

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; or EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Various Trees and Plants of the Prunus Species

I.D. No. AAM-31-07-00007-E
Filing No. 712
Filing date: July 16, 2007
Effective date: July 16, 2007

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

Action taken: Addition of Part 140 to Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit and ornamental nursery stock that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but seriously debilitates the produc-

tive life of the plants. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that failure to immediately establish a quarantine to regulate the intrastate movement of stone fruit could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the agricultural resources of the State, but could also result in a federal quarantine or exterior quarantines imposed by other states. Such quarantines would cause economic hardship for New York's stone fruit growers, since such quarantines may be broader than that which we propose and may vary in requirements and prohibitions from state to state. The consequent loss of business would harm industries which are important to New York State's economy and as such, would harm the general welfare. Accordingly, it appears that this rule should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Various trees and plants of the Prunus species.

Purpose: To establish a plum pox virus quarantine in New York State.

Text of emergency rule:

PART 140
CONTROL OF THE PLUM POX VIRUS (POTYVIRUS DIDERON
STRAIN)

Section 140.1 Definitions.

For the purpose of this Part, the following words, names and terms shall be construed, respectively, to mean:

(a) *Certificate means a certificate issued or authorized to be issued by the Commissioner, certifying the eligibility of products for intrastate movement under the requirements of this Part.*

(b) *Commissioner means the Commissioner of Agriculture and Markets of the State of New York and any officer or employee of the New York State Department of Agriculture and Markets or the United States Department of Agriculture duly delegated pursuant to section 17 of the Agriculture and Markets Law.*

(c) *Compliance agreement* means an agreement approved by the Commissioner and executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(d) *Infection* means the presence of plum pox virus.

(e) *Inspector* means an inspector of the New York State Department of Agriculture and Markets, or representatives of the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS), when authorized to act in that capacity.

(f) *Limited permit* means a permit issued by the Commissioner for the planting of regulated articles in the nursery stock regulated area for the restricted movement of regulated articles from a regulated area to a specified destination for specified processing, handling or utilization.

(g) *Moved and movement* means shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved from the regulated area.

(h) *Nursery dealer* means any person, firm, partnership, association or corporation which or who is not a nursery grower or an original producer of nursery stock in the State and which or who buys, or acquires, or receives on consignment nursery stock for the purpose of reselling, transporting, or otherwise disposing of same.

(i) *Nursery grower* means the owner or operator of the grounds or premises, private or public, on or which nursery stock is propagated, grown or cultivated for the purpose of distribution or selling the same as a business. The term nursery grower shall not include persons engaged in the part-time production of plant products not sold in the regular channels of business.

(j) *Nursery stock* means all trees, shrubs, plants and vines and parts thereof.

(k) *Nursery stock regulated area* means any area so designated by this Part, which is within 11.5 kilometers of any location where plum pox virus has been detected within the preceding three years.

(l) *Plum pox virus* means the plum pox potyvirus Dideron strain, which is a pathogen affecting susceptible *Prunus* species.

(m) *Quarantined area* means the area designated as quarantined by this Part.

(n) *Regulated area* means an area designated as regulated pursuant to this Part due to the presence of plum pox virus in that area.

(o) *Regulated articles* means plant and plant materials, including trees, seedlings, root stock, budwood, branches, twigs and leaves of the following varieties of the *Prunus* species:

(1) *Fruit-bearing and ornamental varieties of Prunus americana* (American plum and wild plum); *Prunus armeniaca* (apricot); *Prunus cerasifera* (Myrobalan plum/cherry plum); *Prunus domestica* (European plum); *Prunus dulcis* (sweet almond); *Prunus peresica* var. *persica* (peach and flowering peach); *Prunus persica* var. *nucipersica* (nectarine); and *Prunus salicina* (Japanese plum).

(2) *Ornamental varieties of Prunus cerasifera* (purple leaf plum); *Prunus x cistena* (purple leaf sand cherry); *Prunus glandulosa* (flowering almond); *Prunus persica* (flowering peach and purple leaf peach); *Prunus pumila* (sand cherry); *Prunus spinosa* (black thorn and sloe); *Prunus serrulata* (Japanese flowering cherry and Kwanzan cherry); *Prunus tomentosa* (Nanking cherry and Hansen's bush cherry); and *Prunus triloba* (flowering plum).

(3) For the purposes of this Part, the following varieties of the *Prunus* species are not regulated articles: *Prunus avium*; *Prunus cerasus*; *Prunus Effuse*; *Prunus laurocerasus*; *Prunus mahaleb*; *Prunus padus*; *Prunus sargentii*; *Prunus serotina*; *Prunus serrula*; *Prunus serrulata*; *Prunus subhirtella*; *Prunus yedoensis*; and *Prunus virginiana*.

(4) For the purposes of this Part, seeds and fruit that is free of leaves of all varieties of the *Prunus* species are not regulated articles.

(o) *State* means the State of New York.

Section 140.2 Quarantined area.

That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east by Hosmer Road, and which extends south to Route 104 (Ridge Road); extends west on Route 104 (Ridge Road) to its intersection with Route 425 Cambria / Shawnee Road); extends south on Route 425 (Cambria Road / Shawnee Road) to its intersection with Route 31 (Saunders Settlement Road); extends west on Route 31 (Saunders Settlement Road) to its intersection with Interstate 190 (Niagara Thruway); and extends northwest on Interstate 190 (Niagara Thruway) to the Niagara River.

Section 140.3 Regulated area.

The following areas within the quarantined area are regulated areas:

(a) That area bordered on the east by Porter Center Road; bordered on the south by Balmer Road which terminates on Creek Road; bordered on the west by Creek Road, Blairville Road and the Robert Moses Parkway; and bordered on the north by Lake Ontario in the Town of Porter in the County of Niagara, State of New York.

(b) That area bordered on the east by North Beebe Road; bordered on the south by Wilson Burt Road; bordered on the west by Maple Road; and bordered on the north by Lake Ontario in the Town of Wilson in the County of Niagara, State of New York.

Section 140.4 Nursery stock regulated area.

The nursery stock regulated area shall consist of the quarantined area set forth in section 140.2 of this Part, exclusive of the regulated areas set forth in section 140.3 of this Part.

Section 140.5 Conditions governing the propagation of regulated articles.

Regulated articles originating from or growing within the regulated area or the nursery stock regulated area shall not be used as a source of propagated material (either root stock, scion or seed).

Section 140.6 Conditions governing the intrastate movement of regulated articles.

(a) *Prohibited movement.*

(1) The movement of any regulated article within the regulated area is prohibited.

(2) The intrastate movement of any regulated article from the regulated area to any point outside the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(3) The intrastate movement of any regulated article from any point outside the regulated area to the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(4) The intrastate movement of any article infected with or suspected of having been exposed to the plum pox virus is prohibited, except as provided in Section 140.12 of this Part.

(5) The handling of regulated articles by nursery dealers or nursery growers within the nursery stock regulated area is prohibited, except pursuant to a compliance agreement.

(6) The digging or moving of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(7) The planting and over-wintering of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(b) *Regulated movement.*

Regulated articles may be moved through the regulated area if the regulated articles originated outside the regulated area and:

(1) the point of origin of the regulated articles is on the waybill or bill of lading; and

(2) a certificate accompanies the regulated articles; and

(3) the vehicle moving the regulated articles does not stop within the regulated area except for refueling; and

(4) the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or a vehicle completely covered by canvas, plastic or closely woven cloth to prevent access by aphids or other vectors of plum pox virus.

Section 140.7 Records.

Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated area shall compile, maintain and make available for inspection, for a period of two years, records of inventory and sales of regulated articles on a form or forms prescribed by the Commissioner.

Section 140.8 Conditions governing the issuance of certificates and permits.

(a) Certificates may be issued for the intrastate movement of regulated articles under one or more of the following conditions:

(1) when they have been tested and found apparently free from infection; or

(2) when they have been grown, produced, manufactured, stored, or handled in such a manner that, in the judgment of the inspector, no infection would be transmitted thereby, provided, that subsequent to certification, the regulated articles will be loaded, handled, and shipped under such protection and safeguards against reinfection as are required by the inspector.

(b) Limited permits may be issued for the movement of noncertified regulated articles to specified destinations for specified processing, handling, or utilization. Persons shipping, transporting, or receiving such articles may be required to enter into compliance agreements to maintain such sanitation safeguards against the establishment and spread of infec-

tion and to comply with such conditions as to the maintenance of identity, handling, processing, or subsequent movement of regulated products and the cleaning of cars, trucks and other vehicles used in the transportation of such articles, as may be required by the inspector. Failure to comply with conditions of the agreement will result in cancellation of a limited permit.

(c) Certificates or limited permits issued under these regulations may be withdrawn or canceled by the Commissioner and further certification refused whenever in his or her judgment the further use of such certificates or limited permits may result in the spread of the plum pox virus.

Section 140.9 Inspection and disposition of shipments.

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the regulated area, which contains, or which the inspector has probable cause to believe may contain, regulated articles or other articles infected with the plum pox virus, may be examined by an inspector at any time or place. When regulated articles are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he or she deems necessary to eliminate the danger of the spread of the plum pox virus. If found to be infected, such articles or regulated articles shall be freed of infection without cost to the State except that for inspection and supervision.

Section 140.10 Assembly of regulated articles for inspection.

(a) Persons intending to move intrastate any of the articles covered by these regulations shall make application for certification as far in advance as possible, and will be required to prepare and assemble articles at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments verified. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(b) The New York State Department of Agriculture and Markets or the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS) shall not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

Section 140.11 Marking requirements.

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate or limited permit, issued in compliance with these regulations: provided, that:

(a) for lot freight shipments, other than by road vehicle, one certificate may be attached to one of the containers and another to the waybill; and for car lot freight or express shipment, either in containers or in bulk, a certificate need be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(b) for movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of shipment.

Section 140.12 Shipments for experimental and scientific purposes.

Regulated articles may be moved intrastate for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed by the New York State Department of Agriculture and Markets. The container of articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the New York State Department of Agriculture and Markets showing compliance with such conditions.

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 October 13, 2007.

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

Regulatory Impact Statement

1. Statutory authority:

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

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to

control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

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

2. Legislative objectives:

The proposed rule establishing a quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus).

3. Needs and benefits:

This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of plants within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the trees. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for the plum pox virus. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border.

The amendments establish a plum pox virus quarantine in New York State. The amendments create a quarantined area in which two (2) regulated areas and one nursery stock regulated area are established. The regulated areas extend 1.5 to 2 kilometers from the two points in Niagara County where the plum pox virus was detected in 2006. The nursery stock regulated area extends 11.5 kilometers from the regulated areas in Niagara County where the plum pox virus was detected.

The amendments prohibit the movement of any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles *i.e.*, plants and trees of any Prunus species susceptible to plum pox virus, are restricted under the amendments, and the extent of those restrictions depends on whether the regulated articles are in the regulated areas or the nursery stock regulated area.

In the regulated areas, the amendments prohibit the following: the movement of regulated articles within the regulated areas; the intrastate movement of regulated articles from the regulated areas to any point outside the regulated areas, except pursuant to a limited permit, authorizing such movement; and the intrastate movement of regulated articles from any point outside the regulated areas to the regulated areas, except pursuant to a limited permit, authorizing such movement.

The amendments also regulate the movement of regulated articles through the regulated area. Under the amendments, regulated articles may be moved through the regulated area if the regulated articles originate outside the regulated area and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate accompanies the regulated articles; the vehicle moving the regulated articles does not stop except for refueling; and the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

In the nursery stock regulated area, the amendments prohibit the following: the handling of regulated articles by nursery dealers or nursery

growers, except pursuant to a compliance agreement; the digging or moving of regulated articles by nursery dealers and nursery growers; and the planting and over-wintering of regulated articles by nursery dealers and nursery growers.

Under the amendments, certificates may be issued when the regulated articles have been inspected and found to be free of infection or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles. Limited permits may be issued for the movement of noncertified articles to specified destinations for specified purposes. The amendments provide that persons shipping, transporting, or receiving such articles may be required to enter into written compliance agreements. These agreements would allow the shipment of articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that the plum pox virus is not spread. Under the amendments, certificates and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infection.

The amendments are necessary, since although the virus has only been found in two locations in Niagara County, the failure to immediately establish this quarantine could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the natural resources of New York, but could also result in the imposition on New York of a federal quarantine or quarantines by other states. Such quarantines would cause economic hardship for New York's nurseries and stone fruit growers, since such quarantines may be broader than this one. The consequent loss of business would harm industries which are important to New York's economy and as such, would harm the general welfare.

4. Costs:

(a) Costs to the State government:

Regulated articles in the regulated area that are exposed to plum pox virus would be destroyed. Compensation for the regulated articles is predicated upon the age of the plants and trees. Compensation would range from \$4,368 to \$17,647 per acre, of which the USDA would pay 85% of the compensation. Accordingly, New York's 15% share of the compensation would be \$655 to \$2,647 per acre, provided the owners of the regulated articles in question submit verified claims to the Department in accordance with section 165 of the Agriculture and Markets Law, and provided further that damages are awarded based on those claims.

Nursery dealers and nursery growers would also be eligible to receive compensation for regulated articles planted in the regulated areas and nursery stock regulated area that would otherwise be prohibited from sale. New York would pay up to \$1,000 per acre in costs to remove such regulated articles.

(b) Costs to local government: none.

(c) Costs to private regulated parties:

Regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas and nursery stock regulated areas.

(d) Costs to the regulatory agency:

It is anticipated that regulatory oversight and enforcement of the quarantine would require the hiring of two inspectors at an annual cost to the Department of \$150,900. This cost includes salary, fringe benefits, travel costs, computer hardware and support and cell phones for the persons hired.

5. Local government mandate:

None.

6. Paperwork:

Nursery dealers and nursery growers handling regulated articles in the nursery stock regulated area would require a compliance agreement with the Department. They may also require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement of these regulated articles.

7. Duplication:

None.

8. Alternatives:

None. The failure of the State to establish a quarantine could result in the establishment of quarantines by the federal government or other states. It could also place the State's own natural resources at risk from the further spread of plum pox virus which could result from the unrestricted movement of regulated articles in the regulated area. In light of these factors, there does not appear to be any viable alternative to the establishment of the quarantine proposed in this rulemaking.

9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. This rule does not exceed any minimum standards for the same or similar subject areas, since it restricts the intrastate, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business:

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 22 stone fruit growers and 38 nursery growers or nursery dealers in the nursery stock regulated area, and 11 stone fruit growers in the regulated areas. Most of these entities are small businesses.

Although it is not anticipated that local governments would be involved in the handling or movement of regulated articles within the quarantined area, in the event that they do, they would be subject to the same requirements and restrictions as are other regulated parties.

2. Compliance requirements:

All regulated parties in the nursery stock regulated area, which includes approximately 22 stone fruit growers and 38 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated area would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated area from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

All regulated parties in the regulated areas, which includes approximately 11 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

3. Professional services:

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

4. Compliance costs:

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

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

Regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas.

Local governments moving regulated articles to or through the regulated areas would incur similar costs.

5. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

6. Small business and local government participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated area, other than pursuant to a compliance agreement, would require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, would be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 22 stone fruit growers and 38 nursery growers or nursery dealers in the nursery stock regulated area, and 11 stone fruit growers in the regulated areas. Many of these entities are located in rural areas of New York State.

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

All regulated parties in the nursery stock regulated area, which includes approximately 22 stone fruit growers and 38 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated area would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated area from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

All regulated parties in the regulated areas, which includes approximately 11 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

3. Costs:

Regulated parties handling regulated articles in the nursery stock regulated area pursuant to compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs will be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles exposed to the plum pox virus.

4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

5. Rural area participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

Job Impact Statement

The establishment of a plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 22 stone fruit growers and

38 nursery growers or nursery dealers in the nursery stock regulated area, and 11 stone fruit growers in the regulated areas. A further spread of this plant infection would have very adverse economic consequences to these industries in New York State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government and by other states. By helping to prevent the spread of the plum pox virus, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's stone fruit and nursery industries.

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

Dairy Assistance Program

I.D. No. AAM-31-07-00002-EP

Filing No. 707

Filing date: July 12, 2007

Effective date: July 14, 2007

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

Action taken: Addition of Part 23 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18(6) and 258-pp

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

Specific reasons underlying the finding of necessity: The rule is being adopted as an emergency measure because of the April 9, 2007 enactment of Article 21-D of the Agriculture and Markets Law by Chapter 57 of the Laws of 2007. Said Article establishes a Dairy Assistance Program within the Department of Agriculture and Markets, directs that payment be made to milk producers no later than thirty days following the effective date of the Article and authorizes the Commissioner to promulgate any additional rules and regulations necessary to implement the provisions of the Article. The Article further directs that payments be made to milk producers until such time as \$30 million in State funding is expended pursuant to section 16-h of the New York State Urban Development Corporation Act. This rule establishes a definition for "eligible producer" and includes provisions relating to payment limit, target prices and the verification of production data and is necessary to implement the provisions of Agriculture and Markets Law Article 21-D so that payment may continue to be made to milk producers as directed by said Article.

Subject: Payment of milk producers pursuant to the Dairy Assistance Program.

Purpose: To implement the provisions of Agriculture and Markets Law, Art. 21-D.

Text of emergency/proposed rule:

Part 23

Dairy Assistance Program

23.1 Eligible producer. For the purposes of the Dairy Assistance Program established pursuant to Agriculture and Markets Law § 258-pp, "eligible producer" means a New York State producer who was in operation on April 1, 2007 and who produced milk during the 2006 calendar year.

23.2 Payment limit. For purposes of administering the payment limitations prescribed by Agriculture and Markets Law § 258-pp, the following shall apply:

(a) For producers who participate in the federal Milk Income Loss Contract Extension (MILCX) Program, determinations under that Program as to whether the producer is a combined or separate dairy operation shall be used in applying the four million eight hundred thousand pounds of milk reimbursement limit established by subdivision four of Agriculture and Markets Law § 258-pp.

(b) For producers who operate multiple farms and do not participate in the MILCX Program, any producer using the same tax identification or Social Security number for such farms shall be considered to be one producer for purposes of applying the four million eight hundred thousand pounds of milk reimbursement limit established by subdivision four of Agriculture and Markets Law § 258-pp.

23.3 Target Price. For purposes of distributing the State funding provided by Chapter 57 of the Laws of 2007, the target price shall be the price that results in the payment rate to eligible producers in accordance with

the formula set forth in subdivision one of Agriculture and Markets Law § 258-pp.

23.4 Verification of production data. For the purposes of verifying production data pursuant to subdivision two of Agriculture and Markets Law § 258-pp:

(a) the production data for producers who participate in the MILCX Program shall be the production information provided to the Department by the United States Department of Agriculture's Farm Service Agency (FSA) as requested by the Department pursuant to such subdivision; provided, however, if the required data is not available from the FSA, the data may be obtained from the producers' milk cooperative, processor or handler. In the event production data is not available from any of the foregoing sources, the data shall be obtained directly from producers in accordance with subdivision (b) of this section;

(b) the production data for producers who do not participate in the MILCX Program shall be milk marketing payment stubs, bulk tank records, milk handler records, daily milk marketing records and such other evidence of monthly milk marketing as the Commissioner may deem acceptable.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 9, 2007.

Text of rule and any required statements and analyses may be obtained from: Will Francis, Director of Milk Control, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-1772

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 18(6) of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

Section 258-pp of the Agriculture and Markets Law provides that the Commissioner is authorized to promulgate any additional rules and regulations necessary to implement the provisions of Agriculture and Markets Law Article 21-D.

2. Legislative Objectives:

Agriculture and Markets Law section 258-oo sets forth the Legislative intent of the Dairy Assistance Program. Said Section states that the Legislature finds that the State's dairy farmers continue to labor under a combination of extremely low milk prices well below those of twenty-five years ago, along with very high fuel, feed, energy, fertilizer and other operating costs. It further indicates that these conditions have resulted in unprecedented losses for dairy farmers, that the price of milk continues to be well below the cost of production, and that the vendors and service industries serving dairy farmers have had to provide an increasing amount of credit to such farmers.

The Legislative intent states that Agriculture and Markets Law Article 21-D is intended to assist the dairy farmers of this State and their industry in a time of great need and to prevent further loss in the dairy industry and its infrastructure which are critical to the State's agricultural economy.

The adoption of 1 NYCRR Part 23 will further these goals by implementing the provisions of Agriculture and Markets Law Article 21-D so that payment may continue to be made to milk producers as directed by said Article.

3. Needs and Benefits:

As set forth in Legislative Objectives herein, Agriculture and Markets Law Article 21-D is intended to assist the dairy farmers of this State and their industry in a time of great need and to prevent further loss in the dairy industry and to the infrastructure which are critical to the State's agricultural economy. Said article directs that payment be made to milk producers no later than thirty days following the effective date of the Article and authorizes the Commissioner to promulgate any additional rules and regulations necessary to implement the provisions of the Article. The Article further directs that payments be made to milk producers until such time as \$30 million in State funding is expended pursuant to section 16-h of the New York State Urban Development Corporation Act. This rule implements the provisions of Agriculture and Markets Law Article 21-D so that payment may continue to be made to New York State milk producers as directed by said Article.

The definition of "eligible producer" establishes, within the statutory framework of Chapter 57 of the Laws of 2007, which producers are

eligible to participate in the Dairy Assistance Program. The provision relating to payment limit provides for the application of the statutory reimbursement limit. The provision relating to target prices provides for the target prices referred to in Agriculture and Markets Law § 258-pp. The provision relating to verification of production data provides for the means of determining milk production for producers.

4. Costs:

- (a) Costs to regulated parties: None.
- (b) Costs to agency, state and local governments: None.

5. Local Government Mandates:

None.

6. Paperwork:

The regulation provides that for purposes of subdivision two of Agriculture and Markets Law § 258-pp the production data for producers who do not participate in the MILCX Program shall be milk marketing payment stubs, bulk tank records, milk handler records, daily milk marketing records and such other evidence of monthly milk marketing as the Commissioner may deem acceptable.

7. Duplication:

None.

8. Alternatives:

The alternative of not promulgating a regulation was considered, but it was determined that the proposed regulation was necessary to implement Article 21-D of the Agriculture and Markets Law so that payment may continue to be made to milk producers as directed by said Article.

9. Federal Standards:

None.

10. Compliance Schedule:

It is anticipated that regulated parties can immediately comply with the rule.

Regulatory Flexibility Analysis

1. Effect of Rule:

There are approximately 6,000 dairy farms in New York State, most of which are small businesses. The rule would have no effect on local governments.

2. Compliance Requirements:

The rule provides that for purposes of subdivision two of Agriculture and Markets Law § 258-pp, the production data for producers who do not participate in the MILCX Program shall be milk marketing payment stubs, bulk tank records, milk handler records, dairy milk marketing records and such other evidence of monthly milk marketing as the Commissioner may deem acceptable.

3. Professional Services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

4. Compliance Costs:

- (a) Costs to regulated parties: None.
- (b) Costs to the agency, state and local governments: None.

5. Economic and Technological Feasibility:

The economic and technological feasibility of complying with the proposed regulation has been assessed. The rule is economically feasible. The regulation will implement the provisions of Agriculture and Markets Law Article 21-D so that payment may continue to be made to milk producers as directed by said Article. The rule is technologically feasible. The recordkeeping requirements of the rule involve records that are already being kept and existing technologies that are already in use.

6. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those necessary to implement the provisions of Agriculture and Markets Law Article 21-D.

The rule would have no impact on local governments.

7. Small Businesses and Local Government Participation:

In developing the rule, the Department has taken into consideration the concerns of small businesses. The rule is being adopted on an emergency basis in order to implement Agriculture and Markets Law Article 21-D so that payment may continue to be made to milk producers as directed by said Article. During the rule making process the Department will receive input from small businesses and the organizations that represent them.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

The approximately 6,000 dairy farms in New York State are located throughout the rural areas of the State.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

The rule provides that for purpose of subdivision two of Agriculture and Markets Law § 258-pp, the production data for producers who do not participate in the MILCX Program shall be milk marketing payment stubs, bulk tank records, milk handler records, dairy milk marketing records and such other evidence of monthly milk marketing as the Commissioner may deem acceptable. It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

3. Costs:

- (a) Costs to regulated parties: None.
- (b) Costs to agency, state and local governments: None.

4. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those necessary to implement the provisions of Agriculture and Markets Law Article 21-D.

5. Rural Area Participation:

In developing the rule, the Department took into consideration the concerns of the New York State dairy farmers who reside in rural areas throughout the State. The rule is being adopted on an emergency basis in order to implement Agriculture and Markets Law Article 21-D so that payment may continue to be made to producers as directed by said Article.

Job Impact Statement

1. Nature of Impact:

It is anticipated that the rule will have a positive impact on jobs and employment opportunities by helping New York State dairy farms remain economically viable.

2. Categories and Numbers Affected:

New York State's approximately 6,000 dairy farms provide employment for thousands of persons.

3. Regions of Adverse Impact:

The approximately 6,000 dairy farms in New York State are located throughout the rural areas of the State.

4. Minimizing Adverse Impact:

By implementing Agriculture and Markets Law Article 21-D so that payment may continue to be made to milk producers as directed by said Article this rule will help to preserve the jobs of those employed in this agricultural industry.

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Medical Assistance for Chemical Dependence Services

I.D. No. ASA-31-07-00006-E

Filing No. 711

Filing date: July 13, 2007

Effective date: July 13, 2007

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

Action taken: Amendment of sections 841.11(a), (b), 841.14(a) and addition of section 841.11(d) to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(e), 19.09(b), 19.15(a), 19.40, 32.01, 32.07(a), 32.09, 43.02; and Social Services Law, section 364

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

Specific reasons underlying the finding of necessity: Modification to Inpatient Medically Supervised Withdrawal Services fee methodology is essential to continue operations of a number of service providers. Modification of Residential Rehabilitation Services for Youth rate setting methodology is required to meet Federal Medicaid State plan.

Subject: Medical assistance for chemical dependence services.

Purpose: To modify fee methodology.

Text of emergency rule: 1. New sections 841.11(a)(4), (5), (6) and (7) are added to read as follows:

(4) "Service operating fees" shall mean fees calculated pursuant to sections 841.11(b) and (c) as payment in full for operating costs as required by Part 816 of this Title. Prior to April 1, 2007, such fees shall be inclusive of all reimbursement for capital costs. Beginning on April 1, 2007 such fees shall not be inclusive of reimbursement for capital costs and such costs shall be reimbursed through provider-specific capital add-ons.

(5) "Capital add-on" shall mean a provider-specific cost-based per diem calculated pursuant to section 841.11(d) of this section to address allowable and approved real property, equipment, and start-up costs not included in the service operating fee. The provider-specific capital add-on shall not be utilized for reimbursement purposes prior to April 1, 2007.

(6) "Fee Period" shall be the calendar year, beginning January 1, 2008.

(7) For purposes of computing capital add-ons, the "Base Period" shall be the calendar year two years prior to the fee period.

2. Section 841.11(b) is amended to read as follows:

(b) Calculation of service operating fees. Service operating [F]ees shall be developed for inpatient medically supervised withdrawal services. Such [F]ees shall reflect geographic variations in cost. Such [F]ees, and associated provider-specific capital add-ons, as may be applicable, shall be all inclusive and payment in full for inpatient medically supervised withdrawal services provided pursuant to Part 816 of this Title. Separate inpatient medically supervised withdrawal service operating fees shall be established for the upstate region and the downstate region.

3. Section 841.11(c) is amended to read as follows:

(c) Fee Methodology. The service operating fees for inpatient medically supervised withdrawal services shall be determined using a cost model based on the requirements of Part 816 of this Title and a review of historical costs for inpatient medically supervised withdrawal services. The cost model shall contain personal service and non-personal service costs. Upstate and downstate fees shall be used to recognize cost differentials between these regions of the State. Two [unit] per diem fee models shall be developed: inpatient medically supervised withdrawal downstate and inpatient medically supervised withdrawal service upstate.

4. Section 841.11(d) is re-lettered section 841.11(e)

5. A new section 841.11(d) is added to read as follows:

(d) Calculation of the capital add-on.

(1) To be considered as allowable, capital costs must be reasonable and necessary to patient care under Part 816 of this Title. Allowable capital costs shall be determined and reimbursed by the office in accordance with the requirements of section 841.14 of this Title. Except as provided for in paragraph (4) of this subdivision, allowable patient days for the purpose of calculating the capital add-on shall be the higher of the actual days in the base period or 85 percent of possible days based upon annualized certified bed capacity.

(2) The capital add-on to the service operating fee shall be calculated for each fee period on a provider-specific basis by dividing the provider's allowable capital costs from the base period by allowable patient days as defined in paragraph (1) of this subdivision.

(3) Interest on current working capital shall be treated and reported as an administrative operating expense and as such is not considered an allowable capital cost.

(4) At the discretion of the office, the capital add-on may be calculated or adjusted on a retroactive or prospective basis to more accurately reflect the actual or anticipated allowable capital cost, the base period as defined in section 841.11(a)(7) and the methodology as described in section 841.11(d)(2) notwithstanding. At the discretion of the office, when the capital add-on is adjusted retroactively, actual patient days for the fee period of the adjustment may be used instead of allowable patient days as defined in paragraph (1) of this subdivision.

6. Section 841.12(a)(10) is amended to read as follows:

(10) "Service operating fee" shall mean fees calculated pursuant to subdivision (b) of this section as payment in full for operating expenses as required by Part 817 of this Title. Such fee shall not include [the] capital [or admission review team] add-ons.

7. Section 841.12(a)(12) is deleted.

8. Section 841.12(b)(4)(i) is amended to read as follows:

(i) the application of an annual trend factor to the service operating fee. Such trend factor shall be based on the Congressional Budget Office's Consumer Price Index for all Urban Consumers and shall apply to

all components of the service operating fee, but shall not apply to the capital [or admission review team] add-on[s] to the service operating fee; 9. Section 841.12(d) is deleted.

10. Section 841.12(e) is amended to read as follows:

(3) [If] Where the office determines that sufficient allowable expense exists, a capital [and admission review team] add-on shall be calculated and added to the service operating per diem fee. Capital [and admission review team] add-ons to the service operating fee shall be calculated as defined in [subdivisions] section 841.12 [(c) and (d) of this section].

12. Section 841.12(g) (2) is amended to read as follows:

(2) The service operating fee and [admission review team] capital add-on for each new eligible residential rehabilitation services for youth provider shall be calculated and reimbursed pursuant to the requirements of subdivisions (b) to [(f)] (e) of this section]. The capital add-on shall be approved, calculated and reimbursed pursuant to the requirements of subdivision (c), (e), and (f) of this section] and section 841.14 of this Part.

13. Sections 841.12(e), (f), (g), (h) and (i) are re-lettered 841.12(d), (e), (f), (g), and (h).

14. Section 841.13(c) is amended to read as follows:

(c) Revisions to rates for inpatient rehabilitation programs, revisions to capital [and admission review team] add-ons for residential rehabilitation services for youth programs, revisions to service operating fees for residential rehabilitation services for youth programs based on changes in certified capacity.

15. Section 841.14(a) is amended to read as follows:

(a) This section shall apply [only] to [those] all programs with Medicaid reimbursement calculated pursuant to [Section 841.10 of this Title or Section 841.12 of] this Part.

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 October 10, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Patricia Flaherty, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203-3539, (518) 485-2317, e-mail: PatriciaFlaherty@oasas.state.ny.us

Regulatory Impact Statement

Part 841 – Medical Assistance for Chemical Dependence Services will be amended to revise the fee setting methodology for inpatient medically withdrawal services and residential rehabilitation services for youth.

1. Statutory Authority:

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.15(a) of the Mental Hygiene Law bestows upon the Commissioner the responsibility of promoting, establishing, coordinating, and conducting programs for the prevention, diagnosis, treatment, aftercare, rehabilitation, and control in the field of chemical abuse or dependence.

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue a single operating certificate for the provision of chemical dependence services.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09 of the Mental Hygiene Law gives the Commissioner the authority to issue operating certificates to providers of chemical dependence services.

Section 43.02 of the Mental Hygiene Law gives the Commissioner the authority to determine rates or methods of payment for inpatient services subject to licensure or certification and to adopt rules and regulations to effectuate provisions of this section.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and ensure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk

of becoming chemical abusers. The amendments to Part 841 will remove a standardized regional capital component from the inpatient medically supervised withdrawal (MSW) fee and replace it with a provider specific capital add-on based on each providers actual capital expenditures as reported in their annual cost reports and adjusted by OASAS to remove any costs not allowable under Part 841. Reimbursement for MSW operating costs would continue in the form of regional fees. This change would also comport with the fee/rate methodologies for other inpatient programs which separately reimburse capital costs. In addition the admission review team provision in the residential rehabilitation services for youth section will be deleted. This is deletion is necessary because this provision was not approved as part of the federal approval of the Medicaid state plan amendment for residential services for youth.

3. Needs and Benefits:

The modification to the fee is necessitated by the expiration of the legislative "hold harmless" which assisted MSW providers with high capital costs which were not sufficiently reimbursed in the existing MSW fee by allowing those providers to use cost-based rates. These providers provide MSW services to almost 5,000 patients. Many of these providers will have to drastically cut or eliminate services endangering the health and safety of patients and the communities they serve. Many of these communities do not have alternative programs to serve these patients. The elimination of the admission review team provision in the RSY fee setting methodology is necessary to comply with the Medicaid state plan and essential to begin the certification of this new program model for youth. The elimination of the admission review team provision is necessary to comply with the Medicaid state plan. It should be noted that the admission review team will continue to operate with state funding.

4. Costs:

a. Costs to regulated parties.

Some providers who currently are covered by the hold harmless will see a reduction in revenues. However, implementation of the amendments to Part 841 will significantly reduce such loses.

b. Costs to the agency, state and local governments.

The state and local impact of the fee modification is estimated to be approximately \$2.1 million annually of which 50% is state share and 50% is local share. These increases in Medicaid costs will be offset by elimination of the hold harmless which will provide an overall cost savings of \$1.7 million. The savings will be 50% state and 50% local.

5. Local Government Mandates:

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

6. Paperwork:

The proposed rule does not impose additional paperwork requirements.

7. Duplication:

The proposed rule does not duplicate of other state or federal regulations.

8. Alternatives:

The only alternative to the proposed regulation is to continue the hold harmless.

9. Federal Standards:

Federal standards governing Medicaid requirements for these services are currently incorporated into Part 841.

10. Compliance Schedule:

It is expected that full implementation of these Part 841 become effective for these providers retroactively upon the expiration of the hold harmless on April, 1 2007.

Regulatory Flexibility Analysis

1. Effect of Rule: The proposed amendments to 14 NYCRR Section 841.11 will affect inpatient medically supervised withdrawal services by their reimbursing capital costs on a program basis instead of through a fixed fee. Currently programs are paid an all inclusive fee which includes a capital component. This amendment would remove the capital component from the fee and each provider would have an individual capital add-on to their fee based upon their actual capital costs. This will also assist providers who no longer are covered by the hold harmless, particularly those providers with high capital costs. Local governments where the hold harmless programs are located will be impacted by this change in reimbursement methodology. The state and local impact of the fee modification is estimated to be approximately \$2.1 million annually of which 50% is state share and 50% is local share. These increases in Medicaid costs will be offset by elimination of the hold harmless which will provide an overall cost savings of \$1.7 million. The savings will be 50% state and 50% local.

The amendments to 14 NYCRR Section 841.11 will have no impact on small business or local governments. OASAS will reimburse all costs associated with the Admissions Review Team.

2. Compliance Requirements: Inpatient medically supervised withdrawal services will not be required to comply with any additional requirements. Existing cost reporting requirements will contain the data necessary to calculate the capital add-on. There will be no added compliance requirements resulting from the elimination of the Admission Review Team from the reimbursement methodology for Residential Rehabilitation Services for Youth.

3. Professional Services: There will be no additional requirements for professional services resulting from these amendments.

4. Compliance Costs: There will be no additional costs resulting from compliance with these amendments.

5. Economic and Technological Feasibility: Compliance with the recordkeeping and reporting requirements of the Part 841 amendments and Part 817 are not expected to have an economic impact or require any changes to technology for small businesses and government.

6. Minimizing Adverse Impact: There will be no adverse impact on residential rehabilitation services for youth providers or local governments. The capital add-on to the medically supervised inpatient withdrawal fees will not negatively impact any providers and will provide additional revenues to most providers.

7. Small Business and Local Government Participation: Since this is an emergency rule, small business and local governments have not participated in the rulemaking process.

Rural Area Flexibility Analysis

The proposed amendments do not impose any adverse impact on rural areas because none of the impacted inpatient medically supervised withdrawal services are located in rural areas. The amendments will have no impact on residential rehabilitation facilities for youth programs in rural areas.

Job Impact Statement

Nature of Impact: If the amendments to rate/fee setting methodology are not made and the hold harmless expires there could be a major impact to the fiscal viability of a number of inpatient medically supervised withdrawal service providers. This could result in job layoffs and/or program closures.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Program

I.D. No. EDV-31-07-00008-E

Filing No. 713

Filing date: July 16, 2007

Effective date: July 16, 2007

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

Action taken: Amendment of Parts 10-14 of Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959

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

Specific reasons underlying the finding of necessity: The reforms enacted in ch. 63, L. 2005 require the reconfiguration of the existing Empire Zones by Jan. 1, 2006. Immediate guidance to the affected parties is required.

Subject: Empire Zones Program.

Purpose: To conform the regulations to existing statute and recent statutory amendments and clarify and improve administrative procedures.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2005, as well as a comprehensive review of administrative procedures and existing regulations. The amended laws require the

existing Empire Zones to identify revised zone boundaries—that is, placement of zone acreage into “distinct and separate contiguous areas”—to the Department of Economic Development by January 1, 2006. The existing regulations are affected by this requirement, but at the same time the zones need immediate guidance which requires amending the existing regulations in an accelerated fashion. At the same time, the existing regulations contain several outdated references, and the Department has also taken the opportunity to improve its administrative procedures. The Empire Zone regulations contained in 5 NYCRR Parts 10 through 14 are hereby amended as follows:

First, pursuant to Chapter 63 of the Laws of 2000 and Chapter 63 of the Laws of 2005, the emergency rule would reflect the name change of the program from Economic Development Zones to the Empire Zones and add reference to three new tax benefits: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

Second, the emergency rule would conform the regulations to existing statutory terminology, definitions and practices. For example, an incorrect reference to a local empire zone administrator is being corrected to read local empire zone certification officer or simply, the local empire zone, if applicable. Pursuant to statute, the chief executive officer must ensure that the information on a designation application is accurate and complete, not the local legislative body. The requirements for a shift resolution did not contain all the criteria as set forth in statute. Certain regulatory provisions regarding application for zone designation were not in accord with the statute, such as whether certain information must be contained in local law rather than the application itself. In addition, tracking the statutory changes from Chapter 63 of the Laws of 2005, census tract zones are renamed “investment zones”, county-created zones are renamed “development zones”, and the new term “cost-benefit analysis” is defined. The emergency regulation also tracks the amended statute’s deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

Third, the emergency rule would amend the Department’s discretionary provision that limits the designation of nearby lands in investment zones to 320 acres. Such regulatory limitations are arbitrary and unnecessarily exceed or are inconsistent with State statute, and at the same time place undue limits on the reconfiguration of zones; municipalities cannot effectively utilize zone acreage to create opportunities for business investment and job growth in economically distressed areas that are not necessarily located in eligible or contiguous census tracts. At the same time, the Department is required to provide guidance in regulation on placement of nearby zone lands, and cannot countenance abuse of the program’s requirements on acreage placement. Thus, placement of nearby lands can exceed 320 acres provided that the municipality demonstrates that (1) there is insufficient existing or planned infrastructure within eligible or contiguous tracts to accommodate business development in a highly distressed area, or to accommodate development of strategic businesses or (2) placing up to 960 acres in eligible or contiguous census tracts would be inconsistent with open space and wetland protection or (3) there are insufficient lands available for further business development within eligible or contiguous census tracts or (4) lands previously designated in the eligible or contiguous census tracts that were otherwise suitable for development and have not had any appreciable commercial activity or capital investment or (5) changes to eligible census tracts as a result of the 2000 Census, combined with the requirement in the amended statute that the distinct and separate contiguous areas accommodate already designated lands, alter the amount of nearby acreage used and available for development.

Fourth, the emergency rule clarifies the statutory requirement from Chapter 63, L. 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality. The purpose of this is to fulfill the intent of the new statutory amendments that the counties place a substantial portion of the zone acreage within eligible or contiguous census tracts, and this provision follows essentially the same method for concentrating acreage within distressed areas as the General Municipal Law employed for census tract zones.

Fifth, the emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage, however, any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

Sixth, the emergency rule tracks the new statutory requirement that certain defined “regionally significant” projects can be located outside of the new distinct and separate contiguous areas. There are four categories of projects identified in Chapter 63; only one category of applications, manufacturers projecting the creation of 50 or more jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 25% of the minimum jobs required to meet the definition of regionally significant project within 2 years of the date of designation of the project as regionally significant, 50% of the minimum jobs within 3 years, 75% of the minimum jobs within 4 years, and 100% of the minimum jobs within 5 years. Failure to achieve a milestone would trigger a decertification process.

Seventh, the emergency rule elaborates on the “demonstration of need” requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

Eighth, the emergency rule clarifies Chapter 63’s permission for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be “grandfathered” shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

Ninth, the emergency rule tracks Chapter 63’s requirement that new zone development plans, created in the conjunction with the new distinct and separate contiguous areas to be approved by the Empire Zones Designation Board, are to be approved by the Department within 90 days of submission. The emergency rule defines the date of submission for each zone as the date of approval of the distinct and separate contiguous areas by the Empire Zones Designation Board.

Tenth, the emergency rule fulfills the requirements of Chapter 63 to subject all businesses applying for zone benefits to meet a “cost-benefit analysis”. The cost-benefit analysis is to be included in the zone development plan by the applicant municipality. The definition included in the emergency rule lays out the basic formula for calculating the benefits received to the costs incurred.

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community development projects are not necessarily required to be certified. There is a strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1, 2005 would be considered to be located within its respective Empire Zone, and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the

project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in to the Zone that would include job creation.

Twelfth, the emergency rule would revise the application process in order to ensure timely action and improve efficiency and accountability. For example, the proposed process would no longer require the applicant to submit an application to both the Department and the Department of Labor. In addition, the proposed process allows the applicant to cure incomplete or deficient applications within a set time period.

Lastly, the emergency rule would add certain programmatic information that is helpful to zone administrators, applicants, and practitioners such as the method for determining the effective dates for certifications and boundary revisions.

The full text of the rule is available at www.empire.state.ny.us

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 October 13, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Thomas Regan, Department of Economic Development, 30 South Pearl St., Albany, NY 12245, (518) 292-5120, e-mail: tregan@empire.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt rules and regulations governing the criteria of eligibility for empire zone designation, the application process, and the joint certification of a business enterprise.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to recent statutory amendments and the remaining revisions conform the regulations to existing statute or clarify administrative procedures of the program. It is the public policy of the State to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within areas designated as Empire Zones. The proposed amendments help to further such objectives by enabling the Department of Economic Development to administer the program in a more efficient manner.

NEEDS AND BENEFITS:

The emergency rule is required in order to bring the regulations into accord with statute and to improve the overall administration and effectiveness of the program. There are several benefits that would be derived from this emergency rulemaking. First, the emergency regulations would conform to statutory provisions and thereby eliminate potential confusion to the practitioner. Second, the emergency rule would clarify the application process to ensure timely action and improve efficiency and accountability.

COSTS:

I. Costs to private regulated parties (the Business applicants): None. The emergency regulation will not impose any additional costs to the business applicants beyond the existing program. In fact, there may be a cost savings due to a clearer application and the ability to cure application deficiencies rather than being immediately denied.

II. Costs to the regulating agency for the implementation and continued administration of the rule: While there will be additional costs to the Department of Economic Development associated with the emergency rule making, this is a result of the statutory changes which the emergency regulation language tracks or interprets. All existing Empire Zones have to revise their boundaries as a result of the statutory changes, with certain exceptions tied to specific types of business or the timing of certain applications. This results in more paperwork and additional staff time over the course of the next twelve months as the program is reconfigured. However, over time staff and paperwork costs will be minimized because the statutory changes have clarified eligibility for the program and the revised regulations have made procedures for processing applications easier to understand.

III. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

IV. Costs to local governments (the Local Zone administration): None. The emergency regulation will not impose any additional costs to the local zone administration beyond any additional costs associated with implementing the statutory requirements which reform the program. In the long term, there may be some cost savings in regards to staff time due to a clarification of program requirements.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones Program. If a local government chooses to participate, there is a cost associated with local administration. However, this emergency rule does not impose any additional costs to the local governments beyond any additional costs associated with implementing the statutory requirements which reform the program.

PAPERWORK:

The emergency rule does create additional paperwork, insofar as the various Empire Zones have to refile applications to reconfigure their Zone acreage, identify regionally significant projects and "grandfathered" businesses where necessary, and process boundary revisions before deadlines enumerated in statute which are reproduced verbatim from the statute.

DUPLICATION:

The emergency rule will not duplicate or exceed any other existing Federal or State statute or regulation.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions. Certain alternatives to policies seeking to be adopted were considered in certain subject areas where the Legislature provided some room for interpretation; for example, acreage devoted to existing businesses outside of the reconfigured zone areas, creation of investment zones within development zones, the placement of "nearby" acreage, the location of "grandfathered" businesses and the continuation of community development projects. In each case, interpretation was geared to preserving, to the extent possible, the expectation of benefits for existing zone businesses, making zone reconfiguration as clear as possible for existing zones, and enabling zone acreage to be utilized in the most effective manner. Finally, with regard to the application process, an alternative was considered to include more time for review of the application at the State level. This alternative was rejected because it was determined that certification of a business, which has a complete and sufficient application, should not be delayed.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program; it is purely a state program that offers, among other things, state and local tax credits. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The affected State agencies (Economic Development and Labor), local zone administration and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented.

Regulatory Flexibility Analysis

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

The program is a statewide program. There are eligible municipalities and businesses in rural areas of New York State. However, participation is entirely at the discretion of eligible applicant municipalities and eligible business enterprises. The program does impose some responsibility on those municipalities and businesses which participate in the program such as submitting applications and reports. The emergency rule will not impose any additional reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency

regulation will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency regulation relates to the Empire Zones Program. The Empire Zones Program itself is a job creation incentive. The emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency regulations, which result from statutory-based reforms, will enable the program to better fulfill its mission: job creation and investment for economically distressed areas. At the same time, businesses currently receiving benefits will not have their status jeopardized as a result of the emergency regulations. Because it is evident from the nature of the emergency regulations that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

(2) *The inspectors in each election district shall record the number of persons using audio, tactile or pneumatic switch ballot devices. The county board of elections shall furnish additional voting machines equipped with audio, tactile or pneumatic switch ballot devices when it appears that the number of persons historically using such devices warrant additional devices.*

(d) *The State Board of Elections may authorize a reduction in the number of voting devices provided in these regulations upon application of a county board of elections which demonstrates that such a reduction will not create excessive waiting time by voters.*

Text of proposed rule and any required statements and analyses may be obtained from: Todd D. Valentine, Board of Elections, 40 Steuben St., Albany, NY 12207, (518) 474-6367, e-mail: tvalentine@elections.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: New York State Election Law § 3-100 creates the State Board of Elections (State Board) and § 3-102 grants commissioners the "power and duty to issue instructions and promulgate rules and regulations relating to the administration of the election process." In addition, under § 7-203(2) of the Election Law "the State Board of Elections shall establish ... for each election, the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine. The State Board is currently seeking to adopt NYCRR § 6210.19 in order to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes" § 6210.19(c)(1).

Legislative Objectives: After the 2000 election, the voting process across the country was marred by allegations of corruption and fraud. It was alleged that voting machines had been tampered with and voters were subjected to long lines and delays at the polls. Public confidence and trust in the voting process was at an all time low. As a result, Congress enacted the Help America Vote Act (HAVA) in 2002, to assist all states to purchase new machines and voting equipment. The legislative intent of the bill was to ensure that all Americans could participate in an efficient and accurate election process and, in doing so, restore voter confidence.

Under New York's Election Reform and Modernization Act New York State's traditional lever machines are required to be phased out and replaced.

The New York Legislature established, in accordance with Election Law sections § 3-100, § 3-102 and § 7-203, that in an effort to maintain efficient elections, the State Board shall establish the minimum required voting machines and voting systems needed for each polling place. This number is based upon the type of voting system and the number of registered voters (excluding voters in inactive status) assigned to use that specific voting device.

By enacting § 6210.19 the State Board will establish the minimum required voting machines and privacy booths needed for each polling place based upon the type of voting system and the number of registered voters (excluding voters in inactive status) assigned to use that specific voting device. In addition, county boards of elections are directed to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes" § 6210.19(c)(1).

For Direct Recording Electronic Voting Systems, the SBOE is seeking to establish under § 6210.19(b)(1)(a), that there shall be at least one direct recording electronic voting device for every 550 registered voters (excluding voters in inactive status) at the polling place. For Precinct Based Optical Scan Voting Systems, under § 6210.19(2)(a), there shall be at least one scanning device for every 4000 registered voters (excluding voters in inactive status) at the polling place.

Needs and Benefits: By enacting § 6210.19 and defining the minimum number of voting machines and requiring that voter waiting time at a poll site does not exceed thirty minutes, the State Board will ensure that uniform standards prevail for all elections and in all polling places throughout New York.

In setting the minimum required voting machines and privacy booths needed for each polling place based upon the type of voting system and the number of registered voters assigned to use that specific voting device,

State Board of Elections

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minimum Number of Required Voting Machines

I.D. No. SBE-31-07-00004-P

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

Proposed action: Amendment of Part 6210 of Title 9 NYCRR.

Statutory authority: Election Law, sections 3-100, 7-201, 7-206

Subject: Minimum number of required voting machines.

Purpose: To establish the minimum required voting machines and privacy booths needed for each polling place.

Text of proposed rule: Part 6210

§ 6210.19 Minimum Number of Voting Machines

(a) *The purpose of these determinations is to establish the minimum number of required voting machines and privacy booths needed for each polling place based upon the type of voting system and the number of registered voters (excluding voters in inactive status) assigned to use that specific voting device in accordance with Election Law section 7-203.*

(b) Determinations by Type of Voting System

(1) Direct Recording Electronic Voting Systems

(a) *There shall be at least one direct recording electronic voting device for every 550 registered voters (excluding voters in inactive status) at the polling place.*

(2) Precinct Based Optical Scan Voting Systems

(a) *There shall be at least one scanning device for every 4000 registered voters (excluding voters in inactive status) at the polling place.*

(b)(i) *There shall be at least one privacy booth for every 300 registered voters (excluding voters in inactive status), except that in a general election for governor, or at elections at which electors for President of the United States are selected there shall be at least one privacy booth for every 250 registered voters (excluding voters in inactive status).*

(ii) *At polling places that accommodate more than 6000 registered voters (excluding voters in inactive status), there shall be one privacy booth for every 350 registered voters (excluding voters in inactive status) in a general election for governor, or at elections at which electors for President of the United States shall be selected; and one privacy booth for every 400 active voters in all other elections.*

(iii) *A sufficient number of the privacy booths must be accessible to voters with disabilities.*

(c) Obligations of the County Boards of Elections

(1) *County boards shall deploy sufficient voting equipment, election workers and other resources so that voter waiting time at a poll site does not exceed thirty minutes. Each county board of elections may increase in a non-discriminatory manner, the number of voting devices used in any specific polling place.*

county boards will ensure that there is a sufficient number of machines for voters. The thirty minute wait provision of the rule will ensure that voters do not wait more than 30 minutes to cast their votes. The benefit of these provisions will be most strongly recognized in Presidential elections when voter turnout tends to be the greatest. Since this type of regulation has never been enacted in the state of New York before, the combined effects of this rule will benefit voters in all elections and in all polling places throughout New York State and should help maintain public confidence in the election process.

Costs: The proposed Regulations may impose additional costs on local government. Under the Help America Vote Act (HAVA) county boards were given federal funding toward the purchase and maintenance of new voting machines. However, once machines have been purchased, it is incumbent upon counties to continue to maintain their voting machines and additional voting equipment. Under the proposed § 6210.19(b)(1)(a), which establishes guidelines for Direct Recording Electronic voting systems, “there shall be at least one direct recording electronic voting device for every 550 registered voters (excluding voters in inactive status) at the polling place”.

Under § 6210.19(2)(a), which establishes the guidelines for precinct based Optical Scan voting systems, “there shall be at least one scanning device for every 4000 registered voters (excluding voters in inactive status) at the polling place”. While this machine is considered less technically intricate and can service thousands of voters versus hundreds, the cost to these machines will come in the form of printing a sufficient number of paper ballots for each election. However, the cost of ballots is dependent upon a competitive bid process.

Furthermore, § 6210.19(c)(1) requires county boards to “deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes”. Under this regulation counties may be required to hire additional staff to ensure shorter lines, which may require additional money and election support staff.

Local Government Mandates: This regulation would establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the local county boards of elections and directs them to “deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes”.

Most of the mandated costs will be absorbed by federal funding, but there may be initial and ongoing costs that will be borne by the counties.

Paperwork: Counties must keep track of statistics produced on the number of voters using accessible voting devices.

Duplication: The subject regulation does not duplicate other existing Federal or State requirements.

Alternatives: Under § 7-203(2) the State Board is required to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine.

In order to arrive at the minimum number of voting machines and the maximum number of voters that can vote on one machine, the State Board has conducted studies, solicited surveys and collaborated with other states, as well as reaching out to government advocacy organizations such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

In September 2006, the State Board contracted with the American Institute for Research (AIR) in order to determine the Maximum Daily Rate (MDR) for voters for each voting system that was being considered for use in New York state elections. The primary goal of the study was to provide data on the MDR in order to determine the minimum number of voting machines required per the number of registered voters in an election district. For the study, the MDR was defined as the maximum number of voters a given voting system can accommodate in a 15-hour voting period.

Testing of over 800 reported registered voters occurred in Rochester, New York City and Albany. The tests were based on the use of twelve different machines from Avante, Diebold, ES&S, Liberty and Sequoia, as well as the lever machine.

Taking into account several variables, including location and participants, the MDR was based on the mean, the trimmed mean and median of voters voting within a 15 hour day. Using the mean time, numbers ranged from a low of 207 voters on the Sequoia DRE to a high of 1931 voters on the ES&S Optical Scan. Using the trimmed mean, the Diebold Optical Scan system showed the high MDR at 2,348 voters per machine. Finally, using the median number, both ES&S and Diebold Optical Scan systems

had the highest MDR at 2571 people. The full text and scope of the AIR study can also be found on the NYSBOE web-site.

In addition to the AIR study, surveys were sent to other states in order to solicit answers to questions on the voting machines they used. The information they provided was used in conjunction with the AIR study to arrive at the numbers proposed in § 6210.19. Twenty-six states responded to the Board’s survey.

After reviewing the states answers, NYSBOE has determined that of the participating states:

Few states established the maximum number of votes. However, Virginia stated “No precinct may have more than 5,000 voters per DRE”; South Carolina uses 250 per DRE; North Carolina uses 250 per; Louisiana uses 600 for AVC Advantage machines; and Florida estimates 120 per DRE, but no state has any statute which mandates the maximum number to be used.

Of the states that use Op Scans, no state has established mandatory maximum numbers for the Op Scan. However, California uses between 5000 and 6000 registered voters per machine (1 scanner, 1 automark); Connecticut uses 1296 per machine; Florida estimates 3000 per machine; Michigan uses 2999 per precinct and Virginia states that “No precinct may have more than 5000 voters per Op Scan”.

Eight states used VVPATS.

No uniform number of privacy booths was established. The range varies from 1 for every 75 voters in Illinois to 1 for every 350 voters in Idaho.

No state has a None of the Above option for undervotes.

Only two states (Wisconsin and South Dakota) have established voter wait time.

Lastly, the draft proposed text was sent to various government advocacy organizations and has been posted on the New York State Board of Elections web-site, which can be found at www.elections.state.ny.us.

The State Board has received numerous comments from the public on the AIR study, which was used to ascertain maximum numbers of voters for the machines. Those comments range from “DRE number is too large ...”; “Does not support the use of DRE and the number is not adequate to meet the need without causing lines.”; “550 is too low for DREs. 4000 is a joke for Op Scan”; “DRE should be set for less than 200 registered voters.”; “Likes 30 minute wait time.”; “Not more than 200 registered voters for DRE. Not more than 200 registered voters for a Privacy Booth, and not more than 4,000 registered voters for Op Scan if the undervote notice is turned off”.

After performing due diligence in determining the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine as per § 7-203(2), this new regulation § 6210.19, will allow county boards of elections to adequately plan for elections when new machines have been certified.

In addition to establishing the minimum number of machines, § 6210.19 also requires that voting line wait times may not exceed thirty minutes.

In order to arrive at this number versus a shorter or longer time period, several State Board of Elections staff reviewed voter turnout issues from several county boards through out the state, both urban and rural. In their review, they analyzed the various voting machines available and the number of voters that could vote on those machines. Also, follow up calls were placed to several election inspectors to inquire if voters were concerned about wait times or if the inspectors observed undue wait times.

Other methods used to determine the 30 minute wait time included comments from government advocacy groups. Some of the comments offered were from voting oversight organizations, disability organizations, and several people who offered actual queuing schemes for suggested wait times. Lastly, Board staff had a conference call with a company called Segata that worked in Ohio to scientifically determine appropriate wait times. The call was considered more of a brain storming session since the Board did not actually purchase the software offered by the company.

The Board considered all of the above factors prior to establishing the 30 minute wait period. By consensus, it was determined that some wait time was inevitable and was to be expected during an election day. As a result, a 15 minute wait time seemed unrealistic for larger counties, such as NYC, in a Presidential election and 1 hour was too long, therefore the maximum wait time agreed upon was 30 minutes.

After culling through all relevant information from various sources and groups, the State Board has concluded that the numbers chosen adequately reflect the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine as prescribed in § 6210.19.

In addition, § 6210.19 directs county boards of elections to deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes.

Federal Standards: There are no Federal standards for establishing the maximum number of voters that can vote on a machine in order to guarantee fair and reliable access to voting machines for all voters during average and peak hours or election days.

Compliance Schedule: The Regulation will be effective for the first election after machines have been certified in New York State and the regulation is adopted.

Regulatory Flexibility Analysis

Effect of the rule:

This rule applies solely to local governments and does not apply to small businesses. All 62 county boards of elections will have to comply with this rule.

Compliance requirements:

Under the Help America Vote Act, New York State's traditional lever machines were required to be phased out and replaced with either Direct Recording Electronic Voting Systems or Precinct Based Optical Scan Voting Systems.

The State Board is currently seeking to adopt NYCRR § 6210.19 in order to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the local county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes".

This regulation would mandate the number of new machines each local county board would be required to purchase based on the number of registered voters (excluding voters in inactive status).

Professional services:

No professional services are needed other than Board of Elections staff.

Costs:

The proposed regulation will undoubtedly impose additional costs on local government. However, under the Help America Vote Act (HAVA) county boards were given federal funding toward the purchase and maintenance of new voting machines. Most of the mandated initial costs will be absorbed by federal funding, but there may be ongoing costs that will need to be absorbed by the counties.

The ongoing costs from Direct Recording Electronic (DRE's) voting systems and from Optical Scan machines will come in the form of printing a sufficient number of paper ballots for each election. The exact cost of ballots is dependent upon the technology chosen and the State's competitive bid process.

Furthermore, under this regulation counties may be required to hire additional staff to ensure shorter lines, so that voters do not exceed the 30 minute wait-time provision. This may require additional money and election support staff.

Since there are currently no voting systems, which have been certified, it is difficult to determine exact additional costs for the operation of the machines or for running an election.

Economic and technological feasibility:

New machines will have to be purchased by counties in order to replace the lever machine. The new machines will be more technologically advanced than lever machines and have computerized components.

Enacting this rule will not obligate local county boards to go beyond the requirements of the law.

Minimizing adverse impacts:

Because this rule requires changing over from lever machines to electronic machines, there will likely be an initial adverse impact on voters. Lever machines have been used for over 100 years and new technology will undoubtedly cause some uneasiness amongst voters. In order to remedy this problem, New York State has appropriated ten million dollars, which was dispersed to local county boards for voter outreach and education purposes.

Participation:

In order to arrive at the minimum number of voting machines and the maximum number of voters that can vote on one machine, the State Board has conducted a study by the American Institute of Research, solicited surveys and collaborated with other states, as well as reaching out to government advocacy organizations such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

Throughout the process, local County Boards' of Elections have been kept apprised of on going surveys and outreach by the State Board. Their opinions and input has consistently been solicited.

Rural Area Flexibility Analysis

Effect of the rule:

This rule applies to local county Boards of Elections throughout New York State. It will, therefore, have an impact on every rural area in the state.

Compliance requirements:

Under the Help America Vote Act (HAVA), New York State's traditional lever machines were required to be phased out and replaced with either Direct Recording Electronic Voting Systems or Precinct Based Optical Scan Voting Systems.

The State Board is currently seeking to adopt NYCRR § 6210.19 in order to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the local county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes". The State Board of Elections took into consideration rural areas and concluded that this regulation may impose an adverse impact in rural areas. As a result, because the process will be new to New York State it may require additional, reporting, record keeping or other compliance requirements.

Professional services:

No professional services are needed other than Board of Elections staff.

Costs:

The proposed regulation will undoubtedly impose additional costs on county boards in rural areas. However, under HAVA county boards were given federal funding toward the purchase and maintenance of new voting machines. Most of the mandated initial costs will be absorbed by federal funding, but there may be ongoing costs that will need to be absorbed by the counties, including those with rural areas.

The ongoing costs from Direct Recording Electronic (DRE's) voting systems and from Optical Scan machines will come in the form of printing a sufficient number of paper ballots for each election. The exact cost of ballots is dependent upon the technology chosen and the State's competitive bid process.

Furthermore, under this regulation rural counties may be required to hire additional staff to ensure shorter lines, so that voters do not exceed the 30 minute wait-time provision. This may require additional money and election support staff.

Since there are currently no voting systems, which have been certified, it is difficult to determine exact additional costs for the operation of the machines or for running an election.

Economic and technological feasibility:

New machines will have to be purchased by all rural counties in order to replace the lever machine. The new machines will be more technologically advanced than lever machines and have computerized components.

Enacting this rule will not obligate counties in rural areas to go beyond the requirements of the law.

Minimizing adverse impacts:

Because this rule requires changing over from lever machines to electronic machines, there will likely be an initial adverse impact on voters in rural areas. Lever machines have been used for over 100 years and new technology will undoubtedly cause some uneasiness amongst rural voters. In order to remedy this problem, New York State has appropriated ten million dollars, which was dispersed to counties for voter outreach and education purposes.

Participation:

In order to arrive at the minimum number of voting machines and the maximum number of voters that can vote on one machine, the State Board has conducted a study by the American Institute of Research, solicited surveys and collaborated with other states, as well as reaching out to government advocacy organizations such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

Throughout the process, local County Boards' of Elections, including those in rural areas have been kept apprised of on going surveys and outreach by the State Board. Their opinions and input has consistently been solicited.

Job Impact Statement

These regulations will have neither an adverse nor a positive impact on employment opportunities in New York State.

Department of Health

EMERGENCY RULE MAKING

Chemical Analysis of Blood, Urine, Breath or Saliva for Alcoholic Content

I.D. No. HLT-31-07-00003-E

Filing No. 709

Filing date: July 13, 2007

Effective date: July 13, 2007

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

Action taken: Amendment of Part 59 of Title 10 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 1194(4)(c); Environmental Conservation Law, section 11-1205(6)

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

Specific reasons underlying the finding of necessity: Immediate adoption of this amendment is necessary for preservation of the public safety. The amendment, once adopted, will enable law enforcement agencies to use a breath alcohol testing device, which, while not currently listed in 10 NYCRR Section 59.4, is approved for use by the National Highway Traffic Safety Administration.

A new Conforming Products List was published in the Federal Register on June 29, 2006, adding a state-of-the-art evidential breath test instrument: the DataMaster DMT. Under a Division of Criminal Justice Services project fully funded through the Governor's Traffic Safety Committee, the DataMaster DMT will replace 475 breath test instruments currently used by more than 420 police agencies statewide. The Division of Criminal Justice Services has informed the Department of its expectation to begin distribution of the first lot of approximately 40 DataMaster DMT instruments on or about April 30, 2007.

Failure to update the list by emergency rulemaking will result in confusion as to the DataMaster DMT's approval for use in New York State, resulting in defense challenges to the legal admissibility of evidentiary results obtained with the device. Such failure would obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older DataMaster models become unusable, thereby adversely affecting public safety. Moreover, the federal and State lists of approved breath testing devices must be identical to avoid legal challenges to prosecutions for alcohol-related offenses and preclude inadmissibility of evidence, and to ensure effective enforcement of the laws against driving while intoxicated.

Subject: Chemical analysis of blood, urine, breath or saliva for alcoholic content.

Purpose: To update the conforming products list.

Text of emergency rule: Subdivision (c) of Section 59.1 is amended as follows:

(c) Chemical tests/analyses include breath tests conducted on those instruments found on the Conforming Products List of Evidential Breath Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration, published in the Federal Register on [June 4, 1999] *June 29, 2006*. Such list is set forth in section 59.4 of this Part.

Subdivision (b) of Section 59.4 is amended as follows:

(b) The commissioner has adopted the Conforming Products List of Evidential Breath Measurement Devices, as hereinafter set forth, established by the U.S. Department of Transportation/National Highway Traffic Safety Administration, as meeting the above criteria. Unless otherwise noted, the devices are approved for both mobile and nonmobile use.

Conforming Products List

(1) Alcohol Countermeasure Systems [,] Corp., Mississauga, Ontario, Canada:

(i) Alert J3AD.

(ii) Alert J4X.ec.

[(ii)] (iii) PBA3000C.

(2) BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer.

(3) CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer.

(4) CMI, Inc., Owensboro, KY:

(i) Intoxilyzer 200.

(ii) Intoxilyzer 200D.

(iii) Intoxilyzer 300.

(iv) Intoxilyzer 400.

(v) Intoxilyzer 400PA.

[(v)] (vi) Intoxilyzer 1400.

[(vi)] (vii) Intoxilyzer 4011.

[(vii)] (viii) Intoxilyzer 4011A.

[(viii)] (ix) Intoxilyzer 4011AS.

[(ix)] (x) Intoxilyzer 4011AS-A.

[(x)] (xi) Intoxilyzer 4011AS-AQ.

[(xi)] (xii) Intoxilyzer 4011AW.

[(xii)] (xiii) Intoxilyzer 4011A27-10100.

[(xiii)] (xiv) Intoxilyzer 4011A27-10100 with filter.

[(xiv)] (xv) Intoxilyzer 5000.

[(xv)] (xvi) Intoxilyzer 5000 (with Cal. Vapor Re-Circ.).

[(xvi)] (xvii) Intoxilyzer 5000 (with 3/8" ID hose option).

[(xvii)] (xviii) Intoxilyzer 5000CD.

[(xviii)] (xix) Intoxilyzer 5000CD/FG5.

[(xix)] (xx) Intoxilyzer 5000EN.

[(xx)] (xxi) Intoxilyzer 5000 (CAL DOJ).

[(xxi)] (xxii) Intoxilyzer 5000 VA.

(xxiii) Intoxilyzer 8000.

[(xxii)] (xxiv) Intoxilyzer PAC 1200.

[(xxiii)] (xxv) Intoxilyzer S-D2.

(xxvi) Intoxilyzer S-D5.

[(5) Decator Electronics, Decator, IL: Alco-Tector model 500 (nonmobile only).]

[(6)] (5) Draeger Safety, Inc., Durango, CO:

(i) Alcotest 6510.

(ii) Alcotest 6810.

[(i)] (iii) Alcotest 7010.

[(ii)] (iv) Alcotest 7110.

[(iii)] (v) Alcotest 7110 MKIII.

[(iv)] (vi) Alcotest 7110 MKIII-C.

[(v)] (vii) Alcotest 7410.

[(vi)] (viii) Alcotest 7410 Plus.

[(vii)] (ix) Breathalyzer 900.

[(viii)] (x) Breathalyzer 900A.

[(ix)] (xi) Breathalyzer 900 BG.

[(x)] (xii) Breathalyzer 7410.

[(xi)] (xiii) Breathalyzer 7410-II.

[(7)] (6) Gall's Inc., Lexington, KY: Alcohol Detection System-A.D.S. 500.

(7) Guth Laboratories, Inc., Harrisburg, PA:

(i) Alcotector BAC-100.

(ii) Alcotector C2H5OH.

(8) Intoximeters, Inc., St. Louis, MO:

(i) Photo Electric Intoximeter (nonmobile only).

(ii) GC Intoximeter MK II.

(iii) GC Intoximeter MK IV.

(iv) Auto Intoximeter.

(v) Intoximeter 3000.

(vi) Intoximeter 3000 (rev B1).

(vii) Intoximeter 3000 (rev B2).

(viii) Intoximeter 3000 (rev B2A).

(ix) Intoximeter 3000 (rev B2A) w/FM option.

(x) Intodximeter 3000 (Fuel Cell).

(xi) Intoximeter 3000 D.

(xii) IntoXimeter 3000 DFC.

(xiii) Alcomonitor (nonmobile only).

(xiv) Alcomonitor CC.

(xv) Alco-Sensor III.

(xvi) Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000).

[(xvi)] (xvii) Alco-Sensor IV.

(xviii) Alco-Sensor IV-XL.

[(xvii)] (xix) Alco-Sensor AZ.

(xx) Alco-Sensor FST.

[(xviii)] (xxi) RBT-AZ.

[(xix)] (xxii) RBT III.

[(xx)] (xxiii) RBT III-A.

[(xxi)] (xxiv) RBT IV.

[(xxii)] (xxv) RBT IV with CEM (cell enhancement module).

[(xxiii)] (xxvi) Intox EC/IR.

- (xxvii) IntoX EC/IR II.
 [(xxiv)] (xxviii) Portable Intox EC/IR.
- (9) Komyo Kitagawa, Kogyo, K.K., *Japan*:
 (i) Alcoalyzer DPA-2.
 (ii) Breath Alcohol Meter PAM 101B.
- (10) Lifeloc Technologies, Inc. (formerly Lifeloc, Inc.), Wheat Ridge, CO:
 (i) PBA 3000B.
 (ii) PBA 3000-P.
 (iii) PBA 3000C.
 (iv) Alcohol Data Sensor.
 (v) Phoenix.
 (vi) EV 30.
 (vii) FC 10.
 (viii) FC 20.
- (11) Lion Laboratories, Ltd., Cardiff, Wales, UK:
 (i) Alcolmeter 300.
 (ii) Alcolmeter 400.
 [(iii) Alcolmeter AE-D1.]
 [(iv)] (iii) Alcolmeter SD-2.
 [(v)] (iv) Alcolmeter EBA.
 [(vi) Auto-Alcolmeter (nonmobile only).]
 [(vii)] (v) Intoxilyzer 200.
 [(viii)] (vi) Intoxilyzer 200D.
 [(ix)] (vii) Intoxilyzer 1400.
 [(x)] (viii) Intoxilyzer 5000 CD/FG5.
 [(xi)] (ix) Intoxilyzer 5000 EN.
- (12) Luckey Laboratories, San Bernadino, CA:
 (i) Alco-Analyzer 1000 (nonmobile only).
 (ii) Alco-Analyzer 2000 (nonmobile only).
- (13) National Draeger, Inc., Durango, CO:
 (i) Alcotest 7010.
 (ii) Alcotest 7110.
 (iii) Alcotest 7110 MKIII.
 (iv) Alcotest 7110 MKIII-C.
 (v) Alcotest 7410.
 (vi) Alcotest 7410 Plus.
 (vii) Breathalyzer 900.
 (viii) Breathalyzer 900A.
 (ix) Breathalyzer 900BG.
 (x) Breathalyzer 7410.
 (xi) Breathalyzer 7410-II.
- (14) National Patent Analytical Systems, Inc., Mansfield, OH:
 (i) BAC DataMaster (with or without the Delta-1 accessory).
 (ii) BAC Verifier *Datamaster* [DataMaster] (with or without the Delta-1 accessory).
 (iii) DataMaster cdm (with or without the Delta-1 accessory).
 (iv) *DataMaster DMT*.

* * *

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 October 10, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The New York State Vehicle and Traffic Law, Section 1194(4)(c), and Department of Environmental Conservation Law, Section 11-1205(6), authorize the Commissioner of Health to adopt regulations concerning methods of testing breath for alcohol content.

Legislative Objectives:

This amendment allows law enforcement/police agencies to use state-of-the-art equipment for breath alcohol testing, as approved by the Commissioner of Health. This action fulfills the legislative objective of ensuring effective enforcement of the law against driving while intoxicated.

Needs and Benefits:

In 1986, the Commissioner of Health adopted the Conforming Products List of Evidential Breath Measurement Devices, as established by the National Highway Traffic Safety Administration, under 10 NYCRR Sections 59.1(c) and 59.4(b). The Traffic Safety Administration's list is periodically revised to include additional approved testing devices. Affected

parties are law enforcement agencies that train police organizations in the use of breath testing devices and the organizations/agencies whose staff conduct testing, including the New York State Police; the State Division of Criminal Justice Services' Office of Public Safety; and the Police Departments of Nassau County, Suffolk County, and the City of New York.

A new Conforming Products List was published in the Federal Register on June 29, 2006, adding a state-of-the-art evidential breath test instrument: the DataMaster DMT. Under a Division of Criminal Justice Services project fully funded through the Governor's Traffic Safety Committee, the DataMaster DMT will replace 475 breath test instruments currently used by more than 420 police agencies Statewide. The Division of Criminal Justice Services has informed the Department of its expectation to begin distribution of the first lot of approximately 40 DataMaster DMT instruments on or about April 30, 2007.

Prosecutors and defense attorneys Statewide rely on the provisions of Part 59 daily in adjudicating alcohol-related offenses. By including in Section 59.4 all devices that appear on the latest federal Conforming Products List, this proposed amendment, once adopted, will make these devices available for use by law enforcement agencies without risk of evidentiary challenge to prosecution, and will ensure effective enforcement of the laws against driving while intoxicated.

COSTS:

Costs to Private Regulated Parties:

The requirements of this regulation are not applicable to any private parties regulated by the Department.

Costs to State Government:

Adoption of additions and revisions to the Conforming Products List does not necessitate purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not require affected parties to incur new costs. The Division of Criminal Justice Services has requested timely amendment of Part 59 because the manufacturer of the DataMaster breath analysis device currently in use has begun phasing out production due, in part, to the fact that parts to manufacture and repair these instruments are becoming increasingly unavailable. Moreover, the Division of Criminal Justice Services expects the newer model instrument, which utilizes improved diagnostics, an enhanced operating system and an outboard printer, to generate cost savings from fewer instrument malfunctions, resulting in less downtime. Thus, this amendment's authorizing use of an updated model, the DataMaster DMT, will result in decreased costs to law enforcement agencies.

Costs to Local Government:

Adoption of additions and revisions to the Conforming Products List does not require purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not impose any additional costs to police departments operated by local governments, including the City of New York Police Department. Police departments operated by local governments may experience cost savings for the same reasons described under Costs to State Government.

Costs to the Department of Health:

Adoption of additions and revisions to the Conforming Products List does not impose any costs on the Department.

Local Government Mandates:

This regulation does not impose any new mandate on any county, city, town, village, school district, fire district or other special district.

Paperwork:

No new reporting requirements or forms are imposed as a result of the proposed amendment.

Duplication:

This regulation is consistent with, but does not duplicate, other State and federal statutes concerning approved breath alcohol measurement devices.

Alternative Approaches:

At the present time, there are no acceptable alternatives. Failure to update the list will result in confusion as to the DataMaster DMT's instrument approval for use in New York State, resulting in defense challenges to the admissibility of results obtained with the device. Such failure will obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older DataMaster models become unusable, thereby adversely affecting public safety.

Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government; it merely adds new federally approved devices to the Conforming Products List, to be consistent with federal standards.

Compliance Schedule:

Regulated parties should be able to comply with these regulations effective upon filing a Notice of Emergency Adoption with the Secretary of State.

Regulatory Flexibility Analysis

No Regulatory Flexibility Analysis is required pursuant to Section 202-b (3)(b) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse economic impact on small businesses or local governments, and does not impose reporting, record keeping or other compliance requirements on small businesses or local governments. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse impact on facilities in rural areas, and does not impose any reporting, record keeping or other compliance requirements on regulated parties in rural areas. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

Division of Housing and Community Renewal

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Rent Stabilization Code and Emergency Tenant Protection Regulations

I.D. No. HCR-31-07-00010-P

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

Proposed action: Amendment of Parts 2502 and 2522 of Title 9 NYCRR.

Statutory authority: Rent Stabilization Law, 26-511(b) and Emergency Tenant Protection Act, section 10

Subject: Rent Stabilization Code and Emergency Tenant Protection Regulation.

Purpose: To clarify that housing previously under governmental regulation is not, per se, entitled to an initial rent adjustment based on "unique and peculiar circumstances."

Public hearing(s) will be held at: 10:00 a.m. - 4:00 p.m., Sept. 24, 2007 at 22 Reade St., 1st Fl., New York, NY; 10:00 a.m. - 2:00 p.m., Sept. 24, 2007 at 111 MLK Jr. Blvd., 9th Fl., White Plains, NY; and 10:00 a.m. - 2:00 p.m., Sept. 24, 2007 at One West St., Nassau LOB, Mineola, NY.

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

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

Text of proposed rule: Subchapter A of Chapter VIII of Subtitle S of Title 9 NYCRR

The Emergency Tenant Protection Regulations, as promulgated and adopted by the Division of Housing and Community Renewal pursuant to the Emergency Tenant Protection Act of Nineteen Seventy-four, section 4

of Chap. 576, Laws of 1974, section 10(a), as amended, are amended to read as follows:

PART 2502 ADJUSTMENTS

Section 1

Subdivision (b) of Section 2502.3 of this Part is amended by adopting new paragraphs (3) and (4) to read as follows:

(3) Any such adjustment shall consider in addition to the factors contained in 2502.3(b)(2), the equities involved and the general limitation that such adjustment can be put into effect without dislocation and hardship inconsistent with the purposes of the act and with due regard for preserving the regulated rental housing market.

(4) Previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not in and of itself constitute a unique and peculiar circumstance within the meaning of this subdivision. Any change in economic circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under paragraphs (c) and (d) of section 2502.4 of this Title.

Subchapter B of Chapter VIII of Subtitle S of Title 9 NYCRR

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

PART 2522 RENT ADJUSTMENTS

Section 1

The Title of Section 2522.3 of this Part is amended to read as follows:
§ 2522.3. Fair Market Rent Appeal *and Other Applications for Adjustment of Initial Legal Regulated Rent for Housing Accommodations*

Section 2

Section 2522.3 of this Part is amended by adopting a new subdivision (f) to read as follows:

(f)(1) Except as provided in section 2521.1(a)(2) of this code, the landlord or tenant of a housing accommodation made subject to this code by the ETPA may, within 60 days of the date the housing accommodation became subject to the ETPA or the commencement of the first tenancy thereafter, file an application on forms prescribed by the DHCR to adjust the initial legal regulated rent on the grounds that the presence of unique or peculiar circumstances materially affecting the legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations.

(2) The DHCR may grant an appropriate adjustment of the initial legal regulated rent upon finding that such grounds do exist, provided that the adjustment shall not result in a legal regulated rent substantially different from the legal regulated rents generally prevailing in the same area for substantially similar housing accommodations.

(3) Any such adjustment shall consider, in addition to the factors contained in 2522.3(f)(2), the equities involved and the general limitations required by section 2522.7 of this title.

(4) Previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar circumstance within the meaning of this subdivision. Any change in economic circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under paragraphs (b) and (c) of Section 2522.4 of this code.

Text of proposed rule and any required statements and analyses may be obtained from: Maurice Jamison, Special Assistant to the Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4816, e-mail: mjamison@dhcr.state.ny.us

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

Section 26-511(b) of the Administrative Code of the City of New York, as recodified by the Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.0[b]), as amended by Laws of 1985, Chap. 888, section 2) and section 26-518(a) of such Code, as recodified by the Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.1[a]), as added by the Laws of

1985, Chap. 888, section 8), provides authority to the Division of Housing and Community Renewal (DHCR) to amend Section 2522.3 of the Rent Stabilization Code (RSC).

The Emergency Tenant Protection Act of 1974 (ETPA), Laws of 1974, Chapter 576, section 10a provides authority to DHCR to amend the Tenant Protection Regulations (TPR).

2. LEGISLATIVE OBJECTIVES

The proposed rule making is necessary to clarify the parameters of the initial rent adjustment remedy contained in Section 26-513a of the New York City Rent Stabilization Law (RSL) and Section 2502.3 of the TPR.

3. NEEDS AND BENEFITS

In addition to the Legislative Objectives detailed in item 2 above, the subject amendments are also urgently necessary to ensure the continued availability of affordable housing in New York City and the surrounding counties of Westchester, Rockland and Nassau by protecting low- and middle-income tenants from unduly burdensome initial rent stabilized rents in buildings withdrawing from other forms of governmental regulation, including buildings withdrawing from the Mitchell-Lama program (Private Housing Finance Law, Art. II).

To date, twenty-four applications filed by owners seeking initial rent adjustments to 4,486 former Mitchell Lama units based on unique and peculiar circumstances are pending with DHCR. These owners have made the calculated business decision to exit the Mitchell-Lama program and apply to DHCR for substantial rent increases on the basis that their unilateral decision to forego the benefits of below-market financing and substantial tax exemptions qualifies as a "unique and peculiar" circumstance under the RSL and the ETPA. According to current DHCR and New York City Department of Housing Preservation and Development (HPD) records, 49 developments (which were built prior to 1974) encompassing 13,444 units are currently subject to either the Mitchell-Lama program (48 developments with 11,860 units) or the Limited Dividend Housing program (one development with 1,584 units). These 13,444 units are exclusive of the 4,486 former Mitchell-Lama units which are the subject of the twenty-four pending DHCR proceedings mentioned above. If these developments leave the Mitchell-Lama and Limited Dividend programs, they would fall under the jurisdiction of either the RSL or the ETPA and would most likely be the subject of additional applications for initial rent increases based on unique and peculiar circumstances.

There is no support in the RSL or the ETPA for the proposition that an owner's voluntary withdrawal from a regulatory program resulting in the loss of financial benefits to the owner constitutes a unique and peculiar circumstance. In the past, the "unique and peculiar" rent adjustment remedy has been sparingly applied by DHCR only to sui generis situations. As such, regulations were never adopted by any of the agencies responsible for the administration of the RSL and were never clarified in the TPR. Recently numerous tenants were confronted with the dilemma of their building owners leaving the Mitchell-Lama program and seeking "unique and peculiar" rent increases. Rather than face the uncertainty caused by the lack of regulatory guidance for unique and peculiar applications, these tenants chose to negotiate and then agree to modest rent increases.

The RSL and ETPA set forth specific exemptions from regulation, including, inter alia, housing supervised by DHCR (which accordingly falls under the PHFL). The RSL and ETPA also set forth various methods of determining the initial rent when apartments become subject to rent stabilization. The statutes use different formulas for vacant housing accommodations previously subject to rent control (another statutory exemption), as opposed to all other accommodations. For all other accommodations, the initial rent is "the rent reserved in the last effective lease or other rental agreement" (RSL 26-512(b) and paragraph 2 of subdivision b of Section 6 of the ETPA). If the Legislature had intended another formulation for the initial rent based exclusively on a loss of another exemption other than rent control, it could have, and would have, created one.

To the extent owners are simply claiming that there are certain economic and financial shortfalls attendant with dissolution, DHCR regulations already have a remedy for such shortfalls, which are hardship rent increase applications pursuant to RSC Sections 2522.4(b) and (c) and TPR Sections 2502.4(c) and (d).

In 2000, DHCR, in amending its regulations, made the hardship remedy more accessible for these formerly regulated buildings by amending RSC Section 2520.11(c). The amendment repealed a provision which, in effect, made an owner ineligible for a hardship increase for three years after a voluntary dissolution, termination or reconstitution pursuant to the PHFL or other State or Federal law.

According to the 2005 New York City Housing Vacancy Survey, the median and mean total household income figures for Mitchell-Lama te-

nants are \$22,000 and \$33,183, respectively. Thousands of apartments have already left the Mitchell-Lama program and more are expected in the coming years. According to the New York City Rent Guidelines Board publication entitled "Housing NYC: Rents, Markets and Trends 2006", 103,000 Mitchell-Lama units remain in New York City and 21,000 remain elsewhere in the State. More importantly, since 1985, in New York City alone, more than 33,000 Mitchell-Lama units have been lost due to buyouts. This report further discloses that the "pace has accelerated in the past couple of years, with 14,477 units bought out between January 2003 and April 2006. In the first four months of 2006 alone, almost 3,000 units have lost their Mitchell Lama status and the New York City Comptroller's Office recently reported that another 11,363 Mitchell Lama units are pending buyout." In the first month of 2007, 3,042 State Mitchell-Lama units within the City of New York were bought out of the program. This phenomenon requires that clear and fair parameters be created on the setting of the initial legal regulated rents so that an affordable housing stock remains in New York City and the surrounding counties of Westchester, Rockland and Nassau and to ensure that tenant displacements do not occur due to abruptly high initial rents.

DHCR has crafted a rule that most accurately takes into account that it is the nature of the rental history of the individual apartment and whether there may have been some unique and peculiar arrangement between the owner and previous tenant that makes the current rent inappropriate to be established as the legal regulated rent and thus eligible for a rent adjustment under law. The proposed rule also rejects the unsupported position that an owner's decision to terminate its participation in a government regulatory program is a building wide unique and peculiar circumstance as contemplated by the law.

In sum, owners and tenants benefit by having a regulatory mechanism to obtain increases to initial rents where those initial rents are comparatively low due to compelling circumstances which were not due to the owner's negligence and/or malfeasance and which were not due merely to the fact that their building had previously participated in some governmental rent regulation program.

4. COSTS

a. The regulated parties are residential tenants and the owners of the rent stabilized buildings in which such tenants reside.

Neither tenants nor owners are expected to experience any unduly burdensome increase in costs associated with implementing these regulations. On the contrary, the intent of these amendments is to permit both parties to apply for an adjustment to the initial legal regulated rent, provided said application is properly documented and warranted and in the interests of equity and fairness.

b. DHCR costs are expected to be negligible. Otherwise, no additional costs are expected to be incurred by state or local governments as a result of adopting the proposed amendments.

c. Existing laws, regulations, agency policies and procedures form the basis upon which the above analysis is based.

5. LOCAL GOVERNMENT MANDATES

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

6. PAPERWORK

It is anticipated that the proposed amendments may result in a slight increase in paperwork.

7. DUPLICATION

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

8. ALTERNATIVES

The proposed amendments of the RSC clarify a statutory provision not yet reflected in the Code and create additional parameters for adjustments to initial rents not yet reflected in the regulations. Additionally, the proposed amendments preserve the housing stock, serve the interests of equal treatment, equity, and do not violate due process rights. As indicated and discussed in the "NEEDS AND BENEFITS" and "COSTS" sections, absent these proposed modifications, there are no other significant viable alternatives.

9. FEDERAL STANDARDS

The proposed amendments do not exceed any known minimum Federal standards.

10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules. If the parties need to amend or supplement their submissions in pending administrative proceedings before DHCR based on these regulations, applications may be made in those administrative proceedings. Should the DHCR determine

that delayed implementation is appropriate, section 2527.11 of the RSC and section 2507.11 of the TPR authorize the agency to take such action.

Regulatory Flexibility Analysis

1. EFFECT OF RULE

The Rent Stabilization Code (RSC) and the Emergency Tenant Protection Regulations (TPR) apply only to rent stabilized housing units in New York City and in those communities in Westchester, Rockland and Nassau Counties. The class of small businesses affected by these proposed amendments would be limited to small building owners, those who own limited numbers of rent stabilized units. The amended regulations are expected to have no burdensome impact on such small businesses.

These amendments to the RSC and TPR, which apply exclusively in New York City and in the aforementioned communities in Westchester, Rockland and Nassau Counties, are expected to have no impact on the local governments thereof.

2. COMPLIANCE REQUIREMENTS

To support an application for an adjustment to the initial legal regulated rent based on the existence of unique and peculiar circumstances, owners and tenants must submit supporting financial and/or other relevant documentation. It is expected that existing forms will be satisfactory. However, in any event, existing forms can be updated and amended where necessary.

The proposed amendments do not otherwise require regulated parties to perform any additional recordkeeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services.

4. COMPLIANCE COSTS

There is no indication that this action will impose any significant costs upon small businesses or upon local governments.

5. ECONOMIC AND TECHNOLOGY FEASIBILITY

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

6. MINIMIZING ADVERSE IMPACT

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

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The issue of what types of applications are eligible under the section of law which authorizes DHCR to increase rents to address unique and peculiar circumstances has been the subject of extensive public and legal debate. Owners seeking these rent increases and tenants faced with these significant rent increases have taken diametrically opposite views. Owners, in the absence of any regulatory guidance, have taken the position that their agreement to accept rents under the Mitchell-Lama program and subsequent business decision to forgo the benefits of the Mitchell-Lama program entitles them to raise tenants' rents to cover any loss of revenue occasioned by their decision.

There are currently 24 applications pending with DHCR which were submitted by building owners who voluntarily exited the Mitchell-Lama program and claim that their decision has created a unique and peculiar situation which qualifies for an increase in the rents currently collected from the 4,486 tenants living in these buildings. These owners cite no specific legislative history, judicial precedent or housing policy in support of their interpretation of the law regarding rent increases for unique and peculiar circumstances.

The tenants potentially impacted by these 24 applications espouse the concept that owners of buildings which were formerly under the Mitchell-Lama program may never claim unique and peculiar circumstances after leaving the Mitchell-Lama program. These tenants cite no specific legislative history, judicial precedent or housing policy in support of their interpretation of the law regarding rent increases for unique and peculiar circumstances.

DHCR has carefully reviewed and considered each parties' public statements and the parties' public documents regarding their interpretation of the law regarding rent increases in unique and peculiar circumstances.

In addition, a Regulatory Agenda will be placed on DHCR's website, reflecting these proposed rules, thereby providing all interested parties with an opportunity to comment. All issues raised by concerned parties will be carefully reviewed and considered by DHCR.

Finally, prior to the final adoption of any permanent rules, a public hearing will be held during which all interested parties will have an

opportunity to comment. Comments will be reviewed for possible inclusion where appropriate.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Insurance Department

EMERGENCY RULE MAKING

Homeowners Insurance Disclosure Information and Other Notices

I.D. No. INS-21-07-00001-E

Filing No. 708

Filing date: July 12, 2007

Effective date: July 12, 2007

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

Action taken: Amendment of Part 74 (Regulation 159) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 3425, 3445 and 5403

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

Specific reasons underlying the finding of necessity: Chapter 162 of the Laws of 2006, which went into effect on November 23, 2006, amended Section 3425(e) of the Insurance Law to require notices of cancellation, nonrenewal, and conditional renewal to include certain minimum notification requirements with respect to certain homeowners policies as defined in Section 2351(a) of the Insurance Law where the property is located in an area served by a market assistance program established by the Superintendent for the purpose of facilitating placement of homeowners insurance. These notices shall advise a policyholder of possible eligibility for coverage through a market assistance program or through the New York Property Insurance Underwriting Association (NYPIUA) when the policyholder receives a notice of cancellation, nonrenewal or conditional renewal for a homeowners insurance. Chapter 162 also added a new Section 5403(d), which directs NYPIUA to notify policyholders that may be eligible of the availability of coverage in the market assistance program.

Chapter 162 required the Superintendent to promulgate a regulation that established the minimum standards for the notices required by Section 3425(e). Insurers and NYPIUA were required to comply with the standards in the regulation as of the effective date of the new law, November 23, 2006. Given the short period of time between the enactment of the legislation on July 26, 2006, and the effective date, and in order to afford insurers and NYPIUA sufficient time to incorporate these notices, the regulation was promulgated on an emergency basis on October 20, 2006. Until the Department receives permission to take final regulatory action, this regulation must be kept effective on an emergency basis.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the preservation of the general welfare.

Subject: Homeowners insurance disclosure information and other notices.

Purpose: To set forth the minimum notification requirements.

Text of emergency rule: The Title of Part 74 is hereby amended as follows:

[HOMEOWNER'S] HOMEOWNERS INSURANCE DISCLOSURE INFORMATION AND OTHER NOTICES

Section 74.0 is amended to read as follows:

Section 74.0 Introduction and purpose.

(a)(1) Chapter 44 of the Laws of 1998 enacted a new section 3445 of the Insurance Law, requiring the Superintendent to establish by regulation

disclosure requirements with respect to the operation of any deductible in a [homeowner's] *homeowners* insurance policy or dwelling fire personal lines policy [which] *that* applies as the result of a windstorm. Further, section 3445 requires such regulation to prescribe the form of a notice to be provided by an insurer to an insured and provides that the notice shall explain in clear and plain language the amount of the deductible, the circumstances under which the deductible applies and any other matters which the Superintendent, in his or her discretion, shall deem necessary or appropriate.

[(b)] (2) [The purpose of this] *This Part* [is to set] *sets* standards for the uniform display of windstorm deductibles, which consist of hurricane and non-hurricane deductibles, in the policy declarations; and [to provide] provides the minimum provisions to be contained in the policyholder disclosure notice, which will explain the purpose and operation of the hurricane deductible, and must accompany new and renewal policies containing such deductibles.

(b)(1) *Chapter 162 of the Laws of 2006 amended section 3425(e) of the Insurance Law to direct the Superintendent to establish by regulation standards for notices of cancellation, nonrenewal, and conditional renewal for certain homeowners policies as defined in section 2351(a) of the Insurance Law where the property is located in an area served by a market assistance program established by the Superintendent for the purpose of facilitating placement of homeowners insurance. Chapter 162 also added a new section 5403(d), which directs the New York Property Insurance Underwriting Association (NYPIUA) to notify policyholders that may be eligible for coverage in the market assistance program of the availability of coverage.*

(2) *This Part establishes the minimum requirements pertaining to the notices required by Chapter 162.*

New Sections 74.2 and 74.3 are added to read as follows:

Section 74.2 Insurer cancellation, nonrenewal and conditional renewal notices.

Every notice of cancellation, nonrenewal or conditional renewal issued on or after November 23, 2006 for a homeowners insurance policy as defined in section 2351(a) of the Insurance Law insuring property that may be eligible for participation in a market assistance program established by the Superintendent for the purpose of facilitating placement of homeowners insurance shall advise the insured of the availability of the market assistance program and the availability of coverage through NYPIUA for insurance. The notice shall be conspicuous and provide sufficient information on how to apply to the market assistance program and to NYPIUA, including the name, address, telephone number and Web site address of the administrator of the market assistance program and of NYPIUA.

Section 74.3 NYPIUA notices.

On and after November 23, 2006, with respect to a NYPIUA policyholder whose insured property is located in an area served by a market assistance program established by the Superintendent for the purposes of facilitating placement of homeowners insurance, upon issuance or renewal of the policy, NYPIUA shall provide the notice required by section 5403(d) of the Insurance Law and this section. The notice shall be conspicuous and provide sufficient information on how to apply to the market assistance program including the name, address, telephone number and Web site address of the administrator of the market assistance program.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 9, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 3425, 3445, and 5403 of the Insurance Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law and to prescribe forms or otherwise make regulations.

Section 3425 governs cancellation and renewal provisions of certain property/casualty insurance policies.

Section 3445 authorizes the Superintendent to prescribe regulations regarding disclosure requirements for windstorm insurance.

Section 5403 provides the procedures for the New York Property Insurance Underwriting Association (NYPIUA).

2. Legislative objectives: The Legislature, in enacting Chapter 162 of the Laws of 2006, intended to improve public awareness of market assistance programs, such as the Coastal Market Assistance Program (CMAP), that may be available to homeowners in New York, and of NYPIUA.

Chapter 162 requires that when a policyholder receives a notice of cancellation, nonrenewal or conditional renewal for a homeowners insurance policy as specified in Section 3425(e) of the Insurance Law, on property located in an area served by a market assistance program established by the Superintendent for the purpose of facilitating placement of homeowners insurance, that the policyholder is also notified by the insurer of possible eligibility for coverage through the market assistance program or through NYPIUA. In addition, Chapter 162 requires NYPIUA to notify its policyholders whose properties are located in an area served by a market assistance program to be notified of their possible eligibility for coverage through the market assistance program. In the Senate bill memorandum in support of Chapter 162, it was stated that many consumers who were eligible for CMAP were unaware of its existence. By ensuring that consumers who may be eligible for CMAP or other market assistance programs that may be established are made aware of the availability of the program, CMAP or other programs would be used to their fullest potential and more insureds would have access to more complete coverage than that offered by NYPIUA. In order to implement Chapter 162, the Legislature required the Superintendent to promulgate regulations governing the notices required by Chapter 162.

3. Needs and benefits: The rule, which is required by Chapter 162, is necessary to set forth certain minimum notification requirements to assure that policyholders that may be eligible for a market assistance program or NYPIUA are notified of this including information necessary to apply for coverage. This notification would make information on how to apply for an insurance policy from a market assistance program or from NYPIUA more readily available to the policyholders.

4. Costs: This rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. The rule requires specific information to be included in notices of cancellation, nonrenewal or conditional renewal issued for a homeowners insurance policy as defined in Section 2351 of the Insurance Law. There will be costs associated with the insurers adding the specific information onto the homeowners notices specified in Section 3425(e) of the Insurance Law. However, the notice requirement is mandated by Section 3425 and not by this regulation, which implements the statutory requirement. These costs should be minimal as the insurers are already issuing the cancellation, nonrenewal or conditional renewal notices and the rule only requires that the insurance companies add the specific information to the notices. Insurers are not required to, nor should they need to, hire new personnel to comply with the new notification requirements.

In addition, NYPIUA is required to notify policyholders who may be eligible, of the availability of coverage in a market assistance program. There will be costs associated with NYPIUA issuing these new notices. However, the notice is required by Section 5403(d) and not by this regulation, which implements the statutory requirement.

5. Local government mandates: None.

6. Paperwork: Insurers will incur additional paperwork associated with adding the specific information required by the rule to the cancellation, nonrenewal, and conditional renewal notices specified in Section 3425(e) of the Insurance Law. However, the paperwork should be minimal as the insurers are adding the required language to notices already being issued by the company. Moreover, this notice is required by Section 3425 and not by this regulation.

NYPIUA will incur additional paperwork in notifying policyholders that may be eligible of the availability of coverage in a market assistance program. However, this notice is required by Section 5403(d) and not by this regulation.

7. Duplication: None.

8. Alternatives: The Department considered requiring the names and contact information of the insurers participating in market assistance programs to be included in the notice. However, because a market assistance program is voluntary, there could be additional market assistance programs established, and the list of participating insurers could change frequently, it was determined that this requirement should not be included in the rule.

The Department did outreach with various trade organizations. One of the trade organizations expressed concern that insurers may have problems complying with the November 23, 2006 effective date. The Department has no discretion in setting the date as it was set forth by Chapter 162 of the Laws of 2006. In addition, as long as the information required by the rule is part of the cancellation, nonrenewal, or conditional renewal notice and the information is conspicuous, the information required by the rule may be on a separate page of the notice.

The trade organization requested that the Department consider exempting, from the market assistance plan notice requirement, cancellation notices issued for non payment of premium or issued at the request of the insured. Chapter 162 does not provide exceptions to the notice requirements.

9. Federal standards: None.

10. Compliance schedule: The effective date of the enabling legislation, Chapter 162 of the Laws of 2006, was November 23, 2006. The rule provided that every notice of cancellation, nonrenewal or conditional renewal issued on or after November 23, 2006 for a homeowners policy as specified in Section 3425(e) of the Insurance Law to be in compliance. On or after November 23, 2006, NYPIUA was required to provide the notice required by Section 5403(d) of the Insurance Law upon issuance or renewal of a policy.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The rule is directed at property/casualty insurers. The Insurance Department has reviewed/or monitored Reports on Examination and Annual Statements of property/casualty insurers and believes that none of them fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none which are independently owned and have under 100 employees.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

Rural Area Flexibility Analysis

The Insurance Department finds that this rule does not impose any additional burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas. The rule applies uniformly to parties that do business in both rural and nonrural areas of New York State.

Job Impact Statement

This rule should not have any adverse impact on jobs and employment opportunities in this state since the rule merely sets forth minimum notification requirements pertaining to the notices required by Insurance Law Sections 3425(e) and 5403(d). Insurers are not required to, nor should they need to, hire new personnel to comply with the new notification requirements.

Division of the Lottery

EMERGENCY RULE MAKING

Lucky Sum Promotional Game Feature

I.D. No. LTR-31-07-00005-E
Filing No. 710
Filing date: July 13, 2007
Effective date: July 13, 2007

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

Action taken: Amendment of Parts 2828 and 2832 of Title 21 NYCRR.

Statutory authority: Tax Law, section 1604(a)

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

Specific reasons underlying the finding of necessity: The New York Lottery will be conducting Lucky Sum as a feature to existing games available to New York's Numbers and Win 4 players. Game sales commenced on Jan. 29, 2007. This game is necessary to assist the Lottery in reaching its projected revenue target for this fiscal year. A Notice of Proposed Rule making for this rule is expected to be filed shortly; however to continue operation of this game feature, this emergency adoption is necessary. This feature is intended to improve somewhat slow revenues and will provide needed aid to education in this fiscal year.

Subject: Lucky Sum promotional game feature.

Purpose: To add the Lucky Sum promotional game feature to current Lottery regulations.

Text of emergency rule: Lucky Sum

Section 1. Section 2828.3 is amended by adding a new subdivision (h) to read as follows:

(h) *Lucky Sum is a feature of New York's Numbers game. Lucky Sum shall determine winners from bet tickets by correctly matching the sum of the player's number selection against the sum of the winning numbers drawn by the Lottery for that drawing.*

(1) *To place a bet, a purchaser must communicate (i) the desired game bet data to an agent pursuant to subdivision (e) of this section; and (ii) communicate to the agent that such purchaser's desire to add a Lucky Sum wager to the normal wager, who will issue a bet ticket. Such bet ticket will reflect the sum of the numbers played by the purchaser on that wager as the additional Lucky Sum wager.*

(2) *Lucky Sum wagers shall not be placed with pairs wagers.*

(3) *Up to fifty percent of the sales from each drawing will be allocated to a prize pool for that drawing.*

(4) *Prize structure and odds for this feature.*

Sum of Number Picked	Number of Ways to Match a Number	Expected Odds	Prize
0	1	1,000	\$500.00
1	3	333	\$166.00
2	6	167	\$83.00
3	10	100	\$50.00
4	15	67	\$33.00
5	21	48	\$23.50
6	28	36	\$17.50
7	36	28	\$13.50
8	45	22	\$11.00
9	55	18	\$9.00
10	63	16	\$7.50
11	69	14	\$7.00
12	73	14	\$6.50
13	75	13	\$6.50
14	75	13	\$6.50
15	73	14	\$6.50
16	69	14	\$7.00
17	63	16	\$7.50
18	55	18	\$9.00
19	45	22	\$11.00
20	36	28	\$13.50
21	28	36	\$17.50
22	21	48	\$23.50
23	15	67	\$33.00
24	10	100	\$50.00
25	6	167	\$83.00
26	3	333	\$166.00
27	1	1,000	\$500.00

(5) *Lucky Sum bets may be purchased for a minimum of \$1.00 per wager.*

Section 2. Section 2832.3 is amended by adding a new subdivision (g) to read as follows:

(g) *Lucky Sum is a feature of Win-4 game. Lucky Sum shall determine winners from bet tickets by correctly matching the sum of the player's number selection against the sum of the winning numbers drawn by the Lottery for that drawing.*

(1) *Lucky Sum wagers shall not be placed with pairs wagers.*

(2) *To place a bet, a purchaser must communicate: (i) the desired game bet data to an agent pursuant to subdivision (e) of this section; and (ii) communicate to the agent that such purchaser's desire to add a Lucky Sum wager to the normal wager, who will issue a bet ticket. Such bet ticket will reflect the sum of the numbers played by the purchaser on that wager as the additional Lucky Sum wager.*

(3) *Up to fifty percent of the sales from each drawing will be allocated to a prize pool for that drawing.*

(4) *Prize structure and odds for this feature.*

Sum of Number Picked	Number of Ways to Match a Number	Expected Odds	Prize
0	1	10,000	\$5,000.00
1	4	2,500	\$1,250.00
2	10	1,000	\$500.00
3	20	500	\$250.00
4	35	286	\$142.00

5	56	179	\$89.00
6	84	119	\$60.00
7	120	83	\$42.00
8	165	61	\$30.00
9	220	45	\$22.50
10	282	35	\$17.50
11	348	29	\$14.00
12	415	24	\$12.00
13	480	21	\$10.00
14	540	19	\$9.00
15	592	17	\$8.00
16	633	16	\$7.50
17	660	15	\$7.50
18	670	15	\$7.50
19	660	15	\$7.50
20	633	16	\$7.50
21	592	17	\$8.00
22	540	19	\$9.00
23	480	21	\$10.00
24	415	24	\$12.00
25	348	29	\$14.00
26	282	35	\$17.50
27	220	45	\$22.50
28	165	61	\$30.00
29	120	83	\$42.00
30	84	119	\$60.00
31	56	179	\$89.00
32	35	286	\$142.00
33	20	500	\$250.00
34	10	1,000	\$500.00
35	4	2,500	\$1,250.00
36	1	10,000	\$5,000.00

(5) *Lucky Sum bets may be purchased for a minimum of \$1.00 per wager.*

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 October 10, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Acting General Counsel, New York Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: jrbarker@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Pursuant to the authority conferred in New York State Tax Law, Section 1604[a] and the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 21, Chapter XLIV, Section 2828 and 2832, the following official game rules shall take effect and shall remain in full force and effect throughout the New York Lottery's Lucky Sum as a new feature to existing games.

2. Legislative objectives: The purpose of operating Lottery games is to generate revenue for the support of education in the State. Amendment of these regulations forwards the mission of the New York State Lottery to generate revenue for education.

3. Needs and benefits: The New York Lottery has sustained competitive pressure from large jackpot lottery games in adjoining states. New Yorkers routinely travel outside the state to participate in those games. The New York Lottery's Lucky Sum, as an existing game feature, allows the New York Lottery to continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who participate in large jackpot lottery games. The New York Lottery's Lucky Sum as a new feature to existing games is anticipated on a full annual basis, to bring in more than \$53.9 million in revenue to benefit education in the State.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, since funds originally appropriated for the expenses of operating the existing lottery games are expected to be sufficient to support this new game.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the New York State Lottery's experience in operating State Lottery games for more than 30 years.

5. Local government mandates: None.

6. Paperwork: There are no changes in paperwork requirements. Game feature brochures will be issued by the New York State Lottery for public convenience at retailer locations free of charge.

7. Duplication: None.

8. Alternatives: The alternative to adding New York Lottery's Lucky Sum as an existing game feature is not to proceed and forfeit the investment already made by the New York State Lottery for the game feature. The failure to proceed will also result in lost revenue to education that is anticipated to be earned.

9. Federal standards: None.

10. Compliance schedule: None.

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

The proposal does not require a Regulatory Flexibility Statement, Rural Flexibility Statement or Job Impact Statement. There will be no adverse impact on jobs, rural areas, small business or local governments.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Accounting for Post-Employment Benefits Other Than Pensions by NYSEG for 1999-2006

I.D. No. PSC-31-07-00011-P

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

Proposed action: The commission is considering a proposal, sponsored jointly by New York State Electric & Gas Corp. (NYSEG), Department of Public Service staff, and multiple intervenors, a group of large industrial customers in New York State, to resolve all issues pending in Case 06-M-1413. That case was opened to investigate NYSEG's accounting for post-employment benefits other than pensions during the years 1999-2006. The joint proposal provides for a customer refund of \$17 million to be paid on or before Dec. 31, 2007 and further provides for certain accounting changes. The commission may accept, reject or modify the joint proposal.

Statutory authority: Public Service Law, sections 65(1), 66(1), (4) and (9)

Subject: Accounting for post-employment benefits other than pensions by NYSEG for 1999-2006.

Purpose: To reconcile NYSEG's accounting for post-employment benefits other than pensions with commission policies and orders relating to accounting practices and rate-setting.

Substance of proposed rule: The Commission is considering a proposal, sponsored jointly by New York State Electric & Gas Corp. (NYSEG), Department of Public Service Staff, and Multiple Intervenors, a group of large industrial customers in New York State, to resolve all issues pending in Case 06-M-1413. That case was opened to investigate NYSEG's accounting for Post-Employment Benefits other than pensions during the year 1999-2006. The joint proposal provides for a customer refund of \$17 million to be paid on or before December 31, 2007 and further provides for certain accounting changes. The Commission may accept, reject or modify the joint proposal.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-M-1413SA1)

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

Transfer of Property by Niagara Mohawk Power Corporation d/b/a National Grid

I.D. No. PSC-31-07-00012-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, modify or reject, in whole or in part, a petition by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) requesting authorization for the transfer of certain utility property and for related relief.

Statutory authority: Public Service Law, section 70

Subject: Transfer of property.

Purpose: To allow National Grid to transfer ownership of utility transformers.

Substance of proposed rule: The Public Service Commission is considering whether to approve, reject or modify, in whole or in part, a request by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) for authority under Section 70 of the Public Service Law to transfer ownership of certain transformers. The transformers would be transferred pursuant to the terms of the Spare Transformer Sharing Agreement that National Grid entered into as part of its participation in the Edison Electric Institute Spare Transformer Equipment Program.

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.

(07-E-0683SA1)

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

Certificate of Incorporation by Corning Natural Gas Corporation

I.D. No. PSC-31-07-00013-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 accept, reject or modify the request by Corning Natural Gas Corporation (the company) pursuant to Public Service Law section 108(1), for approval of and consent to certain amendments to Corning Natural Gas Corporation's Certificate of Incorporation that have been approved by shareholders, so that the company may file the Restated Certificate of Incorporation with the Secretary of State of New York.

Statutory authority: Public Service Law, section 108

Subject: Certificate of Incorporation by Corning Natural Gas Corporation.

Purpose: To approve and consent to shareholder-approved amendments to the Certificate of Incorporation of Corning Natural Gas Corporation and endorse such consent and approval on the Restated Certificate of Incorporation to be filed with the New York Secretary of State.

Substance of proposed rule: The Commission is considering whether to accept, reject or modify the request by Corning Natural Gas Corporation (the Company) pursuant to Public Service Law Section 108(1), for approval of and consent to certain amendments to Corning Natural Gas

Corporation's Certificate of Incorporation that have been approved by shareholders, so that the Company may file the Restated Certificate of Incorporation with the Secretary of State of New York. The company seeks approval of or consent to three changes in its Certificate of Incorporation. They are: (1) authorization to issue preferred stock; (2) elimination of shareholders' preemptive rights; and (3) authorization for shareholders to act by less than unanimous written request. Corning Natural Gas Corporation requests that the Commission, to the extent it deems such actions to be required by law for each of the changes, to approve and consent to these amendments and to endorse such consent and approval on the restated Certificate of Incorporation so that the Company may file such Restated Certificate of Incorporation with the Secretary of State.

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.

(07-G-0787SA1)

Racing and Wagering Board

NOTICE OF WITHDRAWAL

Disqualification of a Horse for Intentional or Careless Interference

I.D. No. RWB-24-07-00006-W

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

Action taken: Notice of proposed rule making, I.D. No. RWB-24-07-00006-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on June 13, 2007.

Subject: Disqualification of a horse for intentional or careless interference.

Reason(s) for withdrawal of the proposed rule: Reconsideration of submission by consensus rulemaking.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Failure to Finish a Harness Race

I.D. No. RWB-31-07-00009-P

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

Proposed action: Amendment of section 4117.2 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

Subject: Failure to finish a harness race.

Purpose: To amend the board's rule, as it pertains to a horse's failure to finish in a harness race.

Text of proposed rule: Subdivision (c) of section 4117.2 of 9 NYCRR is amended to read as follows:

4117.2 Failure to finish.

(c) Any horse or sulky, which shall leave the course, is disqualified and ruled out; except that, in races contested at a track without a continuous hub rail, if, in the opinion of the judges, a horse or sulky is forced off the course as a result of the actions of another horse or driver, *or as a result of*

a break from its gait, the judges may determine the appropriate order of finish. Any horse or sulky which may partly leave the course shall be disqualified one or more positions, as appropriate, if, in the opinion of the judges, such occurrence has had a material effect on the finish of the race.

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, e-mail: 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.

Regulatory Impact Statement

1. Statutory Authority: The Board is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law ("RPMWBL") sections 101 and 301. Under section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel racing activities. Section 301 of the RPMWBL authorizes the Board to supervise generally all harness race meetings in New York at which pari-mutuel betting is conducted, and to adopt rules and regulations to carry into effect the provisions of sections 222 through 705 of the RPMWBL.

2. Legislative Objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and Benefits: The proposed amendment to subdivision (c) of section 4117.2 of the New York Codes Rules and Regulations, will allow judges to use their experience and judgment as to whether such horse should be disqualified in the event that a horse leaves the track in order to regain its gait, and if not, in what order of finish the horse should be placed determine the appropriate order of finish in a race. The current rule allows the judges to decide the appropriate order of finish if a harness horse leaves the track as a result of another horse's actions and then returns to the race, but makes no provision for a horse that intentionally leaves the track in order to regain its gait.

Unlike their thoroughbred cousins, which are not required to maintain a gait, harness horses are required to synchronize the movement of their hooves as they progress along the race track. The pattern of their hoof strikes is known as a gait, which characterize the horses as either trotters or pacers depending on the two types of gait that can be coordinated. For example, a pacer's gait is when its two left legs move in synchronicity and the right legs move in synchronicity, while a trotter's gait is when its front left leg moves in synchronicity with the right rear leg, and the front right leg moves in synchronicity with the left rear leg. A harness horse must maintain its gait throughout a harness race.

The harness rules do allow horses that break gait to drop out from the group, regain its gait and resume racing (see NYCRR 4117.10) so long as the horse has clearance to safely do so. Unfortunately, some horses are unable to drop out from the group because they are "boxed in" by competing horses on their right and directly behind. In such cases, the only option for the horse is to leave the course by veering left, allowing the pack to pass, and then restart the gait once clearance exists.

This rule would allow harness horses to intentionally leave the course in order to allow other horses to clear, and then regain its gait to begin racing again. It removes the disqualification penalty for willfully leaving the track and allows the judges to decide the proper order of finish.

This rule is necessary for the safety of the drivers, who can now seek a safe inside clearance rather than attempt to veer right as they try to find clearance. This rule will benefit the betting public by allowing their horse to remain in a race rather than suffer disqualification. The rule is beneficial to overall racing because a horse that has broken gait will have a clear course of refuge and won't become a disruption to other contending horses. Finally, public confidence in pari-mutuel wagering will be maintained because judges will be allowed to make common sense determinations as to order of finish based on common sense principals shared with the betting public, rather than be bound by over-restrictive rules that cannot address every possible circumstance during the course of a harness race.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: See (d) below.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency's best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. There will be no cost to the agency.

5. Local Government Mandates: None. See above.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: After considerable dialog with the stewards and judges, this amendment provides much needed clarity with respect to a horses failure to finish a race as a result of a break from its gait.

9. Federal Standards: None.

10. Compliance Schedule: Once adopted, the rule can be implemented immediately.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as it merely clarifies an existing rule addressing horses that are declared non-starters in a given race. These proposed amendments do not impact upon State Administrative Procedure Act section 102(8), nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, record-keeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule simply assures continuity of racing, confidence of the betting public, and therefore assists to protect jobs and the robust horse racing and breeding economy in New York State.

Department of Taxation and Finance

NOTICE OF ADOPTION

Refunds, Credits and Reimbursements of Motor Fuel Tax

I.D. No. TAF-22-07-00008-A

Filing No. 715

Filing date: July 17, 2007

Effective date: Aug. 1, 2007

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

Action taken: Amendment of sections 415.1-415.3 and 415.5 of Title 20 NYCRR.

Statutory authority: Tax Law, section 171, subd. First

Subject: Refunds, credits and reimbursements of motor fuel tax.

Purpose: To reflect statutory changes extending the period for applying for a refund, credit or reimbursement from two years to three years.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-22-07-00008-P, Issue of May 30, 2007.

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

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: tax_regulations@tax.state.ny.us

Assessment of Public Comment

Written comment was received from Daniel T. Warren of West Seneca, NY, regarding proposal TAF-22-07-00008-P amending 20 NYCRR Parts 415.1-415.3 and 415.5.

Mr. Warren's comment does not object to the adoption of the proposed rule, but rather urges our agency to adopt, with certain modifications, a 2003 proposal regarding sales on Indian reservations (TAF-38-03-00017-P) that expired. This suggestion is beyond the scope of this rule, which merely reflects statutory changes made by Chapter 302 of the Laws of 2006 to extend the period for applying for a refund, credit or reimbursement under article 12-A of the Tax Law from two years to three years. No changes were made to the proposal as a result of Mr. Warren's comment.

NOTICE OF ADOPTION

Regional Average Retail Sales Price for Motor Fuel and Diesel Motor Fuel

I.D. No. TAF-22-07-00009-A
Filing No. 716
Filing date: July 17, 2007
Effective date: Aug. 1, 2007

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

Action taken: Amendment of Part 561 and repeal of Part 562 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, and 1142(1)

Subject: Regional average retail sales prices for motor fuel and diesel motor fuel.

Purpose: To reflect statutory amendments relating to the regional average retail sales prices of motor fuel and diesel motor fuel.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-22-07-00009-P, Issue of May 30, 2007.

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

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: tax_regulations@tax.state.ny.us

Assessment of Public Comment

Written comment was received from Daniel T. Warren of West Seneca, NY, regarding proposal TAF-22-07-00009-P amending 20 NYCRR Parts 561 and 562.

Mr. Warren’s comment does not object to the adoption of the proposed rule, but rather urges our agency to adopt, with certain modifications, a 2003 proposal regarding sales on Indian reservations (TAF-38-03-00017-P) that expired. This suggestion is beyond the scope of this rule, which merely reflects statutory amendments made by Part M-1 of Chapter 109 of the Laws of 2006 relating to the regional average retail sales prices of motor fuel and diesel motor fuel. No changes were made to the proposal as a result of Mr. Warren’s comment.

(OFT), in consultation with the Governor’s Office of Regulatory Reform (GORR), to promulgate rules and regulations to implement the statute. The purpose of this Part is to establish a process for the entities that are subject to section 164-d to use in prioritizing the application forms to be made available on the Internet and establishing the timing for making such application forms available on the Internet.

Section 552.2 Definitions.

For the purposes of this Part, the terms below have the following meanings:

(a) “Applicant” means a person who makes a formal request to a state agency for an approval, authorization, certification, consent, decision, determination, license, order, permit, registration, or other administrative action.

(b) “Application forms” means those documents provided by a state agency for completion by an applicant to such state agency.

(c) “General public” means all persons and not limited or restricted to a particular class of persons.

(d) “Internet” means the Internet as defined by subdivision 3 of section 202 of the State Technology Law.

(e) “State agency” means every state agency, department, bureau, board, authority, office, commission, or any other instrumentality of the state.

(f) “State agency website” means state agency website as defined by subdivision 7 of section 202 of the State Technology Law.

Section 552.3 Inventory of and Prioritization Process for Application Forms.

(a) Within one hundred eighty (180) days from the effective date of this regulation each state agency shall: (i) review and inventory its existing application forms that are intended to be commonly used by the general public; (ii) determine which of these application forms, if any, have already been made available to the general public on the Internet and which have not; and (iii) establish a priority list for making available to the general public on the Internet those application forms that have not previously been made so available.

(b) With respect to those application forms that the inventory shows have not been made available to the general public on the Internet, each state agency shall prioritize the order and estimated timeframe in which such application forms will be made available on the Internet. In establishing a priority list for making application forms available on the Internet, the state agency may consider, among other things: (i) the annual demand for a particular application form among the general public; (ii) the intended scope of the distribution of a particular application form; and (iii) whether a particular application form is readily convertible to Internet form. In assessing whether an application form is “readily convertible to Internet form,” the state agency may consider, among other things, the characteristics of an application form, including, but not limited to, graphic content, security features, and other technical issues, including the need to comply with laws, policies, and procedures in regard to the accessibility of Internet information and applications, that may make conversion to Internet form more difficult.

(c) The inventory prepared by the state agency pursuant to subdivision (a)(i) of this section and the priority list established by the state agency pursuant to subdivision (a)(iii) of this section shall be posted on a state agency website. The state agency website on which the inventory and priority list are posted shall include a conspicuous and direct link to the inventory and the priority list. The inventory and the priority list shall also be filed with GORR in a format prescribed by GORR.

(d) At least once per year, the state agency’s inventory and priority list shall be updated to reflect the development and distribution by the state agency of any new or redesigned application form that is intended to be commonly used by the general public. Such updated inventory and priority list shall be posted on a state agency website and filed with GORR, in the format prescribed by GORR.

(e) In developing a new application form or updating an existing application form that is intended to be commonly used by the general public, a state agency shall, whenever practicable and reasonable, do so in a manner that facilitates making such application form available on the Internet at the time it is initially made available to the general public. If the state agency is unable to make a newly developed or updated application form available on the Internet at the time it is initially made available to the general public, the state agency shall, as provided in subdivision (d) of this section, add such new or updated application form to the state agency’s inventory and priority list.

Section 552.4 Posting Process.

Office for Technology

NOTICE OF ADOPTION

State Agency Internet Posting of Application Forms

I.D. No. OFT-37-06-00005-A
Filing No. 706
Filing date: July 12, 2007
Effective date: Aug. 1, 2007

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

Action taken: Addition of Part 552 to Title 9 NYCRR.

Statutory authority: Executive Law, section 164-d; and State Technology Law, section 103

Subject: State agency internet posting of application forms.

Purpose: To establish a process for State agencies to use in prioritizing application forms to be made available on the internet and in establishing the timing for posting such forms on the internet.

Text of final rule: A new Part 552 is added to read as follows:

PART 552

STATE AGENCY INTERNET POSTING OF APPLICATION FORMS

Section 552.1 Purpose, Intent, and Applicability.

Section 164-d of the Executive Law provides that the state and every state agency, department, bureau, board, authority, office, commission, or any other instrumentality of the state shall make those various application forms developed and distributed by such agency or instrumentality for public use that are readily convertible to Internet form and that are intended to be commonly used by the general public available on the Internet. Section 164-d requires the New York State Office for Technology

(a) Upon completion of the inventory and priority list required by subdivision (a) of Section 552.3 above, a state agency shall, consistent with the priority list and as expeditiously as possible, begin the process of posting application forms on a state agency website. The state agency website on which the application forms are posted shall include a conspicuous and direct link to the application forms. The direct link to the application forms may be combined with the link to the inventory and the priority list required by subdivision (c) of section 552.3.

(b) In posting application forms on the Internet, state agencies shall comply with laws, policies and procedures in regard to the accessibility of Internet information and applications.

Section 552.5 Miscellaneous Provisions.

(a) OFT, in consultation with GORR, is responsible for administering this Part. OFT and GORR may request and shall receive such assistance and information from state agencies as may be necessary or convenient to properly administer this Part.

(b) Nothing in section 164-d of the Executive Law or this Part shall require that a state agency accept or process application forms submitted through the Internet, or post application forms including user-specific data on the Internet.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 552.3(d).

Text of rule and any required statements and analyses may be obtained from: John Aveni, Office for Technology, State Capitol ESP, P.O. Box 2062, Albany, NY 12220-0062, (518) 473-5115, e-mail: john.aveni@oft.state.ny.us

Revised Regulatory Impact Statement

1. Statutory authority: Section 164-d of the Executive Law requires the Office for Technology (OFT), in consultation with the Governor's Office of Regulatory Reform (GORR), to promulgate rules and regulations to implement the provisions of this section of the Executive Law. Additionally, Section 103(11) of the State Technology Law authorizes OFT to adopt rules and regulations necessary or convenient to the performance of OFT's functions, powers and duties.

2. Legislative objectives: Section 164-d of the Executive Law was enacted to allow citizens to access certain state application forms on the Internet. To this end, section 164-d requires state agencies to make available on the Internet those application forms that are: (i) intended to be commonly used by the general public; and (ii) readily convertible to the Internet format. This section also provides that OFT, in consultation with GORR, shall promulgate regulations to implement the provisions of section 164-d. Section 164-d requires that such regulations shall at least provide for the prioritization and timing for making application forms available on the Internet. This proposed regulation achieves this Legislative objective by setting forth processes for state agencies to use in inventorying existing application forms and in prioritizing the order and timing in which application forms that are intended to be commonly used by the general public, and that are readily convertible to the Internet format, will be made available on the Internet.

3. Needs and benefits: The purpose of this proposed regulation is to establish processes pursuant to which state agencies will: (i) review and inventory existing state agency application forms intended to be commonly used by the general public; (ii) determine which of those application forms are already available to the general public on the Internet; and (iii) establish a publicly accessible priority list of the order and estimated timeframes in which application forms that are not currently available on the Internet, and which are readily convertible to Internet form, will be made available on the Internet. Such processes are necessary to achieve the stated objective of providing the general public access to commonly used state agency application forms on the Internet. The processes established also provide state agencies with adequate time in which to review and inventory their existing application forms that are intended to be commonly used by the general public, and with a structure for prioritizing the order and timeframe in which any such application forms that have not previously been made available on the Internet will be posted on the Internet. This structure includes certain factors that a state agency may take into consideration in establishing its priority list of application forms to be made available on the Internet. Furthermore, this proposed regulation recognizes that, where practicable and reasonable, state agencies shall develop new application forms that are intended to be commonly used by the general public, or update existing application forms, in a manner that facilitates making such forms available on the Internet. The proposed regulation also recognizes the need for state agencies to comply with existing laws, policies, and procedures regarding the accessibility of information and applications that are posted on the Internet by state agencies.

As a consequence of the operation of the proposed regulation, those application forms that are readily convertible to Internet form and are intended to be commonly used by the general public will be made available on the Internet in a timely and orderly fashion.

4. Costs: This proposed regulation imposes no costs on citizens or businesses seeking to access commonly used state agency application forms on the Internet. Also, the implementation of this proposed regulation should pose nominal costs for state agencies that are now statutorily required to make commonly used application forms available on the Internet. In consultations with GORR and other state agencies, and from a review of information in OFT's Annual e-Commerce Reports, many state agencies are already making the State's most commonly used application forms available on the Internet. In so doing, state agencies are already mandated by state policies to comply with certain accessibility standards and practices to ensure that state agency web-based Internet information and applications are accessible to persons with disabilities. Additionally, most state agencies currently maintain Internet websites on which such application forms can be posted. The proposed regulation permits those state agencies that do not maintain a website to use another state agency's website for such purposes, therefore, negating the need to create an agency-specific website with its related costs. Furthermore, the proposed regulation does not require the immediate posting of all application forms that fall within the scope of section 164-d, but instead allows state agencies 180 days from the effective date of the regulation to inventory existing application forms and then establish the order and estimated timeframe for making available on the Internet only those application forms that are readily convertible to the Internet format and are intended to be commonly used by the general public. Finally, the Law and proposed regulation specifically provide that state agencies are not required to accept or process application forms submitted through the Internet, which, if required, could prove more costly to implement.

5. Local government mandates: The proposed regulation imposes no program, service, duty or responsibility upon any local government entity, since the provisions of section 164-d only apply to state agencies.

6. Paperwork: The proposed regulation requires a state agency to post on a state agency website its inventory of existing application forms and the priority list it establishes for the order and timing of making such forms available on the Internet. A state agency must also file its inventory and priority list with GORR in a format prescribed by GORR. Additionally, and at least once per year, a state agency's inventory and priority list shall be updated to reflect new or redesigned application forms and any such updated list shall be posted on a state agency website and filed with GORR. In this fashion, a state agency's inventory and priority list will be made publicly available, thus informing citizens of those application forms intended to be commonly used by the general public that are already available on the Internet and of the timeframes in which other application forms that are readily convertible to Internet format are expected to be made so available. Filing the initial and updated inventory and priority lists with GORR will: (1) enable OFT, in consultation with GORR, to assess compliance with the statutory requirement that certain application forms be made available via the Internet; (2) support the continuing development of the State's Online Permit Assistance and Licensing (OPAL) initiative, which provides a single portal for an individual to obtain information about and apply for permits and other approvals required to start or expand a business; and (3) enhance access to government services through electronic media.

7. Duplication: There are no state or federal government rules or legal requirements that duplicate, overlap or conflict with this proposed regulation.

8. Alternatives: There were no significant alternatives to this proposed rulemaking to be considered by OFT, since section 164-d mandates that OFT, in consultation with GORR, promulgate rules and regulations to implement its provisions.

9. Federal standards: There are no federal government standards that address the posting of state agency application forms on the Internet. Therefore, this proposed regulation does not exceed any minimum standards imposed by the federal government.

10. Compliance schedule: The proposed regulation provides that each state agency will have 180 days from the effective date of the regulation to review and inventory its existing application forms, to determine which of those application forms, if any, have already been made available to the general public on the Internet, and to establish a priority list for making available on the Internet those application forms that are readily convertible to Internet format and are intended to be commonly used by the general public which have not yet been made available on the Internet. Once a state

agency has completed its inventory and priority list, the proposed regulation requires that the state agency shall, consistent with the priority list and as expeditiously as possible, begin the process of posting application forms on a state agency website.

Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis (RFA) is not attached because this proposed rule will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This finding is based upon the fact that this proposed rule implements a law that requires state agencies, and not businesses or local governments, to make certain application forms available to the general public on the Internet. This proposed rule imposes no economic impact or other requirements on small businesses, local governments or any members of the general public who access these application forms through the Internet.

Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis (RAFA) is not attached because this proposed rule will not impose any adverse impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that this proposed rule implements a law that requires state agencies, and not public or private entities in rural areas, to make certain application forms available to the general public on the Internet. This proposed rule does not adversely impact or impose requirements on any other entities or on any members of the general public who access these application forms through the Internet.

Job Impact Statement

A revised Job Impact Statement (JIS) is not attached because this proposed rule will not have a substantial adverse impact on jobs and employment opportunities as apparent from the rule's nature and purpose. This finding is based upon the fact that this proposed rule implements a law that requires state agencies to make certain application forms available to the general public on the Internet. Making such application forms available on the Internet should facilitate and expedite transactions with state agencies, thus improving the general public's ability to do business with the state. Consequently, this proposed rule should have a positive impact on jobs and employment opportunities in the state.

Assessment of Public Comment

The Office for Technology (OFT) received two written comments during the 45 day public comment period following the publication in the State Register on September 13, 2006 of the Notice of Proposed Rule Making relative to this adoption. Both comments were from State agencies that will be directly affected by this rule. One agency questioned that part of § 552.3(c) of the rule which provides that in addition to posting a State agency's inventory and priority list on a State agency web site, the list shall also be filed with the Governor's Office of Regulatory Reform (GORR) in a format prescribed by GORR. This agency questioned the necessity of separately filing with GORR a list that will be publicly available on a State agency web site. In addition, this agency was of the opinion that the requirement in § 552.3(d), that a State agency re-file an updated list with GORR whenever it develops and distributes any new or redesigned application form, was unduly burdensome to an agency with thousands of forms on its web site which undergo continual changes over the course of a given year. This agency requested that the requirement of filing an inventory and priority list with GORR either be deleted in its entirety or that State agencies only be required to file updated lists with GORR periodically on an annual basis. In response to this request, OFT has revised § 552.3(d) of the rule to clarify that a State agency shall update its inventory and priority list to identify any new or redesigned application forms at least once per year and file the updated inventory and priority list with GORR. OFT believes that this change is a non-substantial revision of the rule since it does not materially alter the purpose, meaning or effect of the original text. While this revision provides that the updating and re-filing of inventory and priority lists need occur only once per year, State agencies remain free to update their inventory and priority lists and file the same with GORR on a more frequent basis. This revision addresses a potentially burdensome requirement for certain regulated State agencies, while allowing other agencies to continue to operate as provided in the original text of the rule. A second State agency suggested a technical modification to the definition of the term "applicant" that appears in § 552.2(a) of the rule. The original text of the rule defines "applicant" as "a person who makes a formal request to a state agency for an approval, authorization, etc. ..." It was suggested that this definition be modified to "a person who is a member of the general public and who makes a formal request to a state agency for an approval, authorization, etc. ..." OFT does not believe that this suggested

technical change makes any substantive difference to the definition of the term "applicant," since the rule defines "general public" as "all persons and not limited or restricted to a particular class of persons." Consequently, adding the phrase "who is a member of the general public" to the definition of "applicant" appears to have no impact on the persons who are included in and captured by that definition, namely, all persons. Thus, OFT has elected not to make this technical change to the definition of "applicant."

Thruway Authority

NOTICE OF ADOPTION

E-ZPass Discount Plan

I.D. No. THR-46-06-00019-A

Filing No. 714

Filing date: July 17, 2007

Effective date: Aug. 1, 2007

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

Action taken: Amendment of section 101.2 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), (8), (15), 361(1)(a); and Vehicle and Traffic Law, section 1630

Subject: E-ZPass discount plan.

Purpose: To implement a special additional E-ZPass discount plan.

Text of final rule: Amendment to Section 101.2 of NYCRR Title 21.

Section 101.2 Toll schedules and fees.

The following toll schedules and fees shall apply for the use of the Thruway system:

(a) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the cash tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule" and each of which is appended hereto in Appendix A-1, (see section 101.4 of this Part) and made a part hereof. Effective January 6, 2008 such cash tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule 2008" and each of which is appended hereto in Appendix A-2, (see section 101.4 of this Part) and made a part hereof.

(b) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the E-ZPass tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule - E-ZPass" and each of which is appended hereto in Appendix A-3, (see section 101.4 of this Part) and made a part hereof except that certain commercial vehicles including but not limited to certain commercial vehicles in classes 2H, 3H, 4H, 5H, 6H and 7H, may be eligible for a special additional E-ZPass discount[.] and except that vehicles in class 2L that meet fuel efficiency and emissions standards, as determined by the authority, may also be eligible for a special additional E-ZPass discount.

(c) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the E-ZPass tolls for motorcycles and for motorhomes each having an authorized E-ZPass tag shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule - Motorhome E-ZPass and Motorcycle E-ZPass" and each of which is appended hereto in Appendix A-4, (see section 101.4 of this Part) and made a part hereof.

(d) Annual permit plan.

(1) Class 2L vehicles with authorized E-ZPass tags are eligible for the annual permit plan on the controlled system only if such vehicles are held in the name of or leased to:

(i) an individual or two individuals not constituting a business entity; or

(ii) a nonprofit, religious, charitable or educational organization.

Class 2L vehicles owned by or leased to partnerships, corporations or other business entities (including rental companies) are not eligible for the annual permit plan. To receive the annual permit plan discount, customers must comply with all of the terms and conditions of their authorized E-ZPass License Agreement.

(2) All customers that apply and qualify for the annual permit plan shall, upon payment of \$80, be entitled to use one designated E-ZPass tag, which is transferable to vehicles listed in paragraph (1) of this subdivision that are on the customer's E-ZPass account, that will provide an unlimited number of trips of 30 miles or less on the controlled system without payment of additional tolls, except that a toll of 45 cents shall be charged for all trips across the Castleton-on-Hudson Bridge, which will be charged to the annual permit plan customer's account at the time of exit from the controlled system. Under the annual permit plan, for each trip over 30 miles, the amount of the toll charged shall be discounted by the amount of the toll for the first 30 miles of that trip in accordance with the detailed toll schedule, which is designated "New York State Thruway Toll Schedule – Permits" which is appended hereto in Appendix A-5, (see section 101.4 of this Part) and made a part hereof. The annual permit plan shall become effective on the date of issuance of such permit and shall be valid for a term of one year. Customers may purchase the annual permit plan for each E-ZPass tag issued under their account for vehicles listed in paragraph (1) of this subdivision.

(e) Commercial charge accounts. Commercial charge account customers must have an authorized E-ZPass account. Commercial charge account customers with authorized E-ZPass tags shall be allowed a volume discount on such terms as may be set by the authority from time to time, provided that their operators or operating companies apply, qualify, establish and maintain a formal commercial charge account with the authority. Registered omnibuses that maintain a formal charge account with the authority shall be allowed a special discount, in addition to a volume discount, if any, provided that their operators or operating companies file with the authority's department of finance and accounts a formal certification that the operator or operating company operates buses on the Thruway system.

(f) Bridge and barrier stations. (1) The cash tolls for bridge and barrier stations are as follows:

	TAPPAN ZEE BRIDGE *	NEW ROCHELLE *	YONKERS	SPRING VALLEY *	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
2L	\$4.00	\$1.25	\$0.75	\$0.00	\$0.75	\$0.75	\$0.75
3L	\$9.50	\$2.00	\$1.00	\$2.50	\$1.00	\$1.00	\$1.00
4L	\$11.25	\$2.50	\$1.25	\$3.75	\$1.25	\$1.25	\$1.25
2H	\$12.25	\$2.75	\$1.50	\$4.25	\$1.50	\$1.50	\$1.50
3H	\$17.00	\$3.50	\$1.75	\$6.75	\$2.25	\$2.50	\$1.75
4H	\$20.25	\$4.25	\$2.25	\$6.75	\$2.50	\$2.75	\$2.25
5H	\$27.00	\$6.75	\$3.50	\$11.00	\$3.50	\$4.25	\$3.50
6H	\$33.75	\$7.50	\$3.75	\$12.25	\$4.25	\$4.75	\$3.75
7H	\$40.50	\$8.25	\$4.25	\$13.50	\$4.75	\$5.50	\$4.25

* Toll collected one way only.

The E-ZPass tolls for bridge and barrier stations are as follows, except that certain commercial vehicles including but not limited to certain commercial vehicles in classes 2H, 3H, 4H, 5H, 6H and 7H, may be eligible for a special E-ZPass discount[.] and except that vehicles in class 2L that meet certain fuel efficiency and emissions standards, as determined by the authority, may also be eligible for a special additional E-ZPass discount:

	TAPPAN ZEE BRIDGE **	TAPPAN ZEE BRIDGE **	NEW ROCHELLE *	YONKERS	SPRING VALLEY **	SPRING VALLEY **	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
	PEAK	OFF PEAK			PEAK	OFF PEAK			
Resident									\$0.09
Carpool	\$0.50	\$0.50							
Commuter	\$2.00	\$2.00	\$1.00	\$0.50			\$0.50	\$0.50	\$0.25
2L	\$3.60	\$3.60	\$1.13	\$0.68	\$0.00	\$0.00	\$0.68	\$0.68	\$0.68
3L	\$9.50	\$4.75	\$1.80	\$0.90	\$2.50	\$1.25	\$0.90	\$0.90	\$0.90
4L	\$11.25	\$5.63	\$2.25	\$1.13	\$3.75	\$1.88	\$1.13	\$1.13	\$1.13
2H	\$12.25	\$6.13	\$2.61	\$1.43	\$4.25	\$2.13	\$1.43	\$1.43	\$1.43
3H	\$17.00	\$8.50	\$3.33	\$1.66	\$6.75	\$3.38	\$2.14	\$2.38	\$1.66
4H	\$20.25	\$10.13	\$4.04	\$2.14	\$6.75	\$3.38	\$2.38	\$2.61	\$2.14
5H	\$27.00	\$13.50	\$6.41	\$3.33	\$11.00	\$5.50	\$3.33	\$4.04	\$3.33
6H	\$33.75	\$16.88	\$7.13	\$3.56	\$12.25	\$6.13	\$4.04	\$4.51	\$3.56
7H	\$40.50	\$20.25	\$7.84	\$4.04	\$13.50	\$6.75	\$4.51	\$5.23	\$4.04

* Toll collected one way only.

** Toll collected one way only and the toll indicated for classes 3L through 7H represent the maximum amounts to be charged. The tolls for classes 3L through 7H may be reduced, on a graduated scale or otherwise, during certain hours for E-ZPass holders within such classes and upon such terms and conditions as the authority may determine from time to time.

The motor home and motorcycle Plan tolls for bridge and barrier stations are as follows:

	TAPPAN ZEE BRIDGE **	TAPPAN ZEE BRIDGE **	NEW ROCHELLE *	YONKERS	SPRING VALLEY **	SPRING VALLEY **	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
	PEAK	OFF PEAK			PEAK	OFF PEAK			
MTRHOME									
2 AXLES	\$3.60	\$3.60	\$1.13	\$0.68	\$0.00	\$0.00	\$0.68	\$0.68	\$0.68
MTRHOME									
3 AXLES	\$9.50	\$4.75	\$1.80	\$0.90	\$2.50	\$1.25	\$0.90	\$0.90	\$0.90
MTRHOME									
4 AXLES	\$11.25	\$5.63	\$2.25	\$1.13	\$3.75	\$1.88	\$1.13	\$1.13	\$1.13
2/3 AXLES	\$2.00	\$2.00	\$0.63	\$0.38	\$0.00	\$0.00	\$0.38	\$0.38	\$0.38

* Toll collected one way only.

** Toll collected one way only and the toll indicated for motor homes (with 3 or more axles) represents the maximum amounts to be charged. The tolls for motor homes (with 3 or more axles) may be reduced, on a graduated scale or otherwise, during certain hours for E-ZPass holders within such classes and upon such terms and conditions as the authority may determine from time to time.

On January 6, 2008 the Cash tolls will increase for bridge and barrier stations as follows:

	TAPPAN ZEE BRIDGE *	NEW ROCHELLE *	YONKERS	SPRING VALLEY *	HARRIMAN	CITY LINE/ BLACK ROCK *	GRAND ISLAND BRIDGES
2L	\$4.50	\$1.50	\$1.00	\$0.00	\$1.00	\$1.00	\$1.00
3L	\$10.50	\$2.25	\$1.25	\$2.75	\$1.25	\$1.25	\$1.25
4L	\$12.50	\$2.75	\$1.50	\$4.25	\$1.50	\$1.50	\$1.50
2H	\$13.50	\$3.25	\$1.75	\$4.75	\$1.75	\$1.75	\$1.75
3H	\$18.75	\$4.00	\$2.00	\$7.50	\$2.50	\$2.75	\$2.00
4H	\$22.50	\$4.75	\$2.50	\$7.50	\$2.75	\$3.25	\$2.50
5H	\$29.75	\$7.50	\$4.00	\$12.25	\$4.00	\$4.75	\$4.00
6H	\$37.25	\$8.25	\$4.25	\$13.50	\$4.75	\$5.25	\$4.25
7H	\$44.75	\$9.25	\$4.75	\$15.00	\$5.25	\$6.25	\$4.75

* Toll collected one way only.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 101.2(b), (f).

Text of rule and any required statements and analyses may be obtained from: Marcy Pavone, Legal Assistant, New York State Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-3188, e-mail: marcy_pavone@thruway.state.ny.us

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

The rule as adopted contains nonsubstantial revisions. These revisions do not necessitate that a revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement be issued.

Assessment of Public Comment

1. This Notice of Proposed Rule Making was published in the *State Register* on November 15, 2006. The Thruway Authority received one public comment relating to this special additional E-ZPass discount program. The commentor suggested that this discount program include alternate fuel vehicles, as well as the hybrid vehicles with certain fuel efficiency and emissions standards as cited in the Needs and Benefits section of the Regulatory Impact Statement.

2. The Thruway Authority's special additional E-ZPass discount program is based on the Governor's 9-Point Strategic Energy Action plan and offers a special additional E-ZPass discount to customers with vehicles that meet certain fuel efficiency and emissions standards. This E-ZPass discount program uses the exact same program criteria as the New York State Department of Motor Vehicles uses to qualify vehicles to use certain high occupancy vehicle (HOV) lanes even though the vehicles do not contain the requisite number of passengers ordinarily required for the use of such lanes. It is not only required that the vehicle be hybrid in nature, but also that certain fuel efficiency and emissions standard are met. The commentor's suggested vehicle may meet the emissions standard but does not meet the fuel efficiency standard as required by the program criteria.

3. The rule making as published meets the objectives set forth in the Governor's 9-Point Strategic Energy Action plan and is consistent with the criteria established by the Department of Motor Vehicles for HOV use.

The suggestion to include alternative fuel vehicles in this special additional E-ZPass discount program will not meet the fuel efficiency standard of this program and as a result, no change to the rule was made.

Workers' Compensation Board

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules

I.D. No. WCB-31-07-00001-E

Filing No. 705

Filing date: July 11, 2007

Effective date: July 11, 2007

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Claimants are unduly burdened by having to pay out-of-pocket for prescription medications thus reducing the amount of benefits available to them to pay for cost of living expenses. Adoption of this fee schedule will alleviate this burden to claimants, effectively maximizing the benefits available to them and eliminating the delay associated with requesting reimbursement from the insurance carrier. Adoption of this amendment is necessary to get prescription drugs to claimants faster by allowing pharmacies to directly bill carriers and to eliminate the litigation caused by the differences in cost of prescription drugs and the reimbursement rates paid by carriers. Adoption of this amendment also allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules.

Purpose: To adopt pharmacy and durable medical equipment fee schedules.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after July 11, 2007.

Section 440.2 provides the definitions for brand name drugs, controlled substances, generic drugs, and rural areas.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances where an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is equivalent to the New York State

Medicaid fee schedule for prescription drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is ten percent above the New York State Medicaid fee schedule plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets forth that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item.

Appendix A provides the form for notification to be posted in designated pharmacies listing the insurance carriers that are served by the pharmacy.

Appendix B provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix C provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

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 October 8, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Esq., Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 486-9564, e-mail: officeofgeneralcounsel@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Workers' Compensation Law (WCL) § 117 authorizes the Chair of the Workers' Compensation Board (Board) to adopt reasonable rules consistent with the provisions of the WCL. Chapter 6 of the Laws of 2007 added Section 13-o to the WCL mandating that the Chair adopt a pharmaceutical fee schedule. Chapter 6 amended WCL Section 13 to add new subdivision (j). Paragraph (5) of said new subdivision requires the adoption of regulations defining the reasonable distance for a claimant to travel to obtain prescriptions. WCL Section 13(a) was amended by Chapter to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. Finally, Section 80 of Chapter 6 authorizes the Chair, in consultation with the Superintendent of Insurance, to adopt regulations relating to the procedural requirements necessary to implement the provisions of Chapter 6.

2. Legislative objectives: The proposed regulations provide fee schedules to govern the cost of prescription medicines and durable medical equipment in order to control the cost of workers' compensation insurance. Additionally, the proposed regulations provide process and guidance for

claimants, employers, insurance carriers, third party administrators and self-insured employers regarding the operation of pharmacy networks and the payment of prescription bills and durable medical equipment bills according to a uniform standard so that delays in reimbursement or payment to claimants or pharmacies are reduced or eliminated.

3. Needs and benefits: Chapter 6 of the Laws of 2007 enacted sweeping reforms of the New York workers' compensation system. Among other things, the legislation requires the Chair to adopt a pharmacy fee schedule and a fee schedule to govern durable medical equipment. In a major shift, the legislation authorizes insurance carriers and self-insured employers to require claimants to obtain prescriptions from a pharmacy that participates in the network the carrier or self-insured employer may contract with. Prior to this legislation, carriers and self-insured employers were prohibited from directing claimants as to where to obtain medicines, unless the carrier or self-insured employer utilized a Preferred Provider Organization (PPO). Even then claimants could opt out of the PPO after thirty days. To ensure claimants do not have to travel long distances to reach a network pharmacy, WCL Section 13(i)(5) requires a pharmacy location to be within a "reasonable distance" of the claimant's home if the option of a mail order pharmacy is not available. The term "reasonable distance" is to be defined in regulations. Finally, new WCL § 13(i)(2) sets forth the time period and process by which bills for pharmaceuticals must be paid.

The purpose of the rule is to comply with the requirements of the legislation. The rule sets forth the fee schedules for prescription medicines and durable medical equipment. Currently, there is no set fee for prescriptions and durable medical equipment. Instead, the pharmacies and other providers of durable medical equipment charge the price they set. The carrier or self-insured employer must then pay the billed cost or object to the portion which is determined to be excessive or greater than the charges that prevail in the claimant's community. In the past a particular pharmacy has charged more than twice what is considered the customary charge. Disputes over the payment for prescription medications to pharmacies must, in many cases, be decided by a Workers' Compensation Law Judge (WCLJ). Using hearings to resolve these disputes is very costly and time consuming. The time a WCLJ spends deciding the correct payment to a pharmacy is time not spent adjudicating claims for benefits. By having a set fee schedule, there is no dispute over the proper payment for a prescription.

The fee schedule also provides savings to carriers, and ultimately to employers by reducing the cost of workers' compensation insurance. These entities will indirectly benefit from the savings afforded by Medicaid's negotiating power with drug manufacturers. Those carriers and self-insured employers paying currently paying average wholesale price will realize savings of approximately 14 percent for brand name medications and 25 percent for generic medications.

Additionally, the rule requires carriers to provide notice to a claimant that a network pharmacy has been designated and the procedures for filling prescriptions at the designated network pharmacy. The rule sets forth the information that must be included in the notice and the time frame within which notification must be given to the claimant and by the proper means to deliver such notice. The rule also facilitates direct billing of the carrier by the network pharmacy. This benefits the carrier as well as the claimant by reducing the delays inherent in submitting bills to the carrier by the claimant. Direct billing benefits the claimants by eliminating the out-of-pocket costs when they use a network pharmacy. Pharmacies benefit by the reduction or elimination of delay in payment. The rule also provides an incentive to pharmacies to provide prescription drugs in cases where liability is controverted by the carrier by providing an extra dispensing fee, as well as an increase in price of 10 percent.

The rule will benefit self-insured employers and/or carriers by providing a set fee at which the pharmacy or claimant is to be reimbursed. A uniform standard for pricing will reduce the claims litigation which arises when there is a price difference between the price a carrier will pay and the actual costs incurred by a pharmacy or claimant. This rule also allows self-insured employers, carriers and their agents to select a pharmacy that can provide a cost savings and provide the same or better service to a claimant. The rule will benefit workers' compensation claimants by reducing the cost of prescriptions that a claimant pays for out of pocket, increasing timeliness as to the amount they will be reimbursed for prescription drug costs or durable medical equipment, increasing the use of direct billing to the carrier rather than out of pocket payments by a claimant.

The rule will also benefit the Board as it is anticipated that there will be a reduction in the number of hearings held to determine the proper amount of reimbursement to claimants for prescription drugs or durable medical equipment. The rule is also a benefit because it mitigates any adverse

impact by using an existing fee schedule (the Medicaid pharmacy fee schedule) that is familiar to state agencies and insurance carriers. It promotes a uniform standard across state agencies utilizing a pharmacy fee schedule and by preventing the need to change multiple systems to administer claims.

4. Costs: There are additional costs for carriers or self-insured employers. They are liable for the cost of medications if they do not respond to a bill for prescription drugs sent by a pharmacy or claimant within 45 days. This cost does not apply if carriers or self-insured employers respond in a timely fashion as provided by the rule. This cost is also imposed by the legislation. There are costs associated with sending the required notices, such as those set forth as Appendices B and C to the claimant that a network pharmacy has been designated and the procedures to follow in utilizing the network pharmacy. However, in many cases the required notices can be sent with currently required forms so there should be limited additional postage necessary.

Pharmacies will have a minimal cost associated with posting a notice that they are part of a designated network and the procedures for the claimant to follow. The fee schedule will also reduce the amount that a pharmacy can charge for a drug, but that cost is offset by the savings to the Workers' Compensation system as a whole. It should be noted that fee schedules are used in many other areas such as Medicare, Medicaid, and No Fault Insurance which were implemented to reduce costs associated with these programs. Pharmacies will also see this cost offset by the reduction in administrative expenses associated with seeking reimbursement from the carrier since the carrier must pay or object within forty-five days and the fee schedule will eliminate controversies regarding the reimbursement cost of a drug. Overall, workers' compensation prescriptions comprise 3 percent of average pharmacy sales, and thus the impact of the savings from these regulations on overall pharmacy business are limited, and offset by the reduction in administrative expenses for reimbursement and by faster reimbursement from carriers. The procedures for processing bill payment and reimbursement are anticipated to remain the same; therefore, no additional costs associated with record keeping or processing claims will be incurred. The new rule will allow carriers, self-insured employers and their agents to contract with a pharmacy or network of pharmacies to provide prescription drugs or durable medical equipment, thus allowing them to negotiate for the lowest cost of providing such drugs or durable medical equipment. The use of a uniform price standard will reduce the number of hearings necessary to determine what amounts are due and owing to a claimant thus reducing the costs necessary for legal representation at the hearing. It is anticipated that costs will be reduced for claimants.

5. Local government mandates: A municipality or governmental agency that is self-insured is required to comply with the rules for reimbursement for prescription drugs and the rules for notice of a designated network pharmacy. Municipalities or governmental agencies have the option to designate a pharmacy network, however, the fee schedule will still afford substantial savings to a municipality or governmental agency if a pharmacy network is not designated. It is expected that the regulation will actually reduce costs by allowing self-insured local governments to negotiate for lower prescription costs with contracted pharmacies.

6. Paperwork: There are notification requirements that must be met by carriers, employers and pharmacies. Carriers are required by Section 13(i)(5) of the new legislation to provide notice to claimants that a pharmacy network has been designated and that claimants are required to use it to fill their prescriptions. The regulations specify the notice in Appendices B and C. Additionally, notice must be given to all employees when a carrier or self-insured employer contracts with a network so that when an employee is injured he or she knows to use a network pharmacy. This will eliminate the need for the claimant to pay out of pocket and to maximize the savings for the carrier or self-insured employer. When contracting with a network, a carrier or self-insured employer also has the option to establish a streamlined method of payment, eliminating the receipt of multiple bills for prescriptions. In addition, carriers are required to respond to a prescription bill within 45 days or they will waive any objection to payment of a prescription bill. Carriers are also required to certify annually to the Board that the pharmacies in the designated network are in compliance with the regulation. Employers are required to post notice in the workplace that a network pharmacy has been designated and the procedures for utilizing the network pharmacy as well as providing notice to the claimant. Pharmacies are required to post notice that the pharmacy has been designated as a network pharmacy and the procedures for filling prescriptions at that pharmacy. The existing procedure of submitting bills and reimbursement requests to the carrier, third party administrator, or self-insured

employer will remain the same. While the regulation requires a number of notices, this is to ensure the claimant is aware of the arrangement with a network and the requirement to use the network to benefit carriers, claimants and employers through lower costs.

7. Duplication: There is no duplication.

8. Alternatives: Based upon the mandate of the Legislature to establish fee schedules, the Board is essentially required to promulgate regulations in order to ensure the orderly implementation of the proposed fee schedules. To fail to delineate the responsibilities of all participating parties would be imprudent as it would lead to confusion on the issue of timely payment and cause an increase in the number and length of hearings required to resolve this issue. An alternative pharmacy fee schedule was developed using other states fee schedules as a model. Other states generally use a formula consisting of the average wholesale price ("AWP") plus or minus a percentage which varies between plus 40% and minus 12%. The formula may or may not include a dispensing fee which varies between \$3.00 and \$8.70 depending on the state. California has adopted that State's Medicaid fee schedule known as MediCal. The experience in California has produced great savings and there have been no issues regarding claimant's ability to obtain prescription medications.

Initially, the Board considered using the average wholesale price minus 15 percent, or the Medicare fee schedule. It was also suggested by the Pharmacy Alliance that a pharmacy fee schedule be developed to use the average wholesale price plus five dollars for brand name drugs and average wholesale price plus 10 percent plus five dollars for generics. These proposals were judged to be too high to provide significant savings, which would defeat the legislative purpose for the rule.

Rather, it was determined to use the Medicaid fee schedule set by the Department of Health, as it is set for New York, widely known and would generate sufficient savings.

Discussions about the content of the regulations were held with the Assembly and Senate as well as the Business Council of New York State and the AFL-CIO who provided comments and suggestions to be considered in the regulations.

9. Federal standards: There are no applicable Federal Standards.

10. Compliance schedule: The proposed regulation is mandatory. All affected carriers and self-insured employers will have to use the proposed fee schedules beginning on July 11, 2007.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills or durable medical equipment bills if they object to any such bills. This process is required by statute. This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small business and local government by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers are required by statute to file objections to prescription drug bills or durable medical equipment bills within a forty five day time period if they object to the bill, otherwise they will be liable to pay for the bill if the objection is not timely filed. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by

carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Professional services:

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

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that utilizes a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The New York State Department of Health Medicaid Office has the fee schedule posted on the Medicaid website. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices. Further, the Board already provides information for the general public on its website. The Board will provide access to the fee schedule through its website or by providing a link to the Department of Health Medicaid Office. No other additional equipment or software is needed for access to the fee schedule other than an existing web browser and a computer with internet access.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the significant savings by using Medicaid as the index for a pharmacy fee schedule instead of reimbursement at retail prices as currently exists.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills or durable medical equipment bills within a forty five day time period or will be liable for payment of a bill. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule is also a benefit because it mitigates any adverse impact by using an existing fee schedule (the Medicaid fee schedule) that is familiar to state agencies and insurance carriers that encounter the Medicaid pharmacy fee schedule. It promotes a uniform standard across state agencies utilizing a pharmacy fee schedule and by preventing the need to change multiple systems to administer claims.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.