considered eliminating package privileges or severely restricting the number and circumstances under which packages may be received by inmates. It has concluded that such privileges represent a significant connection between inmates and their families and friends and, as such, have rehabilitative and quality-of-life value. As explained under “Needs and Benefits,” the chosen course of action intends to maintain package privileges for most inmates while strengthening the procedures designed to ensure that these privileges are not abused and do not compromise security.

No other alternatives have been proposed or considered

Federal Standards:

There are no minimum standards of the Federal government for this of a similar subject area.

## Compliance Schedule:

The Department of Correctional Services is in compliance with this proposed rule.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This merely updates policy and procedures for receiving, handling, searching and disposing of packages and articles received by inmates correctional facilities.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This merely updates policy and procedures for receiving, handling, searching and disposing of packages and articles received by inmates correctional facilities.

**Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This merely updates policy and procedures for receiving, handling, searching and disposing of packages and articles received by inmates correctional facilities.

**NOTICE OF ADOPTION****Merit Time**

**I.D. No.** COR-12-06-00005-A

**Filing No.** 663

**Filing date:** May 25, 2006

**Effective date:** June 14, 2006

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

**Action taken:** Amendment of sections 280.1, 280.2(a)(2), (b)(2) and (d) and 280.4(a)(2); renumbering of sections 280.3-280.4 to 280.4-280.5; and addition of a new section 280.3 to Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112, 803 and 805

**Subject:** Merit time.

**Purpose:** To ensure that only those inmates who satisfy both the eligibility criteria and intent of the merit time and earned eligibility statutes benefit from merit time reductions.

**Text of final rule:** Section 280.1 is amended as follows:

Inmates serving [indeterminate]sentences for certain nonviolent crimes may receive merit time allowances against [the minimum terms of]their sentences provided they have achieved certain significant programmatic objectives, have not committed any serious disciplinary infractions and have not filed any frivolous lawsuits. [The merit time allowance is one-third of the minimum term or period imposed by the court for an inmate convicted of an A-1 felony under article 220 of the Penal Law and one-sixth of the minimum term or period imposed by the court for an inmate convicted of any other offense.] *In the case of an indeterminate sentence, [T]he merit eligibility date is the parole eligibility date minus the merit time allowance as outlined in section 280.3, below. In the case of a determinate sentence, the merit eligibility date is five-sevenths of the imposed term, as outlined in section 280.3.* When granted, merit time allowances enable inmates to appear before the Board of Parole for possible release on parole on their merit eligibility dates. A merit time allowance is a privilege to be earned by the inmate and no inmate has the right to demand or require that any such allowance be granted. This Subchapter sets forth the policy and procedures for granting and withholding merit time allowances.

Paragraph (2) of subdivision (a) of section 280.2 is amended as follows:

(2) An inmate cannot be presently serving a sentence for any of the following or any attempt thereof:

- (i) manslaughter in the second degree;
- (ii) vehicular manslaughter in the first or second degree;
- (iii) criminally negligent homicide;
- (iv) incest;
- (v) any offense defined in article 130 of the Penal Law (sex offenses); [or]
- (vi) any offense defined in article 263 of the Penal Law (use of a child in a sex performance)[.]; or
- (vii) *aggravated harassment of an employee by an inmate.*

Paragraph (4) of subdivision (a) of section 280.2 is amended as follows:

- (4) An inmate must be serving[.] a sentence of one year or more.

[ (i) an indeterminate sentence with a minimum term in excess of one year; and

(ii) no determinate sentence.]

Subparagraph (xvii) of paragraph (2) of subdivision (b) of section 280.2 is amended as follows:

(xvii) 118.22 - unhygienic act (*under Part 254 only*);

Subdivision (d) of section 280.2 is restructured into paragraphs (1) and (2) and amended as follows:

(d) *Program criteria.*

(1) An inmate must:

(i) successfully perform and pursue his or her most recently assigned earned eligibility plan or program plan; and

(ii) subsequent to the date of that most recently earned eligibility plan or program plan, undertake and complete one of the following:

(a) earn a general equivalency diploma (G.E.D.);

(b) receive an alcohol and substance abuse treatment certificate;

(c) receive a vocational trade certificate following at least six months of programming in that program; or

(d) perform 400 hours or more of service as part of a community work crew/outside assignment.

Note: An earned eligibility plan is a work and treatment program applicable to an inmate serving a minimum term of not more than [six]eight years developed under the Earned Eligibility Program. A program plan refers to a work and treatment program applicable to an inmate serving a minimum term exceeding [six]eight years. In either case, the individualized program plan is created by the department's guidance staff in consultation with the inmate during classification, assessment or intake interviews. It may be modified during later reviews as necessary.

(2) *An inmate shall not be eligible for merit time if the inmate*

(i) *entered the shock incarceration program but failed to successfully complete the program for any reason other than an intervening circumstance beyond the control of the inmate,*

(ii) *was a participant in the temporary release program but was removed for any reason other than an intervening circumstance beyond the control of the inmate, or*

(iii) *was temporarily placed in a relapse program.*

Add the following new section 280.3 and re-number existing sections 280.3 and 280.4 to 280.4 and 280.5, respectively:

280.3 *Effect on the sentence.*

(a) *Indeterminate sentences.*

(1) *The merit time allowance is one-third of the minimum term or period imposed by the court for an inmate convicted of an A-1 felony under Article 220 of the Penal Law and one-sixth of the minimum term or period imposed by the court for an inmate convicted of any other eligible offense.*

(2) *An inmate serving a sentence for any Class A-II through Class E drug offense may earn supplemental merit time in the amount of an additional one-sixth of the minimum period of the sentence imposed for the drug felony if he or she has either:*

(i) *completed two or more of the four possible merit program objectives listed in section 280.2(d)(1)(ii), above; or*

(ii) *completed one of the four and also successfully maintained employment in a work release program or other continuous temporary release program for a period of not less than three months.*

(b) *Determinate sentences. The merit time allowance is an additional one-seventh of the determinate term imposed by the court for an eligible offense.*

Paragraph (2) of subdivision (a) of re-numbered section 280.4 is amended as follows:

(2) The inmate's program history and record will be reviewed by a senior counselor, deputy superintendent for programs, and superintendent, or their respective designees to identify any inmate whose behavior, subsequent to commitment to the department, may be regarded as inconsistent with the intent of Correction Law section 803 (1)(d) and public safety. Factors which will be viewed negatively include:

(i) evidence of escape or attempted escape[;]

(ii) failure, as an approved participant in the Temporary Release Program, to comply with the temporary release memorandum of agreement[;]

(iii) refusal to participate [or failure to successfully participate] in the Shock Incarceration Program.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 280.1.

**Text of rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel,

Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

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

Public comment revealed that there was a typographic error in amended Section 280.1. The third sentence began "In the case of a determinate sentence...."; The word "determinate" should be "indeterminate." The error has been corrected in the adopted text.

This change does not necessitate revision to the previously published RIS, RAFA, RFA or JIS.

**Assessment of Public Comment**

Comment: The Division of Parole pointed out that there is a typographic error in Section 280.1. The third sentence begins "In the case of a determinate sentence....": the word "determinate" should be "indeterminate."

Response: The error has been corrected in the adopted text.

## Education Department

### EMERGENCY RULE MAKING

#### School District Financial Accountability

**I.D. No.** EDU-11-06-00017-E

**Filing No.** 668

**Filing date:** May 25, 2006

**Effective date:** May 29, 2006

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

**Action taken:** Addition of section 170.12 and amendment of sections 170.2 and 170.3 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 1604(35), 1709(20-a), 1711(2)(e), 1950(4)(k), 2102-a(1) through (4), 2116-a(3), 2116-b(1) through (7), 2116-c(1) through (9), 2117(1), 2503(5), 2508(5), 2509(4), 2523(2), 2524(1), 2525(1) and (2), 2526(1), (1-a) and (2), 2527 (not subdivided), 2554(2-a), 2562(2), 2566(6), 2573(4), 2576(1)(a), 2580(2) and 3713(1) and (2) and L. 2005, ch. 263

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

**Specific reasons underlying the finding of necessity:** The proposed rule is needed to conform the Commissioner's Regulations to Chapter 263 of the Laws of 2005 and was adopted as an emergency measure at the February 2006 Regents meeting, effective February 28, 2006, upon a finding by the Board of Regents that such action was necessary for the preservation of the general welfare in order to provide for the timely implementation of Chapter 263 of the Laws of 2005 by immediately establishing requirements relating to school district financial accountability, and thereby ensure that the Commissioner of Education may timely approve providers and curriculums so that board of education members may complete their training by the statutory deadline; ensure sufficient time for school districts and BOCES to establish and operate their internal audit functions by the statutory deadline; and establish requirements relating to claims auditors, audit committees, and the conduct of annual audits.

The proposed rule is being presented to the Board of Regents for adoption as a permanent rule at their May 22-23, 2006 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act. Pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the State Register on June 14, 2006. However, the February emergency adoption will expire on May 28, 2006, 90 days after its filing with the Department of State on February 28, 2006. A second emergency adoption is therefore necessary to ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule.

**Subject:** School district financial accountability.

**Purpose:** To implement L. 2005, ch. 263 by establishing criteria for claims auditor, financial training for school district officers, internal audit

function, request for proposals (RFP) process for contracting for annual audit, audit committees and annual audits.

**Substance of emergency rule:** The State Education Department proposes to add a new section 170.12 and amend sections 170.2 and 170.3 of the Regulations of the Commissioner of Education, effective May 29, 2006. The following is a summary of the provisions of the proposed rule.

Section 170.12(a) requires every trustee or member of a board of education of a school district or a board of cooperative educational services (BOCES), elected or appointed for a term beginning on or after July 1, 2005, to complete, within the first year of his or her term, a minimum of six hours of training on the financial oversight, accountability, and fiduciary responsibilities of a board member.

Section 170.12(a)(1) states that the training may be provided by the State Education Department, the Office of the State Comptroller, or other provider approved by the Commissioner of Education. The section also provides information on the approval process for the trainers.

Section 170.12(a)(2) requires that the provider of the training supply each participant who successfully completes all or part of the required six hours of training with a certificate of completion, as appropriate. The section also requires that each trustee or board member file the certificate with the district clerk.

Section 170.12(a)(3) sets forth applicability provisions for the training requirement, and specifies that upon completion of the training requirements, no trustee or board member shall be required to repeat such training.

Section 170.12(b) requires school districts and BOCES to establish an internal audit function no later than July 1, 2006, with the internal audit function to be in operation no later than December 31, 2006.

Section 170.12(b)(1) specifies the minimum requirements for the internal audit function including an initial risk assessment of district operations, an annual review and update of such risk assessment, annual testing and evaluation of one or more areas, and preparation of reports, which analyze significant risk assessment findings, recommend changes for strengthening controls and reducing identified risks, and specify timeframes for implementation of such recommendations.

Section 170.12(b)(2) establishes criteria for the conduct of the internal audit function, including that personnel or entities conducting internal audits, reviews, or risk assessments shall follow generally accepted auditing standards, and shall be independent of district or BOCES business operations; and have the requisite knowledge and skills to complete the work. This section also states a district or BOCES may use its employees, inter-municipal cooperative agreements, shared services to the extent authorized by Education Law section 1950, or independent contractors to fulfill the internal audit function, provided that personnel or entities performing the function meet professional auditing standards for independence between the auditor and the district.

Section 170.12(b)(3) provides exemptions from the internal audit function requirements for districts employing fewer than eight teachers, districts with actual general fund expenditures totaling less than five million dollars in the previous school year, and districts with actual enrollment of less than three hundred students in the previous school year. Any school district claiming an exemption shall annually certify to the Commissioner that it meets the requirements set forth in this paragraph.

Section 170.12(c) specifies criteria relating to the establishment of the office of claims auditor and the appointment of a claims auditor.

Section 170.12(c)(1) specifies the qualifications of the position and specifically prohibits certain individuals from the position. It further clarifies that the claims auditor does not have to be a resident of the district.

Section 170.12(c)(2) specifies that the claims auditor shall report directly to the trustees or board on the result of the audits of claims, and shall report, as determined by the trustees or board of education, to the clerk of the school district or board of education or to the superintendent of schools, for administrative matters.

Section 170.12(c)(3) permits the delegation of the auditing of claims to an individual through the use of a school district or BOCES employee who is not prohibited from being the claims auditor, an inter-municipal cooperative agreement, shared services to the extent authorized by Education Law section 1950, or independent contractors. The regulation also defines the independence requirement for the claims auditor.

Section 170.12(d)(1) provides that school districts and BOCES shall establish an audit committee by January 1, 2006. The audit committee shall consist of at least three members, who shall serve without compensation but may be reimbursed for actual and necessary expenditures. The audit committee may be a committee of the trustees or board members, a committee of the whole, or an advisory committee. Persons other than trustees

or board members who serve on an advisory committee shall be independent as defined in the regulations.

Section 170.12(d)(2) specifies the duties and responsibilities of an audit committee and specifies its role as advisory. It is responsible for providing recommendations regarding the appointment of the external auditor for the district, meeting with the external auditor prior to commencement of the audit, reviewing and discussing with the external auditor any risk assessment of the district's fiscal operations, receiving and reviewing the draft annual audit report and accompanying draft management letter and, making a recommendation to the trustees or board on accepting the annual audit report, reviewing every corrective action plan developed, and assisting in the oversight of the internal audit function.

The audit committee shall develop, and submit to the trustees or board for approval, a formal, written charter which includes provisions regarding its purpose, mission, duties, responsibilities and membership requirements.

Section 170.12(d)(3) provides exemptions from the audit committee requirement for school districts employing fewer than eight teachers, and the city school district of the city of New York, provided that the Chancellor of such school district shall annually certify to the Commissioner that such district has a process for review by an audit committee of the district's annual audit that meets or exceeds the requirements of this subdivision.

Section 170.12(e)(1) specifies that each school district, except those employing fewer than eight teachers, and each BOCES shall obtain an annual audit of its records by an independent certified public accountant or an independent public accountant.

Section 170.12(e)(2) requires that the independent accountant shall present the report of the annual audit to the trustees or board and provide a copy of the audit to each trustee or board member. The trustees or board shall adopt a resolution accepting the audit report and shall file a copy of the resolution with the Commissioner. A school district or BOCES shall file with the Commissioner its audit report for a specific school year by October 15th of the following school year; provided that the city school districts of the cities of Buffalo, Rochester, Syracuse and Yonkers, and the city school district of the city of New York and community districts of such city school district, shall file their audit reports with the Commissioner by January 1st of such following school year.

Section 170.12(e)(3) requires that on or after July 1, 2005, all school districts, except the city school district of the city of New York, and each BOCES shall utilize a competitive request for proposal process when contracting for its annual audit. In addition, on or after July 1, 2005, no audit engagement shall be for a term longer than five consecutive years.

Section 170.12(e)(4) states that within ninety days of receipt of an audit report or management letter, each school district superintendent and BOCES district superintendent shall prepare a corrective action plan, approved by the board, in response to any findings contained in the annual external audit report or management letter, a final audit report issued by the district's internal auditor, a final audit report issued by the State Comptroller, a final audit report issued by the State Education Department, or a final audit report issued by the United States or an office, agency or department thereof. Each school district and BOCES shall file its corrective action plan with the State Education Department.

Section 170.2(d) is amended to clarify that the requirement regarding the filing of an official undertaking applies to the claims auditor.

Section 170.2(r) is amended to delete requirements relating to the filing of a school district's annual audit that have been superceded by the new section 170.12(e).

Section 170.3(a) is amended to delete requirements relating to the filing of a BOCES' annual audit that have been superceded by the new section 170.12(e).

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-11-06-00017-EP, Issue of March 15, 2006. The emergency rule will expire July 23, 2006.

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

#### Regulatory Impact Statement

##### REGULATORY AUTHORITY:

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

Education Law section 215 provides that the Regents, or the Commissioner, or their representatives, may visit, examine into and inspect, any institution in the University of the State of New York and any school or institution under the educational supervision of the State, and may require, as often as desired, duly verified reports giving such information and in such form as they shall 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. Section 305(25) directs the Commissioner to conduct periodic fiscal audits of boards of cooperative educational services (BOCES).

Education Law section 1950(4)(k), as amended by Chapter 263 of the Laws of 2005, provides that the receipt, deposit, investment and disbursement of moneys by a BOCES, and all procedures relating thereto, including, but not limited to the requirements for signatures, the appointment of a claims auditor to approve claims for purchases, and the optional use of claim forms, and the establishment of an internal audit function, shall be subject to the laws relating to union free school districts.

Education Law section 2117(1) provides that the school authorities of each school district shall make a full report to the Commissioner upon an particular matter relating to their schools whenever such report shall be required by the Commissioner.

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.

Chapter 263 of the Laws of 2005 added a new subdivision 35 to Education Law section 1604, and amended Education Law sections 1709(20-a), 1711(2)(e), 1950(4)(k), 2503(5), 2508(5), 2509(4), 2523(2), 2524(1), 2525, 2526, 2527, 2554(2-a), 2562(2), 2566(6), 2573(4), 2576(1), and 2580(2) to provide for the discretionary appointment by school districts and BOCES of a claims auditor.

Chapter 263 of the Laws of 2005 added a new Education Law section 2102-a to require training on the financial oversight, accountability and fiduciary responsibilities of members of boards of education and BOCES pursuant to curriculum approved by the Commissioner in consultation with the Comptroller.

Chapter 263 of the Laws of 2005 amended Education Law section 2116-a(3) to require school districts to utilize a competitive request for proposal process when contracting for their annual audit, and to prepare a corrective action plan in response to certain findings.

Chapter 263 of the Laws of 2005 added section 2116-b and 2116-c, and amended Education Law section 1950(4)(k), to require school districts and BOCES to establish an internal audit function pursuant to regulations promulgated by the Commissioner in consultation with the Comptroller, and to establish an audit committee pursuant to regulations promulgated by the Commissioner.

#### LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and its necessary to implement Chapter 263 of the Laws of 2005 by establishing criteria for school district financial accountability.

#### NEEDS AND BENEFITS:

The proposed rule is needed to implement the statutory requirements. The rule establishes systems and processes that provide for transparency and accountability in the conduct of district business, strengthens oversight, and increases accountability. It will help ensure the \$38 billion spent annually by school districts and BOCES is used in an effective and efficient manner.

Six key areas are addressed:

- Requirements for training of school board and BOCES members
- Establishment of an internal audit function
- Clarifications related to the position of claims auditor
- Enhancements related to external audits
- Establishment of an audit committee, and
- The requirement to use a request for proposal (RFP) for the procurement of the annual audit of the financial statements.

#### COSTS:

The rule is necessary to implement Chapter 263 of the Laws of 2005 and does not impose any additional costs beyond those inherent in the statute.

a. Costs to State government:

None.

b. Costs to local governments:

The new requirements will result in additional costs to school districts and BOCES, as follows:

(i) Board Training – The statute requires that each board member elected for a period on or after July 1, 2005 shall receive a minimum of six hours training. There are approximately 5,200 school district and BOCES board members in the State and assuming a cost of \$150 per board member for the training, the total estimated cost to train all Board members during the first three years is \$780,000. Since the requirement is being phased in, the estimated annual cost is \$270,000 for each of the first three years. Once fully implemented, the annual on-going cost is estimated to be \$135,000 annually. The New York City Department of Education is exempt from this requirement if certain conditions are met.

(ii) Internal Audit Function – Most districts are required to have an internal audit function. The statute exempts districts with fewer than eight teachers, districts with general fund expenditures totaling less than five million dollars, districts with actual enrollment of less than 300 students and districts or BOCES that have an internal audit function that meets or exceeds the requirements. For these districts, no additional cost is required to be incurred.

For all other districts, the statute provides much flexibility and permits a district to hire its own staff or an independent contractor, or use inter-municipal agreements or shared services to the extent authorized. While the districts are required to conduct an initial risk assessment and update it annually, districts determine the number of areas that are reviewed annually. Given this flexibility and the lack of data on the cost of an internal audit function, it is not possible to reasonably estimate the costs.

(iii) Audit Committee – The requirement for an audit committee will not result in any significant costs to school districts and BOCES. The statute does not permit any payments to the audit committee member for their service other than the reimbursement of actual and necessary expenditures incurred in relation to attendance at meetings. However, it is not anticipated that the cost will be significant.

(iv) Claims Auditor – The statute enhances the effectiveness of the Office of the Claims Auditor by placing restrictions on the individuals that may be appointed to the position. However, the statute did not amend the authority of the Board to audit each claim rather than appoint a claims auditor. For some districts that assigned the claims auditor duties to an existing employee such as the superintendent’s secretary, there may be an additional cost to these districts. However, given the variations in size, locations, regional cost indexes, and volume of expenditures, it is not possible to reasonably estimate the costs.

(v) External Auditor – The statute requires that districts use a request for proposal process to hire the independent auditor. There are no estimates whether the cost of external auditor will increase or decrease given this requirement. Generally, competition would be expected to lower the costs, but given the school district environment and concerns with the adequacy of work, cost may, in fact, increase. There is no data readily available to estimate the impact of this requirement. It is anticipated that the other requirements – reporting the results to the full board, increasing the involvement of the audit committee in the audit process, and development of corrective action plans – will have no significant impact on costs.

c. Costs to private, regulated parties:

There are no anticipated additional costs to private, regulated parties.

d. Costs to the Department of implementation and continuing compliance:

It is anticipated that the costs associated with the State Education Department’s approval of training providers and curriculum, and any necessary oversight of school district and BOCES compliance with the statutory provisions, can be assumed by existing staff and resources. The Department may need to reassign priorities to permit staff to provide guidance and answer questions on the new requirements.

LOCAL GOVERNMENT MANDATES:

Consistent with Chapter 263 of the Laws of 2005, the proposed rule requires that each board member of a school district and BOCES receive six hours of training. It also requires most school districts and BOCES to establish an internal audit function and an audit committee. Finally, the rule requires that school districts and BOCES use a request for proposal for obtaining the annual audit of its records by an independent accountant.

PAPERWORK:

The proposed rule requires the following reporting requirements:

1. An application for approval as an approved provider of training and an application for approval of the curriculum must be submitted to the Commissioner.

2. A certificate of completion of training must be provided to each participant that successfully approves the training and the certificate should be filed with the district clerk.

3. The internal audit function must include reports that analyze significant risk assessment findings and recommend changes to strengthen controls.

4. Any district exempt from the requirement to establish an internal audit function is required to annually certify to the Commissioner that the district meets the exception requirements.

5. Each school district and BOCES that is required to establish an audit committee must prepare an annual report and develop a formal written charter defining the committee’s purpose, mission duties, responsibilities, and membership requirement.

6. Any district exempt from the requirement to establish an audit committee is required to annually certify to the Commissioner that the district meets the exception requirements.

DUPLICATION:

The proposed rule will not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to implement Chapter 263 of the Laws of 2005.

ALTERNATIVES:

The Department considered permitting the claims auditor to also be the internal auditor. However, the Department believes that the same individual or entity should not be appointed to both positions, due to concerns with independence. For the work of the internal auditors to be objective, they cannot function as the claims auditor and review and approve claims and also audit the claims auditor’s review and approval process.

The Department considered leaving out any requirement related to an audit committee charter. However, the Department concluded that requiring a charter and specifying some minimum provisions for the charter would help ensure that the members of the audit committee and the board understand the purpose, mission, duties, responsibilities, and membership requirement of the audit committee.

The Department considered exempting from the requirement to establish an audit committee those districts that had fewer than 8 teachers, actual general fund expenditures of less than \$5 million, or actual enrollment of less than 300 students, from the audit committee requirement. However, the statute is quite clear as exempting districts from the audit committee requirement only if they have fewer than eight teachers.

FEDERAL STANDARDS:

The proposed rule does not exceed any minimum federal standards, and is necessary to implement Chapter 263 of the Laws of 2005.

COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement Chapter 263 of the Laws of 2005. The statute specifies deadlines for certain requirements. The statute provides that a board member elected or appointed for a term beginning on or after July 1, 2005 must complete the required fiscal training within the first year of his or her term. The statute requires that the internal audit function be established no later than July 1, 2006 and be in operation by December 31, 2006. The new requirements for the claims auditor pursuant to Chapter 263 became effective July 19, 2005. The statute also requires that school districts and BOCES establish audit committees by January 1, 2006. The effective date for the requirement to use a request for proposal for the annual audit was established pursuant to Chapter 263 and became effective July 19, 2005.

**Regulatory Flexibility Analysis**

Small Businesses:

The proposed rule is necessary to implement Chapter 263 of the Laws of 2005, relating to school district financial accountability. The proposed amendment applies to school districts and boards of cooperative educational services (BOCES), and establishes criteria, consistent with Chapter 263, for school district and BOCES financial accountability. The proposed rule does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local government:

EFFECT OF RULE:

The proposed amendment applies, with certain exceptions noted below, to all public school districts and boards of cooperative educational services (BOCES) in the State, and establishes criteria, consistent with Chapter 263, for training of school district and BOCES board members in financial oversight, accountability and fiduciary responsibilities; the estab-

lishment of an internal audit function; the establishment of a claims auditor; the establishment of audit committees; and for an annual audit, including a requirement that a competitive request for proposal (RFP) process be used when contracting for the annual audit.

Section 170.12(b)(3) provides exemptions from the internal audit function requirement for districts employing fewer than eight teachers, districts with actual general fund expenditures totaling less than five million dollars in the previous school year, and districts with actual enrollment of less than three hundred students in the previous school year.

Section 170.12(d)(3) provides an exemption from the requirement that school districts appoint an audit committee for school districts employing fewer than eight teachers and for the city school district of the City of New York, provided that the Chancellor of the New York City School District shall annually certify to the Commissioner that such district has a process for review by an audit committee of the district's annual audit that meets or exceeds the requirements of this subdivision.

Section 170.12(e)(1) exempts school districts employing fewer than eight teachers from the requirement that school districts obtain an annual audit of their records by an independent certified public accountant or an independent public accountant.

Section 170.12(e)(3) exempts the New York City School District from the requirement that a competitive request for proposal (RFP) process be used when contracting for a school district's annual audit.

#### COMPLIANCE REQUIREMENTS:

The proposed rule requires that each board member of a school district or BOCES receive six hours of training. It also requires most school districts and BOCES to establish an internal audit function and an audit committee, and requires that an RFP process be used to contract for the annual audit.

In addition, the proposed rule requires the following reporting requirements:

1. An application for approval as an approved provider of training and an application for approval of the curriculum must be submitted to the Commissioner.
2. A certificate of completion of training must be provided to each participant that successfully approves the training and the certificate should be filed with the district clerk.
3. The internal audit function must prepare reports that analyze significant risk assessment findings and recommend changes to strengthen controls.
4. Any district exempt from the requirement to establish an internal audit function is required to annually certify to the Commissioner that the district meets the exception requirements.
5. Each school district and BOCES that is required to establish an audit committee must prepare an annual report and develop a formal written charter defining the committee's purpose, mission duties, responsibilities, and membership requirement.
6. Any district exempt from the requirement to establish an audit committee is required to annually certify to the Commissioner that the district meets the exception requirements.

#### PROFESSIONAL SERVICES:

School districts and BOCES will need the services of an experienced professional to provide training to board members. It is anticipated that much of the training will be provided by the State Education Department, the Office of the State Comptroller, and educational organizations.

School Districts and BOCES will need the services of a qualified auditor to meet the requirements to establish an internal audit function. However, the regulation does not require that the individual or entity completing the internal audit function be a certified public accountant, or certified internal auditor.

School districts and BOCES will need the services of individuals that collectively possess knowledge in accounting, auditing, financial reporting, and school district finances to serve on the audit committee.

#### COMPLIANCE COSTS:

The proposed rule is necessary to implement Chapter 263 of the Laws of 2005 and does not impose any additional costs beyond those inherent in the statute. The new requirements will result in additional costs to school districts and BOCES, as follows:

(i) Board Training – The statute requires that each board member elected for a period on or after July 1, 2005 shall receive a minimum of six hours training. There are approximately 5,200 school district and BOCES board members in the State and assuming a cost of \$150 per board member for the training, the total estimated cost to train all Board members during the first three years is \$780,000. Since the requirement is being phased in, the estimated annual cost is \$270,000 for each of the first three years. Once

fully implemented, the annual on-going cost is estimated to be \$135,000 annually. The New York City Department of Education is exempt from this requirement if certain conditions are met.

(ii) Internal Audit Function – Most districts are required to have an internal audit function. The statute exempts districts with fewer than eight teachers, districts with general fund expenditures totaling less than five million dollars, districts with actual enrollment of less than 300 students and districts or BOCES that have an internal audit function that meets or exceeds the requirements. For these districts, no additional cost is required to be incurred.

For all other districts, the statute provides much flexibility and permits a district to hire its own staff or an independent contractor, or use inter-municipal agreements or shared services to the extent authorized. While the districts are required to conduct an initial risk assessment and update it annually, districts determine the number of areas that are reviewed annually. Given this flexibility and the lack of data on the cost of an internal audit function, it is not possible to reasonably estimate the costs.

(iii) Audit Committee – The requirement for an audit committee will not result in any significant costs to school districts and BOCES. The statute does not permit any payments to the audit committee member for their service other than the reimbursement of actual and necessary expenditures incurred in relation to attendance at meetings. However, it is not anticipated that the cost will be significant.

(iv) Claims Auditor – The statute enhances the effectiveness of the Office of the Claims Auditor by placing restrictions on the individuals that may be appointed to the position. However, the statute did not amend the authority of the Board to audit each claim rather than appoint a claims auditor. For some districts that assigned the claims auditor duties to an existing employee such as the superintendent's secretary, there may be an additional cost to these districts. However, given the variations in size, locations, regional cost indexes, and volume of expenditures, it is not possible to reasonably estimate the costs.

(v) External Auditor – The statute requires that districts use a request for proposal process to hire the independent auditor. There are no estimates whether the cost of external auditor will increase or decrease given this requirement. Generally, competition would be expected to lower the costs, but given the school district environment and concerns with the adequacy of work, cost may, in fact, increase. There is no data readily available to estimate the impact of this requirement. It is anticipated that the other requirements – reporting the results to the full board, increasing the involvement of the audit committee in the audit process, and development of corrective action plans – will have no significant impact on costs.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The economic impact on school districts and BOCES is not expected to be significant and is discussed in the Compliance Costs section above. The rule provides flexibility in implementing many of the provisions and exempts smaller districts from certain of the requirements. The regulation does not impose any requirements that would adversely impact technological feasibility.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Chapter 263 of the Laws of 2005. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts and BOCES from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts and BOCES in the development of this rule, and to the extent possible, the proposed rule has been drafted incorporating their comments, to provide flexibility in implementing many of the provisions and, consistent with the statute, to exempt smaller districts and the New York City School District from certain of the requirements. For example, the proposed rule provides that a board member shall be deemed to have met the training requirement in section 170.12(a) if such person can provide sufficient documentation to establish completion, on or after July 1, 2004 and prior to January 1, 2006, a training program substantially equivalent to an approved curriculum by an approved provider. The training may be provided in one session or in partial increments. Upon demonstration of compliance with the training requirements, no board member shall be required to repeat the training. School districts and BOCES may use its employees, inter-municipal cooperative agreements, shared services to the extent authorized by Education Law section 1950, or independent contractors to fulfill the internal audit function under section 170.12(b). Furthermore, districts employing fewer than eight teachers, districts with actual general fund expenditures of less than five million dollars, and districts with actual enrollment of less than 300 students are exempt from the requirement to establish an internal audit function. For

those that are required to establish an internal audit function, the regulations provide flexibility in the number of areas of internal controls that should be reviewed annually. A school district or BOCES with an internal audit function that meets or exceeds the requirements of Education Law section 2116-b shall not be required to replace or modify its existing internal audit function. A claims auditor under section 170.12(c) shall not be required to be a resident of the school district or BOCES supervisory district. A school district or BOCES may delegate the auditing of claims to an individual through the use of school district or BOCES employees (where not otherwise prohibited), an inter-municipal cooperative agreement, shared services to the extent authorized by Education Law section 1950 or independent contractors. Audit committees established pursuant to section 170.12(d) may consist of either: (a) a committee of the trustees or board members; (b) a committee of the whole; or (c) an advisory committee, which may be composed entirely of persons other than trustees or board members, if advisable to provide accounting and auditing experience.

#### LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule have been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. School districts, BOCES, and the public were provided the opportunity to provide comments on the proposed regulations. The draft regulations were available on the Department's website and comments were requested from various educational organizations and the Office of the State Comptroller. Over 20 written comments and numerous verbal comments were received for consideration and many were incorporated into the proposed rule.

#### **Rural Area Flexibility Analysis**

##### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule generally applies to each school district and board of cooperative educational services (BOCES) 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.

Section 170.12(b)(3) provides exemptions from the internal audit function requirement for districts employing fewer than eight teachers, districts with actual general fund expenditures totaling less than five million dollars in the previous school year, and districts with actual enrollment of less than three hundred students in the previous school year.

Section 170.12(d)(3) provides an exemption from the requirement that school districts appoint an audit committee for school districts employing fewer than eight teachers and for the city school district of the City of New York.

Section 170.12(e)(1) exempts school districts employing fewer than eight teachers from the requirement that school districts obtain an annual audit of their records by an independent certified public accountant or an independent public accountant.

Section 170.12(e)(3) exempts the city school district of the city of New York from the requirement that a competitive request for proposal process be used when contracting for a school district's annual audit.

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

The proposed rule requires that each board member of a school district and BOCES receive six hours of training. It also requires most school districts and BOCES to establish an internal audit function and an audit committee. The proposed rule also requires that school districts and BOCES use a request for proposal for obtaining the annual audit of its records by an independent accountant.

In addition, the proposed rule requires the following reporting requirements:

1. An application for approval as an approved provider of training and an application for approval of the curriculum must be submitted to the Commissioner of Education.

2. A certificate of completion of training must be provided to each participant that successfully approves the training and the certificate should be filed with the district clerk.

3. The internal audit function must prepare reports that analyze significant risk assessment findings and recommend changes to strengthen controls.

4. Any district exempt from the requirement to establish an internal audit function is required to annually certify to the Commissioner that the district meets the exception requirements.

5. Each school district and BOCES that is required to establish an audit committee must prepare an annual report and develop a formal written

charter defining the committee's purpose, mission duties, responsibilities, and membership requirement.

6. Any district exempt from the requirement to establish an audit committee is required to annually certify to the Commissioner that the district meets the exception requirements.

School districts and BOCES will need the services of an experienced professional to provide training to board members. It is anticipated that much of the training will be provided by the State Education Department, the Office of the State Comptroller, and educational organizations.

School Districts and BOCES will need the services of a qualified auditor to meet the requirements to establish an internal audit function. However, the regulation does not require that the individual or entity completing the internal audit function be a certified public accountant, or certified internal auditor.

School districts and BOCES will need the services of individuals that collectively possess knowledge in accounting, auditing, financial reporting, and school district finances.

#### COSTS:

The proposed rule is necessary to implement Chapter 263 of the Laws of 2005 and do not impose any additional costs beyond those inherent in the statutes. The new requirements will result in additional costs to school districts and BOCES. A discussion of the cost for each of the requirements follows:

- (i) Board Training – The statute requires that each board member elected for a period on or after July 1, 2005 shall receive a minimum of six hours training. There are approximately 5,200 school district and BOCES board members in the State and assuming a cost of \$150 per board member for the training, the total estimated cost to train all Board members during the first three years is \$780,000. Since the requirement is being phased in, the estimated annual cost is \$270,000 for each of the first three years. Once fully implemented, the annual on-going cost is estimated to be \$135,000 annually. The New York City Department of Education is exempt from this requirement if certain conditions are met.

- (ii) Internal Audit Function – Most districts are required to have an internal audit function. The statute exempts districts with fewer than eight teachers, districts with general fund expenditures totaling less than five million dollars, districts with actual enrollment of less than 300 students and districts or BOCES that have an internal audit function that meets or exceeds the requirements. For these districts, no additional cost is required to be incurred.

For all other districts, the statute provides much flexibility and permits a district to hire its own staff or an independent contractor, or use inter-municipal agreements or shared services to the extent authorized. While the districts are required to conduct an initial risk assessment and update it annually, districts determine the number of areas that are reviewed annually. Given this flexibility and the lack of data on the cost of an internal audit function, it is not possible to reasonably estimate the costs.

- (iii) Audit Committee – The requirement for an audit committee will not result in any significant costs to school districts and BOCES. The statute does not permit any payments to the audit committee member for their service other than the reimbursement of actual and necessary expenditures incurred in relation to attendance at meetings. However, it is not anticipated that the cost will be significant.

- (iv) Claims Auditor – The statute enhances the effectiveness of the Office of the Claims Auditor by placing restrictions on the individuals that may be appointed to the position. However, the statute did not amend the authority of the Board to audit each claim rather than appoint a claims auditor. For some districts that assigned the claims auditor duties to an existing employee such as the superintendent's secretary, there may be an additional cost to these districts. However, given the variations in size, locations, regional cost indexes, and volume of expenditures, it is not possible to reasonably estimate the costs.

- (v) External Auditor – The statute requires that districts use a request for proposal process to hire the independent auditor. There are no estimates whether the cost of external auditor will increase or decrease given this requirement. Generally, competition would be expected to lower the costs, but given the school district environment and concerns with the adequacy of work, cost may, in fact, increase. There is no data readily available to estimate the impact of this requirement. It is anticipated that the other requirements – reporting the results to the full board, increasing the involvement of the audit committee in the audit process, and development of corrective action plans – will have no significant impact on costs.

There are no anticipated additional costs to private regulated parties.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Chapter 263 of the Laws of 2005 and is generally applicable, with certain exceptions, to all school districts and BOCES throughout the State. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts and BOCES in rural areas from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts and BOCES, including those located in rural areas, in the development of this rule, and to the extent possible, the proposed rule has been drafted incorporating their comments, to provide flexibility in implementing many of the provisions and, consistent with the statute, to exempt smaller districts and the New York City School District from certain of the requirements. For example, the proposed rule provides that a board member shall be deemed to have met the training requirement in section 170.12(a) if such person can provide sufficient documentation to establish completion, on or after July 1, 2004 and prior to January 1, 2006, a training program substantially equivalent to an approved curriculum by an approved provider. The training may be provided in one session or in partial increments. Upon demonstration of compliance with the training requirements, no board member shall be required to repeat the training. School districts and BOCES may use its employees, inter-municipal cooperative agreements, shared services to the extent authorized by Education Law section 1950, or independent contractors to fulfill the internal audit function under section 170.12(b). Furthermore, districts employing fewer than eight teachers, districts with actual general fund expenditures of less than five million dollars, and districts with actual enrollment of less than 300 students are exempt from the requirement to establish an internal audit function. For those that are required to establish an internal audit function, the regulations provide flexibility in the number of areas of internal controls that should be reviewed annually. A school district or BOCES with an internal audit function that meets or exceeds the requirements of section 170.12(b) shall not be required to replace or modify its existing internal audit function. A claims auditor under section 170.12(c) shall not be required to be a resident of the school district or BOCES supervisory district. A school district or BOCES may delegate the auditing of claims to an individual through the use of school district or BOCES employees (where not otherwise prohibited), an inter-municipal cooperative agreement, shared services to the extent authorized by Education Law section 1950 or independent contractors. Audit committees established pursuant to section 170.12(d) may consist of either: (a) a committee of the trustees or board members; (b) a committee of the whole; or (c) an advisory committee, which may be composed entirely of persons other than trustees or board members, if advisable to provide accounting and auditing experience.

#### RURAL AREA PARTICIPATION:

The proposed rule was submitted for discussion and comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas. Copies of the proposed amendments have been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. School districts, BOCES, and the public were provided the opportunity to provide comments on the proposed regulations. The draft regulations were available on the Department's website and comments were requested from various educational organizations and the Office of the State Comptroller. Over 20 written comments and numerous verbal comments were received for consideration and many were incorporated into the proposed rule.

#### Job Impact Statement

The proposed amendment is necessary to implement Chapter 263 of the Laws of 2005, relating to school district financial accountability. The proposed amendment applies to school districts and boards of cooperative educational services (BOCES), and establishes criteria, consistent with Chapter 263, for training of school district and BOCES board members in financial oversight, accountability and fiduciary responsibilities; the establishment of an internal audit function; the establishment of a claims auditor; the establishment of audit committees; and for an annual audit, including a requirement that a competitive request for proposal (RFP) process be used when contracting for the annual audit.

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

## NOTICE OF ADOPTION

### Standing Committees of the Board of Regents

**I.D. No.** EDU-11-06-00003-A

**Filing No.** 665

**Filing date:** May 25, 2006

**Effective date:** June 15, 2006

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

**Action taken:** Amendment of section 3.2 of the Title 8 NYCRR.

**Statutory authority:** Education Law, section 207 (not subdivided)

**Subject:** Standing committees of the Board of Regents.

**Purpose:** To conform the Rules of the Board of Regents to recent changes to the committee structure of the Board of Regents to replace the Committee on Quality with a new Committee on Policy Integration and Innovation and define its functions and responsibilities.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-11-06-00003-P, Issue of March 15, 2006.

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

**Revised rule making(s) were previously published in the State Register on** April 12, 2006.

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

#### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

### State Learning Requirements for Injury Prevention and Life Safety Education

**I.D. No.** EDU-11-06-00005-A

**Filing No.** 666

**Filing date:** May 25, 2006

**Effective date:** June 15, 2006

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

**Action taken:** Amendment of section 100.2(c)(5) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided), 808(1) and 3204(3)

**Subject:** State learning requirements for injury prevention and life safety education.

**Purpose:** To establish requirements for instruction in injury prevention and life safety education consistent with L. 2005, ch. 242.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-11-06-00005-P, Issue of March 15, 2006.

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

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

#### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

### State Graduation and Diploma Requirements for Mathematics

**I.D. No.** EDU-11-06-00006-A

**Filing No.** 667

**Filing date:** May 25, 2006

**Effective date:** June 15, 2006

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

**Action taken:** Amendment of section 100.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

**Subject:** State graduation and diploma requirements for mathematics.

**Purpose:** To revise mathematics graduation and diploma requirements consistent with policy adopted by the New York State Board of Regents.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-11-06-00006-P, Issue of March 15, 2006.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### State Aid to School Districts

**I.D. No.** EDU-11-06-00007-A

**Filing No.** 670

**Filing date:** May 25, 2006

**Effective date:** June 15, 2006

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

**Action taken:** Amendment of section 175.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided) and 3602(1)(d)

**Subject:** State aid to school districts.

**Purpose:** To amend section 175.5(b) of the commissioner's regulations to provide that the minimum daily sessions lengths set forth in section 175.5(a), for purposes of determining State aid, shall not apply to school days during which Regents examinations have been scheduled.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-11-06-00007-P, Issue of March 15, 2006.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### School District Financial Accountability

**I.D. No.** EDU-11-06-00017-A

**Filing No.** 669

**Filing date:** May 25, 2006

**Effective date:** June 15, 2006

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

**Action taken:** Addition of section 170.12 and amendment of sections 170.2 and 170.3 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 1604(35), 1709(20-a), 1711(2)(e), 1950(4)(k), 2102-a(1) through (4), 2116-a(3), 2116-b(1) through (7), 2116-c(1) through (9), 2117(1), 2503(5), 2508(5), 2509(4), 2523(2), 2524(1), 2525(1) and (2), 2526(1), (1-a) and (2), 2527 (not subdivided), 2554(2-a), 2562(2), 2566(6), 2573(4), 2576(1)(a), 2580(2) and 3713(1) and (2), and L. 2005, ch. 263

**Subject:** School district financial accountability.

**Purpose:** To implement L. 2005, ch. 263 by establishing criteria for claims auditor, financial training for school district officers, internal audit function, request of proposals (RFP) process for contracting for annual audit, audit committees and annual audits.

**Substance of final rule:** The State Education Department has adopted a new section 170.12 and amended sections 170.2 and 170.3 of the Regulations of the Commissioner of Education, effective June 15, 2006.

Since publication of a Notice of Proposed Rule Making in the State Register on March 15, 2006, a nonsubstantial revision was made to the proposed rule.

In section 170.12(e)(2), the provision relating to the filing with the Commissioner of the annual audit report of a school district or Board of Cooperative Educational Services was revised to change the filing date from October 30th to October 15th of the following school year. The

October 30th date was originally specified in Chapter 263 of the Laws of 2005, but was subsequently changed to October 15th by Part A-1, section 4 of Chapter 58 of the Laws of 2006. The revision merely conforms the proposed rule to the date required by the statutory change.

The following is a summary of the provisions of the revised proposed rule.

Section 170.12(a) requires every trustee or member of a board of education of a school district or a board of cooperative educational services (BOCES), elected or appointed for a term beginning on or after July 1, 2005, to complete, within the first year of his or her term, a minimum of six hours of training on the financial oversight, accountability, and fiduciary responsibilities of a board member.

Section 170.12(a)(1) states that the training may be provided by the State Education Department, the Office of the State Comptroller, or other provider approved by the Commissioner of Education. The section also provides information on the approval process for the trainers.

Section 170.12(a)(2) requires that the provider of the training supply each participant who successfully completes all or part of the required six hours of training with a certificate of completion, as appropriate. The section also requires that each trustee or board member file the certificate with the district clerk.

Section 170.12(a)(3) sets forth applicability provisions for the training requirement, and specifies that upon completion of the training requirements, no trustee or board member shall be required to repeat such training.

Section 170.12(b) requires school districts and BOCES to establish an internal audit function no later than July 1, 2006, with the internal audit function to be in operation no later than December 31, 2006.

Section 170.12(b)(1) specifies the minimum requirements for the internal audit function including an initial risk assessment of district operations, an annual review and update of such risk assessment, annual testing and evaluation of one or more areas, and preparation of reports, which analyze significant risk assessment findings, recommend changes for strengthening controls and reducing identified risks, and specify timeframes for implementation of such recommendations.

Section 170.12(b)(2) establishes criteria for the conduct of the internal audit function, including that personnel or entities conducting internal audits, reviews, or risk assessments shall follow generally accepted auditing standards, and shall be independent of district or BOCES business operations; and have the requisite knowledge and skills to complete the work. This section also states a district or BOCES may use its employees, inter-municipal cooperative agreements, shared services to the extent authorized by Education Law section 1950, or independent contractors to fulfill the internal audit function, provided that personnel or entities performing the function meet professional auditing standards for independence between the auditor and the district.

Section 170.12(b)(3) provides exemptions from the internal audit function requirements for districts employing fewer than eight teachers, districts with actual general fund expenditures totaling less than five million dollars in the previous school year, and districts with actual enrollment of less than three hundred students in the previous school year. Any school district claiming an exemption shall annually certify to the Commissioner that it meets the requirements set forth in this paragraph.

Section 170.12(c) specifies criteria relating to the establishment of the office of claims auditor and the appointment of a claims auditor.

Section 170.12(c)(1) specifies the qualifications of the position and specifically prohibits certain individuals from the position. It further clarifies that the claims auditor does not have to be a resident of the district.

Section 170.12(c)(2) specifies that the claims auditor shall report directly to the trustees or board on the result of the audits of claims, and shall report, as determined by the trustees or board of education, to the clerk of the school district or board of education or to the superintendent of schools, for administrative matters.

Section 170.12(c)(3) permits the delegation of the auditing of claims to an individual through the use of a school district or BOCES employee who is not prohibited from being the claims auditor, an inter-municipal cooperative agreement, shared services to the extent authorized by Education Law section 1950, or independent contractors. The regulation also defines the independence requirement for the claims auditor.

Section 170.12(d)(1) provides that school districts and BOCES shall establish an audit committee by January 1, 2006. The audit committee shall consist of at least three members, who shall serve without compensation but may be reimbursed for actual and necessary expenditures. The audit committee may be a committee of the trustees or board members, a committee of the whole, or an advisory committee. Persons other than trustees

or board members who serve on an advisory committee shall be independent as defined in the regulations.

Section 170.12(d)(2) specifies the duties and responsibilities of an audit committee and specifies its role as advisory. It is responsible for providing recommendations regarding the appointment of the external auditor for the district, meeting with the external auditor prior to commencement of the audit, reviewing and discussing with the external auditor any risk assessment of the district's fiscal operations, receiving and reviewing the draft annual audit report and accompanying draft management letter and, making a recommendation to the trustees or board on accepting the annual audit report, reviewing every corrective action plan developed, and assisting in the oversight of the internal audit function.

The audit committee shall develop, and submit to the trustees or board for approval, a formal, written charter which includes provisions regarding its purpose, mission, duties, responsibilities and membership requirements.

Section 170.12(d)(3) provides exemptions from the audit committee requirement for school districts employing fewer than eight teachers, and the city school district of the city of New York, provided that the Chancellor of such school district shall annually certify to the Commissioner that such district has a process for review by an audit committee of the district's annual audit that meets or exceeds the requirements of this subdivision.

Section 170.12(e)(1) specifies that each school district, except those employing fewer than eight teachers, and each BOCES shall obtain an annual audit of its records by an independent certified public accountant or an independent public accountant.

Section 170.12(e)(2) requires that the independent accountant shall present the report of the annual audit to the trustees or board and provide a copy of the audit to each trustee or board member. The trustees or board shall adopt a resolution accepting the audit report and shall file a copy of the resolution with the Commissioner. A school district or BOCES shall file with the Commissioner its audit report for a specific school year by October 15th of the following school year; provided that the city school districts of the cities of Buffalo, Rochester, Syracuse and Yonkers, and the city school district of the city of New York and community districts of such city school district, shall file their audit reports with the Commissioner by January 1st of such following school year.

Section 170.12(e)(3) requires that on or after July 1, 2005, all school districts, except the city school district of the city of New York, and each BOCES shall utilize a competitive request for proposal process when contracting for its annual audit. In addition, on or after July 1, 2005, no audit engagement shall be for a term longer than five consecutive years.

Section 170.12(e)(4) states that within ninety days of receipt of an audit report or management letter, each school district superintendent and BOCES district superintendent shall prepare a corrective action plan, approved by the board, in response to any findings contained in the annual external audit report or management letter, a final audit report issued by the district's internal auditor, a final audit report issued by the State Comptroller, a final audit report issued by the State Education Department, or a final audit report issued by the United States or an office, agency or department thereof. Each school district and BOCES shall file its corrective action plan with the State Education Department.

Section 170.2(d) is amended to clarify that the requirement regarding the filing of an official undertaking applies to the claims auditor.

Section 170.2(r) is amended to delete requirements relating to the filing of a school district's annual audit that have been superceded by the new section 170.12(e).

Section 170.3(a) is amended to delete requirements relating to the filing of a BOCES' annual audit that have been superceded by the new section 170.12(e).

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 170.12(e)(2).

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

#### **Regulatory Impact Statement**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 15, 2006, a nonsubstantial revision was made to the proposed rule.

In section 170.12(e)(2), the provision relating to the filing with the Commissioner of the annual audit report of a school district or Board of Cooperative Educational Services was revised to change the filing date from October 30th to October 15th of the following school year. The October 30th date was originally specified in Chapter 263 of the Laws of

2005, but was subsequently changed to October 15th by Part A-1, section 4 of Chapter 58 of the Laws of 2006. The revision merely conforms the proposed rule to the date required by the statutory change.

The proposed rule, as so revised, does not require any changes to the Regulatory Impact Statement previously published herein.

#### **Regulatory Flexibility Analysis**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 15, 2006, a nonsubstantial revision to the proposed rule was made as described in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, does not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

#### **Rural Area Flexibility Analysis**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 15, 2006, a nonsubstantial revision to the proposed rule was made as described in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, does not require any changes to the previously published Rural Area Flexibility Analysis.

#### **Job Impact Statement**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 15, 2006, a nonsubstantial revision to the proposed rule was made as described in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed amendment is necessary to implement Chapter 263 of the Laws of 2005, relating to school district financial accountability. The proposed amendment applies to school districts and boards of cooperative educational services (BOCES), and establishes criteria, consistent with Chapter 263, for training of school district and BOCES board members in financial oversight, accountability and fiduciary responsibilities; the establishment of an internal audit function; the establishment of a claims auditor; the establishment of audit committees; and for an annual audit, including a requirement that a competitive request for proposal (RFP) process be used when contracting for the annual audit.

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

#### **Assessment of Public Comment**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 15, 2006, the State Education Department received the following comments.

##### **1. COMMENT:**

The proposed regulations are worded in such a way as to require the board, when constituted as a "committee of the whole" to essentially advise, assist, and report to itself. The regulations should address the procedural and logistical requirements for those boards that have established audit committees as a committee of the whole board, by providing for determinations instead of recommendations by a committee of the whole.

##### **DEPARTMENT RESPONSE:**

Section 170.12(d)(1)(ii)(b) of the proposed regulations merely reflects the statutory requirement in Education Law section 2116-c(2) that an audit committee may be established as a "committee of the whole." The comment misunderstands the function of a committee of the whole by identifying the "committee of the whole" with the board of education. A "committee of the whole" is not equivalent to the board of education and any vote taken by the committee is not the final determination of the board of education but instead is a recommendation to the board, which the board may then consider further and must take a final vote on just as it would with respect to any other committee recommendation (see Robert's Rules of Order [10th ed.], p. 513, l. 12-16 and p. 514, l. 15-19). Therefore, it is not necessary to amend the proposed regulations as the comment requests, and it would be contrary to the proper function of a board of education to do so.

##### **2. COMMENT:**

The auditor performing the internal audit function should be classified as exempt for purposes of Civil Service classification.

##### **DEPARTMENT RESPONSE:**

This cannot be accomplished by regulations but instead requires statutory authorization by the Legislature.

##### **3. COMMENT:**

More detail should be provided on risk assessment and the relationship of internal audit function to the superintendent and the board.

**DEPARTMENT RESPONSE:**

These concerns can be more appropriately addressed in guidance rather than in regulations. It is intended that the Department and other organizations will provide training and guidance on risk assessment and the reporting relationship.

**4. COMMENT:**

Allowing the claims auditor and internal auditor functions to be performed by the same individual or firm would minimize the overall costs of implementing the statutory mandate, provide a more consistent oversight of the fiscal integrity of the school district and provide a stronger internal control structure.

**DEPARTMENT RESPONSE:**

The claims auditor function is a key control designed to help ensure only legitimate claims against the a school district or BOCES are paid and should be one of the areas that is reviewed by the internal auditor to ensure the controls are working as intended. The independence and objectivity of the internal auditor would be impaired if the same individual was permitted to perform both functions.

**5. COMMENT:**

In the Big 5 school districts it is unrealistic to require a claims auditor to audit every claim and report directly to the Board. Such duties should be allowed to be performed by the accounts payable/audit departments.

**DEPARTMENT RESPONSE:**

If the board appointed a claims auditor, the expectation is that a district could hire one or more individuals in the claims audit office under the supervision of a single claims auditor. The claims auditor would be responsible for approving the work of others in the offices.

**6. COMMENT:**

Why are the audit committee membership requirements for independence (i.e. that persons serving on the audit committee be independent and not be a close or immediate family member of an employee, officer, or contractor providing services to the district) not made applicable to board members serving on the audit committee?

**DEPARTMENT RESPONSE:**

Board members are required to meet other provisions of law relating to disclosure of conflict of interest (see General Municipal Law, §§ 800-805 and § 805-a).

**7. COMMENT:**

The requirement that a member of the audit committee cannot be a close relative of an employee of the district would include instances where the employee is a student worker. Since student workers generally receive minimal income, the regulation should be revised to provide an exclusion for student workers.

**DEPARTMENT RESPONSE:**

The Department believes that distinctions should not be made regarding the income level of employees, since the relationship itself may suggest an appearance of impropriety or favoritism.

**8. COMMENT:**

The proposed regulations should be revised to require the individual performing the internal audit function meet minimum requirements including a bachelor of science degree in accounting and at least one year in public accounting.

**DEPARTMENT RESPONSE:**

The regulations require that the individual performing the internal audit function must have the "requisite and knowledge and skills to complete the work" and "follow generally accepted auditing standards" including those related to technical knowledge and competence. The regulations adequately address the training and experience requirement without being overly prescriptive.

**9. COMMENT:**

A BOCES should be permitted to provide the internal audit service. In addition, the internal audit service should be made BOCES aidable.

**DEPARTMENT RESPONSE:**

The proposed regulations permit a school district to hire a BOCES to provide the internal audit service provided the independence and other auditing standards are met. In regard to the aidability issue, Chapter 263 of the Laws of 2005 was nonspecific regarding such aid and the Department believes it cannot make it aidable unilaterally in the absence of express legislation allowing such aid.

**10. COMMENT:**

Qualifications including education, training, and experience for a school business official be strengthened, but not be so restrictive so as to defer qualified individuals from entering the field.

**DEPARTMENT RESPONSE:**

Placing additional requirements on the qualifications for a business official is outside of the scope of this regulation. However, the Department has in fact strengthened the requirements for school business officials.

**11. COMMENT:**

Education Law section 2116-b(6), as added by Chapter 263 of the Laws of 2006, provides that "[p]ersonnel or entities performing the internal audit function shall report directly to the trustees or board of education of each district." It would circumvent the mandates of the Taylor Law if this provision is to be interpreted as requiring school district employees who perform internal audit functions to be directly supervised by the board of education. The statute's objective of oversight and accountability can be accomplished by an interpretation providing for the internal auditor to report directly to the board, while maintaining internal audit department staff as district employees.

**DEPARTMENT RESPONSE:**

The proposed regulations do not specify that internal audit staff shall report directly to the trustees or board of education or otherwise be directly supervised by the board of education. Section 170.12(b)(2)(iii) provides that "[t]he results of the work of the internal audit function shall be reported directly to the board." This is therefore a matter of statutory, rather than regulatory, construction/interpretation. In general, a statute must be interpreted in a manner consistent with other statutes, including the Taylor Law. This issue can be more appropriately addressed in guidance rather than in the regulations.

**12. COMMENT:**

The regulations should be clarified to permit an individual who completed the training, prior to being legally required to do so, be given credit for the training.

**DEPARTMENT RESPONSE:**

This position is consistent with our interpretation of the legislation and will be clarified in guidance.

**13. COMMENT:**

Questions the need for an audit committee to propose a charter, and if one is needed it should it be developed by the audit committee members.

**DEPARTMENT RESPONSE:**

A charter is needed to clearly define the responsibilities of the audit committee and will ensure that the board, school officials, and audit committee members understand the responsibilities of the audit committee. The regulations provide for the development of the charter by the audit committee, however, the board of education is given ultimate responsibility for approving the charter.

**14. COMMENT:**

The criteria for exemption from the requirement to establish an audit committee should be expanded to include exclusions related to number of teachers, number of students, and size of the budget.

**DEPARTMENT RESPONSE:**

Chapter 263 of the Laws of 2005 only provides for exemptions for the audit committee for districts with less than eight teachers, and no other exemptions are permitted.

---



---

## Department of Environmental Conservation

---



---

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

**Sanitary Condition of Shellfish Lands**

**I.D. No.** ENV-24-06-00010-EP

**Filing No.** 672

**Filing date:** May 30, 2006

**Effective date:** May 30, 2006

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

**Action taken:** Amendment of Part 41 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0307 and 13-0319

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

**Specific reasons underlying the finding of necessity:** Environmental Conservation Law § 13-0307 requires that the Department examine shellfish lands and certify those that are in such sanitary condition that shellfish may be taken therefrom and used as food; all other lands must be designated as uncertified. Recent sanitary surveys of shellfish lands in the Towns of Smithtown, Brookhaven, Riverhead, and Southold show that changes in classification of certain shellfish lands are required. This rule will immediately designate shellfish lands that do not meet water quality standards as uncertified and close such lands to shellfishing. The rule will also certify (open) certain shellfish lands in Port Jefferson Harbor, which were previously uncertified, during that portion of the year when water quality standards are now satisfied.

It is necessary to adopt this rule through emergency rule making to protect the public health and general welfare. The closure of shellfish lands which do not meet the bacteriological criteria for certification will protect the public health by ensuring that shellfish found thereon are not harvested and marketed to the general public for consumption. The reopening of areas that meet bacteriological criteria, specified in Title 6 NYCRR Part 47, will help to protect the general welfare by providing increased opportunity for shellfish harvesters and economic benefit to New York's shellfish industry.

**Subject:** Sanitary condition of shellfish lands.

**Purpose:** To reclassify underwater lands for shellfishing to protect public health.

**Text of emergency/proposed rule:** 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

Section 41.0 through clause 41.3(b)(3)(iii)(‘a’) remains unchanged.

Clauses 41.3(b)(3)(iii)(‘b’), (‘c’), (‘d’), and (‘e’) are renumbered as clauses 41.3(b)(3)(iii)(‘c’), (‘d’), (‘e’), and (‘f’), respectively.

New clause 41.3(b)(3)(iii)(‘b’) is adopted to read as follows:

(‘b’) All that area of Bellport Bay within a 500-foot radius of the flagstaff serving the Bellport Yacht Club located at the foot of Bellport Lane in Bellport.

New clause 41.3(b)(3)(iii)(‘g’) is adopted to read as follows:

(‘g’) During the period May 15th through December 14th, both dates inclusive, all that area of Bellport Bay, including tributaries, lying north and east of a line extending southerly from the foot of Mott Lane (Gorman Lane) at Fireplace Neck to the westernmost point of land at John Boyle Island (local landmark); thence continuing southerly to the northwesternmost point of land east of the dock at Old Inlet.

Subparagraph 41.3(b)(3)(iv) through clause 41.3(b)(3)(v)(‘c’) remains unchanged.

Clause 41.3(b)(3)(v)(‘d’) is amended to read as follows:

(‘d’) During the period May 15th through September 30th, both dates inclusive, all that area of the boat basin formerly known as Cerullo Brothers Fishing Station, East Moriches (local name).

Clause 41.3(b)(3)(v)(‘e’) through subparagraph 41.3(b)(7)(xi) remains unchanged.

Clause 41.3 (b)(7)(xi)(‘a’) is amended to read as follows:

(‘a’) All that area of Brushes Creek, including tributaries and the entrance canal, and all that area of Great Peconic Bay within a [500 foot] 300-yard radius of the southwesternmost corner of the bulkheading protecting the northern shoreline of the entrance to Brushes Creek.

Clause 41.3(b)(7)(xi)(‘b’) through clause 41.3(b)(8)(iii)(‘a’) remains unchanged.

Subparagraph 41.3(b)(8)(iv) is amended to read as follows:

(iv) All that area of Long Island Sound within a [300 yard] 500-yard radius of the northernmost point of the rock jetty (local landmark) located at the mouth of Wading River Creek.

Subparagraph 41.3(b)(8)(v) remains unchanged.

New subparagraph 41.3(b)(8)(vi) is adopted to read as follows:

(vi) All that area of Baiting Hollow Creek and all that area of Long Island Sound within a 100-yard radius of the entrance to Baiting Hollow Creek.

Paragraph 41.3(b)(9) through clause 41.3(b)(9)(i)(‘b’) remains unchanged.

Clause 41.3(b)(9)(i)(‘c’) is amended to read as follows:

(‘c’) During the period May 1st through [November 30th] October 31st, both dates inclusive, all that area of Port Jefferson Harbor, including tributaries, lying southerly and easterly of a line extending southwesterly from the light, Fl 4 sec 35 feet 6M “3” (located on the eastern jetty at the eastern entrance to Port Jefferson Harbor) to the light, Fl R 4 sec, 26

feet 5M “2A” (located on the western jetty at the entrance to Port Jefferson Harbor); and thence continuing southeasterly to the southeasternmost point of land on the western side of the entrance to Port Jefferson Harbor; and thence continuing southwesterly to the southern end of the rock jetty (located on the western shoreline of Port Jefferson Harbor approximately 250 yards easterly of the eastern side of the entrance to Setauket Harbor).

Clause 41.3(b)(9)(i)(‘d’) through clause 41.3(b)(9)(v)(‘c’) remains unchanged.

Clauses 41.3(b)(9)(v)(‘d’) and 41.3(b)(9)(v)(‘e’) are renumbered as clauses 41.3(b)(9)(v)(‘e’) and 41.3(b)(9)(v)(‘f’), respectively.

New clause 41.3(b)(9)(v)(‘d’) is adopted to read as follows:

(‘d’) During the period May 15th through October 31st, both dates inclusive, all that area of Stony Brook Harbor and tributaries lying south of a line extending southeasterly from the southernmost red brick chimney on the Knox School located at 541 Long Beach Road in the incorporated Village of Nissequogue (said school is a 3-story red brick building, local landmark) to the southernmost chimney on the residence at #121 Harbor Road in the incorporated Village of Head of the Harbor (said residence is a white 3-story structure with dark shutters and three chimneys and is located on the Thatch Meadow Farm property, local landmark).

Subparagraph 41.3(b)(9)(vi) remains unchanged.

Subparagraph 41.3(b)(9)(vii) is amended to read as follows:

(vii) All that area of Long Island Sound within a [300 yard] 500-yard radius of the northernmost point of the rock jetty (local landmark) located at the mouth of Wading River Creek.

Subparagraph 41.3(b)(9)(viii) through clause 41.3(b)(10)(ii)(‘c’) remain unchanged.

Clauses 41.3(b)(10)(ii)(‘d’) and 41.3(b)(10)(ii)(‘e’) are renumbered as clauses 41.3(b)(10)(ii)(‘e’) and 41.3(b)(10)(ii)(‘f’), respectively.

New clause 41.3(b)(10)(ii)(‘d’) is adopted to read as follows:

(‘d’) During the period May 15th through October 31st, both dates inclusive, all that area of Stony Brook Harbor and tributaries lying south of a line extending southeasterly from the southernmost red brick chimney on the Knox School located at 541 Long Beach Road in the incorporated Village of Nissequogue (said school is a 3-story red brick building, local landmark) to the southernmost chimney on the residence at #121 Harbor Road in the incorporated Village of Head of the Harbor (said residence is a white 3-story structure with dark shutters and three chimneys and is located on the Thatch Meadow Farm property, local landmark).

Paragraph 41.3(b)(11) through the end of Part 41 remains unchanged.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire August 27, 2006.

**Text of rule and any required statements and analyses may be obtained from:** William Hastback, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733, (631) 444-0479, e-mail: wghastba@gw.dec.state.ny.us

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

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

#### Regulatory Impact Statement

Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is Environmental Conservation Law (ECL) Section 13-0307. Subdivision 1 of Section 13-0307 of the ECL requires the Department to periodically conduct examinations of shellfish lands within the marine district to ascertain the sanitary condition of said lands. Subdivision 2 of this section requires that the Department certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is Section 13-0319 of the ECL.

Legislative objectives:

There are two purposes of the legislation: to protect public health and to ensure that shellfish lands are appropriately classified as certified or uncertified for the harvest of shellfish. This legislation requires the Department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in regulation, Part 47 of Title 6 NYCRR, promulgated pursuant to Section 13-0319 of the ECL. Shellfish lands which meet criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

**Needs and benefits:**

To protect public health and to comply with ECL 13-0307, the Bureau of Marine Resources' shellfish sanitation program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas.

Annually, water quality evaluation reports are prepared by the staff of the shellfish sanitation program for each SGA which contains certified shellfish lands. These reports present the results of statistical analyses of water quality data gathered by the program, and annual updates to the shoreline pollution source surveys. Each report includes a summary and recommendations for the appropriate classification of that particular shellfish growing area. The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of, an SGA should be designated as certified for the harvest of shellfish based on criteria in 6 NYCRR Part 47. These reports are on file at the Bureau of Marine Resources office in East Setauket, NY.

In "Port Jefferson Harbor Complex SGA #33 Triennial Water Quality Data Evaluation" dated October 2005, data analyses demonstrate that water quality in a seasonally uncertified portion of Port Jefferson Harbor now meets bacteriological criteria for certified shellfish lands during a portion of the year as specified in 6 NYCRR Part 47, "Certification of Shellfish Lands." It recommends that this portion of Port Jefferson Harbor be designated as certified for the harvest of shellfish during the months when water quality meets criteria. This change will extend the "open" period, which is currently December 1 through April 30, to November 1 through April 30, thereby providing one additional month of harvesting opportunity each year.

Regulations which designate shellfish lands as certified, as is proposed for a portion of the Port Jefferson Harbor SGA, benefit the general welfare by ensuring that shellfish resources on underwater lands which meet the sanitary criteria are available for both commercial and recreational use. The classification of previously uncertified lands as certified may provide additional sources of income to shellfish diggers by increasing the amount of harvest area available.

In the "Bellport Bay SGA #7 Triennial Water Quality Data Evaluation" report dated January 2006, data analyses demonstrate that water quality in two separate portions of the growing area no longer meet bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. It recommends that one area of Bellport Bay be designated as uncertified during the months when the shellfish lands fail to meet criteria and that another area of Bellport Bay be designated as uncertified throughout the year.

In the "Stony Brook Harbor SGA #37 Triennial Water Quality Data Evaluation" report dated December 2005, data analyses demonstrate that water quality in a portion of the growing area no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. It recommends that this portion of Stony Brook Harbor be designated as uncertified during the months when the shellfish lands fail to meet criteria.

In the "Central Long Island Sound SGA #35 Triennial Water Quality Data Evaluation" report dated December 2005, data analyses demonstrate that water quality in two separate portions of the growing area no longer meet bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. It recommends that these portions of Central Long Island Sound be designated as uncertified throughout the year.

In the "Great Peconic Bay SGA #28 Triennial Water Quality Data Evaluation" report dated January 2006, data analyses demonstrate that water quality in a portion of the growing area no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. It recommends that this portion of Great Peconic Bay be designated as uncertified throughout the year.

Regulations which designate shellfish lands as uncertified, as proposed for Bellport Bay, Stony Brook Harbor, Central Long Island Sound, and Great Peconic Bay, are needed to prevent the harvest and subsequent sale for consumption of shellfish from lands which do not meet the criteria for certified shellfish lands. The direct harvest of shellfish for use as food is allowed from certified shellfish lands only. Shellfish harvested from uncertified shellfish lands have a greater potential to cause human illness due to the possible presence of pathogenic bacteria or viruses which may cause the transmission of infectious disease to the shellfish consumer.

One technical amendment is included to improve the description of a closure line landmark for proper harvesting and enforcement purposes; it will not result in classification changes.

**Costs:**

There will be no costs to state or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The reopening of uncertified shellfish lands is likely to provide economic benefit to commercial shellfish harvesters whose livelihoods depend on access to certified shellfish lands.

The Department cannot provide an estimate of potential lost income to shellfish harvesters when areas are designated as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of December 31, 2005, the Department had issued 1,706 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The Department's records do not differentiate between full-time and part-time commercial or recreational shellfishing.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the Department's proposed regulatory action.

The Department's actions to designate areas as certified or uncertified are not dependent on the amount of shellfish resources in a particular area. They are based solely on public health concerns and legal mandates.

This rule making does not impose any new costs on the Department. Administration and enforcement of the proposed amendment are covered by existing programs.

**Local government mandates:**

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

**Paperwork:**

No new paperwork is required.

**Duplication:**

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

**Alternatives:**

There are no significant alternatives. By law (ECL Section 13-0307), once the Department has determined that a shellfish land no longer meets the sanitary criteria for a certified shellfish land, the Department must designate that land as uncertified for the harvest of shellfish. This is necessary to protect public health. Conversely, once the Department has determined that an uncertified shellfish land meets the sanitary criteria, the Department must designate the land as certified and open the area to shellfish harvesting.

**Federal standards:**

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary - each state adopts its own standards. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non-conformity with NSSP guidelines can result in sanctions being taken by FDA and the NSSP, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non-conforming state's product from interstate commerce.

**Compliance schedule:**

Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes to SGA classification by mail either prior to, or concurrent with, the adoption of new regulations.

Compliance with new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record-keeping or any action by the regulated parties in order to comply, except that harvesters must observe the new closure lines. Therefore, immediate compliance may be readily achieved.

**Regulatory Flexibility Analysis**

Effect on small business and local government:

As of December 31, 2005, there were 1,706 licensed shellfish diggers in New York State. The number of permits issued for areas in the state is as follows: New York City, 54; Westchester, 3; Town of Hempstead, 129; Town of Oyster Bay, 156; Town of North Hempstead, 4; Town of Babylon, 58; Town of Islip, 105; Town of Brookhaven, 270; Town of Southampton, 179; Town of East Hampton, 228; Town of Shelter Island, 39; Town of Southold, 215; Town of Riverhead, 44; Town of Smithtown, 23; Town of Huntington, 193; other, 6.

Any change in the designation of shellfish lands may have an effect on shellfish diggers. Each time shellfish lands or portions of shellfish lands are designated as uncertified, there may be some loss of income for a number of diggers who may be harvesting shellfish from the lands to be closed. This loss is determined by the acreage to be closed, the type of closure (whether year-round or seasonal), the species of shellfish present in the area, its productivity, and the market value of the shellfish resource in the particular area.

When uncertified shellfish lands are found to meet the sanitary criteria for a certified shellfish land, and are then re-designated as certified, there is also an effect on shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in income. Again, the effect of the re-opening of a harvesting area is determined by the shellfish species present, the area's productivity, and the market value of the shellfish resource in the area.

Local governments on Long Island exercise management authority and share law enforcement responsibility for shellfish with the state and the counties of Nassau and Suffolk. These are the towns of Hempstead, North Hempstead and Oyster Bay in Nassau County and the towns of Babylon, Islip, Brookhaven, Southampton, East Hampton, Southold, Shelter Island, Riverhead, Smithtown and Huntington in Suffolk County. Changes in the classification of shellfish lands impose no additional requirements on local governments above what level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

**Compliance requirements:**

There are no reporting or recordkeeping requirements for small businesses or local governments.

**Professional services:**

Small businesses and local governments will not require any professional services to comply with proposed rules.

**Compliance costs:**

There are no capital costs which will be incurred by small businesses or local governments.

**Minimizing adverse impact:**

The designation of shellfish lands as uncertified may have an adverse impact on commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the designation of shellfish lands as uncertified, prior to the date the closures go into effect. Shellfish lands which fail to meet the sanitary criteria during specified times of the year will be designated as uncertified only during those times. At other times, shellfish may be harvested from those lands (seasonally certified). To further minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for conditionally certified designation or for a shellfish transplant project. Under appropriate conditions, shellfish may be harvested from uncertified lands and microbiologically cleansed in a shellfish depuration plant. Shellfish diggers will also be able to shift harvesting effort to nearby certified shellfish lands. There should be no significant adverse impact on local governments from most changes in the classification of shellfish lands.

**Small business and local government participation:**

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the Department, is comprised of representatives of local baymen's associations and local town officials. Through their representatives, shellfish harvesters can express their opinions and give recommendations to the department concerning shellfish land classification. Local governments, state legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rule making prior to filing with the Department of State.

**Economic and technological feasibility:**

As specified above, there are no reporting, recordkeeping or affirmative acts that small businesses or local governments must undertake to comply with the proposed rules which result in the reclassification of shellfish harvesting areas as certified or uncertified. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it

should be economically and technically feasible for small businesses and local governments to comply with rules of this type.

**Rural Area Flexibility Analysis**

Amendments to Part 41 will not impose an adverse impact on rural areas. Only the State's marine district will be directly affected by regulatory initiatives to open or close shellfish lands. The Department of Environmental Conservation has determined that there are no rural areas within the marine district, and no shellfish lands within the marine district are located adjacent to any rural areas of the state. The proposed regulations will not impose reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by amendments of Part 41 "Sanitary Condition of Shellfish Lands" of Title 6 NYCRR, the Department of Environmental Conservation has determined that a Rural Area Flexibility Analysis is not required.

**Job Impact Statement**

**Nature of impact:**

Environmental Conservation Law section 13-0307 requires that the Department examine shellfish lands and certify which shellfish lands are in such sanitary condition that shellfish may be taken therefrom for use as food. Shellfish lands that do not meet the criteria for certified (open) shellfish lands must be designated as uncertified (closed) to protect public health.

Rule makings to amend 6 NYCRR 41, Sanitary Condition of Shellfish Lands, can potentially have a positive or negative effect on jobs for shellfish harvesters. Amendments to reclassify areas as certified may increase job opportunities, while amendments to reclassify areas as uncertified may limit harvesting opportunities.

The Department does not have specific information regarding the locations in which individual diggers harvest shellfish, and therefore is unable to assess the specific job impacts on individual shellfish diggers. In general terms, amendments of 6 NYCRR Part 41 to designate areas as uncertified can have negative impacts on harvesting opportunities. The extent of the impact will be determined by the acreage closed, the type of closure (year-round or seasonal), the area's productivity, and the market value of the shellfish. In general, any negative impacts are small because the Department's actions to designate areas as uncertified typically only affect a small portion of the shellfish lands in the state. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect effort to adjacent certified areas.

**Categories and numbers affected:**

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surf clams or ocean quahogs in the Atlantic Ocean.

As of December 31, 2005, there were 1,706 licensed shellfish diggers in New York State. The number of permits issued for areas in the state is as follows: New York City, 54; Westchester, 3; Town of Hempstead, 129; Town of Oyster Bay, 156; Town of North Hempstead, 4; Town of Babylon, 58; Town of Islip, 105; Town of Brookhaven, 270; Town of Southampton, 179; Town of East Hampton, 228; Town of Shelter Island, 39; Town of Southold, 215; Town of Riverhead, 44; Town of Smithtown, 23; Town of Huntington, 193; other, 6. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder are seasonal or part-time harvesters.

**Regions of adverse impact:**

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located in or adjacent to Nassau County, Suffolk County, and a portion of the Atlantic Ocean south and east of New York City. There is no potential adverse impact to jobs in any other areas of New York State.

**Minimizing adverse impact:**

Shellfish lands are designated as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from rule makings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the Department evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The Department also operates Conditional Harvesting Programs at the request of, and in cooperation with, local governments. Conditional Harvesting Programs allow harvest in uncertified areas under prescribed conditions, determined by studies, when bacteriological water quality is acceptable. Additionally, the Department operates transplant harvesting programs which allow removal of shellfish from closed areas for cleansing in certified areas, thereby recovering a valuable resource. Conditional and transplant programs increase harvesting oppor-

tunities by making the resource in a closed area available under controlled conditions.

In this particular rule making, a number of the areas affected have only been closed seasonally. This is intended to minimize the adverse impact on individual shellfish diggers.

Self-employment opportunities:

A large majority of shellfish harvesters in New York State are self-employed. Rule makings to change the classification of shellfish lands can have an impact on self-employment opportunities. The impact is dependent on the size and productivity of the affected area and the availability of adjacent lands for shellfish harvesting.

## NOTICE OF ADOPTION

### Harvest and Possession of Marine Crustaceans

**I.D. No.** ENV-12-06-00007-A

**Filing No.** 673

**Filing date:** May 30, 2006

**Effective date:** June 14, 2006

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

**Action taken:** Amendment of Part 44 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0329 and 13-0331

**Subject:** Harvest and possession of marine crustaceans in New York waters.

**Purpose:** To manage the harvest and possession of marine crustaceans to conform with Fishery Management Plans (FMPs), Federal regulations, and safe navigation.

**Substance of final rule:** The text of this proposed rulemaking, which amends 6 NYCRR Part 44, "Lobsters and Crabs," makes the following regulatory changes: increases the circular vent size on lobster pots; clarifies lobster trap tag regulations and conforms them with criteria established in the Atlantic States Marine Fisheries Commission Fishery Management Plan for American Lobster; establishes criteria for authorizing a lobster permit holder to tend another permit holder's gear in the event of a "temporary emergency"; revises the reporting requirements to include lobster bait gillnet permit holders; revises regulations to allow horseshoe crabs harvested for bio-medical purposes to be sold as bait; establishes criteria to close areas to commercial horseshoe crab harvest; establishes regulations for marking crab pots; restricts the placement of lobster and crab traps/pots in relation to designated navigation channels; establishes and clarifies regulations on the construction of escape panels in crab and lobster pots; and establishes minimum size limits for blue crabs.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 44.3, 44.7 and 44.8.

**Text of rule and any required statements and analyses may be obtained from:** Kim McKown, Department of Environmental Conservation, 205 N. Bellemeade Rd., East Setauket, NY 11733, (631) 444-0454, e-mail: kamckown@gw.dec.state.ny.us

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

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

Non-substantive changes were made by the Department to the text of the final rule as adopted. These changes were added in an effort to clarify certain wording of the rule, and to correct typographical errors. The substance of the rule remains unchanged. Therefore, the Department of Environmental Conservation has determined that it is not necessary to revise the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### **Assessment of Public Comment**

A proposal to revise Part 44 of 6 NYCRR, New York's marine crustacean regulations, was published in the New York State Register on March 22, 2005. The Department received a total of 19 comments concerning this proposed rule making, including comments received at a public information meeting on the proposed rule held by the Department. The public meeting took place on 4/17/06 at the Marine Resources Office in East Setauket, New York, and thirty-one people were in attendance. The Marine Resources Advisory Council reviewed the draft Assessment of Public Comments at its meeting on May 16, 2006. MRAC voted (6 in favor; 0 in opposition; 5 abstentions) to recommend adoption of the entire rule mak-

ing proposal, with two recommended revisions concerning crabs which are noted below.

#### **American Lobster**

Twelve people commented on American lobster proposed rules.

**Comment:** Seven comments were in relation to restricting the placement of lobster pots within 25 feet of designated navigation channels, four in support and three opposed. Those in support felt traps in or near channels were navigation hazards, while those in opposition felt that traps in channel were acceptable as long as lines and buoys were outside the channel.

**Department response:** In light of the safety concerns regarding navigation and the need to keep channels clear of obstructions, the Department will adopt the rule as proposed.

**Comment:** There were three comments on the increase in the circular vent size in LMA 4, one in support, one opposed, and one with suggested modifications. The suggested modification was to delay implementation 30 - 60 days after adoption.

**Department response:** This is a compliance requirement of the ASMFC American Lobster FMP. Currently, New York is not in compliance with the FMP circular vent requirement. The proposed action will bring New York's regulations into compliance with ASMFC. In response to comments, the Department will modify the language of the proposed rule to change the implementation date to July 19, 2006, in order to give Industry time to abide with the rule.

**Comment:** There were two comments on clarifications to the construction of escape panels in lobster pots, 1 in support and 1 with modifications. The suggested modification was to work with industry on the implementation date.

**Department response:** In response to comments, the Department will modify the language of the proposed rule to delay the implementation date for this specific requirement in order to provide affected parties with sufficient time to comply with the rule. Industry participants will be given until July 19, 2006, in order to reach compliance.

**Comment:** There were two comments in opposition to the qualifying dates for documentation of trap use or landings to receive trap tag allocations in LMA 6. The individuals felt inclusion of 1995 in the qualifying period would increase trap tag allocations.

**Department response:** The current proposed rule moves these dates to a different section but does not change them. No changes will be made to this proposed rule.

**Comment:** There were four comments on the proposed rule for temporary medical emergency authorization, three in support and one opposed. The opposing comment felt the doctor and licensee should be from New York.

**Department response:** The Department has determined there is no basis to exclude certification from any validly licensed physician, regardless of the state in which a physician is licensed. Accordingly, the rule will be adopted as proposed.

**Comment:** There were three comments on reporting requirements for the lobster bait gill net permit. Comments suggested that such reporting is already required in Part 40, and that the Department should discuss reporting with NMFS.

**Department response:** The Department will adopt the rule as proposed, and will work with NMFS Port agents to ensure that harvest is not double counted.

#### **Horseshoe Crab**

Sixteen people commented on horseshoe crab proposed rules.

**Comment:** Four comments addressed the revisions to the biomedical harvest, one in support and three opposed. Opposing comments felt horseshoe crabs should not be shipped out of state.

**Department response:** The revision relaxes restrictions on bio-medical harvest as authorized under Addendum III to the ASMFC Horseshoe Crab FMP. The comments address a different issue: the desire of New York's horseshoe crab harvesters to prohibit the transport of horseshoe crabs out of the State. This concern is not specifically relevant to, and is beyond the scope of, the proposed rule.

**Comment:** There were 15 comments on the proposed rule on closed areas, six in support and nine opposed. Those in support generally thought that mating horseshoe crabs needed protection, with some suggested modifications to the rule, including that local governing boards should have authority to close beaches. Those in opposition generally felt the rule would allow essentially all Long Island beaches to be closed to horseshoe crab harvest, and they did not believe many red knots used Long Island beaches.

Department response: Only beaches that meet the distinct criteria contained in the proposal could be closed to horseshoe crab hand harvest. In addition, for each proposed closure, a notice eliciting comments would be sent to all horseshoe crab permit holders and other interested parties. There is some information that red knots and other shore birds use Long Island beaches for habitat and feeding. The Department will continue to study and collect data on the use of these beaches by both horseshoe crabs and shore birds. The Department also agrees that inclusion of local governing bodies as groups with authority to recommend beach closures is a good suggestion, and will make that modification.

#### Crabs

Comments were received from fifteen people on crabs, as well as MRAC.

Comment: There were two public comments and a comment from MRAC which recommended modification of definitions. Recommendations included redefining "crab pot" as "blue crab pot", and prohibiting use of metal or steel cable as "sinking line". MRAC also recommended that the definition of "crab pot" be modified by removing the 24" size restriction.

Department response: Based on the comments, the Department will remove the 24" maximum size restriction. DEC will also modify the definition of sinking line to prohibit the use of braided steel cable.

Comment: Seven people commented on the identification of gear, with suggestions for modifications of the rule.

Department response: In response to comments, the Department will remove the word "plastic" to broaden the proposed rule, and will modify the rule to specify that the permit number must be affixed on the marker with clearly visible characters, and remove the 2 inch specification.

Comment: There were nine comments on the proposed rule to restrict the placement of crab pots within 25 feet of designated navigation channels, five in support and four opposed. The comments in support felt that traps in channels were acceptable as long as they were not marked or the lines and buoys were outside the channel.

Department response: MRAC voted (7 in favor, 0 in opposition, and 4 abstentions) to recommend an exemption for personally attended traps affixed to a vessel. In light of the safety concerns regarding navigation, the need to keep channels clear of obstructions, and recommendations from MRAC, the Department will adopt the proposed rule with one modification: include an exemption for pots affixed to occupied vessels.

Comment: There were four comments about the requirement for escape panels in crab pots which suggested modifications to the rule. Modifications included; require for commercial pots only, exemption for pots with sides that fall open, and use cull rings instead.

Department response: The Department concurs with the comment recommending an exemption for traps with sides that fall open, and will so modify the final rule.

Comment: There were six comments on the use of Turtle Excluder Devices (TED) in pots, two in support and four opposed. Comments in support included a recommendation for smaller size TEDs, while comments in opposition felt there either wasn't a problem with pots catching turtles or TEDs would limit their crab catch.

Department response: The Department recognizes that the use of TEDs would reduce blue crab catch. For this reason, the Department has indicated that their use will only be required under circumstances that are necessary for protection of depleted populations of terrapins. In response to comments, the Department has modified the definition of a TED to clarify that TEDs may not be larger than 6 inches wide and 2 inches high.

Comment: There were eleven comments on the blue crab size limits, six in support and five opposed. Comments in support agreed with restricting the harvestable size or recommended further restrictions. Comments in opposition generally recommended either no size limit, a smaller size limit, or cull rings on pots to let out small crabs. There were also comments on percent tolerance of small crabs and marketplace tagging.

Department response: In light of the comments supporting both smaller and larger size limits, and the recommendation of MRAC, the minimum size limits will not be changed. The Department will work with fishery participants to verify the size of maturation for female blue crabs. The Department will also consider the percent tolerance of small crabs for a future rule making.

#### Conclusion

The adoption of the modified proposed amendments to 6 NYCRR Part 44 are needed to adequately manage marine Crustacea, comply with ASMFC FMP requirements, and reduce user conflicts. These regulations authorize appropriate use for the listed species consistent with the status of the stocks and the ASMFC FMP requirements for each species. In the case

of lobster, the proposed rule is specifically necessary to achieve compliance with the FMP's requirements, and to avoid a non-compliance determination and imposition of a federal moratorium on American lobster fishing in New York. For this reason, the Department has determined that the modified proposed amendments to 6 NYCRR Part 44 for American lobster, horseshoe crab, and blue crab should be adopted.

---



---

## Department of Health

---



---

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

#### Revised Standards for Arsenic in Drinking Water

I.D. No. HLT-24-06-00009-P

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

**Proposed action:** Amendment of sections 5-1.52, 5-1.72 and 5-1.91 and Appendix 5C of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1) and 225

**Subject:** Revised standards for arsenic in drinking water.

**Purpose:** To amend the Sanitary Code to incorporate mandatory Federal regulations revising the maximum containment level for arsenic in drinking water.

**Substance of proposed rule (Full text is posted at the following State website: [www.health.state.ny.us](http://www.health.state.ny.us)):** The proposed code amendment incorporates the requirements of the Arsenic Rule which was promulgated by the United States Environmental Protection Agency (USEPA) on January 22, 2001. As a condition of primacy, New York State must promulgate a rule no less stringent than the federal rule to assure that public water systems comply with the federal Arsenic Rule. The Department entered into a Memorandum of Understanding (MOU) with the USEPA regarding rule implementation while the Department pursued the necessary Code amendment. The MOU outlined responsibilities between the Department and USEPA, Region 2 during the interim period.

The following is a summary of the proposed amendments to Subpart 5-1 of 10 NYCRR Part 5:

#### Section 5-1.52 Tables

The goal of the Arsenic Rule is to improve public health by reducing exposure to arsenic. All public water systems are required to meet a reduced maximum contaminant level (MCL) of 0.010 milligrams per liter (mg/L).

Table 1 in Subpart 5-1.52 is proposed to be amended to incorporate the requirements of the Arsenic Rule:

Table 1. Inorganic Chemicals and Physical Characteristics – Maximum Contaminant Level Determination: The MCL for arsenic is changed from 0.050 mg/L to 0.010 mg/L. Determination of an MCL violation is based on a running annual average for systems that monitor more frequently than annually. Systems monitoring arsenic on an annual or less frequent basis must initiate quarterly monitoring if the MCL at any sample point is exceeded. However, an MCL violation does not occur until the system has completed one year of quarterly sampling and the running annual average is greater than the MCL.

#### Section 5-1.72(f)(12)(i)

The Arsenic Rule requires health effects language to be included in the Annual Water Quality Reports if arsenic concentrations are within a specified range up to and including the MCL. The existing requirements under Section 5-1.72(f)(12)(i) do not include the MCL in the specified range. Therefore, proposed amendments to this section include revised language requiring additional health effects language for systems that detect arsenic at levels above 5 micrograms per liter, but less than or equal to the MCL.

Section 5-1.91 Variance from required use of any specified treatment technique

The Best Available Technologies (BATs) table included in 5-1.91(e) has been amended to include additional information about BATs for achieving compliance with the arsenic MCL. In addition, Oxidation/Filtration has been added as a BAT.

A new subdivision (f) of Section 5-1.91 was added to include affordable technologies for achieving compliance with the arsenic MCL for public

water systems serving less than 10,000 people. The previous subdivisions (f), (g), and (h) were renumbered to subdivisions (g), (h), and (i), respectively.

Appendix 5-C.I.B

The amendments to Appendix 5-C.I.B include a new footnote pertaining to arsenic analytical methods 200.7, 200.8 and 3120 B.

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

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

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

**Summary of Regulatory Impact Statement**

Introduction

The U.S. Environmental Protection Agency (USEPA) promulgated the Arsenic Rule on January 22, 2001. The Arsenic Rule reduces the enforceable Maximum Contamination Level (MCL) for arsenic from 0.050 milligrams per liter (mg/L) to 0.010 mg/L and clarifies monitoring requirements and procedures used for determining compliance. In addition, the rule includes clarifications to compliance requirements for new systems and systems using a new source of drinking water. The compliance date for the new arsenic standard is January 23, 2006, while the clarifications to compliance and new source contaminants monitoring regulations became enforceable on January 22, 2004. Surface water systems must collect a sample by December 31, 2006 to demonstrate compliance with the revised MCL. Groundwater systems must collect a sample by December 31, 2007 to demonstrate compliance with the revised MCL, unless the State permits the use of grandfathered data collected after January 1, 2005.

Alternatives

As a condition of primary enforcement responsibility (primacy), States must have rules no less stringent than the federal rules in order to assure that public water systems comply with the requirements of federal rules. Therefore, to maintain primacy for administering and enforcing the requirements of the rule within the regulatory framework established by the USEPA the New York State Department of Health (NYSDOH) must adopt the federal requirements by amending Subpart 5-1 of the State Sanitary Code. As such, the NYSDOH did not consider any significant alternatives to the rule. If the State does not adopt these regulations, the USEPA will enforce these provisions in New York State. Therefore, public water systems and local and state governments will incur the costs associated with the Arsenic Rule regardless of whether the State adopts these regulations. Dual oversight by the USEPA and the NYSDOH will result in significant confusion for water systems and will result in conflicts between state and federal regulations. The proposed revisions to Subpart 5-1 are as protective as, and generally conform to, the U.S. EPA's National Primary Drinking Water Regulations as specified in Subparts B, C, F, G, O, and Q of 40 CFR Part 141, and Subpart B of 40 CFR Part 142.

Applicability

The new federal Arsenic Rule applies to community water systems (CWSs) and non-transient non-community water systems (NTNCWSs) that have at least 15 service connections or serve at least 25 individuals. NTNCWSs were not previously subject to the federal standards related to arsenic in drinking water. In New York State, CWSs and NTNCWSs that have at least 5 service connections or serve at least 15 individuals are currently subject to the MCL and monitoring requirements for arsenic under Subpart 5-1 of the State Sanitary Code. Also, under the current requirements of Subpart 5-1, transient non-community water systems (TNCWSs) are subject to the arsenic MCL and may be subject to associated monitoring requirements if the State determines that such monitoring is necessary to protect public health.

Needs and Benefits

The revisions to Subpart 5-1 will improve public health by increasing the level of protection from exposure to Arsenic in drinking water. The rule is expected to reduce exposure to approximately 33,735 New Yorkers, based on an analysis of recently reported detections above the revised MCL. According to an economic analysis published by the USEPA, the national annual bladder and cancer cases avoided by reducing arsenic to 0.010 mg/L in CWSs and NTNCs is estimated to be between 37.4 and 55.7 (U.S. EPA, EPA 815-R-00-026. December, 2000). Based on the same analysis, the number of deaths nationally avoided by reducing arsenic to 0.010 mg/L is estimated to be between 21.3 and 29.8. It is also estimated that a number of other cases of cancerous and noncancerous diseases, such

as skin cancer and heart disease would be prevented by reducing arsenic in drinking water to 0.010 mg/L.

There are other benefits of reducing the arsenic level in drinking water. Many consumers purchase bottled water or other water quality improvement products to avoid ingestion of contaminants such as arsenic. Consumer avoidance of tap water sources usually results in costs to the consumers as a result of obtaining an alternate supply of drinking water. Therefore, it can be assumed that a reduction in arsenic in drinking water will have a long term effect of restoring some level of consumer confidence in the water supply.

Costs

The USEPA presents the national cost estimates for the Arsenic Rule in a document titled "Arsenic in Drinking Water Rule – Economic Analysis" (U.S. EPA, EPA 815-R-00-026. December, 2000). Cost estimates for compliance with the Arsenic Rule include estimates for treatment, monitoring, and administrative costs incurred by public water systems, and monitoring and administrative costs incurred by States to implement and enforce the rule. For the revised MCL of 0.010 mg/L, the USEPA estimates that the total annual national cost of compliance is \$180 million (annualized over 20 years and are presented in 1999 dollars at a discount rate of 3%). The USEPA also estimates that the national cost savings associated with the total lung and bladder cancer health benefits from reducing arsenic in drinking water from PWSs is \$140 million to \$198 million nationally (in 1999 dollars).

Two methods were used to estimate the cost of compliance in New York State. Both methodologies are based on data obtained from the federal analysis. In addition, both methods use mitigation costs, arsenic monitoring and reporting costs, and implementation costs for New York that are directly proportional to the estimated national costs.

As presented in Table 1, compliance costs for public water systems located in New York State were estimated to be approximately \$3.0 million using Method 1 and \$1.0 million using Method 2. Compliance cost to New York State government was estimated as \$1.0 million under both Method 1 and Method 2, and is based on the state compliance cost estimated by the USEPA. Therefore, the total cost of compliance with the Arsenic Rule was estimated to be approximately \$4.0 million using Method 1 and \$2.0 million using Method 2.

Table 1. Estimated Annual National and New York State Arsenic Rule Compliance Cost<sup>a</sup>

System Cost:	Total Estimated Annual Cost <sup>b</sup>		
	National	New York State	
		Method 1	Method 2
Treatment	\$176.7M	\$3.0M	\$1.0M
Monitoring/Administrative	\$2.7M	\$45,900	
State Costs	\$1.0M	\$1.0M	\$1.0M
<b>TOTAL COST</b>	<b>\$180.4M</b>	<b>\$4.0M</b>	<b>\$2.0M</b>

<sup>a</sup> National data was obtained from USEPA document, "Arsenic in Drinking Water Rule—Economic Analysis." EPA 815-R-00-026. December 2000.

<sup>b</sup> Estimated costs are annualized over 20 years and presented are in 1999 dollars at a discount rate of 3%.

In estimating compliance cost incurred by New York systems using Method 1, it was assumed that the systems predicted to be in noncompliance with the Arsenic Rule serve similar populations and fall into similar service type categories to noncompliant systems nationwide. Method 2 on the other hand, accounts for economies of scale in that it breaks costs down by system population or service area type. While Method 1 may be an acceptable method for estimating the average system cost for states nationwide, Method 2 may provide a more accurate cost estimate to systems located in New York State, since Method 2 accounts for the size and service type of the systems most likely to be affected by the new Arsenic Rule.

Public Notice Requirements

In order for public water systems to comply with the Arsenic Rule, systems must provide public notice in certain circumstances. The Arsenic Rule requires systems to provide a Tier 2 public notice (notice within 30 days) for violation of the arsenic standard and a Tier 3 public notice (annually) for violations of the monitoring and testing procedure requirements.

**Regulatory Flexibility Analysis**

**Effect of Rule**

All public water systems in New York State must comply with the requirements of the Arsenic Rule. There are approximately 9,952 small public water systems in New York State that are subject to this regulation. For the purpose of this analysis, a small system (business) is defined as a public water system that serves 3,300 people or less. Among these 9,952 small systems, approximately 9,634 are either privately-owned or owned by local government (8,025 privately-owned and 1,609 local government-owned). The remainder are owned or operated by the state or federal government. Systems operated by small businesses consist primarily of restaurants, motels, mobile home parks, apartment complexes, and realty subdivisions, among others. Systems operated by local government are primarily municipal water systems, or systems serving schools, campgrounds, or other recreation areas.

Only those systems which have arsenic present in the finished water at concentrations exceeding the revised maximum contaminant level (MCL) of 0.010 milligrams per liter (mg/L) will be affected by the Arsenic Rule. Of the 9,634 privately-owned or local government-owned small systems subject to the requirements of the Arsenic Rule, only 53 systems have reported arsenic concentration in excess of the revised MCL.

**Compliance Requirements**

The proposed revisions to Subpart 5-1 of the State Sanitary Code may result in an increase in monitoring, reporting and record-keeping requirements for small businesses and local governments that operate small public water systems. Systems in violation of the revised arsenic MCL will be subject to an increased monitoring schedule, which would result in increased monitoring costs, along with an increase in associated record-keeping and reporting requirements. In addition, systems that are in violation of the arsenic standard or monitoring requirements will be required to give public notice to notify consumers that the system failed to comply with the regulation.

**Professional Services**

Water Systems operated by small businesses and local governments will require the professional services of a certified or approved laboratory to perform water analyses for arsenic. The laboratory used must be approved by the New York State Department of Health (NYSDOH) under its Environmental Laboratory Approval Program. It is estimated that sufficient laboratory capability and capacity are available.

For the few systems that are predicted to have arsenic concentrations exceeding the MCL, a licensed professional engineer may be required to design a treatment system to meet the arsenic standard or to design facilities for providing an alternate supply of water.

**Compliance Costs to Small Business and Local Governments**

It is estimated that the economic impact of the Arsenic Rule will not be significant for the majority of small businesses and local governments that operate small public water systems in New York State. As mentioned previously, only 53 systems of the 9,634 small privately-owned or local government-owned systems subject to the Arsenic Rule have reported arsenic concentration in excess of the revised MCL. These systems may incur additional costs in the form of water treatment costs, monitoring and reporting costs, and administrative costs. For these 53 small systems most affected by the Arsenic Rule, the estimated average annualized compliance cost is \$11,664 per system. Therefore, the estimated total annual compliance cost for small businesses and local governments that operate small systems in New York State is \$11,664 x 53 systems, or \$618,192.

It is important to note that there is substantial variability in how systems will elect to comply with the Arsenic Rule. Compliance method choices will vary depending on baseline source water arsenic concentrations, system size and location, types of treatment currently in place, and availability of alternative sources. In addition, the source water pH, total dissolved solids, sulfides, and other salts can change the effectiveness of arsenic removal technologies. All of these variables ultimately affect the cost of compliance with the arsenic standard.

**Economic and Technological Feasibility**

Compliance with the Arsenic Rule is both economically and technologically feasible. As discussed previously, it is estimated that the economic impact of the Arsenic Rule will not be significant for the majority of small water systems. Analytical methods currently exist for the analysis of arsenic. Treatment techniques to reduce the concentration of arsenic in drinking water are well established and understood. In addition, the USEPA has determined that treatment alternatives available to small systems are affordable. Also, the NYSDOH has the staff and the expertise to provide technical guidance to public water systems.

**Minimizing Adverse Impact**

In accordance with Section 202-b(1) of the New York State Administrative Procedures Act, the NYSDOH is required to consider utilizing alternatives that will accomplish the objectives of applicable statutes while minimizing adverse economic impacts of the rule on small businesses. Consideration is to be given to such alternatives that include the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small businesses; that use performance rather than design standards; and that provide an exemption from coverage by the rule, or by any part thereof, for small businesses so long as the public health, safety or general welfare is not endangered.

Revisions to Subpart 5-1 of the New York State Sanitary Code incorporate performance based compliance options in the form of Best Available Technology (BAT) and Small System Compliance Technology. These performance based compliance technologies are alternate methods of achieving compliance with maximum contaminant levels. Several options are available for achieving compliance with the new arsenic standard.

In addition to the performance based compliance options, current provisions of Subpart 5-1 allow a supplier of water to request, and the NYSDOH to grant a variance or exemption from an MCL or treatment technique requirement. These pre-existing provisions will provide the regulated community with avenues for relief and no additional provisions are needed to accomplish the requirements of Section 202-b(1) of the New York State Administrative Procedure Act.

In making the determination to grant a variance or an exemption, the NYSDOH takes a variety of factors into consideration including, risk to public health and resources available to the public water system. In addition to variances and exemptions, current provisions of Subpart 5-1 of the State Sanitary Code allows the NYSDOH to grant a waiver of up to nine years from the initial monitoring frequency for inorganic chemicals (including arsenic). The NYSDOH will assist small systems and local health departments to determine which systems can obtain the monitoring waiver based on arsenic levels found in samples previously collected.

The costs that will be incurred by small systems are the result of the requirements of the federal Arsenic Rule, which will take effect regardless of state action. If necessary, the NYSDOH will provide owners and operators of small water systems with training, guidance documents, and technical assistance to help alleviate some of the labor costs associated with the requirements of the Arsenic Rule. Systems granted a variance, exemption, or monitoring waiver would recognize a reduction in labor and laboratory costs associated with the Arsenic Rule, thereby minimizing potential adverse economic impacts of the rule.

**Small Business and Local Government Participation**

Many of the public water systems that will be subject to the proposed amendments are towns and villages operating municipal water systems. The NYSDOH has been discussing the proposed amendments at organizational meetings where small community water systems are represented. In addition, the NYSDOH representatives have and will continue to explain the new requirements at local meetings of the New York Rural Water Association, the New York Chapter of the American Water Works Association, the Conference of Environmental Health Directors, the New York Association of Towns, and the New York Conference of Mayors, among others.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas**

For the purpose of the Rural Area Flexibility Analysis, rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, towns with population densities of 150 persons or less per square mile (SAPA Section 102[10] and Executive Law 481[7]). The following 44 counties have a population less than 200,000:

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

Genesee	St. Lawrence	Yates
Greene	Saratoga	

Of the counties with a population equal to or greater than 200,000, the following nine counties have certain townships with population densities of 150 persons or less per square mile.

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

All public water systems in New York State must comply with the requirements of the Arsenic Rule. Therefore, the proposed revisions to Subpart 5-1 of the State Sanitary Code will apply to public water systems located throughout all rural areas in New York State. This amounts to approximately 7,463 rural systems that will be subject to the requirements of the proposed revisions to Subpart 5-1. However, only those systems which have arsenic present in the finished water at concentrations exceeding the revised maximum contaminant level (MCL) of 0.010 milligrams per liter (mg/L) will be affected by the proposed revisions to Subpart 5-1. Based on data obtained from the Safe Drinking Water Information System (SDWIS) database and information provided by local health departments, there are approximately 52 public water systems located in 14 rural counties and/or townships that have reported arsenic concentrations that exceed the revised MCL.

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

The proposed revisions to Subpart 5-1 of the State Sanitary Code may result in an increase in monitoring, reporting and recordkeeping requirements for public water systems. Systems in violation of the revised arsenic MCL will be subject to an increased monitoring schedule, which would result in increased monitoring costs, along with an increase in associated record-keeping and reporting requirements. In addition, systems that are in violation of the arsenic standard or monitoring requirements will be required to give public notice to notify consumers that the system failed to comply with the regulation.

Public water systems will require the professional services of a certified or approved laboratory to perform water analyses for arsenic. The laboratory used must be approved by the New York State Department of Health (NYSDOH) under its Environmental Laboratory Approval Program. It is estimated that sufficient laboratory capability and capacity are available. For the few systems that are predicted to have arsenic concentrations exceeding the MCL, a licensed professional engineer may be required to design treatment facilities to meet the arsenic standard or to design facilities for providing an alternate supply of water.

**Costs**

It is estimated that the economic impact of the proposed revisions to Subpart 5-1 of the State Sanitary Code will not be significant for the majority of systems located in rural areas. Of the approximately 7,463 rural area systems subject to the requirements of proposed revisions, only 52 systems have reported arsenic concentration in excess of the revised MCL. These systems may incur additional costs in the form of water treatment costs, monitoring and reporting costs, and administrative costs. For the 52 rural area systems most affected by the Arsenic Rule, the estimated average annualized compliance cost is \$15,828 per system. Therefore, the estimated total annual compliance cost for rural areas in New York State is \$15,828 x 52 systems, or \$823,056.

It is important to note that there is substantial variability in how systems will elect to comply with the Arsenic Rule. Compliance method choices will vary depending on baseline source water arsenic concentrations, system size and location, types of treatment currently in place, and availability of alternative sources. In addition, the source water pH, total dissolved solids, sulfides, and other salts can change the effectiveness of arsenic removal technologies. All of these variables ultimately affect the cost of compliance with the arsenic standard.

**Minimizing Adverse Impact**

In accordance with Section 202-bb(2) of the New York State Administrative Procedures Act, the NYSDOH is required to consider utilizing alternatives that will accomplish the objectives of applicable statutes while minimizing adverse economic impacts of the rule on public and private sector interests in rural areas. Consideration is to be given to such alternatives that include the establishment of differing compliance or reporting

requirements or timetables that take into account the resources available to small businesses; that use performance rather than design standards; and that provide an exemption from coverage by the rule, or by any part thereof, for small businesses so long as the public health, safety or general welfare is not endangered.

Revisions to Subpart 5-1 of the New York State Sanitary Code incorporate performance based compliance options in the form of Best Available Technology (BAT) and Small System Compliance Technology. These performance based compliance technologies are alternate methods of achieving compliance with maximum contaminant levels. Several options are available for achieving compliance with the new arsenic standard.

In addition to the performance based compliance options, current provisions of Subpart 5-1 allow a supplier of water to request, and the NYSDOH to grant a variance or exemption from an MCL or treatment technique requirement. These pre-existing provisions will provide the regulated community with avenues for relief and no additional provisions are needed to accomplish the requirements of Section 202-bb(2) of the New York State Administrative Procedure Act.

In making the determination to grant a variance or an exemption, the NSYDOH takes a variety of factors into consideration including, risk to public health and resources available to the public water system. In addition to variances and exemptions, current provisions of Subpart 5-1 of the State Sanitary Code allows the NYSDOH to grant a waiver of up to nine years from the initial monitoring frequency for inorganic chemicals (including arsenic). The NYSDOH will assist small systems and local health departments to determine which systems can obtain the monitoring waiver based on arsenic levels found in samples previously collected.

The costs that will be incurred by systems located in rural areas are the result of the requirements of the federal Arsenic Rule, which will take effect regardless of state action. If necessary, the NYSDOH will provide owners and operators of water systems located in rural areas with training, guidance documents, and technical assistance to help alleviate some of the labor costs associated with the requirements of the Arsenic Rule. Systems granted a variance, exemption, or monitoring waiver would recognize a reduction in labor and laboratory costs associated with the Arsenic Rule, thereby minimizing potential adverse economic impacts of the rule.

**Rural Area Participation**

Many of the community water systems that will be affected by the proposed amendments are towns and villages operating municipal water supplies. The NYSDOH has been discussing the proposed amendments at organizational meetings where small community water systems are represented. The NYSDOH representatives have and will continue to explain the new requirements at local meetings of the New York Rural Water Association, the New York Chapter of the American Water Works Association, the Conference of Environmental Health Directors, the New York Association of Towns, and the New York Conference of Mayors, among others.

**Job Impact Statement**

**Nature of Impact**

The New York State Department of Health (NYSDOH) has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities. It may require public water systems to increase the frequency of monitoring water quality and possibly install water treatment equipment to reduce arsenic concentrations. Its impact on employment, if any, is expected to be positive for the construction/water treatment industry during the first years of implementation.

**Categories and Numbers Affected**

The proposed amendments will not decrease the number of jobs in New York State. Also, it is unlikely that there will be an increase in employment due to the increased monitoring and treatment requirements for some systems.

**Regions of Adverse Impact**

The proposed rule will not have a disproportionate adverse impact on jobs or employment opportunities in specific regions in New York State.

**Minimizing Adverse Impact**

No adverse impact on jobs in New York State is anticipated.

**Self-employment Opportunities**

No self-employment opportunities are anticipated as a result of the proposed rule.

## Insurance Department

### EMERGENCY RULE MAKING

#### Life Insurance Reserves

**I.D. No.** INS-24-06-00003-E

**Filing No.** 664

**Filing date:** May 25, 2006

**Effective date:** May 25, 2006

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

**Action taken:** Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

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

**Specific reasons underlying the finding of necessity:** During 2004, the Department became aware that some insurers have designed certain life insurance products with the clear intent of circumventing the existing reserve standards. The Department is concerned with the solvency of insurers who fail to set aside sufficient funds to pay claims as they pose a serious threat to consumers who rely on insurers to honor their commitment both now and in the future. In addition, insurers who have elected to circumvent the law place themselves at a competitive advantage over those insurers who follow the rules and establish the appropriate level of reserves. On a daily basis, those insurers who abide by the law suffer substantial losses in terms of market share, as they cannot effectively compete against insurers that do not set aside adequate reserves. This practice of under-reserving by insurers, which have decided market share is more important than the safety and soundness of policyholder funds, puts policyholders at continued risk.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the June 30, 2006 quarterly statement is August 15, 2006. 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, the emergency adoption of this first amendment to Regulation No. 147 is necessary for the general welfare.

**Subject:** Rules governing valuation of life insurance reserves.

**Purpose:** To prescribe rules and guidelines for valuing individual life insurance policies and certain group life insurance certificates, with primary emphasis on valuation of non-level premium and/or non-level benefit life insurance policies, indeterminate premium life insurance policies, universal life insurance policies, variable life insurance policies, and credit life insurance policies in accordance with statutory reserve formulas.

**Substance of emergency rule:** The First Amendment to Regulation No. 147 provides new mortality and reserve standards for credit life insurance policies. It also provides new reserve standards for certain other specified life insurance policies. The following is a summary of the amendments to Regulation No. 147:

Section 98.1(a) was amended to include credit life insurance policies and to mention clarification of principles.

Section 98.2(b) was amended to ensure consistency in applicability wording within the regulation.

Section 98.2(i) was amended to state that unless notification was previously provided to the superintendent to adopt lower reserves based on the requirements of this Part, insurers may not adopt such lower reserves without the prior approval of the superintendent.

A new subdivision (j) was added to section 98.2 regarding the use of the minimum mortality standards defined in Part 100 of this Title.

A new subdivision (k) was added to section 98.2 regarding the applicability of this regulation to certain specified life insurance policies.

A new subdivision (l) was added to section 98.2 regarding the applicability of this regulation to credit life insurance.

Subdivision (d)(2) of section 98.4 was amended to change an incorrect reference.

The last sentence of section 98.4(s) was amended to change a reference from 1% to one percent, in order to be consistent with similar references in other sections of the regulation.

Section 98.4(u) was amended to reference the examples and reserve methodologies described in section 98.9 of this Part.

A new Section 98.4(v) was added to describe the reserve methodology for life insurance policies that provide long-term care benefits through the acceleration of benefits.

The third sentence of paragraph (2) of section 98.6(a) was amended to change an incorrect reference to the Contract Segmentation Method to the mortality and interest rates used in calculating basic unitary reserves.

Section 98.7(b)(1)(ii) was amended to have the definition of secondary guarantee period extended to this whole Part rather than just paragraph (1) of section 98.7.

Section 98.7(b)(1)(iii) was amended to provide clarification of an example supplied in this section.

Section 98.7(c) was amended to change the reference from age 100 to the age at the end of the applicable valuation mortality table, since the 2001 CSO Mortality Tables go out to ages greater than 100.

Section 98.8(b) was amended to reference section 98.9 of this Part.

A new section 98.9 was added for certain specified life insurance policies. This section provides examples of policy designs which constitute guarantees and describes the reserve methodologies to be used in valuing such policies.

A new section 98.10 was added for credit life insurance. This section provides minimum mortality standards and minimum reserve standards for such policies.

Section 98.9 was renumbered to section 98.11. This is the severability provision.

**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 August 22, 2006.

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

#### Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the First Amendment of Regulation No. 147 (11 NYCRR 98) is derived from sections 201, 301, 1304, 1308, 4217, 4218, 4240 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(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of this paragraph.

Section 4217(c)(6)(D) permits the superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies and contracts, as the superintendent deems appropriate.

Section 4217(c)(9) requires that reserves for any plan of life insurance which provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or which is of such a nature that the minimum reserves cannot be determined by the methods prescribed in sections 4217 and 4218, must be computed by a method consistent with the principles of sections 4217 and 4218 as determined by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated

by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract.

Section 4240(d)(7) states that the superintendent shall have the power to promulgate regulation, as may be appropriate, to carry out the provisions of this section.

For fraternal benefit societies, section 4517(b)(2) provides that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of this subsection (b).

#### 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 authorized 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. After the adoption of the current version of Regulation No. 147, which incorporates the National Association of Insurance Commissioners (NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), some insurers developed life insurance products that resulted in reserves being held that were lower than the reserves defined in section 4217 of the Insurance Law and the current version of Regulation No. 147, even though these products had similar death benefit and premium guarantees. To clarify the intent of the NAIC model regulation, NAIC Actuarial Guideline 38 was developed in 2002. The Guideline stated that new policy designs which are created to simply disguise guarantees provided by the policy must be reserved in a manner similar to more typical designs with similar guarantees. Section 98.4(u) of the current version of Regulation No. 147 also contains wording to address consistent reserving principles. In the past year the Department and other states became aware that, in spite of such wording, some insurers were creating new products in order to avoid the reserve methodologies described in Regulation No. 147. As a result, the NAIC began revising the Guideline in 2004 and ultimately addressed the concerns of the Department and other regulators by eliminating any perceived ambiguity in the Guideline for policies issued July 1, 2005 and later. This revision was adopted at the NAIC level in October 2005. The new reserve methodologies for various policy features that constitute guarantees, as described in section 98.9 of this amendment, are consistent with the principles of section 4217 of the Insurance Law and with the standards adopted at the NAIC level for policies issued July 1, 2005 and later. Not adopting this amendment could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

The regulation will also set standards for determining policy reserves for credit life insurance and for determining reserves for life insurance policies that provide long-term care benefits through the acceleration of benefits.

#### 4. Costs:

Administrative costs to most insurers authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the original adoption of this regulation in March of 2003, most insurers would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees and credit life insurance policies. An insurer that needs to modify its current system could produce the modifications internally or if the system was purchased from a consultant, have their consultant produce the modifications. The cost associated with the modifications is estimated to be \$50,000 - \$100,000. The cost would include the actual modifications as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred due to those requirements.

Regarding costs in terms of reserve impact, for insurers following the intent of the Law and Regulation No. 147, there will be no reserve impact. A survey conducted by the Department showed that the reserve impact ranged from zero for many insurers to nearly \$200 million as of December 31, 2004. For no insurer was the reserve impact as a percentage of capital and surplus greater than 16% as of December 31, 2004. Notwithstanding

these reserve increases, holding reserves at appropriate levels is mandated by statute and will help guarantee that insurers will be able to pay future claims.

Costs to the Insurance Department will be minimal as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. 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:

One significant alternative considered was to keep the current version of Regulation No. 147, which would result in some insurers holding reserves lower than those intended by section 4217 of the Insurance Law. Over the course of several months, the Department discussed this matter as part of the NAIC Life and Health Actuarial Task Force (LHATF) forums and in several conference calls and meetings with impacted insurers. During mid to late 2004, revised wording to NAIC Actuarial Guideline 38 was exposed in order to extend the principles of the NAIC's Standard Valuation Law to products not contemplated at the time of the writing of the NAIC Law by removing any perceived ambiguity in the Actuarial Guideline. Since the same perceived ambiguity exists in the current version of Regulation No. 147 when the Regulation is applied to some new product designs, the amendment is necessary to clarify the rules that apply to these products. The Department reviewed insurers' concerns related to the exposed wording, but determined that such change was needed because the Department believes the reserves that would be held by these insurers would be lower than those intended by section 4217 of the Insurance Law. Before drafting the amendment to Regulation No. 147, the Department analyzed a spreadsheet that calculates the reserve impact of the revised language to Regulation No. 147. The Department also discussed the impact with several potentially affected insurers. As confirmed by the results of the survey conducted by the Department in early 2005, the Department believes that the amendment to Regulation No. 147 has had the appropriate effect on reserves, i.e., reserves consistent with those intended by the Insurance Law and consistent with the reserve level for similar products.

Another alternative was to keep the current minimum standard for credit life insurance, but this would result in a mortality standard that is inconsistent with the national NAIC standard.

Another alternative was to not include the wording in section 98.4(v) that describes the reserve methodology for life insurance policies that provide long-term care benefits through the acceleration of benefits, but this would result in a standard that is inconsistent with the national NAIC standard.

#### 9. Federal standards:

There are no federal standards in this subject area.

#### 10. Compliance schedule:

This regulation applies to financial statements filed on or after December 31, 2004. The Department's concern about very low reserves being held for certain product designs is well known in the insurance industry. Numerous discussions with impacted insurers have taken place during the course of developing a national standard through the National Association of Insurance Commissioners. Since this regulation has been adopted on an emergency basis since December 29, 2004, insurers have had ample time to achieve full compliance.

### **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 insurers authorized 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 amendment to this regulation establishes reserve requirements for certain types of life insurance, including universal life insurance with secondary guarantees, and for credit life insurance.

##### 3. Costs:

Administrative costs to most insurers authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the original adoption of this regulation in March of 2003, most insurers would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees and credit life insurance policies. An insurer that needs to modify its current system could produce the modifications internally or if the system was purchased from a consultant, have their consultant produce the modifications. The cost associated with these modifications is estimated to be \$50,000 - \$100,000. The cost would include the actual modifications as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred due to those requirements.

Regarding costs in terms of reserve impact, for insurers following the intent of the Law and Regulation No. 147, there will be no reserve impact. A survey conducted by the Department showed that the reserve impact ranged from zero for many insurers to nearly \$200 million as of December 31, 2004. For no insurer was the reserve impact as a percentage of capital and surplus greater than 16% as of December 31, 2004.

##### 4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

##### 5. Rural area participation:

The Department's concern about very low reserves being held for certain product designs is well known in the insurance industry. Numerous discussions with impacted insurers have taken place during the course of developing a national standard through the National Association of Insurance Commissioners. Insurers that may be impacted by this standard are aware of the issues and should have already formed an estimate of the impact. In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the January 4, 2006 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 life insurance reserves for insurers. The regulation 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 authorized 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.

## Department of Labor

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

#### **Public Employee Occupational Safety and Health Standards**

**I.D. No.** LAB-24-06-00001-P

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

**Proposed action:** This is a consensus rule making to amend section 800.3 of Title 12 NYCRR.

**Statutory authority:** Labor Law, section 27-a.4(a)

**Subject:** Public employee occupational safety and health standards.

**Purpose:** To incorporate by reference into New York State occupational safety and health standards, those safety and health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of Feb. 28, 2006.

#### **Substance of proposed rule:**

The proposed rule amends Section 800.3 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York, which sets forth those standards of the Occupational Safety and Health Administration which are incorporated by reference into state regulations. It is amended so as to incorporate those standards revised as of January 18, 2006.

The material incorporated by reference in Part 800.3 contains the following parts of Title 29 of the Code of Federal Regulations, revised as of the dates following the title of each part:

Part 1910 - General Industry Standards; July 1, 1988 edition

Part 1915 - Shipyard Employment Standards; July 1, 1988 edition

Part 1917 - Marine Terminal Standards edition; July 1, 1988 edition

Part 1918 - Longshoring Standards; July 1, 1988 edition

Part 1926 - Construction Standards; July 1, 1988 edition

Part 1928 - Agricultural Standards; July 1, 1988 edition

Certain revisions to these standards, published in the Federal Register through January 18, 2006, have been adopted previously.

Since the standards were last updated, the Department of Labor has obtained one additional standard:

1. Updating OSHA Standards Based on National Consensus Standards; General, Incorporation by Reference; Occupational Exposure to Hexavalent Chromium; Final Rule, 71 Federal Register, 10299-10348.

**Text of proposed rule and any required statements and analyses may be obtained from:** Diane Wallace Wehner, Legal Assistant II, Department of Labor, Counsel's Office, State Campus, Bldg. 12, Albany, NY 12240, (518) 457-4380, e-mail: diane.wehner@labor.state.ny.us

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

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

#### **Consensus Rule Making Determination**

This amendment is necessary because Section 27-a(4)(a) of the Labor Law directs the Commissioner to adopt by rule, for the protection of the safety and health of public employees, all safety and health standards promulgated under the U.S. Occupational Safety and Health Act of 1970, and to promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to OSHA. This insures that public employees will be afforded the same safeguards in their workplaces as are granted to employees in the private sector.

#### **Job Impact Statement**

As the proposed action does not affect jobs and employment opportunities but simply affords workplace safety and health guidelines to improve job performance and safety, a job impact statement is not submitted.

## Niagara Falls Water Board

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

#### Powers of the Director and Appeal Process

**I.D. No.** NFW-24-06-00007-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 1960.9(a)(4) of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 1230-f

**Subject:** Power of the director and appeal process.

**Purpose:** This proposed change will clarify the definition of “water board.”

**Text of proposed rule:** The proposed additions to the existing section 21 NYCRR Part 1960(a)(4) are shown underlined below. There are no deletions.

(4) If a response contesting the action is entered, prior to scheduling a formal hearing, the user may at the discretion of the director be afforded the opportunity to meet with the director to resolve the matter by mutual consent. If settlement cannot be reached, then, upon request of the user, the director shall refer the matter to the *governing body of the water board* for a formal hearing. The *governing body of the water board* may appoint and refer the dispute or enforcement proceeding to a hearing officer who shall conduct the hearing of the alleged violation and contest thereof. The hearing officer shall promptly conduct the hearing and provide a written report to the *governing body of the water board* with a recommendation, based on the evidence presented, for a final determination by the *governing body of the water board*. Reasonable notice shall be given to the user who shall be allowed to present relevant evidence and argument at the hearing. A written decision by the *governing body of the water board* based upon evidence and argument presented shall be made within thirty (30) days following the conclusion of the hearing or receipt of the hearing officer’s report. The decision of the *governing body of the water board* shall be only subject to review pursuant to Article 78 of the Civil Practice Law and Rules of the state. Following such hearing, the water board may commence an action, in any court having jurisdiction, seeking appropriate legal and/or equitable relief, including injunctions against the violative activity, from users not in compliance with any of the provisions of this part, or any pretreatment standards and requirements.

**Text of proposed rule and any required statements and analyses may be obtained from:** Gerald Grose, Niagara Falls Water Board, 5815 Buffalo Ave., Niagara Falls, NY 14304, (716) 283-9770, e-mail: ggrose@nfwb.org

**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

The Water Board has determined that this proposed rule change is a “consensus rule” as defined by SAPA 202(1)(e)(iii). This proposed change only clarifies some potentially ambiguous language in the pretreatment portion of the Water Board Regulations that may be confusing. This is the provision where a violation is sent for a hearing by the executive director to the water board. Since the term “water board” could be the name of the corporate entity as well as the governing board, the proposed amendment identifies which applies. As it is generally clear in the context of the paragraph, and because we currently do not have any violators that might benefit from this ambiguity we do not expect any objections to this proposal.

#### Job Impact Statement

This Rule change will have no impact on job and employment opportunities. The rule change only clarifies a possibly confusing paragraph. The rule with the proposed amendments will better reflect the past and current de facto practice in this enforcement activity.

## Public Service Commission

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

#### Supplemental Home Energy Assistance Benefits

**I.D. No.** PSC-24-06-00005-EP

**Filing date:** May 26, 2006

**Effective date:** May 26, 2006

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

**Action taken:** The commission, on May 25, 2006, adopted an order in Case 00-E-1273 approving on an emergency basis, Central Hudson Gas & Electric Corporation’s request to extend the deadline to use certain surplus ratepayer funds from the Powerful Opportunities Program to provide a supplemental benefit to low-income customers that are HEAP recipients.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

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

**Specific reasons underlying the finding of necessity:** Immediate adoption is necessary to extend the deadline for receiving the \$200 supplemental benefit for low-income customers during the targeted winter heating season when energy bills are at their highest.

**Subject:** Extension of deadline for supplemental home energy assistance benefits for low-income customers for the targeted winter heating season.

**Purpose:** To extend the deadline for a supplemental benefits to Central Hudson’s low-income customers to help them meet expected high bills during the targeted winter heating season.

**Substance of emergency/proposed rule:** The Commission approved on an emergency basis Central Hudson Gas and Electric Corporation’s proposal to extend the deadline to give its low-income customers a supplemental home energy assistance benefit of \$200 per customer to assist in paying their energy bills for the targeted winter heating season, subject to the terms and conditions set forth in the order.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The rule will expire August 23, 2006.

**Text of rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

**Data, views or arguments may be submitted to:** Jaelyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement** Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (00-E-1273SA12)

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

#### Supplemental Home Energy Assistance Benefits

**I.D. No.** PSC-24-06-00006-EP

**Filing date:** May 26, 2006

**Effective date:** May 26, 2006

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

**Action taken:** The commission, on May 25, 2006, adopted an order in Case 00-G-1274 approving on an emergency basis, Central Hudson Gas & Electric Corporation’s request to extend the deadline to use certain surplus ratepayer funds from the Powerful Opportunities Program to provide a supplemental benefit to low-income customers that are HEAP recipients.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

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

**Specific reasons underlying the finding of necessity:** Immediate adoption is necessary to extend the deadline for receiving the \$200 supplemental benefit for low-income customers during the targeted winter heating season when energy bills are at their highest.

**Subject:** Extension of deadline for supplemental home energy assistance benefits for low-income customers for the targeted winter heating season.

**Purpose:** To extend the deadline for supplemental benefits to Central Hudson's low-income customers to help them meet expected high bills during the targeted winter heating season.

**Substance of emergency/proposed rule:** The Commission approved on an emergency basis Central Hudson Gas and Electric Corporation's proposal to extend the deadline to give its low-income customers a supplemental home energy assistance benefit of \$200 per customer to assist in paying their energy bills for the targeted winter heating season, subject to the terms and conditions set forth in the order.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The rule will expire August 23, 2006.

**Text of rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

**Data, views or arguments may be submitted to:** Jaclyn A. Brillong, 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.

(00-G-1274SA6)

## NOTICE OF ADOPTION

### Increase in Rates and a Surcharge by The Callicoon Water Company

**I.D. No.** PSC-40-05-00014-A

**Filing date:** May 25, 2006

**Effective date:** May 25, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order approving the request of The Callicoon Water Company for a rate increase and to establish an escrow account for capital improvements and extraordinary expenditures.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Increase in rates as well as a surcharge to fund an escrow account for capital improvements and extraordinary or unexpected expenditures.

**Purpose:** To approve a rate increase and to establish escrow accounts for capital improvements and extraordinary expenditures.

**Substance of final rule:** The Commission adopted an order approving a rate increase of 6.3% for The Callicoon Water Company (Callicoon) and allowed Callicoon to establish an escrow account to collect \$72,000 for capital improvements and to establish a \$10,000 escrow account to be used for extraordinary expenditures, and directed Callicoon to file tariff amendments, to become effective June 1, 2006, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

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

(05-W-1097SA1)

## NOTICE OF ADOPTION

### Mini Rate Increase by Plattsburgh Municipal Lighting Department

**I.D. No.** PSC-51-05-00012-A

**Filing date:** May 24, 2006

**Effective date:** May 24, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order in Case 05-E-1496 approving Plattsburgh Municipal Lighting Department's request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service — P.S.C. No. 1.

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

**Subject:** Mini rate increase.

**Purpose:** To approve Plattsburgh Municipal Lighting Department's request to increase annual revenues of \$299,000 or 1.8 percent.

**Substance of final rule:** The Commission adopted an order approving an increase in the Plattsburgh Municipal Lighting Department's (Plattsburgh) annual revenues of \$299,000 or 1.8%, effective June 1, 2006, provided Plattsburgh files further revisions, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

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

(05-E-1496SA1)

## NOTICE OF ADOPTION

### Water Rates and Charges by Aqua America, Inc.

**I.D. No.** PSC-08-06-00013-A

**Filing date:** May 24, 2006

**Effective date:** May 24, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order approving the request of Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Kingsvale Water Company, Inc. (Kingsvale) to increase rates based on increases in the gross domestic product.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Water rates and charges.

**Purpose:** To approve Kingsvale's request to increase rates based on increases in the gross domestic product.

**Substance of final rule:** The Commission adopted an order approving Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a Aqua Source Utility, Inc., f/k/a Kingsvale Water Company, Inc.'s (Kingsvale) request to increase rates based on increases in the Gross Domestic Product and directed Kingsvale to file further revisions, to become effective June 1, 2006, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

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

(06-W-0145SA1)

## NOTICE OF ADOPTION

**Water Rates and Charges by Aqua America, Inc.**

**I.D. No.** PSC-08-06-00015-A  
**Filing date:** May 24, 2006  
**Effective date:** May 24, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order approving the request of Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Waccabuc Water Works, Inc. (Waccabuc) to increase rates based on increases in the gross domestic product.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Water rates and charges.

**Purpose:** To approve Waccabuc's request to increase rates based on increases in the gross domestic product.

**Substance of final rule:** The Commission adopted an order approving Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a Aqua Source Utility, Inc., f/k/a Waccabuc Water Works, Inc.'s (Waccabuc) request to increase rates based on increases in the Gross Domestic Product and directed Waccabuc to file further revisions, to become effective June 1, 2006, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0147SA1)

## NOTICE OF ADOPTION

**Water Rates and Charges by Aqua America, Inc.**

**I.D. No.** PSC-08-06-00016-A  
**Filing date:** May 25, 2006  
**Effective date:** May 25, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order approving the request of Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Wild Oaks Water Company, Inc. (Wild Oaks) to increase rates based on increases in the gross domestic product.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Water rates and charges.

**Purpose:** To approve Wild Oaks' request to increase rates based on increases in the gross domestic product.

**Substance of final rule:** The Commission adopted an order approving Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Wild Oaks Water Company, Inc.'s (Wild Oaks) request to increase rates based on increases in the Gross Domestic Product, and directed Wild Oaks to file further revisions, to become effective June 1, 2006, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0148SA1)

## NOTICE OF ADOPTION

**Water Rates and Charges by Aqua America, Inc.**

**I.D. No.** PSC-08-06-00017-A  
**Filing date:** May 25, 2006  
**Effective date:** May 25, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order approving the request of Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Cambridge Water Works Company, Inc. (Cambridge) to increase rates based on increases in the gross domestic product.

**Statutory authority:** Public Service Law, section 80-c(10)

**Subject:** Water rates and charges.

**Purpose:** To approve Cambridge's request to increase rates based on increases in the gross domestic product.

**Substance of final rule:** The Commission adopted an order approving Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Cambridge Water Works Company, Inc.'s (Cambridge) to request to increase rates based on increases in the Gross Domestic Product and directed Cambridge to file further revisions, to become effective June 1, 2006, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0149SA1)

## NOTICE OF ADOPTION

**Water Rates and Charges by Aqua America, Inc.**

**I.D. No.** PSC-08-06-00018-A  
**Filing date:** May 26, 2006  
**Effective date:** May 26, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order approving the request of Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Dykeer Water Company, Inc. (Dykeer) to increase rates based on increases in the Gross Domestic Product.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Water rates and charges.

**Purpose:** To approve Dykeer's request to increase rates based on increases in the Gross Domestic Product.

**Substance of final rule:** The Commission adopted an order approving Aqua America, Inc., f/k/a Philadelphia Suburban Corporation, f/k/a AquaSource Utility, Inc., f/k/a Dykeer Water Company, Inc.'s (Dykeer) request to increase rates based on increases in the Gross Domestic Product, and directed Dykeer to file further revisions, to become effective June 1, 2006, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0150SA1)

## NOTICE OF ADOPTION

## Submetering of Electricity by Cocoa Partners, LP

I.D. No. PSC-11-06-00011-A

Filing date: May 24, 2006

Effective date: May 24, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order in Case 06-E-0213 approving the petition of Cocoa Partners, LP to submeter electricity at One Wall Street Court, New York, NY located in the territory of Consolidated Edison Company of New York, Inc.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To approve the request of Cocoa Partners, LP to submeter electricity at One Wall Street Court, New York, NY.

**Substance of final rule:** The Commission approved a request by Cocoa Partners, LP to submeter electricity at One Wall Street Court, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

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

(06-E-0213SA1)

## NOTICE OF ADOPTION

## Transfer of Water Plant Assets between the Town of Woodbury, Orange County and Ridge Road Water Co., Inc.

I.D. No. PSC-12-06-00014-A

Filing date: May 26, 2006

Effective date: May 26, 2006

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

**Action taken:** The commission, on May 17, 2006, adopted an order in Case 06-W-0197 approving the joint petition of Ridge Road Water Co., Inc. and the Town of Woodbury (Town), Orange County for the Town to acquire all of the water supply assets of Ridge Road Water Co., Inc.

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Transfer of water plant assets.

**Purpose:** To approve the transfer of the water plant assets of Ridge Road Water Co., Inc. to the Town of Woodbury, Orange County.

**Substance of final rule:** The Commission approved a joint petition by Ridge Road Water Co., Inc. and the Town of Woodbury (Town), Orange County for the transfer of all of the water plant assets to the Town, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

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

(06-W-0197SA1)

PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED

## Interconnection Agreement between Verizon New York Inc. and Ymax Communications Corp.

I.D. No. PSC-24-06-00011-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Ymax Communications Corp. for approval of an interconnection agreement executed on March 10, 2006.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of the networks between Verizon New York Inc. and Ymax Communications Corp. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Verizon New York Inc. and Ymax Communications Corp.

**Substance of proposed rule:** Verizon New York Inc. and Ymax Communications Corp. have reached a negotiated agreement whereby Verizon New York Inc. and Ymax Communications Corp. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until March 9, 2008, or as extended.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillings, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-C-0597SA1)

PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED

## Interconnection Agreement between Verizon New York Inc. and Northstar Telecom, Inc.

I.D. No. PSC-24-06-00012-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Northstar Telecom, Inc. for approval of an interconnection agreement executed on May 1, 2006.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of the networks between Verizon New York Inc. and Northstar Telecom, Inc. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Verizon New York Inc. and Northstar Telecom, Inc.

**Substance of proposed rule:** Verizon New York Inc. and Northstar Telecom, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Northstar Telecom, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until April 30, 2008, or as extended.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our**

*website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:* Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-C-0598SA1)

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

**Interconnection Agreement between TDS Communications Corp. and Sprint Communications Company L.P.**

**I.D. No.** PSC-24-06-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by TDS Communications Corp. and Sprint Communications Company L.P. for approval of an interconnection agreement executed on Jan. 1, 2006.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of the networks between TDS Communications Corp. and Sprint Communications Company L.P. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between TDS Communications Corp. and Sprint Communications Company L.P.

**Substance of proposed rule:** TDS Telecommunications Corp. and Sprint Communications Company L.P. have reached a negotiated agreement whereby TDS Telecommunications Corp. and Sprint Communications Company L.P. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-C-0610SA1)

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

**Interconnection Agreement between ALLTEL New York, Inc. and 1-800-Reconex, Inc.**

**I.D. No.** PSC-24-06-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by ALLTEL New York, Inc. and 1-800-Reconex, Inc. for approval of an interconnection agreement executed on May 4, 2006.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of the networks between ALLTEL New York, Inc. and 1-800-Reconex, Inc. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between ALLTEL New York, Inc. and 1-800-Reconex, Inc.

**Substance of proposed rule:** ALLTEL New York, Inc. and 1-800-Reconex, Inc. have reached a negotiated agreement whereby ALLTEL New York, Inc. and 1-800-Reconex, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 4, 2007, or as extended.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-C-0632SA1)

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

**Transfer of Property by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-24-06-00015-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 by Rochester Gas and Electric Corporation to sell its street lighting facilities situated within the Village of Hilton, Monroe County, NY to the Village of Hilton.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of property.

**Purpose:** To allow Rochester Gas and Electric to transfer ownership of its street lighting facilities within the Village of Hilton to the Village of Hilton.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject in whole or in part, a petition by Rochester Gas and Electric Corporation to sell its street lighting facilities situated within the Village of Hilton, Monroe County, New York to the Village of Hilton.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-E-0542SA1)

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

**Cable Line Extension Rules by Empire Video Services Corporation**

**I.D. No.** PSC-24-06-00016-P

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, a petition of Empire Video Services Corporation for a declaratory ruling seeking a waiver from the cable line extension rules of 16 NYCRR section 895.5.

**Statutory authority:** Public Service Law, sections 215 and 221

**Subject:** Cable line extension rules.

**Purpose:** To consider petition for approval of a declaratory ruling seeking a waiver from the line extension rules of 16 NYCRR section 895.5.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, a petition of Empire Video Services Corporation for a Declaratory Ruling seeking a waiver from the cable line extension rules of 16 NYCRR Section 895.5.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillong, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(06-V-0605SA1)

---



---

## Racing and Wagering Board

---



---

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

**Regulatory Exemption of Registration, Licensing and Reporting Requirements for Raffles**

**I.D. No.** RWB-24-06-00004-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 5601.1, 5602.1 and 5624.1 of Title 9 NYCRR.

**Statutory authority:** General Municipal Law, sections 188-a and 190-a

**Subject:** Regulatory exemption of registration, licensing and reporting requirements for raffles conducted by certain charities.

**Purpose:** To amend the Board's games of chance rules and regulations to conform with amendments to the General Municipal Law that were enacted under L. 2004, ch. 678 and L. 2005, ch. 400. These statutory amendments exempted charitable organizations from registration, licensing and reporting requirements for organizations that intend to conduct raffles where net proceeds are less than \$5,000 per drawing or \$20,000 in a calendar year. Such organizations may avoid the registration process by deeming themselves an authorized organization, and are relieved of any licensing or financial reporting requirements.

**Text of proposed rule:** New subdivision (c) is added to Section 5601.1 of 9E NYCRR to read as follows:

*(c) Notwithstanding the registration requirements set forth in this Part, an authorized organization may conduct a raffle without complying with*

*such registration requirements, provided, that such organization shall derive net proceeds from raffles in an amount less than \$5,000 during the conduct of one raffle and shall derive net proceeds from raffles in an amount less than \$20,000 during one calendar year. Such organization must first determine that it is in fact an "authorized organization" in order to qualify for such an exemption. For the purposes of this subdivision, "authorized organization" shall mean and include any bona fide religious or charitable organization or bona fide educational, fraternal or service organization or bona fide organization of veterans or volunteer firefighters, which by its charter, certificate of incorporation, constitution, or act of the Legislature, shall have among its dominant purposes one or more of the lawful purposes as defined in this chapter for a period of three years immediately prior to being granted the registration requirement exemption. No organization shall be deemed an authorized organization which is formed primarily for the purpose of conducting games of chance and which does not devote at least seventy-percent of its activities to other than conducting games of chance. No political party shall be deemed an authorized organization.*

Current section 5602.1 of 9E NYCRR is renumbered as subdivision (a) and a new subdivision (b) is added to Section 5602.1:

*(b) Notwithstanding the licensing requirements set forth in this Part, an authorized organization that has met the self-determination requirements of section 5601.1(c) of this Title may conduct a raffle without complying with such licensing requirements, provided that such organization shall derive net proceeds from raffles in an amount less than \$5,000 during the conduct of one raffle and shall derive net proceeds from raffles in an amount less than \$20,000 during one calendar year.*

*(1) No person under the age of eighteen shall be permitted to play, operate or assist in any raffle conducted pursuant to subdivision (b).*

*(2) Raffles conducted pursuant to subdivision (b) shall only be conducted within a municipality in which the authorized organization is domiciled that has passed a local law, ordinance or resolution in accordance with Sections 187 and 188 of the General Municipal Law approving the conduct of games of chance that are located within the county or contiguous to the county in which the organization is domiciled.*

Current section 5624.1 of 9E NYCRR is renumbered as subdivision (a) of Section 5624 and a new subdivision (b) is added to read as follows:

*(b) Notwithstanding the filing requirements set forth in this Part, an authorized organization that has met the self-determination requirements of section 5601.1(c) of this Title may conduct a raffle without complying with such filing requirements, provided, that such organization shall derive net proceeds from raffles in an amount less than \$5,000 during the conduct of one raffle and shall derive net proceeds from raffles in an amount less than \$20,000 during one calendar year. Such authorized organizations are not relieved of any other financial reporting and record-keeping requirements of local, state or federal laws or rules regarding the receipt and expenditure of monies, including but not limited to the Not-For-Profit Corporations Law.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: [info@racing.state.ny.us](mailto:info@racing.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**

Board staff has determined that no person is likely to object to the rule as written because it merely implements or conforms to non-discretionary statutory provisions of the General Municipal Law.

The rule making will amend sections 5601.1, 5602.1 and 5624.1 of subtitle T of 9E NYCRR to conform with amendments to the General Municipal Law that were enacted under Chapter 678 of the Laws of 2004 and Chapter 400 of the Laws of 2005. These non-discretionary statutory provisions are found in General Municipal Law 190-a.

The non-discretionary statutory provisions exempt charitable organizations from registration, licensing and reporting requirements for raffles where net proceeds are less than \$5,000 per drawing or \$20,000 in a calendar year. Such organizations may avoid the registration process by deeming themselves an authorized organization, and are relieved of any licensing or financial reporting requirements.

**Job Impact Statement**

The New York State Racing and Wagering Board has determined that the rule will have no impact on jobs and employment opportunities. As is apparent from the nature and purpose of the rule, charitable organizations will be relieved from certain registration, licensing, and reporting require-

ments for the conduct of raffles. This rule will neither add jobs nor have a substantial adverse impact on jobs. Raffles may only be conducted by volunteers and General Municipal Law 189(11) prohibits any person from receiving remuneration for participating in the management or operations of any game of chance, including raffles.

---



---

## Department of Taxation and Finance

---



---

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

#### Fuel Use Tax on Motor Fuel and Diesel Motor Fuel

**I.D. No.** TAF-24-06-00008-EP

**Filing No.** 671

**Filing date:** May 30, 2006

**Effective date:** May 30, 2006

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

**Action taken:** Amendment of section 492.1(b)(1)(xlii) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); 528(a) and (c); and L. 2006, ch. 35

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

**Specific reasons underlying the finding of necessity:** The amendments are being adopted on an emergency basis in order to preserve the general welfare of the people of New York State. For each calendar quarterly reporting period, carriers must calculate their fuel use tax based upon a sales tax component and a composite rate per gallon for motor fuel and diesel motor fuel. These rates are set forth by the Commissioner in the Fuel Use Tax Regulations.

Chapter 35 of the Laws of 2006, enacted May 21, 2006, added a new subdivision (m) to section 1111 of the Tax Law to change the rates of sales and use tax imposed on motor fuel and diesel motor fuel by sections 1105 and 1110 of the Tax Law, in effect capping the State sales and use tax at 8 cents per gallon effective June 1, 2006. Under section 523(b) of the Tax Law, the sales tax component of the fuel use tax is set, in part, by reference to the rates of sales and use tax imposed by sections 1105 and 1110. Section 492.1(b)(1)(xlii) of the Fuel Use Tax Regulations sets forth the fuel use tax rates applicable to the second calendar quarter beginning April 1, 2006, and ending June 30, 2006, after which taxpayers must file their returns for the quarter, which are due July 31st. In order that the fuel use tax rates for this quarter take into account the reduction in the sales and use tax rates, it is necessary to proceed by emergency action. This rule amends the fuel use tax rates previously set forth in the Fuel Use Tax Regulations for the second calendar quarter by calculating such rates on an average basis for the three month period. In addition, pursuant to section 528(b) of the Tax Law, New York is a party to the International Fuel Tax Agreement (IFTA), under which carriers report and pay several jurisdictions' fuel use tax to their base jurisdictions. In order to assure that the various jurisdictions collect the correct amount of New York State tax, it is necessary, under IFTA, to give notice of rate changes to the other jurisdictions at least 60 days prior to the due date of the quarterly returns, *i.e.*, by June 2, 2006, for the return for the April - June quarter.

Therefore, an emergency measure is the only way for the Commissioner to put regulatory amendments in place that comply with (1) the new statutory structure effective June 1, 2006, (2) the governing terms of the International Fuel Tax Agreement, and (3) the rule making requirements of the State Administrative Procedure Act.

**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To amend the fuel use tax rates and aggregate rates per gallon of the fuel use tax on motor fuel and diesel motor fuel and jointly administered art. 13-A carrier tax for the calendar quarter beginning April 1, 2006, and ending June 30, 2006, to reflect recently enacted legislation that

implements a State sales and use tax reduction on sales of such fuel and to calculate such rates on an average basis for this three month period pursuant to section 528(c) of the Tax Law.

**Text of emergency/proposed rule:** Section 1. Subparagraph (xlii) of paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xlii) April - June 2006					
[15.7]	15.4	[23.7]	23.4	[39.6]	39.3
			[17.2]	16.6	[25.2]
			24.6	[39.35]	38.75

**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 27, 2006.

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: John\_Bartlett@tax.state.ny.us

**Data, views or arguments may be submitted to:** Marilyn Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: Marilyn\_Kaltenborn@tax.state.ny.us

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

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

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