

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Required Procedures for Weights and Measures Officials

I.D. No. AAM-43-07-00001-P

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

Proposed action: This is a consensus rule making to add section 220.14 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18 and 197-b(3)(a)

Subject: Required procedures for weights and measures officials to determine accuracy of prices of merchandise offered for sale at retail stores.

Purpose: To incorporate by reference “Examination Procedure for Price Verification,” as set forth in NIST Handbook 130.

Text of proposed rule: 1 NYCRR is amended by adding thereto section 220.14, to read as follows:

220.14 Testing Procedures for Price Verification. The testing procedures for pricing accuracy shall be those adopted by the 80th National Conference on Weights and Measures and published in the National Institute of Standards and Technology Handbook 130, 2006 edition, “Examination Procedure for Price Verification”. This document is available from the National Conference on Weights and Measures, 15245 Shady Grove

Road, Rockville, MD 20850, or the Superintendent of Documents, U.S. Government Printing Office, Washington DC 20402. It is available for public inspection and copying in the office of the Director of Weights and Measures, Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, or in the office of the Department of State, 41 State Street, Albany, NY 12231.

Text of proposed rule and any required statements and analyses may be obtained from: Ross Andersen, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3146, e-mail: ross.andersen@agmkt.state.ny.us

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

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

Consensus Rule Making Determination

The proposed rule amends 1 NYCRR by adding thereto section 220.14, to incorporate by reference “The Examination Procedure for Price Verification” as adopted by the National Conference on Weights and Measures (NCWM) at its 80th Annual Meeting in 1995. The document was first published in the 1996 edition of National Institute of Standards and Technology (NIST) Handbook 130 and has remained unchanged in every edition of NIST Handbook 130 published subsequent thereto.

The proposed rule is required pursuant to the directive set forth in Agriculture and Markets Law section 197-b(3)(a) as added by Chapter 665 of the Laws of 2006. Such provision of law, inter alia, requires the Commissioner of Agriculture and Markets to “. . . adopt test procedures utilizing randomized sampling techniques . . . [that are] consistent with the examination procedure for price verification developed by [NCWM] and published in [NIST] handbook one hundred thirty.” The proposed rule is, therefore, a consensus rule because it implements a non-discretionary statutory provision.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs or on employment opportunities.

The proposed rule will amend 1 NYCRR by adding thereto section 220.14, to incorporate by reference “The Examination Procedure for Price Verification”, as it appears in National Institute of Standards and Technology Handbook 130, 2006 edition. The procedure in such document is used by the weights and measures officials in verifying compliance with pricing accuracy statutes and the use of these procedures is not incumbent on any retail store operator or employee.

The proposed rule will not, therefore, have any adverse impact upon jobs or employment opportunities.

Office of Children and Family Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Market Rates for Subsidized Child Care

I.D. No. CFS-43-07-00012-P

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

Proposed action: Amendment of section 415.9 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 410 and 410-x(4)

Subject: Market rates for subsidized child care.

Purpose: To update the market rates social services districts can pay for subsidized child care.

Text of proposed rule: Section 415.9(j) is amended to read as follows and a new rate schedule is added to read as follows:

(1) Effective October 1, [2005] 2007, following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week.

(2) The market rates are established in five groupings of social services districts. Except for districts noted as an exception in the market rate schedule, the rates established for a group apply to all districts in the designated group. The district groupings are as follows:

Group A: Nassau, Putnam, Rockland, Suffolk, Westchester

Group B: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren

Group C: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuylar, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates

Group D: Albany, Dutchess, Orange, Ulster

Group E: Bronx, Kings, New York, Queens, Richmond

GROUP A COUNTIES:

Nassau, Putnam, Rockland, Suffolk, and Westchester

DAY CARE CENTER

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$314	\$280	\$250	\$262
<i>Exceptions:</i>				
<i>Westchester</i>	\$378	\$331	\$274	—
DAILY	\$70	\$62	\$55	\$54
<i>Exceptions:</i>				
<i>Nassau</i>	\$75	\$77	—	—
<i>Suffolk</i>	\$80	\$70	—	—
<i>Westchester</i>	\$75	\$70	\$58	—
PART-DAY	\$47	\$41	\$37	\$36
<i>Exceptions:</i>				
<i>Nassau</i>	\$50	\$51	—	—
<i>Suffolk</i>	\$53	\$47	—	—
<i>Westchester</i>	\$50	\$47	\$39	—
HOURLY	\$8.88	\$9.48	\$8.81	\$9.17

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$250	\$250	\$250	\$250
<i>Exceptions:</i>				
<i>Putnam</i>	\$300	\$275	\$278	—
<i>Suffolk</i>	\$260	\$263	—	—
<i>Westchester</i>	\$300	—	\$331	—
DAILY	\$56	\$56	\$55	\$50
PART-DAY	\$37	\$37	\$37	\$33
HOURLY	\$8.00	\$8.89	\$7.75	\$8.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$260	\$255	\$250	\$250
<i>Exceptions:</i>				
<i>Rockland</i>	—	—	\$261	—
<i>Westchester</i>	\$275	\$275	\$266	\$276
DAILY	\$58	\$56	\$55	\$56
<i>Exceptions:</i>				
<i>Westchester</i>	—	\$60	\$60	\$60
PART-DAY	\$39	\$37	\$37	\$37
<i>Exceptions:</i>				

<i>Westchester</i>	—	\$40	\$40	\$40
HOURLY	\$8.00	\$8.00	\$8.00	\$8.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$0	\$0	\$0	\$262
DAILY	\$0	\$0	\$0	\$54
PART-DAY	\$0	\$0	\$0	\$36
HOURLY	\$0	\$0	\$0	\$9.17

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$163	\$163	\$163	\$163
DAILY	\$36	\$36	\$36	\$33
PART-DAY	\$24	\$24	\$24	\$22
HOURLY	\$5.20	\$5.78	\$5.04	\$5.20

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$188	\$188	\$188	\$188
DAILY	\$42	\$42	\$41	\$38
PART-DAY	\$28	\$28	\$27	\$25
HOURLY	\$6.00	\$6.67	\$5.81	\$6.00

GROUP B COUNTIES:

Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren

DAY CARE CENTER

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$210	\$200	\$183	\$177
<i>Exceptions:</i>				
<i>Saratoga</i>	—	\$211	\$196	—
DAILY	\$50	\$48	\$43	\$38
<i>Exceptions:</i>				
<i>Erie</i>	—	—	\$44	—
<i>Monroe</i>	\$55	\$52	\$48	—
PART-DAY	\$33	\$32	\$29	\$25
<i>Exceptions:</i>				
<i>Monroe</i>	\$37	\$35	\$32	—
HOURLY	\$7.74	\$7.78	\$6.89	\$7.74

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$150	\$150	\$145	\$136
<i>Exceptions:</i>				
<i>Erie</i>	—	\$161	—	—
<i>Ontario</i>	\$164	\$169	—	—
<i>Saratoga</i>	\$169	\$165	\$160	\$143
<i>Schenectady</i>	\$170	\$160	\$150	\$150
<i>DAILY</i>	\$34	\$35	\$31	\$31
<i>Exceptions:</i>				
<i>Columbia</i>	\$35	—	—	—
<i>Erie</i>	\$38	\$38	\$34	\$34
<i>Saratoga</i>	\$35	—	—	\$33
<i>Warren</i>	—	—	—	\$33
PART-DAY	\$23	\$23	\$21	\$21
<i>Exceptions:</i>				
<i>Erie</i>	\$25	\$25	\$23	\$23
<i>Saratoga</i>	—	—	—	\$22
<i>Warren</i>	—	—	—	\$22
HOURLY	\$5.00	\$5.17	\$5.00	\$4.45

GROUP FAMILY DAY CARE

AGE OF CHILD

	<i>Under 1¹/₂</i>	<i>1¹/₂-2</i>	<i>3-5</i>	<i>6-12</i>
WEEKLY	\$170	\$165	\$160	\$160
<i>Exceptions:</i>				
<i>Erie</i>	—	\$175	\$165	—
<i>Schenectady</i>	\$195	\$188	\$186	—

DAILY	\$38	\$35	\$35	\$33
Exceptions:				
Erie	—	—	—	\$34
PART-DAY	\$25	\$23	\$23	\$22
Exceptions:				
Erie	—	—	—	\$23
HOURLY	\$5.00	\$5.14	\$5.14	\$5.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$177
DAILY	\$0	\$0	\$0	\$38
PART-DAY	\$0	\$0	\$0	\$25
HOURLY	\$0	\$0	\$0	\$7.74

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$98	\$98	\$94	\$88
DAILY	\$22	\$23	\$20	\$20
PART-DAY	\$15	\$15	\$13	\$13
HOURLY	\$3.25	\$3.36	\$3.25	\$2.89

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$113	\$113	\$109	\$102
DAILY	\$26	\$26	\$23	\$23
PART-DAY	\$17	\$17	\$15	\$15
HOURLY	\$3.75	\$3.88	\$3.75	\$3.34

GROUP C COUNTIES:

Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$171	\$165	\$155	\$136
Exceptions:				
Niagara	—	—	—	\$138
DAILY	\$40	\$37	\$34	\$31
Exceptions:				
Broome	—	\$40	\$38	—
PART-DAY	\$27	\$25	\$23	\$21
Exceptions:				
Broome	—	\$27	\$25	—
HOURLY	\$5.44	\$5.06	\$5.25	\$5.23

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$135	\$130	\$125	\$125
Exceptions:				
Clinton	—	—	—	\$135
Oneida	—	—	\$130	—
DAILY	\$31	\$31	\$30	\$30
Exceptions:				
Clinton	—	—	—	\$34
Sullivan	—	—	—	\$31
PART-DAY	\$21	\$21	\$20	\$20
Exceptions:				
Clinton	—	—	—	\$23
Sullivan	—	—	—	\$21
HOURLY	\$3.18	\$3.00	\$3.00	\$3.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$140	\$130	\$126	\$125

Exceptions:				
Oneida	\$150	\$150	\$135	—
Steuben	—	—	\$135	\$138
Washington	—	—	\$145	\$130
DAILY	\$34	\$33	\$31	\$30
PART-DAY	\$23	\$22	\$21	\$20
HOURLY	\$4.00	\$4.00	\$4.00	\$4.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$136
Exceptions:				
Niagara	—	—	—	\$138
DAILY	\$0	\$0	\$0	\$31
PART-DAY	\$0	\$0	\$0	\$21
HOURLY	\$0	\$0	\$0	\$5.23

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$88	\$85	\$81	\$81
DAILY	\$20	\$20	\$20	\$20
PART-DAY	\$13	\$13	\$13	\$13
HOURLY	\$2.07	\$1.95	\$1.95	\$1.95

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$101	\$98	\$94	\$94
DAILY	\$23	\$23	\$23	\$23
PART-DAY	\$15	\$15	\$15	\$15
HOURLY	\$2.39	\$2.25	\$2.25	\$2.25

GROUP D COUNTIES:

Albany, Dutchess, Orange, and Ulster

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$227	\$210	\$195	\$185
Exceptions:				
Dutchess	\$250	\$225	\$197	\$223
Orange	—	\$220	—	—
DAILY	\$51	\$47	\$44	\$44
Exceptions:				
Albany	—	\$50	\$45	—
PART-DAY	\$34	\$31	\$29	\$29
Exceptions:				
Albany	—	\$33	\$30	—
HOURLY	\$7.75	\$7.46	\$7.24	\$7.34

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$191	\$185	\$175	\$175
Exceptions:				
Dutchess	—	—	—	\$180
Orange	\$200	\$200	\$200	\$200
DAILY	\$44	\$41	\$38	\$38
Exceptions:				
Dutchess	—	\$45	\$44	\$45
Orange	—	—	\$40	\$44
PART-DAY	\$29	\$27	\$25	\$25
Exceptions:				
Dutchess	—	\$30	\$29	\$30
Orange	—	—	\$27	\$29
HOURLY	\$7.00	\$6.00	\$6.00	\$6.10

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$200	\$194	\$180	\$178
Exceptions:				
Orange	\$225	—	—	\$189

DAILY	\$45	\$45	\$43	\$40
<i>Exceptions:</i>				
Orange	\$54	—	\$45	\$44
PART-DAY	\$30	\$30	\$29	\$27
<i>Exceptions:</i>				
Orange	\$36	—	\$30	\$29
HOURLY	\$7.50	\$7.00	\$7.00	\$7.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$185

Exceptions:

Dutchess	—	—	—	\$223
DAILY	\$0	\$0	\$0	\$44
PART-DAY	\$0	\$0	\$0	\$29
HOURLY	\$0	\$0	\$0	\$7.34

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$124	\$120	\$114	\$114
DAILY	\$29	\$27	\$25	\$25
PART-DAY	\$19	\$18	\$17	\$17
HOURLY	\$4.55	\$3.90	\$3.90	\$3.98

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$143	\$139	\$131	\$131
DAILY	\$33	\$31	\$29	\$29
PART-DAY	\$22	\$21	\$19	\$19
HOURLY	\$5.25	\$4.50	\$4.50	\$4.59

GROUP E COUNTIES:

Bronx, Kings, New York, Queens, and Richmond

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$370	\$255	\$224	\$185
DAILY	\$67	\$67	\$50	\$50
PART-DAY	\$45	\$45	\$33	\$33
HOURLY	\$17.64	\$17.00	\$16.21	\$12.18

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$160	\$150	\$150	\$141
DAILY	\$36	\$39	\$35	\$31
PART-DAY	\$24	\$26	\$23	\$21
HOURLY	\$16.00	\$11.11	\$13.20	\$13.06

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$175	\$175	\$160	\$150
DAILY	\$38	\$38	\$36	\$35
PART-DAY	\$25	\$25	\$24	\$23
HOURLY	\$16.41	\$15.17	\$11.73	\$17.14

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$185
DAILY	\$0	\$0	\$0	\$50
PART-DAY	\$0	\$0	\$0	\$33
HOURLY	\$0	\$0	\$0	\$12.18

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$104	\$98	\$98	\$92
DAILY	\$23	\$25	\$23	\$20

PART-DAY	\$15	\$17	\$15	\$13
HOURLY	\$10.40	\$7.22	\$8.58	\$8.49
LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE ENHANCED RATE				

AGE OF CHILD

	Under 1½	1½ -2	3-5	6-12
WEEKLY	\$120	\$113	\$113	\$106
DAILY	\$27	\$29	\$26	\$23
PART-DAY	\$18	\$19	\$17	\$15
HOURLY	\$12.00	\$8.33	\$9.90	\$9.80

SPECIAL NEEDS CHILD CARE

The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.

The highest full time market rate in the State is:

Weekly	\$ 378
Daily	\$ 80
Part-Day	\$ 53
Hourly	\$ 17.64

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

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 20(3)(d) of the Social Services Law (SSL) authorizes the Commissioner of the Office of Children and Family Services (Office) to establish rules, regulations and policies to carry out the Office's powers and duties under the SSL.

Section 34(3)(f) of SSL authorizes the Commissioner to establish regulations for the administration of public assistance and care within the State.

Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rates that will establish the ceilings for State and federal reimbursement for payments made under the New York Child Care Block Grant. The amount to be paid or allowed for child care assistance funded under the Block Grant and under Title XX shall be the actual cost of care but no more than the applicable rate established in regulations. Payment rates must be sufficient to ensure equal access for eligible children to comparable child care assistance in the substate area that are provided to children whose parents are not eligible to receive assistance under any federal or State programs. Payment rates must take into account the variations in the costs of providing child care in different settings and to children of different age groups, and the additional cost of providing child care for children with special needs.

Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure such equal access for eligible children. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan in effect covers the period October 1, 2005 through September 30, 2007. The proposed State Plan for the period October 1, 2007 through September 30, 2009 has been submitted to the federal government for approval. The market rates that are being replaced were effective October 1, 2005 and were based on a survey conducted in 2005.

2. Legislative objectives:

The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

3. Needs and benefits:

The regulations are needed to adjust existing rates that were established based on a survey conducted in 2005. Since then, child care providers have experienced increased costs in operating their businesses. These costs are reflected in the higher rates that they are charging as compared to the existing rates. The rates need to be updated to reflect the increased rates in order to continue to provide subsidized families with equal access to child care comparable to that received by unsubsidized families as required by federal and State laws.

The methodology used by the Office to establish the payment rates for the regulations meets the federal and State statutory requirements for conducting a local survey of child care providers. Prior to conducting the market rate survey, a letter was mailed to all licensed and registered providers to inform them that they might be among the sample of providers who would be asked to participate in the market rate survey. The Office contracted with a market research firm to conduct the telephone survey in English and Spanish and had resources available to assist providers in other languages. The sample was drawn so that it encompassed the full range of providers within all geographic areas.

The payment rates were established based on over 4,800 completed telephone market rate surveys from licensed and registered providers throughout the State. Providers were asked for the rates they charge for full-time and part-time care, if applicable, based on the age of the child.

These rates were analyzed to determine the 75th percentile. The federal Administration of Children and Families has indicated in the preamble to the final rule for the Child Care and Development Fund that it regards the 75th percentile of the actual cost of care as sufficient to provide subsidized parents with equal access to child care providers. The rates that resulted were then clustered into five distinct groupings of social services districts based on rate similarities. Within each group, rates are differentiated by type of provider (i.e. day care center, school-age child care, family day care, group family day care and legally-exempt family child care and in-home child care), age of child (i.e. under 1½, 1½-2, 3-5, 6-12), and amount of time in care (i.e., weekly, daily, part-day, and hourly). This data was compiled and analyzed by Suzanne Zafonte Sennett, Director within the Office's Bureau of Early Childhood Services.

The standard market rates for legally-exempt family child care and in-home child care were established based on a 65 percent differential applied to the group market rates established for family day care. The enhanced market rate for legally exempt family and in-home child care were established based on a 75 percent differential applied to the group market rates established for family day care to reflect an incentive to legally exempt providers to pursue a minimum of 10 hours of approved training. This differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider.

Revising the existing rates will help subsidized families to avoid losing their child care arrangements or being unable to find appropriate child care. This will help prevent such families from being forced to place their children in child care settings that are inappropriate or unsafe or to leave their children unsupervised. Avoiding such results is important because it can be detrimental to a child's development to experience disruption in care or to receive substandard or no care at all. The updated rates also will help subsidized families avoid having to choose whether to use their limited income to supplement the cost of child care services or to meet their basic living costs.

4. Costs:

Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; and, districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2007-08, social services districts received their allocations of \$713,220,629 in federal and State funds under the New York State Child Care Block Grant. While this allocation is the primary resource available, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to use for the child care subsidy program.

5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new

market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates.

6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

8. Alternatives:

The adjustments in rates set forth in the regulations are necessary to implement the federal and State statutory and regulatory mandates.

9. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

10. Compliance schedule:

These provisions must be implemented effective on October 1, 2007.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 70,000 informal providers that may provide child care services to families receiving a child care subsidy.

2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to the new market rates. Payment adjustments will have to be made, as needed.

3. Professional services:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2007-08, social services districts received their allocations of \$713,220,629 in federal and State funds under the New York State Child Care Block Grant. While this allocation is the primary resource available, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to use for the child care subsidy program.

5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of over 4,800 licensed and registered child care providers throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care within the counties.

Social services districts will benefit from the increases in the rates. The increases will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access comparable to those families not receiving a child care subsidy.

This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of public assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from over 4,800 providers and that information formed the basis for the updated market rates.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

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

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the new market rates. Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

3. Costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2007-08, social services districts received their allocations of \$713,220,629 in federal and State funds under the New York State Child Care Block Grant. While this allocation is the primary resource available, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to use for the child care subsidy program.

4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of over 4,800 completed surveys from licensed and registered child care providers throughout the State. The rates were analyzed to establish market rates at the 75th percentile of the amounts charged. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for rural counties are based on the actual costs of care within the counties.

Social services districts in rural areas will benefit from the increases in the rates. The increases will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of temporary assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers in rural areas also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from over 4,800 providers and that information formed the basis for the updated market rates.

Job Impact Statement

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

These regulations will have a positive impact on jobs or employment opportunities as the increased rates will allow child care providers to hire additional staff or improve the compensation they pay existing staff. Individuals who may have been discouraged from starting up new child care programs in low-income communities because the existing rates would not have been sufficient to support their operational costs may be encouraged by the new rates to establish such programs. In addition, by making child care more available and affordable for low-income working families, the regulations will improve the ability of employers to attract and retain employees and the ability of low-income workers to obtain and maintain jobs.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Performance and Outcome-Based Provisions for Preventive Services

I.D. No. CFS-43-07-00013-P

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

Proposed action: Amendment of section 423.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 153-k and 409-a; and L. 2007, chs. 53, 57, part H

Subject: Performance and outcome-based provisions for preventive services.

Purpose: To require preventive services to include performance and outcome-based provisions to promote the efficient use of State and local resources so that resources are used to achieve desired results.

Text of proposed rule: Section 423.5 of Title 18 NYCRR is amended to read as follows:

(a) General requirements. A social services district will be reimbursed for [75] 65 percent of the costs of mandated, *non-mandated*, and *community optional* preventive services provided pursuant to section 409-a of the *Social Services Law* [to children and their families] when the following conditions are met:

(1) [such] children and their families receiving such preventive services meet the client eligibility criteria as defined in sections 423.3 and 430.9 of this Title or a *community optional preventive services program approved by the Office of Children and Family Services ("OCFS") under subdivision (3) of section 409-a of the Social Services Law*;

(2) the social services district receives approval of its *county's child and family services* [multi-year service] plan pursuant to section 34-a of the *Social Services Law*;

(3) *the social services district certifies that it will not be using these funds to supplant other state and local funds and that it will not submit claims for reimbursement for the same type and level of services that the district previously provided and claimed under any contract in existence*

on October 1, 2002 as other than child protective, preventive, independent living, or after care services or adoption administration and services;

(4) for a district to receive an increase in funding for child protective, preventive, independent living, or after care services, or adoption administration and services over the amount the district received for such services that were reimbursable in state fiscal year 2004-05:

(i) the amount of funds that the district expends on such services from its flexible fund for family services allocation and any flexible fund for family services funds transferred at the district's request to the title XX social services block grant must, to the extent that families are eligible therefore, be equal to or greater than the amount the district spent for such services that were reimbursed during state fiscal year 2004-05 with temporary assistance to needy families block grant funds for families eligible for emergency assistance to families and with temporary assistance to needy families block grant funds transferred to the title XX social services block grant; or

(ii) the district must increase the gross amount of such funds above the amount claimed for state fiscal year 2004-05, in which case, the increase in funding will only be available for 65 percent of the claims that exceed the gross amount claimed in state fiscal year 2004-05;

(5) beginning January 1, 2008, such preventive services, whether purchased or provided directly by the district, include performance or outcome-based provisions.

(i) For purposes of complying with this requirement, performance means quantifiable and verifiable interim changes in, or maintenance of, the conditions or behaviors of the target population resulting from the provision of services that indicate progress towards an outcome, and outcome means the anticipated change in, or maintenance of, conditions or behaviors of a targeted population as a result of the provision of services.

(ii) In the absence of the required performance or outcome-based provisions, OCFS may limit up to 100% of a district's state reimbursement for preventive services expenditures related to any increases in the amount of the district's gross claims for such expenditures that are otherwise reimbursable during state fiscal year 2007-08 and thereafter that exceed the amount of its gross claims for the period October 1, 2005 through September 30, 2006 that were claimed through March 31, 2007. However, OCFS may determine, in its discretion, not to reduce a district's reimbursement in this manner if the district is able to demonstrate, in a form and manner determined by OCFS, that the absence of the required performance or outcome-based provisions is due to extenuating circumstances beyond the district's control including, but not limited to, the inability to amend a contract for the purchase of preventive services that was in effect on April 9, 2007 that extends past January 1, 2008.

(3) the social services district expends an amount on child protective services equal to or greater than its child protective services maintenance of effort amount as published annually by the office based on expenditures and rate of child protective services reporting and indicators. In the event that the social services district does not meet its child protective services maintenance of effort amount, preventive services expenditures up to such an amount will be reimbursed as child protective services expenditures; and

(4) expenditures of the social services district are in excess of its title XX ceiling and total preventive services expenditures of such district exceed the preventive services maintenance of effort amount as specified in section 409-b of the Social Services Law unless otherwise specified in the State's annual aid to localities budget.]

(b) In-kind or indirect services and donated funds.

[(1) Up to one half of the social services district's total annual share of the cost of mandated preventive services may be met by in-kind or indirect services or by nontax levy funds, including, but not limited to, privately donated funds. However, this limitation does not apply to that amount equal to the total reimbursable preventive services expenditures, the local share of which was met by privately donated funds and subject to State reimbursement, during the State fiscal year ending March 31, 1981.

(2) A social services district's share of the costs of nonmandated preventive services provided pursuant to subdivision (2) of section 409-a of the Social Services Law or of the costs of community preventive services provided pursuant to subdivision (3) of section 409-a of the Social Services Law may be met in whole or in part by in-kind or indirect services or by nontax levy funds, including, but not limited to, privately donated funds.]

Claims for preventive services and independent living services submitted by a social services district for reimbursement may be comprised of in-kind, indirect services, and non-tax levy funds, including but not limited to

privately donated funds, up to the same amount as the social services district's claims for such services during federal fiscal year 1998-99 were comprised of in-kind, indirect services and non-tax levy funds; provided, however, that up to 17½ percent of a social services district's claims for preventive services and independent living services may be comprised of privately donated funds if the percentage of its claims comprised of privately donated funds was less than 17½ percent during federal fiscal year 1998-99. Federal reimbursement of such claims shall be available only to the extent permitted by federal law or regulations.

[(c) Nonmandated preventive services. Expenditures for nonmandated preventive services shall be subject to 50 percent State reimbursement, provided that the Legislature has appropriated sufficient funds for this purpose and that these expenditures are not reimbursed through title XX of the Social Services Act.

(d) Reimbursement by the department to local social services departments for day care, homemaker, housekeeper/chore, home management, transportation, and family planning as mandated preventive services shall not exceed 30 percent of Group I and II local department's and 15 percent of Group III and IV local department's total expenditures for mandated preventive services unless adjusted by a decline in foster care days as set forth in this paragraph. Groups I, II, III and IV as defined in section 679.2 of this Title and are as follows:

(1) Group I. Social services districts having a caseload of less than 1,000 cases;

(2) Group II. Social services districts having a caseload of 1,000, but less than 5,000 cases;

(3) Group III. Social services districts having a caseload of 5,000, but less than 50,000 cases; and

(4) Group IV. Social services districts having a caseload of 50,000 cases and over. Each local social services department's percentage will be increased by one percent for every three percent decline in foster care days. Such percentage will be computed by the department annually for each Federal fiscal year, using the State fiscal year 1979-80 as a base year. This provision will become effective October 1, 1983.

(e) Reimbursement by the department to local social services departments for emergency cash, goods and shelter as preventive services shall not exceed three percent of such local department's total expenditures for mandated preventive services. Such reimbursement shall only be made for those expenditures not eligible for reimbursement under the Emergency Assistance to Needy Families with Children Program pursuant to Part 372 of this Title.]

(c) [(f)] Reimbursement by OCFS [the department] for foster care services, including casework contact requirements pursuant to section 441.21 of this Title and diligence of efforts requirements pursuant to section 430.12 of this Title may not be claimed as preventive services.

(d) [(g)] Reimbursement by OCFS [the department] for child protective services, including activities of receiving and investigating reports and monitoring shall not be claimed as preventive services.

(e) [(h)] Reimbursement by OCFS [the department] to local social services districts [departments] for preventive services expenditures shall be claimed on such forms as designated by OCFS [the department].

(f) [(i)] Notwithstanding any provision of this section, reimbursement by OCFS [the department] to local social services districts [departments] for preventive services expenditures shall not be made unless the local social services districts [departments] explore and use other available funding sources including [emergency assistance to needy families with children and] title XIX of the Social Security Act where applicable.

(g) [(j)] Notwithstanding any provision of this section, reimbursement by OCFS [the department] to local social services districts [departments] for preventive services expenditures shall not be made if OCFS [the department] determines that such local districts [departments] are over-utilizing particular forms or types of preventive services or are not providing balanced preventive services programs based on the identified needs of children and families residing in such local districts [departments].

(h) Social services districts shall prepare and submit to OCFS information about compliance with this section in a form and manner and at the times specified by OCFS.

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

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 20(3)(d) of the Social Services Law (SSL) authorizes the Commissioner of the Office of Children and Family Services (OCFS) to establish rules, regulations and policies to carry out OCFS' powers and duties under the SSL.

Section 409-a of the SSL authorizes social services districts (districts) to provide preventive services to children and families under specified circumstances. Section 409-a(5)(a) of the SSL authorizes OCFS to establish regulations governing preventive services, including reimbursement limitations for such services. Section 153-k of the SSL specifies standards and conditions for state reimbursement of expenditures by districts for preventive and other child welfare services. Additional conditions for state reimbursement are set forth in the Education, Labor and Family Assistance portion of the state budget enacted for Fiscal Year 2007-2008 (Chapter 53 of the Laws of 2007) and in the state budgets enacted for prior fiscal years. The non-supplantation budgetary requirement in section 423.5(a)(3) of the regulation has been in place since April 1, 2003, and the budgetary child welfare threshold requirement in section 423.5(a)(4) of the regulation has been in place since April 1, 2005.

Part H of Chapter 57 of the Laws of 2007 ("the Act") requires that any preventive services provided pursuant to section 409-a of the SSL include performance or outcome-based provisions beginning January 1, 2008. The Act authorizes OCFS to limit, in accordance with regulations, a social services district's state reimbursement for preventive services expenditures in the absence of the required performance or outcome-based provisions. The Act also directs OCFS to grant a waiver from implementation of the required performance and outcome-based provisions under specified circumstances and to promulgate on an emergency basis no later than August 15, 2007, any regulations necessary to implement the requirements established by the Act.

2. Legislative Objectives

The regulation carries out the intent of the statutory provisions discussed above, and in particular Part H of Chapter 57 of the Laws of 2007, by establishing rules that define the required performance and outcome-based provisions and specify the circumstances under and the manner in which OCFS may limit a district's state reimbursement in the absence of the required provisions. The regulation also carries out the intent of section 153-k of the SSL and related budget appropriation requirements by revising existing regulation to reflect the current statutory standards for state reimbursement of preventive services expenditures.

3. Needs and Benefits

The legislative requirement that preventive services include performance and outcome-based provisions is intended to promote the efficient use of state and local resources so that resources are used to achieve desired results. To effectuate this legislative intent, the regulation defines performance and outcome-based provisions and specifies the authorized fiscal consequence that may be imposed in the absence of the required provisions.

The regulation also updates regulatory conditions for state reimbursement of district expenditures for preventive services so that they are consistent with existing statutory and budgetary standards.

4. Costs

Because the amendment is necessary to implement Part H of Chapter 57 of the Laws of 2007 and other statutory standards governing state reimbursement for preventive services (SSL 153-k; Chapter 53 of the Laws of 2007), this regulatory amendment will not impose any costs on districts beyond those imposed by these laws. Technical assistance from OCFS, as required by statute, will assist local districts in meeting this statutory requirement. Additionally, based on discussions with districts, OCFS understands that many districts already include performance or outcome measures for the preventive services they provide or for which they contract, and thus many districts already satisfy the minimum standards required by statute and the implementing regulation.

There is no adverse fiscal impact to OCFS or the State related to the regulatory amendment.

5. Local Government Mandates

The requirement that social services districts include performance or outcome-based provisions in directly-provided and contracted-for preventive services and the conditions for state reimbursement implement statutory requirements and conditions. Therefore, the regulation does not impose any additional requirements on local governments.

6. Paperwork

OCFS is mandated by statute to report to the Governor and Legislature on local compliance with respect to performance or outcome-based provisions for preventive services. OCFS has developed a one-page attestation

form for local districts to report on initial compliance. Subsequent reporting will be incorporated into existing district reporting procedures.

7. Duplication

This regulation does not duplicate other state or federal requirements.

8. Alternate Approaches

Part H of Chapter 57 of the Laws of 2007 requires OCFS to promulgate any regulations necessary to implement the statutory provisions. The regulation does this by defining the statutorily-required performance or outcome-based provisions for preventive services and by providing a fiscal consequence under certain circumstances if the statutory requirement is not met. Proposed definitions of performance and outcome were shared with representatives of regulated parties (commissioners and staff of local social services districts), their input was given careful consideration and appropriate suggestions were adopted in drafting the final regulation.

Insofar as the regulation codifies other existing statutory standards and conditions for state reimbursement the amendments are technical in nature and there were no significant alternatives to be considered.

9. Federal Standards

These regulations meet but do not exceed any applicable federal standards.

10. Compliance Schedule

Local districts must include performance or outcome-based provisions for preventive services by January 1, 2008. Other technical amendments to the regulation reflect existing statutory standards and conditions for state reimbursement of preventive services expenditures that are already in effect.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments

The regulation implements statutory requirements applicable to all social services districts (districts). Those voluntary agencies contracting with social services districts to provide preventive services also will be affected by the regulation. Currently, there are approximately 200 such agencies.

2. Compliance Requirements

As required by Part H of Chapter 57 of the Laws of 2007 (the Act), the regulation implements the statutory requirement that social services districts include performance or outcome-based provisions in preventive services. OCFS is mandated by the Act to report to the Governor and Legislature on local compliance with this requirement, and the regulation therefore directs local districts to prepare and submit information about compliance in a form and manner specified by OCFS. OCFS has developed a one-page attestation form for local districts to report on initial compliance. Subsequent reporting will be incorporated into existing district reporting procedures.

3. Professional Services

The technical assistance to be provided by OCFS will include professional services to assist local districts in complying with the statutory requirements implemented by the regulation. It is anticipated that this assistance will minimize the need for districts to incur any additional costs for professional services to comply with the regulation.

4. Compliance Costs

Because the regulation is necessary to implement Part H of Chapter 57 of the Laws of 2007 and other statutory standards governing state reimbursement for preventive services (SSL 153-k; Chapter 53 of the Laws of 2007), the regulation will not impose any costs on local social services districts beyond those imposed by these laws. Technical assistance from OCFS will assist local districts, and any private services agencies with which they contract, in meeting this statutory requirement.

5. Economic and Technological Feasibility

It is anticipated that the affected local governmental agencies (social services districts) have the economic and technological feasibility to include performance or outcome-based provisions in preventive services.

6. Minimizing Adverse Impact

It is not anticipated that the regulation will result in an adverse impact on small businesses or local government agencies or instrumentalities. As outlined above, OCFS is offering technical assistance to affected local governmental agencies (social services districts) to assist with compliance. Consistent with State Administrative Procedure Act § 202-b(1), the regulation does not impose design standards or mandate specific types of performance or outcome-based provisions that local districts must include. The regulation also appropriately allows for exemption from fiscal consequences where compliance is not possible due to extenuating circumstances beyond the district's control. Additionally, based on discussions with districts, OCFS understands that many districts already include performance or outcome measures for the preventive services they provide or

for which they contract, and thus many districts already satisfy the minimum standards required by statute and the implementing regulation.

7. Small Business and Local Government Participation

OCFS presented a workshop on the implementation of Part H of Chapter 57 of the Laws of 2007, the statutory provision that requires OCFS to develop this regulation, at the New York State Public Welfare Association's summer 2007 conference. Comments on the proposed regulation were received from workshop participants, who included commissioners and staff of local social services districts. OCFS subsequently held a telephone conference on the proposed regulation for all districts during which OCFS received input from district representatives on issues concerning compliance and the types of technical assistance needed by districts.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

The regulation applies to all social services districts (districts), including the 44 districts that contain rural areas. Those voluntary agencies in rural areas contracting with social services districts to provide preventive services also will be affected by the regulation. Currently, there are approximately 84 such agencies.

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

OCFS is mandated by statute to report to the Governor and Legislature on local compliance with respect to performance or outcome-based provisions for preventive services. OCFS has developed a one-page attestation form for local districts to report on initial compliance. Subsequent reporting will be incorporated into existing district reporting procedures.

As provided for in statute, OCFS will be offering technical assistance to local districts to assist with compliance. This technical assistance will minimize the need for additional professional services.

3. Costs:

Because the regulation is necessary to implement Part H of Chapter 57 of the Laws of 2007 and other statutory standards governing state reimbursement for preventive services (SSL 153-k; Chapter 53 of the Laws of 2007), the regulation will not impose any costs on social services districts, including those in rural areas, beyond those imposed by these laws. Technical assistance from OCFS will assist local districts and any private services agencies with which they contract in meeting this statutory requirement.

4. Minimizing adverse impact:

It is not anticipated that the regulation will result in an adverse impact on rural areas. As outlined above, OCFS is offering technical assistance to all affected local governmental agencies to assist with compliance. Consistent with State Administrative Procedure Act § 202-bb(2), the regulation does not impose input or design standards or mandate specific types of performance or outcome-based provisions that local districts must include. The regulation also appropriately allows for exemption from fiscal consequences where compliance is not possible due to extenuating circumstances beyond the district's control. Additionally, based on discussions with districts, OCFS understands that many local districts already include performance or outcome measures for the preventive services they provide or for which they contract, and thus many districts already satisfy the minimum standards required by statute and the implementing regulation.

5. Rural area participation:

OCFS presented a workshop on the implementation of Part H of Chapter 57 of the Laws of 2007, the statutory provision that requires OCFS to develop this regulation, at the New York State Public Welfare Association's summer 2007 conference. Comments on the proposed regulation were received from workshop participants, who included commissioners and staff of social services districts that contain rural areas. OCFS subsequently held a telephone conference on the proposed regulation for all districts during which OCFS received input from district representatives on issues concerning compliance and the types of technical assistance needed by districts, including those districts encompassing rural areas.

Job Impact Statement

A full job impact statement has not been prepared for the regulation. The regulation would not result in the loss of any jobs. It is apparent from the nature and purpose of the rule (implementation of statutory requirements for state reimbursement to social services districts of expenditures for preventive services) that it will not have a substantially adverse impact on jobs and employment opportunities. To the extent that social services

districts expand the types of preventive services they currently provide and the private agencies with which they contract in order to comply with the statutory requirement underlying the regulation, the regulation may result in job creation.

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

Child Care Subsidies for Employed Public Assistance Recipients

I.D. No. CFS-43-07-00014-P

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

Proposed action: This is a consensus rule making to amend section 415.2 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 410-w(a)

Subject: Child care subsidies for employed public assistance recipients.

Purpose: To modify an eligible employed public assistance applicant or recipient to include a person whose gross earnings equal, or are greater than, the required number of work hours times the State minimum wage.

Text of proposed rule: Subparagraph (ii) of paragraph (1) of subdivision (a) of section 415.2 is repealed and a new subparagraph (ii) of paragraph (1) of subdivision (a) of section 415.2 is added to read as follows:

(ii) *A local social services district must guarantee to applicants who would otherwise be eligible for, or are recipients of, public assistance benefits and who are employed, the option to choose to receive continuing child care subsidies in lieu of public assistance benefits, for such period of time as the recipient continues to be eligible for public assistance. For the purposes of this section, an eligible applicant for, or recipient of, public assistance benefits and who is employed, includes a person whose gross earnings equal, or are greater than, the required number of work hours times the state minimum wage. Recipients of child care subsidies under this section who are no longer eligible for public assistance benefits, shall be eligible for transitional child care described in subparagraph (iv) of this section as if they had been recipients of public assistance.*

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

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

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

Consensus Rule Making Determination

The Office of Children and Family Services (OCFS) is filing the attached rulemaking proposal as a consensus rule. Under the New York State Administrative Procedure Act section 102(11)(b), a consensus rule is defined as a rule that is proposed by an agency for expedited adoption that implements or conforms the rule to a non-discretionary statutory provision. OCFS has considered the changes proposed by this rule and has concluded that the proposed amendment only conforms the rule at issue to the recently enacted non-discretionary statutory provision. The proposed rule would replace the existing language in 18 NYCRR section 415.2(a)(1)(ii) with the language contained in the Social Services Law section 410-w(a). Social Services Law section 410-w(a) was modified by Chapter 135 of the Laws of 2007. The change would allow the rule to conform to the non-discretionary statute and would make both the statute and regulation, which address the same subject, read the same. As a result, OCFS reasonably believes this change will eliminate any confusion about the statutory criteria for determining the eligibility of child care subsidy applicants. Thus, OCFS has concluded that the proposed rule should be published as consensus proposal, as it conforms the rule at issue to a non-discretionary statutory provision and no party is likely to object to the rule as proposed.

Job Impact Statement

The Office does not anticipate the loss of any jobs as a result of the proposed regulations. The proposed regulation only serves to conform the regulation to a non-discretionary statutory provision. It is thus evident from the subject matter of the proposed regulations that they could only have a positive impact or no impact on jobs and employment opportunities.

Crime Victims Board

NOTICE OF ADOPTION

Presumption of Physical Injury when Determining the Eligibility of Victims of Human Trafficking

I.D. No. CVB-33-07-00002-A

Filing No. 1045

Filing date: Oct. 3, 2007

Effective date: Nov. 1, 2007

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

Action taken: Addition of section 525.32 to Title 9 NYCRR.

Statutory authority: Executive Law, section 621(5)

Subject: Presumption of physical injury when determining the eligibility of victims of human trafficking.

Purpose: To create the rebuttable presumption that victims of human trafficking crimes, as defined in sections 135.35 and 230.24 of the Penal Law, have suffered a physical injury for the purposes of eligibility under article 22 of the Executive Law.

Text or summary was published in the notice of proposed rule making, I.D. No. CVB-33-07-00002-P, Issue of August 15, 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 Watson, General Counsel, Crime Victims Board, One Columbia Circle, Suite 200, Albany, NY 12203, (518) 457-8066, e-mail: johnwatson.@cvb.state.ny.us

Assessment of Public Comment

The agency received no public comment.

(2) "Eligible student" means a student nominated by the superintendent to participate in a summer program administered pursuant to this section who:

(i) will have completed seventh grade prior to the start of such summer program;

(ii) has demonstrated distinguished work in mathematics and science as determined by multiple measures, including, but not limited to:

(a) the student has maintained a grade point average of 90 or above in mathematics and science in grades five, six and seven; and

(b) has scored at level four on the state assessment in mathematics in grades five and six;

(iii) has received recommendations from at least one teacher of mathematics and at least one teacher of science who have taught such student in grades five, six and/or seven; and

(iv) has written consent from a parent or person in parental relation to participate in such summer program following completion of seventh grade.

(3) "Excelsior scholars" means students who have successfully completed a summer program of advanced coursework during the summer following the completion of seventh grade administered in accordance with this section.

(4) "Other high performing student" means a student nominated by the superintendent to participate in a summer program administered pursuant to this section who:

(i) will have completed seventh grade prior to the start of such summer program;

(ii) has demonstrated excellent work in mathematics and science as determined by multiple measures, including, but not limited to:

(a) maintaining a grade point average of 90 or above in mathematics or science in grades five, six and seven;

(b) scoring at level four on a state assessment in mathematics in either grades five or six;

(iii) has scored at level four on the state assessment in English language arts in grades five and six;

(iv) has received a recommendation from at least two of the following: a teacher of mathematics, a teacher of science, or a teacher of English language arts who have taught such student in grades five, six and/or seven; and

(v) has written consent from a parent or person in parental relation to participate in such summer program following completion of seventh grade.

(5) "Centers of Excellence in Technology" shall include those centers identified through the State's economic development agency to support State research facilities and other technology and biotechnology capital projects.

(c) The superintendent may nominate up to ten percent of a school's eligible grade seven students to participate in the programs described in this section. The superintendent shall nominate equal numbers of male and female students, as practicable.

(d) Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities to administer summer programs as described in this section. Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include, but not be limited to, the following:

(1) a description of the process used to promote the Excelsior Scholars program among local school districts and to engage in student outreach;

(2) a description of the selection process and criteria, which shall be based on demonstrated academic achievement, used by the college or university to review and select eligible students and, where applicable, other high performing students, from those nominated for participation in the program. Such selection process and criteria shall ensure:

(i) the selection of students who have demonstrated the highest level of academic achievement in mathematics and science; and

(ii) a balanced number of male and female participants, as practicable;

(3) a description of the advanced coursework to be provided to such students, including how such coursework is aligned with the State learning standards;

(4) a description of the academic qualifications of the faculty who will provide the advanced coursework to students participating in the program, and programmatic capacity of the site and staff; and

(5) a description of the criteria to be used to determine whether such students have successfully completed the program.

Education Department

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Excelsior Scholars Program

I.D. No. EDU-33-07-00012-RP

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

Revised action: Addition of sections 100.14 and 100.15 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2) and sections 3641-a(1), (2) and (3) and 3641-b (not subdivided), as added by L. 2007, ch. 57, part B, section 39

Subject: Excelsior Scholars Program and grants for summer institutes for mathematics and science teachers.

Purpose: To establish criteria for the award of grants for the Excelsior Scholars Program pursuant to Education Law section 3641-a and grants for summer institutes for mathematics and science teachers pursuant to Education Law section 3641-b.

Text of revised rule: 1. Section 100.14 of the Regulations of the Commissioner of Education is added, effective January 3, 2008, as follows:

§ 100.14 *Excelsior scholars programs for grade seven mathematics and science students.*

(a) *Purpose.* The purpose of this section is to establish requirements for summer programs for high performing students in mathematics and science who have completed seventh grade that are offered pursuant to Education Law section 3641-a.

(b) *Definitions.* As used in this section:

(1) "Advanced coursework" means advanced instruction in mathematics and science that leads to attainment of the State learning standards in mathematics and science at the commencement level.

(e) *Competitive grants will be awarded to eligible public and independent colleges and universities to implement program(s) pursuant to this section based on, but not limited to, the following criteria:*

- (1) *the provision of appropriate advanced coursework and the program's alignment with the State learning standards;*
- (2) *the extent to which participation was solicited through student outreach and program promotion;*
- (3) *the expertise of faculty and programmatic capacity of site and staff;*
- (4) *coordination with programs offered by the centers of excellence in technology, to the extent practicable; and*
- (5) *the availability of appropriated funds for such purpose.*

2. Section 100.15 of the Regulations of the Commissioner of Education is added, effective January 3, 2008, as follows:

§ 100.15 *Summer institutes for mathematics and science teachers in middle grades five through eight.*

(a) *Purpose. The purpose of this section is to establish requirements for a competitive grant program to public and independent colleges and universities offering teacher education programs, in partnership with school districts, to conduct summer institutes for teachers of mathematics and science pursuant to Education Law section 3641-b.*

(b) *Subject to the availability of funds appropriated for such purpose, the commissioner shall annually issue a request for proposals to public and independent colleges and universities offering teacher education programs, registered pursuant to section 52.21 of this Title, that partner with school districts to conduct summer institutes for teachers of mathematics and science in grades five through eight in middle schools, junior high schools, intermediate schools or junior/senior high schools.*

(1) *Such proposals shall be in a format, and submitted pursuant to a timeline, as prescribed by the commissioner and shall include a description of how the program will advance the content knowledge and pedagogy of participating teachers in the areas of mathematics and science, including, but not limited to, how the program is:*

- (i) *aligned to State learning standards for mathematics and science; and*
- (ii) *aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this Part, to the extent practicable, as well as with other State and federal programs with similar purposes.*

(2) *Teachers shall be selected for participation in such summer institutes by principals who shall give priority to teachers who meet the following criteria:*

- (i) *first and second year teachers of grades five through eight;*
- (ii) *teachers who are changing assignments and would benefit from professional development to improve student learning; and*
- (iii) *teachers who have been identified as needing additional professional development in building content knowledge in mathematics and science and understanding of pedagogy.*

(c) *Competitive grants will be awarded to public and independent colleges and universities submitting a proposal pursuant to subdivision (b) of this section based on, but not limited to, the following criteria:*

- (1) *the program is aligned to the State learning standards for mathematics and science;*
- (2) *the program is designed to advance the content knowledge and pedagogy of participating mathematics and science teachers based on local measures of need assessment;*
- (3) *the program is aligned and integrated with programs offered to Excelsior Scholars pursuant to the requirements of section 100.14 of this Part, to the extent practicable, as well as other State and federal programs with similar purpose; and*
- (4) *priority is given, as practicable, to teachers in schools identified as schools in need of improvement, corrective action or restructuring status, schools under registration review or schools requiring academic progress.*

Revised rule compared with proposed rule: Nonsubstantive changes were made in section 100.14(b)(4).

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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 15, 2007, the following substantial revisions were made to the proposed rule.

The definition of "other high performing student" in section 100.14(b)(4) has been revised to provide school districts with more flexibility in nominating such students for participation in the Excelsior Scholars program. Specifically, the rule has been revised to read as follows:

(4) "Other high performing student" means a student nominated by the superintendent to participate in a summer program administered pursuant to this section who:

- (i) will have completed seventh grade prior to the start of such summer program;
- (ii) has demonstrated excellent work in mathematics and science as determined by multiple measures, including, but not limited to:
 - (a) maintaining a grade point average of 90 or above in mathematics or science in grades five, six and seven; and
 - (b) scoring at level four on a state assessment in mathematics in either grades five or six;
 - (iii) has scored at level four on the state assessment in English language arts in grades five and six;
 - (iv) has received a recommendation from at least two of the following: a teacher of mathematics, a teacher of science, or a teacher of English language arts who have taught such student in grades five, six and/or seven; and
- (v) has written consent from a parent or person in parental relation to participate in such summer program following completion of seventh grade.

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 15, 2007, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revision to the proposed rule does not require any revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 15, 2007, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revision to the proposed rule does not require any revisions to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on August 15, 2007, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as revised, relates to the establishment of requirements for the Excelsior Scholars program for high performing students in mathematics and science who have completed seventh grade, and requirements for grants for Summer Institutes for Mathematics and Science Teachers in grades five through eight in middle, junior high, intermediate or junior/senior high schools, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the revised proposed rule that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

New York State Energy Research and Development Authority

PROPOSED RULE MAKING HEARING(S) SCHEDULED

CO₂ Allowance Auction Program

I.D. No. ERD-43-07-00027-P

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

Proposed action: Addition of Part 507 to Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1850-a, 1851, 1854 and 1855

Subject: Create the CO₂ Allowance Auction Program to operate in conjunction with the Department of Environmental Conservation CO₂ Budget Trading Program.

Purpose: To provide for the administration and implementation by the New York State Energy Research and Development Authority (authority) or its designee of CO₂ allowance auctions and programs to promote the purposes of the clean energy technology account (the account) as provided by the CO₂ Budget Trading Program at 6 NYCRR Part 242. This Part complements the provisions of the CO₂ Budget Trading Program, which was established by the New York State Department of Environmental Conservation to stabilize and then reduce anthropogenic emissions of CO₂, a greenhouse gas, from CO₂ budget sources in an economically efficient manner.

Public hearing(s) will be held at: 10:00 a.m., Dec. 10, 2007 at Department of Environmental Conservation, Public Assembly Rm. 129, 625 Broadway, Albany, NY; 1:00 p.m., Dec. 11, 2007 at Department of Environmental Conservation, Region 5, Conference Rm., 1115 Rte. 86, Ray Brook, NY; 10:00 a.m., Dec. 12, 2007 at Department of Public Service, Board Rm., 4th Fl., 90 Church St., New York, NY; and 1:00 p.m., Dec. 13, 2007 at Department of Environmental Conservation, Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, 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.

Substance of proposed rule (Full text is posted at the following State website: www.nyserda.org): The CO₂ Budget Trading Program, as promulgated by the Department of Environmental Conservation, is implemented as the New York State commitment to the Regional Greenhouse Gas Initiative, and agreement among ten Northeastern State to control and reduce greenhouse gas emissions and to address the significant challenge of climate change. The CO₂ Budget Trading Program creates a cap and trade program to reduce carbon dioxide emissions from power plants. The CO₂ Allowance Auction Program, as proposed herein, implements essential segments of the CO₂ Budget Trading Program. The CO₂ Allowance Auction Program creates the Energy Efficiency and Clean Energy Technology Account, into which CO₂ emissions allowances will be allocated. From that Account, emissions allowances will be auctioned to entities which must comply with the CO₂ Budget Trading Program cap and trade requirements. This rule establishes the rules and procedures to implement an auction program. The proceeds of the auction(s) will be used to promote the stated purposes of the Account, and for administrative and implementation expenses incurred.

Text of proposed rule and any required statements and analyses may be obtained from: Peter Keane, Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203-6399, (518) 862-1090, ext. 3366, e-mail: 242rggi@gw.dec.state.ny.us

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

Public comment will be received until: 10 days after the last scheduled public hearing.

Regulatory Impact Statement

BACKGROUND

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of ten Northeast and Mid-Atlantic States have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) has proposed to establish the CO₂ Budget Trading Program by promulgating 6 NYCRR Part 242.

The CO₂ Budget Trading Program is designed to allocate CO₂ emissions allowances ("Allowances") to an Energy Efficiency and Clean Energy Technology Account ("Account"), which will be established and administered by the New York State Energy Research and Development Authority ("Authority") under this Part 507. The CO₂ Allowance Auction Program as set forth at Part 507 is designed to complement the provisions of the CO₂ Budget Trading Program and to effectuate the purposes thereof.

As stated in Section 242-5.3 of the proposed CO₂ Budget Trading Program rule, the Account will be established to promote and reward investments in energy efficiency, renewable or non-carbon emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will conduct auctions, pursuant to the process provided in Part 507, through which the allowances will be made available for sale. The proceeds of the auction(s) will be used to promote the above-stated purposes of the Account, and for administrative and implementation expenses incurred.

1. STATUTORY AUTHORITY

The Authority currently administers energy efficiency and clean energy technology programs that are similar to the programs and/or projects that will be funded by the proceeds raised by the auction of allowances from the Account. The stated purposes of the Account are consistent with the Authority's statutory authority, which directs the Authority to conduct, sponsor and assist programs related to new energy technologies and to provide services related to their development. The Authority has the statutory authority to sell the allowances and enter into any contracts and to execute all instruments necessary to develop, research, promote and reward investments related to energy efficiency, renewable or non-carbon-emitting technologies.

The Authority's statutory authority springs from Title 9 of Article 8 of the Public Authorities Law (PAL). In enacting Title 9 of Article 8, the legislature declared, in relevant part, that the purpose of the Authority is, among other things, to promote the development and utilization of "safe, dependable, renewable and economic energy sources and the conservation of energy and energy resources." PAL Section 1850-a. The statute directs the Authority to develop and implement [these] "new energy technologies" and "energy conservation technologies" as such terms are broadly defined by the statute, in a manner consistent with economic, social and environmental objectives. PAL Sections 1851(10), (11); 1854. Taken together, the "new energy technologies" and "energy conservation technologies" that the statute directs the Authority to promote closely match the "energy efficiency, renewable or non-carbon-emitting technologies" that are to be promoted through Part 507. In exercising its statutory powers, the Authority is directed to cooperate and act in conjunction with various entities, including State agencies, in exercising its powers, and is authorized to provide services to State agencies in furtherance of its corporate purposes. PAL Section 1854(2). The Authority is empowered to make rules and regulations governing the exercise of its corporate powers and in fulfillment of its corporate purposes by PAL Section 1855(4).

Pursuant to PAL Section 1855, the Authority is specifically empowered to accept from any State agency the grant of any aid in any form and to comply, subject to the relevant provisions of the Authority's enabling legislation, with the terms and conditions of the grant of the aid. Public Authorities Law Section 1855 also provides that the Authority may receive, acquire, sell, and dispose of any personal property, and may "enter into any contracts and to execute all instruments necessary or convenient for the exercise of its corporate powers and the fulfillment of its corporate purposes." PAL Sections 1855(5), (10). Finally, the statute provides the Authority with the statutory authority "to do all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted by this title." PAL Section 1855(17).

Given the numerous references and express emphasis in the Authority's enabling statute on the development of energy conservation and renewable energy resources, as central to the Authority's purpose, the Authority's establishment of the Account, auction of the allowances, and

use of allowance sale revenues for the purposes stated in the Account definition clearly fall within the authority granted to NYSEDA by Title 9 of Article 8 of the PAL.

2. LEGISLATIVE OBJECTIVES

The legislative history reinforces the plain import of the statutory language. The Governor's Memoranda approving the Authority's creation states that "the primary purpose of this bill is to accelerate the development and use within the State of new energy technologies." L. 1975, c. 864. Upon amendment in 1980, the Governor stated that it is the Authority's statutory mandate to "foster, sponsor and assist development and demonstration of new energy generation and conservation technologies." L. 1980, c. 558.

3. NEEDS AND BENEFITS

The Department has determined that the burning of fossil fuels to generate electricity is a major contributor to a warming climate, and that a warming climate poses a serious threat to environmental resources and public health of New York State. In response, the Department has proposed to establish the CO₂ Budget Trading Program by promulgating 6 NYCRR Part 242. Under that Part 242, proceeds from the sale of allowances to affected generators of CO₂ will be used by the Authority to fund programs promoting energy efficiency, renewable or non carbon-emitting technologies, and innovative carbon-emissions abatement technologies with significant carbon reduction potential. The CO₂ Allowance Auction Program will thereby effectuate the purposes of the CO₂ Budget Trading Program by producing significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

In support of these goals, the auctions will be designed to achieve the following objectives: achieve fully transparent and efficient pricing of allowances; promote a liquid allowance market by making entry and trading as easy and low-cost as possible; be open to participation by the categories of bidders determined to be eligible by the Authority or its designee in consultation with the Auction Advisory Committee; monitor for and guard against the exercise of market power and market manipulation; be held as frequently as is needed to achieve design objectives; avoid interference with existing allowance markets; align well with wholesale energy and capacity markets; and to not act as a barrier to efficient investment in relatively clean existing or new electricity generating sources.

An Auction Advisory Committee ("Committee") comprised of the President and Chief Executive Officer of the Authority, the Commissioner of the Department and the Chairperson of the New York State Public Service Commission, or their respective designees, shall advise the Authority on procedures relevant to conducting the auctions described in Part 507. Beginning in 2008, CO₂ Allowance auctions will be held at least annually, but may be held as often as necessary to effectuate the objectives of the CO₂ Budget Trading Program, as determined by the Authority in consultation with the Committee.

Prior to each auction, the Authority or its designee, in consultation with the Committee, shall select the category or categories of bidders eligible to participate in each auction. Eligible bidders for an auction may include owners of CO₂ budget units located in New York, owners of CO₂ budget units located outside of New York but within the RGGI participating States that have final CO₂ Budget Trading rules in place at the time of the auction, and other market participants including but not limited to owners of fossil fuel-fired generation units located outside of the RGGI participating State, brokers, environmental groups and financial and investment institutions. All otherwise eligible bidders wishing to participate in an auction will be required to open and maintain a compliance or a general CO₂ allowance account pursuant to Part 242.

A detailed description of each auction, including details regarding participation, will be set forth in a Notice of CO₂ Allowance Auction ("Notice"), which will be published on a CO₂ allowance auction website and in the Department's Environmental Notice Bulletin at least 45 days prior to each auction. The Notice will include but will not be limited to the following information: date and time of auction, type of auction, eligible categories of bidders, number of CO₂ Allowances to be auctioned, location and/or electronic address of auction, format of bids, surety or security mechanism to certify eligibility to participate, and the Authority's information contact person. The Notice may also include a "reserve" or minimum price to be accepted for CO₂ Allowances.

Auctions will be implemented through a two-step process, consisting of (1) a pre-qualification application step that will pre-qualify bidders, and

(2) a competitive bidding step. Only those bidders found pre-qualified through the step one application process will be permitted to submit bid(s) in the auctions. The prequalification application will include a detailed description of the bidder and its corporate background, and will be accompanied by the bidder's surety. The surety required may be a letter of credit, bond, or other surety instrument deemed acceptable to the Authority or its designee that guarantees payment of the stated surety amount in the event the bidder's offer is accepted and the bidder fails to complete the transaction.

The Authority will review each pre-qualification application and make determinations as to qualification for participation in bidding. Failure to provide any information required by the Notice may result in the pre-qualification application being declared incomplete or otherwise deficient. All prospective bidders will be notified in writing of such determinations no later than 15 days prior to the date upon which the auction may be conducted. If a pre-qualification application is determined to be incomplete or otherwise deficient, the Authority shall notify the bidder and state the reasons therefore. Prospective bidders whose pre-qualification applications have been determined to be incomplete or deficient will be given a reasonable opportunity to provide additional information and to cure such deficiencies.

In conducting auctions, the Authority or its designee may employ any one of the following auction formats, or an auction format consisting of any or all of the components thereof:

(a) Sealed Bid, Discriminatory Price. A single or multiple round sealed-bid auction in which the bidders may submit multiple bids at different prices. Allowances are allocated to the highest bidders at their own bid prices.

(b) Sealed Bid, Uniform Price. A single or multiple round sealed-bid auction in which bidders may submit multiple bids at different prices; the price paid by all awarded bidders will be uniform.

(c) Ascending price, multiple round. A multiple round auction starting with an opening price with increases each round by predetermined increments. In each round, bidders offer the quantity they are willing to purchase at the posted price. Rounds continue so long as demand exceeds the quantity offered for sale. At the completion of the final round, the Authority may allocate allowances: (i) at the final price to remaining bidders and withhold unsold allowances for a future auction, (ii) at the penultimate price, first to final round bidders and then in order of bid during the penultimate round for all remaining allowances, or (iii) according to an alternative mechanism designed to effectuate the objectives of this Part.

(d) Descending price, multiple round. A multi-round auction starting with a high provisional price, which falls in each round by predetermined increments. In each round, the bidder can "lock in" some purchases at the current provisional price and/or the bidder can wait for the price to fall. The auction rounds cease when the number of allowances locked in is greater than or equal to the quantity of allowances being offered.

Upon closure of bidding, the Authority or its designee will rank all bids and all CO₂ Allowances will be sold at the amounts specified in the accepted bids until there are no remaining CO₂ Allowances available for the specified auction. In the event that there is more than one winning bidder submitting the same price and the total number of CO₂ allowances requested in all such winning bids exceeds the number of CO₂ allowances remaining, the Authority or its designee will award the remaining CO₂ allowances based on the pro rata share of the number of CO₂ allowances bid on by each winning bidder, in chronological order based on the time that the winning bids were submitted, or such other method as designed by the Authority. At such time as the transactions are complete, the Authority will notify the Department or its designee to transfer the corresponding CO₂ allowances from the energy efficiency clean energy technology account to the bidder's compliance or general account. All unsuccessful bidders may submit a written request for return of all financial securities or payments following the conclusion of each auction. After the auction is completed, any CO₂ Allowances left unsold shall be made available for sale in a subsequent auction or group of auctions, which will be determined by the Authority in consultation with the Auction Advisory Committee.

As noted above, proceeds of such auctions will be deposited into a designated Authority account and will be used to promote or reward investments in energy efficiency, renewable or non-carbon-emitting technologies, innovative carbon emissions abatement technologies with significant carbon reduction potential, and for the administration of the CO₂ Budget Trading Program and the Account.

4. COSTS

The costs to regulated parties and other bidders of participation in the CO₂ Allowance Auction Program are expected to be minimal². The auction process will provide regulated sources with an opportunity to acquire CO₂ allowances for compliance with the CO₂ Budget Trading Program. It has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties. The requirement that regulated sources, consisting of fossil fuel-fired electric generating units, reduce their greenhouse gas emissions and otherwise comply with the CO₂ cap and trade program is imposed by the CO₂ Budget Trading Program. A detailed analysis of the costs of the CO₂ Budget Trading Program, as promulgated by the Department at Part 242, which this Part 507 is designed to complement, is included in the Regulatory Impact Statement for that program.

The Authority will incur costs associated with the design, administration and implementation of the CO₂ Allowance Auction program and associated with administration and implementation of the Account and the programs that will be funded thereby.

With regard to the administration and implementation of the auctions, the Authority will need sufficient staff to: administer the auction process on an ongoing basis, including the preparation of notices to the public and other documents required under the process, to review applications submitted by prospective bidders, to conduct and/or supervise the conduct of each auction, to complete the transactions reached under each auction, and to coordinate the administration of the CO₂ Allowance Auction Program with the Department. The Authority estimates that between two and three person years (the full time equivalent of working 100 percent on the project for a full work year expressed as 220 days) will be required to administer and implement the CO₂ Allowance Auctions, at a cost of \$110,000 per person per year, inclusive of employee benefits, or up to \$330,000 annually. The Authority also expects to contract for the services of an auction service provider and an independent auditor, who will assist in the actual conduct of each auction.

The costs incurred by the Authority and the number of staff needed to administer and implement the programs that are to be funded through auction proceeds are difficult to quantify at this time, as those costs will depend in large part on the size and scope of those programs, which in turn will be determined by the amount of funds realized through the auctions.

The Authority currently administers application-based offerings and implements programs, under the System Benefits Charge (SBC) program, that are similar to the energy efficiency and clean energy technology programs that the Authority expects to administer and implement, through the use of auction proceeds, under the CO₂ Allowance Auction Program. Under the SBC program, the Authority's administration and evaluation expenditures are capped at 10% of the funds available. Based on the similarity between the current SBC programs and those that the Authority expects to initiate under the CO₂ Allowance Auction Program, the Authority expects that administration and evaluation costs under the CO₂ Allowance Auction Program will approximate 10% of the funds available to the Authority through auction proceeds. The Authority expects that all costs will be recovered from the auction proceeds.

5. LOCAL GOVERNMENT MANDATES

The Jamestown Board of Public Utilities ("JBPU"), a municipally owned utility, owns and operates the S.A. Carlson Generating Station, and will need to comply with the provisions of the CO₂ Budget Trading Program. In addition to the purchase of allowances through the CO₂ Allowance Auction Program, various strategies are available for JBPU to comply with the CO₂ Budget Trading Program, including increasing the efficiency of the natural gas-fired turbine, co-firing with biofuel, or the purchase of offsets. Should the JBPU decide to participate in the CO₂ Allowance Auction Program for compliance purposes, the JBPU will be required to comply with the provisions of Part 507.

No other additional recordkeeping, reporting, or other requirements will be imposed on local governments under this rulemaking.

6. PAPERWORK

Bidders in the CO₂ Allowance Auction Program will be required to submit a pre-qualification application and associated supporting documentation as outlined in Part 507. The process has been designed to minimize the amount of paperwork associated with each application, and allows for the continuing qualification of bidders, absent changes, for subsequent auctions.

7. DUPLICATION

The CO₂ Allowance Auction Program is designed to complement the provisions of the CO₂ Budget Trading Program. It does not duplicate any current regulation or rule.

8. ALTERNATIVES

The CO₂ Allowance Auction Program is designed to complement the provisions of the CO₂ Budget Trading Program, which provides for the auction of CO₂ allowances that are allocated to the Account. The Authority will design and implement auctions in accordance with the requirements of the CO₂ Budget Trading Program. As is provided by the rule, NYSERDA has identified a range of alternative auction formats that may be employed for individual auctions over the course of the program, including:

(1) Sealed Bid, Discriminatory Price. A single or multiple round sealed-bid auction in which the bidders may submit multiple bids at different prices; allowances are allocated to the highest bidders at their own bid prices.

(2) Sealed Bid, Uniform Price. A single or multiple round sealed-bid auction in which bidders may submit multiple bids at different prices; the price paid by all awarded bidders will be uniform.

(3) Ascending price, multiple round. A multiple round auction starting with an opening price with increases each round by predetermined increments. In each round, bidders offer the quantity they are willing to purchase at the posted price. Rounds continue so long as demand exceeds the quantity offered for sale. At the completion of the final round, the Authority may allocate allowances: (i) at the final price to remaining bidders and withhold unsold allowances for a future auction, (ii) at the penultimate price, first to final round bidders and then to bidders in the penultimate round in chronological order of bid during the penultimate round for all remaining allowances, or (iii) according to an alternative mechanism designed to effectuate the objectives of this Part.

(4) Descending price, multiple round. A multi-round auction starting with a high provisional price, which falls in each round by predetermined increments. In each round, the bidder can lock in some purchases at the current provisional price and/or the bidder can wait for the price to fall. The auction rounds cease when the number of allowances locked in is greater than or equal to the quantity of allowances being offered.

NYSERDA may also employ an auction format consisting of a combination of the components of the various formats described above. NYSERDA has hired a consultant to provide information useful in selecting the auction format to be employed. The consultants will provide information about the advantages/disadvantages of each format. The consultants will also provide guidance about how frequently to hold auctions, whether and how to sell allowances from future compliance periods in advance of their associated compliance period, and whether and how to use a reserve price. NYSERDA and the Auction Advisory Committee will use this information to weigh these alternatives and make decisions about what auction features should be used in each auction.

9. FEDERAL STANDARDS

The CO₂ Allowance Auction Program is an administrative program, and does not exceed any current federal standard.

10. COMPLIANCE SCHEDULE

The CO₂ Allowance Auction Program will be administered in such a manner as to ensure that regulated parties have the opportunity to comply with the requirements of the CO₂ Budget Trading Program in a timely manner.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² An analysis of the costs of the CO₂ Budget Trading Program, being promulgated by the Department of Environmental Conservation at 6 NYCRR Part 242, is included in the Regulatory Impact Statement for that program.

Regulatory Flexibility Analysis

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of ten Northeast and Mid-Atlantic States have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their respective states¹. In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) has proposed to establish the CO₂ Budget Trading Program by promulgating 6 NYCRR Part 242.

The CO₂ Budget Trading Program is designed to allocate CO₂ emissions allowances ("Allowances") to an Energy Efficiency and Clean Energy Technology Account ("Account"), which will be established and administered by the New York State Energy Research and Development Authority ("Authority") under this Part 507. The proposed CO₂ Allowance

Auction Program as set forth at Part 507 is designed to complement the provisions of the CO₂ Budget Trading Program and to effectuate the purposes thereof.

As stated in Section 242-5.3 of the proposed CO₂ Budget Trading Program rule, the Account will be established to promote and reward investments in energy efficiency, renewable or non-carbon emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will conduct CO₂ allowance auctions (“Auctions”), through the process provided in Part 507, through which the allowances will be made available for sale. The proceeds of the auction(s) will be used to promote the above-stated purposes of the Account, and for administrative and implementation expenses incurred.

1. Effect of Rule. No small businesses will be directly affected by the adoption of the proposed CO₂ Allowance Auction Program. The only local government affected by the CO₂ Budget Trading Program is the James-town Board of Public Utilities (“JBPU”), a municipally owned utility which owns and operates the S. A. Carlson Generating Station (SACGS).

2. Compliance Requirements. The JBPU, as owner and operator of the SACGS, will need to comply with the provisions of the CO₂ Budget Trading Program. In addition to the purchase of allowances through the CO₂ Allowance Auction Program, various strategies are available for JBPU to comply with the CO₂ Budget Trading Program, including increasing the efficiency of the natural gas-fired turbine, co-firing with biofuel, or the purchase of offsets. Should the JBPU decide to participate in the CO₂ Allowance Auction Program for compliance purposes, the JBPU will be required to comply with the provisions of Part 507.

3. Professional Services. The auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to JBPU or other regulated parties.

4. Compliance Costs. The costs to regulated parties and other bidders of participation in the CO₂ Allowance Auction Program are expected to be minimal². The auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

5. Economic and Technological Feasibility. In addition to the purchase of allowances through the CO₂ Allowance Auction Program, various strategies are available for JBPU to comply with the CO₂ Budget Trading Program, including increasing the efficiency of the natural gas-fired turbine, co-firing with biofuel, or the purchase of offsets.

6. Minimizing Adverse Impact. As stated, the costs to regulated parties and other bidders of participation in the CO₂ Allowance Auction Program are expected to be minimal. The auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to JBPU and other regulated parties.

7. Small Business and Local Government Participation. The JBPU actively participated in the public forums established to discuss the CO₂ Budget Trading Program with interested parties. Those forums included discussions of the auction of allowances and the use of the auction proceeds.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² An analysis of the costs of the CO₂ Budget Trading Program, being promulgated by the Department of Environmental Conservation at 6 NYCRR Part 242, is included in the Regulatory Impact Statement for that program.

Rural Area Flexibility Analysis

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of ten Northeast and Mid-Atlantic States have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states¹. In order to carry out the State’s commitment, the Department of Environmental Conservation (the Department) has proposed to establish the CO₂ Budget Trading Program by promulgating 6 NYCRR Part 242.

The CO₂ Budget Trading Program is designed to allocate CO₂ emissions allowances (“Allowances”) to an Energy Efficiency and Clean Energy Technology Account (“Account”), which will be established and

administered by the New York State Energy Research and Development Authority (“Authority”) under this Part 507. The proposed CO₂ Allowance Auction Program as set forth at Part 507 is designed to complement the provisions of the CO₂ Budget Trading Program and to effectuate the purposes thereof.

As stated in Section 242-5.3 of the proposed CO₂ Budget Trading Program rule, the Account will be established to promote and reward investments in energy efficiency, renewable or non-carbon emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will conduct CO₂ allowance auctions (“Auctions”), through the process provided in Part 507, through which the allowances will be made available for sale. The proceeds of the Auction(s) will be used to promote the above-stated purposes of the Account, and for administrative and implementation expenses incurred.

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS

The proposed CO₂ Allowance Auction Program is designed to facilitate compliance with the CO₂ Budget Trading Program by providing for the sale of the CO₂ allowances to the owners of affected sources of CO₂ emissions and other entities. Owners and other entities that are located in rural areas will be affected, if at all, no differently than those in other areas of the State.

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

Bidders in the CO₂ Allowance Auction Program will be required to comply with the Auction application requirements, including the requirements for supporting documentation, as is outlined in Part 507. The Auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

3. COSTS

The costs to regulated parties and other bidders of participation in the CO₂ Allowance Auction Program are expected to be minimal². The auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

The Authority will incur costs associated with the administration and implementation of the CO₂ Allowance Auctions and associated with administration and implementation of the Account and the programs that will be funded thereby.

With regard to the administration and implementation of the auctions, the Authority will need sufficient staff to: administer the auction process on an ongoing basis, including the preparation of notices to the public and other documents required under the process, to review applications submitted by prospective bidders, to conduct and/or supervise the conduct of each auction, to complete the transactions reached under each auction, and to coordinate the administration of the CO₂ Allowance Auction Program with the Department. The Authority estimates that between two and three person years (the full time equivalent of working 100 percent on the project for a full work year expressed as 220 days) will be required to administer and implement the Auctions, at a cost of \$110,000 per person per year, inclusive of employee benefits, or up to \$330,000 annually. The Authority also expects to contract for the services of an auction service provider and an independent auditor, who will assist in the actual conduct of each auction.

The costs incurred by the Authority and the number of staff needed to administer and implement the programs that are to be funded through auction proceeds are difficult to quantify at this time, as those costs will depend in large part on the size and scope of those programs, which in turn will be determined by the amount of funds realized through the auctions.

The Authority currently administers application-based offerings and implements programs, under the System Benefits Charge (SBC) program, that are similar to the energy efficiency and clean energy technology programs that the Authority expects to administer and implement, through the use of auction proceeds, under the CO₂ Allowance Auction Program. Under the SBC program, the Authority’s administration and evaluation expenditures are capped at 10% of the funds available. Based on the similarity between the current SBC programs and those that the Authority expects to initiate under the CO₂ Allowance Auction Program, the Authority expects that administration and evaluation costs under the CO₂ Allowance Auction Program will approximate 10% of the funds available to the Authority through auction proceeds. The Authority expects that all costs will be recovered from the auction proceeds.

4. MINIMIZING ADVERSE IMPACT

Since the proposed CO₂ Allowance Auction Program regulations apply equally to affected parties statewide, rural areas are not impacted any differently than other areas in the State. The Auction process has been designed to provide a user-friendly web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

5. RURAL AREA PARTICIPATION

Since the announcement of the Regional Greenhouse Gas Initiative in September of 2003, numerous stakeholder meetings were held with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations for the CO₂ Budget Trading Program were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment. Initial drafts and the discussions that ensued included the auction of allowances and the use of the auction proceeds.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² An analysis of the costs of the CO₂ Budget Trading Program, being promulgated by the Department of Environmental Conservation at 6 NYCRR Part 242, is included in the Regulatory Impact Statement for that program.

Job Impact Statement

1. Nature of Impact: On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of ten Northeast and Mid-Atlantic States have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their respective states¹. In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) has proposed to establish the CO₂ Budget Trading Program by promulgating 6 NYCRR Part 242.

The CO₂ Budget Trading Program is designed to allocate CO₂ emissions allowances ("Allowances") to an Energy Efficiency and Clean Energy Technology Account ("Account"), which will be established and administered by the New York State Energy Research and Development Authority ("Authority") under this Part 507. The proposed CO₂ Allowance Auction Program as set forth at Part 507 is designed to complement the provisions of the CO₂ Budget Trading Program and to effectuate the purposes thereof.

Under the CO₂ Allowance Auction Program, the Authority will conduct Auctions, through the process provided in Part 507, through which the Allowances will be made available for sale. The proceeds of the Auction(s) will be used to fund programs that will promote and reward investments in energy efficiency, renewable or non-carbon emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential.

It is expected that the implementation of energy efficiency and other programs will have a significant positive impact on jobs and employment opportunities throughout the State.

2. Categories and Numbers Affected: The Authority currently administers, through the New York Energy Smart Program, energy efficiency and clean energy technology programs that are very similar to those that will be funded with Auction proceeds under the CO₂ Allowance Auction Program. A 2006 Macroeconomic Impact Analysis of the New York Energy Smart Program concluded that expenditures under that program created and sustained approximately 4.8 new jobs per \$1 million of program funds spent. The following illustrates the breakdown of jobs created per sector:

Economic Sector	% of Total Added Jobs Through 2006
Agriculture, Forestry, Mining	0.60
Construction	10.52
Products Manufacturing	5.07
Equipment and Instrument Manufacturing	6.46
Transportation, Communication, and other Public Service	3.30
Wholesale and Retail Trade	30.86
Personal and Business Services	52.81
Electric Utilities	-9.63
Total	100

The results of the Macroeconomic Impact Analysis were published in the March 2007 New York Energy Smart Evaluation Report, which is

available on the Authority's website at http://www.nysersda.org/Energy_Information/evaluation.asp.

3. Regions of Adverse Impact: No adverse impact on jobs or employment opportunities is expected in any region. It is expected that the positive impact on jobs and employment opportunities will be statewide.

4. Minimizing Adverse Impact: No adverse impact on jobs or employment opportunities is expected.

5. Self-Employment Opportunities: While precise predictions are not possible, the positive impact on jobs and the employment opportunities that are expected as a result of implementation of the CO₂ Allowance Auction Program are expected to include opportunities for self employment.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Special Fishing Regulations for West Canada Creek

I.D. No. ENV-43-07-00006-E

Filing No. 1047

Filing date: Oct. 5, 2007

Effective date: Oct. 5, 2007

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

Action taken: Amendment of Section 10.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0305, 11-1301 and 11-1303

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

Specific reasons underlying the finding of necessity: The immediate adoption of this rule is necessary for the preservation of the general welfare.

Subdivision 10.3(b) Table A of NYCRR designates fishing regulations for specially designated waters, including special regulations for sections of West Canada Creek located in Oneida and Herkimer Counties. This 28 mile stretch currently provides an internationally renowned brown trout fishery. The upper 2.5 miles is open all year to catch and release fishing only. The remainder of this 28 mile portion of the Creek has an open season that closes on November 30.

The Hinckley Reservoir is managed through a license from the Federal Energy Regulatory Commission (FERC) to provide year round base flows to the lower 28 miles of West Canada Creek. The prescribed base flow for the fall is 160 cubic feet per second (cfs). The reservoir also provides water to the Mohawk Valley Water Authority and the Canal Corp. The recent drought has left the reservoir at an historic low level (35 feet below dam crest on 10/5/07) with no significant rain in the forecast. As a result, all parties involved recently agreed to conserve water in the reservoir and to reduce the base flow in West Canada Creek to 120 cfs.

After 10 days of this reduced flow, the trout in this section are now concentrated in the remaining pools. The riffles between the pools are impassable to fish passage due to low water. In light of the drought condition noted above, the Department has several concerns. First, the fish mortality rate associated with catch and release fishing, which is normally low, will increase during drought conditions. Warmer water temperatures and lower water levels place additional stress on fish and increase the likelihood that fish will not survive after catch and release. An increase in the fish mortality rate would be contrary to the purpose of catch and release fishing. Second, the low water levels and high concentrations of fish, conditions currently present in this portion of West Canada Creek are not conducive to ethical fishing and would likely result in numerous fish being illegally hooked (snagged). Third, in order to maintain this high quality

trout fishery, an adequate number of fish need to survive and overwinter this year. If the fishery were to remain open, the first two concerns noted above could interfere with the future of this fishery.

In response to this situation, the Department is closing this section of stream to all fishing from October 5, 2007 through November 30, 2007. Although the Department is hopeful that conditions will return to levels that will allow fishing to resume in the upper 2.5 mile section on December 1, 2007, the Department reserves the right to extend the closure for a longer period of time should conditions not improve sufficiently.

Subject: Special fishing regulations for West Canada Creek.

Purpose: To prevent trout mortality due to drought conditions.

Text of emergency rule: Subparagraphs 10.3(b)(22), (c) and (d) are amended to read as follows:

(22) Herkimer

- (c) Moose River, Middle and South Branch of Moose River downstream of Moose River Plains Rec. Area, West Canada Creek from mouth upstream to Cincinnati Creek Trout April 1 through November 30; *except West Canada Creek from mouth upstream to Cincinnati Creek* Any size 5 with no more than 2 longer than 12"
- (d) West Canada Creek from Trenton Falls Dam downstream 2.5 miles to Cincinnati Creek Trout [All year] *December 1 through October 4; Closed October 5 through November 30* Catch and release only Artificial lures only

Subparagraphs 10.3(b)(33), (c) and (d) are amended to read as follows:

(33) Oneida

- (c) West Canada Creek, East Branch Fish Creek from Rome Reservoir downstream and West Branch Fish Creek except for sections below Trout April 1 through November 30; *except West Canada Creek closed October 5 through March 31* Any size 5 with no more than 2 longer than 12"
- (d) West Canada Creek from Trenton Falls Dam downstream 2.5 miles to Cincinnati Creek Trout [All year] *December 1 through October 4; Closed October 5 through November 30* Catch and release only Artificial lures only

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 January 2, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Shaun Keeler, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8928, e-mail: sxkeeler@gw.dec.state.ny.us

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

Regulatory Impact Statement

1. Statutory Authority

Sections 11-0303 and 11-0305 of the Environmental Conservation Law (ECL) authorize the Department of Environmental Conservation (Department) to provide for the management and protection of the State's fisheries resources, taking into consideration ecological factors, public safety, and the safety and protection of private property. Sections 11-1301 and 11-1303 of the ECL empower the Department to fix by regulation open seasons, size and catch limits, and the manner of taking of all species of fish, except certain species of marine fish (listed in section 13-0339 of the Environmental Conservation Law), in all waters of the state.

2. Legislative Objectives

Open seasons, size restrictions, daily creel limits, and restrictions regarding the manner of taking fish are the basic tools used by the Department in achieving the Legislature's intent. The purpose of setting seasons is to prevent the over-exploitation of fish populations during vulnerable periods, such as during spawning, thereby insuring healthy fish populations. Size limits are necessary to maintain quality fisheries and to insure that adequate numbers survive to spawning size. Creel limits are used to distribute the harvest of fish among many anglers and angling days and to optimize resource benefits. Regulations governing the manner of taking fish enhance the quality of the recreational experience, provide for a variety of harvest techniques and angler preferences, and limit exploitation. Catch-and-release fishing regulations are used in waters capable of sustaining outstanding growth and survival of fish to reduce fishing mortality to the lowest possible level. Reduction of fishing mortality results in a larger population of desirable-sized fish and increases the quality of the recreational opportunities for anglers.

3. Needs and Benefits

Subdivision 10.3(b) Table A of NYCRR designates fishing regulations for specially designated waters, including special regulations for sections of West Canada Creek located in Oneida and Herkimer Counties. This 28 mile stretch currently provides an internationally renowned brown trout fishery. The upper 2.5 miles is open all year to catch and release fishing only. The remainder of this 28 mile portion of the Creek has an open season that closes on November 30.

The Hinckley Reservoir is managed through a license from the Federal Energy Regulatory Commission (FERC) to provide year round base flows to the lower 28 miles of West Canada Creek. The prescribed base flow for the fall is 160 cubic feet per second (cfs). The reservoir also provides water to the Mohawk Valley Water Authority and the Canal Corp. The recent drought has left the reservoir at an historic low level (35 feet below dam crest on 10/5/07) with no significant rain in the forecast. As a result, all parties involved recently agreed to conserve water in the reservoir and to reduce the base flow in West Canada Creek to 120 cfs.

After 10 days of this reduced flow the trout in this section are now concentrated in the remaining pools. The riffles between the pools are impassable to fish passage due to low water. In light of the drought conditions noted above, the Department has several concerns. First, the fish mortality rate associated with catch and release fishing, which is normally low, will increase during drought conditions. Warmer water temperatures and lower water levels place additional stress on fish and increase the likelihood that fish will not survive after catch and release. An increase in the fish mortality rate would be contrary to the purpose of catch and release fishing. Second, the low water levels and high concentrations of fish, conditions currently present in this portion of West Canada Creek are not conducive to ethical fishing and would likely result in numerous fish being illegally hooked (snagged). Third, in order to maintain this high quality trout fishery, an adequate number of fish need to survive and overwinter this year. If the fishery were to remain open, the first two concerns noted above could interfere with the future of this fishery.

In response to this situation, the Department is closing this section of stream to all fishing from October 5, 2007 through November 30, 2007. Although the Department is hopeful that conditions will return to levels that will allow fishing to resume in the upper 2.5 mile section on December 1, 2007, the Department reserves the right to extend the closure for a longer period of time should conditions not improve sufficiently.

4. Costs

Enactment of the emergency regulation described herein governing fishing will not result in increased expenditures by the State, local governments, or the general public.

5. Local Government Mandates

These amendments of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district.

6. Paperwork

No additional paperwork will be required as a result of these changes in regulations.

7. Duplication

There are no other state or federal regulations which govern the taking of fish.

8. Alternatives

The alternative to the regulation would be to retain the current fishing regulation, which the Department does not find acceptable. In the absence of the change, adequate numbers of fish may not overwinter, fish may be vulnerable to large scale harvest and catch and release mortality, and a high concentration of fish would be exposed to conditions not conducive to ethical angling (i.e., snagging).

9. Federal Standards

There are no minimum federal standards that apply to the regulation of sportfishing.

10. Compliance Schedule

This regulation will take effect immediately upon filing with the Department of State. Compliance with the closed period will be required as of October 5, 2007.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule is intended to protect the trout fishery in West Canada Creek to avoid the potential over-harvest and catch and release mortalities that would likely occur due to the low flow, high water temperature situation that currently exists. The rule would also eliminate unscrupulous fishing activity (i.e., snagging) that would likely occur given the current high density of fish in the area and the low flows.

2. Compliance requirements:

The area would be closed to fishermen from October 5th through and including November 30th. Absent further action by the Department, a portion of the area would reopen on December 1st.

3. Professional services:

NA.

4. Compliance Costs:

NA.

5. Economic and Technological Feasibility:

NA.

6. Minimizing adverse impact:

Only the lower 28 miles of West Canada Creek will be affected which leaves anglers with approximately 32 miles of river upstream to fish. All other trout streams in the area will remain open to fishing until October 15th, the traditional closing date. Other streams in the area that will remain open until November 30 include the Black, Moose and Mohawk Rivers and Nine Mile, Oneida and Sauquoit Creeks. The 2.5 mile catch and release section of West Canada Creek will reopen on December 1, 2007.

7. Small business and local government participation:

The Department's outreach efforts on this rulemaking included notification to the area businesses that we are considering the rule. The Department will issue a press release on the regulation change, and notification of the delayed open season will be posted on the Department's website www.dec.ny.gov. Department staff will seek to have the rule posted on Brookfield Power's "water line" www.h2online.com/365123.asp, which is a web site that provides flow levels in West Canada Creek and is very popular with anglers. In addition, the Department will have staff on the stream to inform anglers of the closure and to suggest other fishing areas.

Rural Area Flexibility Analysis

This emergency rulemaking will close to fishing only one stream in the state. Anglers have approximately 32 other miles of West Canada Creek to fish and many other trout streams in the area. The additional protection afforded fish in this section will help ensure the future of this renowned trout fishery. Therefore, the Department of Environmental Conservation has determined that this rule will not impose any significant adverse impact on rural areas.

The rulemaking simply closes an area to fishing for approximately two months. Thus, the Department has determined that this rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas.

Therefore, the Department has concluded that a rural area flexibility analysis is not required.

Job Impact Statement

The Department has determined that this emergency rulemaking will not have a substantial adverse impact on jobs and employment opportunities. The only jobs that could potentially be directly affected by this rule are fishing guides. While certain fishing guides may wish to take clients on this portion of West Canada Creek, the effects are limited and temporary.

The Department knows of no guides that use this stream exclusively. All other streams in the area will remain open. There are approximately 32 additional miles of West Canada Creek not impacted by this rulemaking that are open to anglers and fishing guides.

Protection of the fish during this low water, high temperature period will benefit angling businesses and jobs by ensuring that sufficient fish will holdover this winter and will be available to support the fisheries in future years.

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

PROPOSED RULE MAKING HEARING(S) SCHEDULED

New York State CO₂ Budget Trading Program

I.D. No. ENV-43-07-00028-P

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

Proposed action: Addition of Part 242 and amendment of Part 200 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 24-0103, 25-0102, 34-0108, 49-0309, 71-2103 and 71-2105; Energy Law, sections 3-101 and 3-103; and Public Authorities Law, sections 1850, 1851, 1854 and 1855

Subject: New York State CO₂ Budget Trading Program.

Purpose: To reduce CO₂ emissions from fossil fuel-fired electric generating sources statewide to counter the threat of a warming climate. The CO₂ Budget Trading Program will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

Public hearing(s) will be held at: 10:00 a.m., Dec. 10, 2007 at Department of Environmental Conservation, Public Assembly Rm., 129, 625 Broadway, Albany, NY; 1:00 p.m., Dec. 11, 2007, at Department of Environmental Conservation, Region 5, Conference Rm., 1115 Rte. 86, Ray Brook, NY; 10:00 a.m. Dec. 12, 2007, at Department of Public Service, Board Rm., 4th Fl., 90 Church St., New York, NY; and 1:00 p.m., Dec. 13, 2007, at Department of Environmental Conservation, Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, 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.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): Part 242 establishes the New York State CO₂ Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of carbon dioxide (CO₂), a greenhouse gas (GHG), from CO₂ Budget sources in an economically efficient manner.

Part 242 establishes emission budgets for CO₂. Part 242 establishes a trading program by creating and allocating allowances that are limited authorizations to emit up to one ton of CO₂ in each control period. Affected sources are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the source for the control period immediately preceding such deadline.

For Part 242, the first control period commences on January 1, 2009 and concludes on December 31, 2011. Subsequent control periods begin on January 1 and conclude on the December 31 three years later. Part 242 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells or uses any amount of electricity.

Part 242 includes a limited exemption provision that allows units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. A limited exemption is available to industrial units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit.

Part 242 requires each CO₂ budget unit to have a CO₂ authorized account representative (AAR) who shall be responsible for, among other

things, complying with the CO₂ budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. The owner and/or operator of the unit may also designate an alternate CO₂ AAR to perform the above duties. The CO₂ Budget Trading Program was designed to allow for the use of agents that can make electronic submissions on behalf of the AAR and Alternate AAR.

The CO₂ AAR shall submit a complete CO₂ budget permit application to the department by the later of January 1, 2009 or 12 months before the date on which the CO₂ budget unit commences operation. The CO₂ AAR shall submit to the department a compliance certification report for each control period by March 1 immediately following the relevant control period.

The Statewide CO₂ Budget Trading Program base budget is 64,310,805 tons per year for the first two control periods (2009-2011 and 2012-2014). The base budget decreases as follows: to 62,703,035 tons in 2015, to 61,095,265 tons in 2016, to 59,487,495 tons in 2017 and to 57,879,725 tons per year for 2018 and beyond. By January 1, 2009, the department or its agent will record in the energy efficiency and clean technology account the CO₂ allowances for all allocation years.

The department will allocate most of the CO₂ Budget Trading Program base budget to the energy efficiency and clean energy technology account. The New York State Energy Research and Development Authority (NYSERDA) will administer the energy efficiency and clean technology account so that allowances will be sold in an open and transparent allowance auction or auctions. The proceeds of the auction or auctions will be used to promote the purposes of the energy efficiency and clean technology account and for administrative costs associated with the CO₂ Budget Trading Program. The auction will be carried out to achieve the following objectives to the extent practicable: achieve fully transparent and efficient pricing of allowances; promote a liquid allowance market by making entry and trading as easy and low-cost as possible; be open to participation for bidding by any individual or entity that meets reasonable minimum financial requirements; monitor for and guard against the exercise of market power and market manipulation; be held as frequently as is needed to achieve design objectives; avoid interference with existing over-the-counter allowance markets; align well with wholesale energy and capacity markets; and be designed to not act as a barrier to efficient investment in existing or new electricity generating sources. The department will also include a voluntary renewable energy market and long term contract set-aside allocation. Accordingly, the department shall allocate 700,000 and 1,500,000 tons to the voluntary renewable energy market and long term contract set-aside accounts, respectively, from the CO₂ Budget Trading Program annual base budget.

The department may award early reduction allowances to a CO₂ budget source for reductions in the CO₂ budget source's CO₂ emissions (inclusive of all emissions from the CO₂ budget units at the CO₂ budget source) that are achieved by the source during the early reduction period (2006, 2007 and 2008). Total facility shutdowns or reductions that result from enforcement actions shall not be eligible for early reduction allowances. Early reductions during the control period will be demonstrated against the baseline period (2003, 2004 and 2005).

The department will establish one CO₂ compliance account for each CO₂ budget source. Deductions of allowances for compliance purposes will be made from the compliance account. Allowances may be banked without discount until deducted for compliance. The CO₂ AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the source's budget emissions limitation for the control period immediately preceding, CO₂ allowances must be submitted for recordation in a unit's compliance account by midnight of March 1. After making the deductions for compliance, if a unit has excess emissions the department will deduct from the source's compliance account, allowances allocated for a subsequent control period, allowances equal to three times the unit's excess emissions. If the source has insufficient CO₂ allowances to cover three times the number of allowances in its compliance account, the source shall be required to immediately transfer sufficient allowances into its compliance account.

Part 242 will provide for the award of CO₂ offset allowances to sponsors of CO₂ emissions offset projects or CO₂ emission credit retirements that have reduced or avoided atmospheric loading of CO₂, CO₂ equivalent (a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential) or sequestered carbon as demonstrated in accordance with the offset consistency application and monitoring and verification report requirements of the program. Offsets

can be obtained from eligible landfill methane capture and destruction projects, reduction in emissions of sulfur hexafluoride, sequestration of carbon due to afforestation, reduction or avoidance of CO₂ emissions from natural gas, oil or propane end-use combustion due to end-use energy efficiency, and from avoided methane from agricultural manure management operations. CO₂ retirements include the permanent retirement of GHG allowances or credits issued pursuant to any governmental mandatory carbon constraining program outside of the United States that places a specific tonnage limit on GHG emissions, or certified GHG emissions reduction credits issued pursuant to the United Nations Framework Convention on Climate Change (UNFCCC) or protocols adopted through the UNFCCC process.

For CO₂ offset allowances, the number of CO₂ offset allowances that are available to be deducted for compliance with a CO₂ budget source's CO₂ budget emissions limitation for a control period may not exceed the number of tons representing 3.3 percent of the CO₂ budget source's CO₂ emissions for that control period. If the department determines that there has been a stage one trigger event, five percent will be allowed and if the department determines that there has been a stage two trigger event, offset up to 10 percent will be allowed. A stage one trigger event is the occurrence of any 12 month period that completely transpires following the market settling period and is characterized by an average CO₂ allowance price that is equal to or greater than the stage one threshold price (\$7.00 adjusted annually by the consumer price index). A stage two trigger event is the occurrence of any 12 month period that completely transpires following the market settling period and is characterized by an average CO₂ allowance price that is equal to or greater than the stage two threshold price (\$10.00 adjusted annually by the consumer price index plus two percent).

Part 200 cites the portions of federal statute and regulations that are incorporated by reference into Part 242.

Text of proposed rule and any required statements and analyses may be obtained from: Michael P. Sheehan, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: 242rggi@gw.dec.state.ny.us

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

Public comment will be received until: 5:00 p.m. on Monday, December 24, 2007.

Additional matter required by statute: Pursuant to article 8 of the State Environmental Quality Review Act, a short environmental assessment form, a positive declaration and a draft generic environmental impact statement are on file. (DGEIS is currently being prepared.) A coastal assessment form is also on file. This rule must be approved by the Environmental Board.

Summary of Regulatory Impact Statement

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The statutory authority to promulgate Part 242 in the State derives primarily from the Department's obligation to prevent and control air pollution, as set out in the Environmental Conservation Law (ECL) at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103, 71-2105. The Department's obligation to preserve and protect the other natural resources and public health in the State as it relates to climate change extends beyond the control of air pollution, however, as set out in ECL Sections 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 24-0103, 25-0102, 34-0108, and 49-0309. The promulgation of the Program is also consistent with the Department's obligations under Energy Law 3-101 and Energy Law 3-103. The general powers of the New York State Energy Research and Development Authority (NYSERDA) that are relevant to the Program's ability to sell allowances in a transparent auction are set forth in the Public Authorities Law Sections 1850, 1851, 1854 and 1855.

Mitigating the impacts of New York's warming climate represents one of the most pressing environmental challenges for the State, the nation and the world. Extensive scientific work demonstrates the need for immediate world-wide action to reduce emissions from burning fossil fuels, as well as

the great benefits that will accrue if the emissions are reduced through programs like RGGI. This section outlines the Department's analysis of the needs and the considerable benefits of the Program.

A naturally occurring greenhouse effect has regulated the earth's climate system for millions of years. Solar energy from the sun that reaches the surface of the earth is radiated back into the atmosphere as long wave or infrared radiation. CO₂ and other naturally occurring GHGs trap heat in our atmosphere, maintaining the average temperature of the planet approximately 50 degrees Fahrenheit above what it would be otherwise. An enhanced greenhouse effect, and associated climate change, results as large quantities of anthropogenic GHGs, especially CO₂ from the burning of fossil fuels, are added to the atmosphere.

Atmospheric concentrations of CO₂ and other GHGs have substantially increased since the mid-1700s due to human activities. In addition, ice core samples spanning thousands of years have proven that CO₂ concentrations far exceed pre-industrial values. These global increases in CO₂ concentration are due primarily to fossil fuel use and land-use change.²

While there is strong evidence that the climate is warming, there is also clear scientific consensus that anthropogenic emissions of CO₂ from the burning of fossil fuels are contributing to observed warming of the planet. The evidence comes from direct measurements of rising surface air and subsurface ocean temperatures, increases in sea levels, retreating glaciers and changes to many physical and biological systems.

Scientists have already observed significant warming in New York's climate due in part to increased concentrations of GHGs in the atmosphere.³ Since 1970, the Northeast United States has been warming at a rate of 0.5̊ F per decade. Winter temperatures have risen even faster, at a rate of 1.3̊ per decade from 1970 to 2000. Temperature increases in the coastal areas of the state have been more dramatic. In summary, scientists have concluded that the New York climate has already begun migrating south, taking on the characteristics of the climate formerly found in the states south of New York.⁴

In addition to examining the observational changes that have already occurred in the New York climate, scientists have invested considerable effort in attempting to identify the future trends for the Northeast climate. The extent of the environmental threat of future regional climate change depends largely on whether atmospheric GHG concentrations and emissions of CO₂ and other GHGs are reduced.

The scientific literature confirms that reducing emissions of GHGs like CO₂ will help to mitigate the impacts of climate change. It is clear that these projections about New York's potential future will have adverse impacts on New York's environment and human health. It is also clear that reducing GHG emissions will reduce those impacts. More intense and prolonged periods of summertime heat can result in increased mortality and heat illnesses, especially in cities that experience the heat island effect. The term "heat island" refers to urban air and surface temperatures that are higher than nearby rural areas. Many U.S. cities and suburbs have air temperatures up to 10̊ F warmer than the surrounding natural land cover.⁵ The United States Environmental Protection Agency (EPA) reports that a one degree Fahrenheit increase in average temperature could more than double heat related fatalities in New York City from 300 to 700 per year.⁶ Increased GHG emissions contribute to conditions that enhance the formation of ground-level ozone, specifically by increasing temperature through global climate change. Increased temperature and precipitation levels also produce conditions favorable to the introduction or spread of vector-borne illnesses such as Lyme Disease, Equine Encephalitis, West Nile Virus, and other diseases spread by mosquitoes, ticks, and wild rodents.⁷

New York's shoreline could also be adversely affected by the warming climate. New York has approximately 2,625 miles of coastline including barrier islands, coastal wetlands, and bays.⁸ The major contributor to sea level rise is thermal expansion and melting of glaciers and ice sheets. In New York City for example, sea level has risen 0.27 cm/year on average over the last hundred years and is expected to increase over the next century to an average of approximately 0.60 cm/year.⁹ Accelerated sea level rise due to global climate change is expected to increase the frequency and magnitude of storms such as the 100 year storm, which would result in increased flood damage. The return period of the resulting 100 year flood could be reduced to once every 50 years by the 2080s, and as often as once every four years in worst case scenarios.¹⁰

New York's public water supply could also be stressed by changes in temperature and precipitation. The majority of drinking water is obtained from surface flow, which can be highly variable. The New York City water supply comes from a 2,000 square mile watershed area in upstate New York that is greatly influenced by temperature and precipitation levels.¹¹

Lake Erie and Lake Ontario are critical water sources to New York State which would also be threatened by global climate change. New York relies on these Great Lakes for drinking water, hydroelectric power, commercial shipping, and recreation, including boating and fishing. New York State has approximately 331 miles of shoreline along Lake Ontario and approximately 77 miles along Lake Erie.¹² Global climate change is likely to lower the water levels of the Great Lakes through increased evaporation.

Agriculture and forests in New York will also be affected by global climate change. The majority of crops grown in New York may be able to withstand a warmer climate with the exception of cold weather crops. These include apples, potatoes, and others which would shift to the north or have reduced growing seasons. These shifts would eventually result in a different crop mix for New York's farmers. Dairy farmers would also be impacted since milk production is maximized under cooler conditions ranging from 41 to 68̊ F.¹³ Global climate change could also affect the current forest mix in New York. It could change from the current mixed forest to a temperate deciduous forest. New York State's Adirondack Park is the largest forested area east of the Mississippi and it consists of six million acres including 2.6 million acres of state-owned forest preserve.¹⁴ The Adirondack Park, one the most significant hardwood ecosystems in the world, would be threatened by global climate change. Climate change would also negatively impact New York's maple syrup industry since specific temperature conditions are required in order for the sugar maples to produce sap. As forest species change, the dulling of fall foliage will likely have a negative impact on regional tourism.¹⁵ Distribution of wild-life is also likely to change due to increased temperature and changes in precipitation. As a result, cold-water salmon and trout fisheries and migratory birds could be adversely impacted due to loss or changes in habitat.

The global community must reduce its GHG emissions well below 1990 levels within a few decades if we are to stabilize atmospheric concentrations of CO₂ at acceptable levels. The burning of fossil fuels in power plants in New York is a major contributor to increased atmospheric concentrations of CO₂. In 2005, power plants in New York burned fossil fuels to produce approximately 61 million tons of CO₂ and significant amounts of other harmful pollutants that impact the health and welfare of New Yorkers. This represents approximately one-quarter of the State's total GHG emissions. Any effort to curb the State's contribution to atmospheric concentrations of CO₂, therefore, must address CO₂ pollution from power plants.

Offsets are an integral part of RGGI and the Program. An "offset" is a project-based GHG reduction (or sequestration) occurring at sources that are not subject to the Program that may be used by regulated sources for the purpose of compliance with the Program. Offsets not only provide flexibility for regulated sources, but also provide significant environmental and or economic co-benefits. Offsets allowed under the Program are from: Landfill Gas; SF₆: reduction of fugitive emissions from electricity transmission and distribution infrastructure; Afforestation; Agricultural methane; and Natural gas and oil/end-use energy efficiency. The Program also incorporates an energy efficiency and clean energy technology allocation (the "EE & CET Allocation"). The EE & CET Allocation will be administered by NYSERDA and allowances in the account will be sold in a transparent allowance auction or auctions. This will better achieve the emissions reduction goals of the Program by promoting or rewarding investments in energy efficiency, renewable or non-carbon-emitting technologies, innovative carbon emissions abatement technologies with significant carbon reduction potential, and/or the administration of the Program. NYSERDA currently administers similar energy efficiency and clean energy technology programs, and the addition of the EE & CET Allocation, should be readily accomplished. The EE & CET Allocation will increase the emissions reduction benefits of the Program while simultaneously reducing impacts on consumers. The Department will also include a voluntary renewable energy market and long term contract set-aside allocation. Accordingly, the Department shall allocate 700,000 and 1,500,000 tons to the voluntary renewable energy market and long term contract set-aside accounts, respectively, from the CO₂ Budget Trading Program annual base budget.

The Department sought input from NYSERDA and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance of the Program. The analysis provided by NYSERDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSERDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department

also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the program may have on the state economy.¹⁶

CO₂ allowance prices (the cost of complying with RGGI) are projected to increase from approximately \$2/ton in 2009 to about \$3.00/ton in 2015 and about \$4.45/ton in 2021. Under the Program, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 kWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.¹⁷ A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.¹⁸ The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

There will also be costs associated with the administration of the Program. First and foremost, the Department will incur costs associated with the implementation of the Program. The Department estimates that between five and eight person years (the full time equivalent of working 100 percent on a project for a full year expressed as 220 days) will be required to implement all aspects of the Program at a cost of \$110,000 per person year or up to \$880,000 annually. The Department will also need to reimburse its agent for its costs in administering the emission and allowance tracking and reporting system. Based on contractor costs associated with the administration of the Acid Deposition Reduction Program (ADRP) under Parts 237 and 238, the Department estimates that the capital start up costs for designing and implementing a regional system for tracking CO₂ allowance transactions will be between \$500,000 and \$950,000. The Department is currently contracting with an agent to administer the ADRP program and the annual operating costs for the administration of the emission and allowance tracking and reporting system under that program are approximately \$160,000. The Department estimates that administration of a regional system will be between \$150,000 and \$300,000.

The owners and operators of each source subject to the Program and each unit at the source shall keep each of the following documents for a period of 10 years from the date the document is created: account certificate of representation form; all emissions monitoring information; copies of all reports, compliance certifications, and other submissions and all records made or required under the Program; copies of all documents used to complete a permit application and any other submission under the Program or to demonstrate compliance with the Program; copies of all documents used to complete a consistency application and monitoring and verification report to demonstrate compliance with the offset provisions of the Program.

For each control period in which one or more units at a source are subject to the CO₂ budget emission limitation, the CO₂ authorized account representative of the source shall submit to the Department, a compliance certification report for each source covering all such units. This must be submitted by the March 1 following the relevant control for the units subject to the Program.

The Department examined the alternative of an emission rate based program for CO₂ to the cap-and-trade structure of the Program that could conceivably be used to achieve equivalent emissions reductions. This alternative is a command-and-control regulatory structure which the Department concluded is less cost-effective and more difficult for sources to implement than the Program. The Department also determined that an emission rate program would be no more protective of the public health and the environment.

The Department also considered a number of variations of the emissions cap-and-trade construct that could share many or most of the features of the Program as proposed. These alternatives included: (1) a New York only trading program; (2) allocating allowances to generators at no cost; and (3) applicability to smaller sources.

In carrying out its statutory obligation to assess all relevant factors in developing an appropriate control program that is most cost-effective, the

Department determined that emissions cap-and-trade programs are the most appropriate programs for the control of CO₂ emissions from the subject sources.

There are currently no federal standards that limit CO₂ emissions from the electricity generating sector. The Program will reduce CO₂ emission from electric generating sources to 10 percent below current levels by 2018. In response to the need to reduce GHG and the lack of a national program, the Department has determined that fossil fuel-fired electricity generators will have to reduce emissions of CO₂.

The Program will require affected sources and units to comply with the emission limitations of the Program beginning with the first three year control period (2009, 2010 and 2011). In order to meet the necessary permit requirements, the authorized account representative of each CO₂ budget unit shall submit to the Department a complete CO₂ Budget permit application by January 1, 2009, or 12 months before the date the unit commences operation. Each year, the owners and operators of each source subject to the Program shall hold a number of CO₂ allowances available for compliance deductions, as of the CO₂ allowance transfer deadline not less than the total tons of CO₂ emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² IPCC WGI Fourth Assessment Report, Climate Change 2007: The Physical Science Basis, February 2007, and available at: <http://www.ipcc.ch>

³ Climate Change in the U.S. Northeast, A Report of the Northeast Climate Impacts Assessment (2006), available at: http://www.climatechoices.org/ne/resource_ne/jump.jsp?path=/assets/documents/climatechoices/NESCI_A_climate_report_final.pdf.

⁴ Id.

⁵ <http://www.epa.gov/hiri/about/index.html>

⁶ United State Environmental Protection Agency. "Climate Change and New York." September 1997. Page 3.

⁷ National Assessment Synthesis Team (NAST), 2001: Climate Change Impacts On The United States, The Potential Consequences of Climate Variability and Change. Page 450.

⁸ National Oceanic and Atmospheric Administration (NOAA). Treasure Our New York Coasts and Estuaries. June 2003. Page 1.

⁹ Goddard Institute for Space Studies Institute on Climate and Planets (GISS ICP). Climate Impacts in New York City: Sea Level Rise and Coastal Floods. 2002. Page 3.

¹⁰ GISS ICP. Rising Seas: A View From New York City. August 2000. Page 2.

¹¹ NAST. Page 123.

¹² Michigan Department of Environmental Quality: Shorelines of the Great Lakes. http://www.michigan.gov/deq/0,1607,7-135-3313_3677-15959-,00.html

¹³ Garcia, Alvaro, Dealing With Heat Stress In Dairy Cows. South Dakota Cooperative Extension Service. September, 2002. Page 1.

¹⁴ New York State Adirondack Park Agency (APA). http://www.apa.state.ny.us/About_Park

¹⁵ NAST. Page 125.

¹⁶ "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF" by the Economic Development Research Group, dated November 17, 2005.

¹⁷ Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSEERDA, *Patterns and Trends* (December 2005).

¹⁸ "REMI Impacts for RGGI Policies based on the std REF & Hi-Emission REF", by the Economic Development Research Group, dated November 17, 2005.

Regulatory Flexibility Analysis

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program

(the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO₂, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

1. Effects on Small Businesses and Local Governments. No small businesses will be directly affected by the adoption of new Part 242 and the amendments to Part 200.

The only local government affected by the Programs is the Jamestown Board of Public Utilities (JBPU), a municipally owned utility which owns and operates the S. A. Carlson Generating Station (SACGS). The emissions monitoring at SACGS currently meets the monitoring provisions of the Program, 40 CFR Part 75. Therefore, no additional monitoring costs will be incurred. The costs associated with the Program will be dictated by how JBPU decides to comply with the provisions of the regulation.

2. Compliance Requirements. The JBPU, as owner and operator of the SACGS, will need to comply with the provisions of the Program, as described below.

The Program will require affected sources and units to comply with the emission limitation of the Program beginning with the 2009-2011 control period. In order to meet the necessary permit requirements, the authorized account representative of each CO₂ subject unit shall submit to the Department a complete CO₂ Budget permit application, by January 1, 2009 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to the Program shall hold a number of CO₂ allowances available for compliance deductions, as of the CO₂ allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the source's compliance account that is not less than the total tons of CO₂ emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

For each control period in which one or more units at a source are subject to the Program, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

3. Professional Services. The only local government affected by the Program, the JBPU, may need to hire outside professional consultants to comply with the Program and the amendments to Part 200. This work would likely be associated with any analyses of the Program. If it is determined that capital investments are needed to comply, design and construction management services will likely need to be procured.

4. Compliance Costs. In addition to the costs identified for regulated parties and the public, state and local governments will incur costs. The Jamestown Board of Public Utilities (JBPU), a municipally owned utility, owns and operates the S.A. Carlson Generating Station (SACGS). Since the emissions monitoring at SACGS currently meets the monitoring provisions of the Program, no additional monitoring costs will be incurred.

Notwithstanding this, the JBPU will need to purchase allowances equal to the number of tons emitted. The Department limited the analysis of control costs to the purchase of allowances to comply with the Program and assumed the costs of allowances will be \$3 per ton for CO₂.² To estimate total costs for SACGS under the Program, the Department reviewed 2002 through 2004 emissions from Jamestown's affected unit. The highest emissions from the affected unit during that time frame were approximately 41,772 tons. Purchasing allowances to cover emissions will result in estimated costs of approximately \$125 thousand annually. These costs will eventually be passed on to the consumers of electricity from the JBPU.

The JBPU has a range of compliance options open to it and can utilize the flexibility inherent under the Program to comply. Since the Program has a three year control period with the compliance obligation at the end of

the control period, the emission peaks associated with electricity generation will be averaged out and more long term planning options will be available to SACGS. In addition, the Program allows affected sources to offset up to 3.3 percent of their emissions utilizing reductions from emission categories outside of the regulated sector.

5. Minimizing Adverse Impact. The promulgation of the Program and the amendments to Part 200 do not directly affect small businesses. Only one local government is affected by the Program, the JBPU. The Program constitutes an emissions allowance based cap and trade program. Cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the Program in such a manner, the Department will minimize the adverse economic impacts of the Program on the JBPU.

6. Small Business and Local Government Participation. The JBPU actively participated in the public forums established by the Department to discuss the Program with interested parties.

7. Economic and Technological Feasibility. The JBPU has the option to do any combination of the following to comply with the Program: increase the efficiency of the natural gas-fired turbine, co-fire biofuel; purchase allowances, or purchase offsets. It has never been demonstrated that any or all of these options are technologically or economically infeasible to apply to SACGS.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

² Regional Greenhouse Gas Initiative (RGGI): New York Electricity Sector Modeling Results, September 15, 2006, DRAFT.

Rural Area Flexibility Analysis

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO₂, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations regardless of location, including those in rural areas, will be affected.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations, that are located in rural areas, will be subject to the reporting, record keeping and compliance requirements detailed below.

The Program will require affected sources and units to comply with the emission limitation of the Program beginning with the 2009 - 2011 control period. In order to meet the necessary permit requirements, the authorized account representative of each Program unit shall submit to the Department a complete CO₂ Budget permit application by January 1, 2009 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to the Program and each unit at the source shall comply with the monitoring and reporting requirements thereof.

Each control period, the owners and operators of each source shall hold a number of CO₂ allowances available for compliance deductions, as of the CO₂ allowance transfer deadline (midnight of March 1, or if March 1 is not a business day, midnight of the first business day thereafter), in the source's compliance account that is not less than the total tons of CO₂ emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

For each control period in which one or more units at a source are subject to the Program, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

COSTS

Introduction

The Department sought input from the New York State Energy Research and Development Authority (NYSERDA) and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance of the Program. The analysis provided by NYSEDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSEDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the Program may have on the state economy.²

Costs to the Regulated Sources and the Public

The modeling analysis and review process was coordinated by NYSEDA staff, working closely with the Department and DPS staff, as well as staff from each regional Independent System Operator (ISO, a federally regulated regional organization which coordinates, controls and monitors the operation of the electrical power system of a particular state) staff and the RGGI Staff Working Group, consisting of energy and environmental representatives from all of the states participating in the RGGI process.

To estimate the potential impacts of the Program, IPM® was used to compare a future with the Program (Program Case) to a business-as-usual (BAU) Case that projects what the electricity system would look like if the Program were not implemented. The modeling assumptions and input data were developed through an extensive stakeholder process with representatives from the electricity generation sector, business and industry, environmental advocates and consumer interest groups. Modeling results were presented to stakeholders for review and comment throughout the process of developing the RGGI proposal.

Assumptions and sources of input data are specified in detail in the "Assumption Development Document: Regional Greenhouse Gas Initiative Analysis."³ Key assumptions and data include regional electricity demand, load shapes, transmission system capacities and limits, generation unit level operation and maintenance costs and performance characteristics, fuel prices, new capacity and emission control technology costs and performance characteristics, zonal reliability requirements, reserve margins, Renewable Portfolio Standard requirements, national and state environmental regulations, and financial market assumptions. All estimates are based on 2003 dollars. Regional electricity demand growth projections, transmission capacities and limits, and near-term expected infrastructure additions/retirements were provided by the regional ISOs. Long range Henry Hub natural gas prices, based on forecast data from Energy and Environmental Analysis, Inc. are projected to be approximately \$7/MMBtu (constant 2003 dollars).

New coal-fired and nuclear plants were precluded as an economic choice to meet projected capacity shortfalls within the RGGI region. However, a 600 MW Integrated Gasification Combined Cycle (IGCC) coal plant with 50 percent carbon capture capability was assumed to be operational in upstate New York by 2018 in response to the State's Advanced Clean Coal Power Plant Initiative. New nuclear units were also precluded outside the RGGI region. A national 3-pollutant policy (SO₂, NO_x and mercury) that approximates the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR) is assumed as well as the achievement of RPS in individual states.

Under the BAU Case, generation from new gas-fired combined cycle units is projected to supply most of the growing electricity demand. Generation from gas-fired plants is projected to approximately double from 36,307 Gigawatt hours (GWh) in 2006 to 64,934 GWh in 2021. (However, note that as recently as 1999, New York's gas-fired generation reached as high as 46,000 GWh.) Generation from new renewable resources (primarily wind units) is projected to increase significantly in response to RPS requirements. While nuclear generation is projected to increase by about two percent between 2006 and 2021 due to capacity up-rates at existing plants, generation from coal-fired plants is projected to increase by about 17 percent between 2015 and 2018 with the addition of the new proposed IGCC plant. Finally, generation from existing oil/gas steam units is projected to decrease over time, as a result of displacement by lower-cost electricity from new gas-fired units.

Net imports of electricity into New York are projected to decrease from approximately 21,000 GWh in 2006 to approximately 10,000 GWh in 2021. Underlying the projected decrease in net imports to New York is the increasing reliance on generation from new gas-fired units in neighboring Mid-Atlantic States. Generally, electricity flows from one region to another because of price differentials between those regions. As gas-fired generation increasingly sets market-clearing electricity prices in neighboring states, their electricity prices increasingly approach those of New York, where electricity prices are already largely determined by gas-fired generation.

CO₂ emissions in the BAU Case are projected to increase from approximately 52.9 million tons in 2006 to about 58.6 million tons in 2021. This increase is due primarily to the addition of new gas-fired power plants to meet projected load growth, but also includes the emissions from the new IGCC coal plant. There are several factors that contribute to the result showing that BAU emissions from the model in 2006 are lower than actual CO₂ emissions reported to both the EPA and the Department over the period 2000 through 2004. The first is the use of total on-site emissions from cogeneration. Actual emissions reports to EPA and the Department are inclusive of on-site emissions while the modeling analysis reflects only the emissions associated with the electricity provided to the grid. A second contributing is an upward bias in emissions recorded by continuous emissions monitoring systems and reported to EPA.⁴ As a result, it is expected that emissions reported to EPA are on the order of two to 10 percent higher than actual emission. In contrast the modeling analysis was based on carbon emissions factors that are not subject to systematic errors in measurement. Lastly, significant changes to the electricity sector also contribute to the difference between BAU emissions and 2000 to 2004 actual emissions. These include the addition of new natural gas-fired combined cycle capacity and new renewable resources as well as the updating of existing nuclear units.

Several assumptions were made to project the impacts of the Program in the Program Case. The Program was applied to electricity generators 25 MW and larger in seven northeastern and mid-Atlantic states including New York, Maine, New Hampshire, Vermont, Connecticut, New Jersey, and Delaware. For modeling purposes, the proposed initial CO₂ cap is assumed to be "current" emission levels. The initial cap level, stabilizing emissions at current levels, is implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. The Program Case allows a limited number of emission offsets to be purchased by affected generators and used for compliance. The Program Case assumes that all RGGI states extend current annual levels of public benefit expenditures on end-use energy efficiency programs through 2025. Further, the public benefit programs are assumed to continue to deliver annual electricity end-use reductions at the same incremental cost as reported in most recent years. This assumption results in regional electricity demand in each year being lower in the Program Case than in the BAU Case.

Several types of results between the Program Case and the BAU Case are compared including generation mix, net electricity imports, changes in generation capacity, CO₂ emissions, CO₂ allowance prices, and wholesale and retail electricity price impacts.

The generation mix in New York under the Program Case reflects the continuation of energy efficiency projects and the change in build mix. Electricity generation from gas-fired units in 2021 is about 10,600 GWh or 16 percent lower in the Program Case than in the BAU Case. Net imports into New York in 2021 are projected to be about 4,000 GWh or 40 percent higher in the Program Case than in the BAU Case. However, the projected imports in 2021 in the Program Case are about 7,000 GWh or 33 percent lower than BAU Case imports in 2006. The total electricity requirement (generation plus net imports) is lower in the Program Case by about 7,000

GWh (3.7 percent) in 2021, due to the higher level of end-use energy efficiency expenditures assumed in the Program Case.

Relative to the BAU Case, total capacity additions in the Program Case are 757 megawatts lower (10 percent) in 2015 and 918 megawatts lower (eight percent) in 2021. The block of avoided capacity additions due to RGGI is comprised almost entirely of gas-fired combined-cycle units.

CO₂ emissions from New York generators are projected to be 5.1 million tons or 8.7 percent lower in 2021 for the Program Case as compared to the BAU Case. The initial cap level, which stabilizes emissions at current levels, is proposed to be implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. CO₂ emissions from the electricity sector are projected to remain approximately flat between 2006 and 2021, rather than decreasing, as might be suggested by the decreasing cap level over the last five years of this period. This result is expected because RGGI-affected sources are allowed to bank emission allowances in the early years of the policy for use in later years when the cap becomes more stringent. Further, a portion of the cap is projected to be achieved by the use of offsets based on emission reduction projects implemented in sectors outside the electricity sector. Through 2021, about 70 percent of the CO₂ emission reductions resulting from RGGI are projected to be achieved by on-system reductions by the electricity sector, while about 30 percent are projected to be achieved by purchasing emission offsets.

Under the Program Case, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021, than the BAU Case. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 KWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.⁵

The analysis conducted by ICF did not identify any New York generation facilities as candidates for retirement due to the costs imposed by the Program. DPS, NYSERDA and the Department developed a two phase analysis to test that result. The analyses focused on generating units that are considered necessary to the reliable operation of New York State's bulk power system. The selection of those units was based on provisions in the New York State Reliability Council's reliability rules which require their operation under certain conditions.

The first phase of the analysis was performed by DPS using plant specific data, combined with zone-specific modeling output (i.e. projected kWh, energy prices, etc.) from IPM®. This assessment predicted that the Program would result in small decreases in net operating revenue for certain of the units being studied while others actually did better under a future with RGGI, and supported ICF's conclusion that the units would not retire. The second phase of the analysis conducted by the Department of Public Service consisted of more detailed modeling with General Electric's MAPS model. The second phase analysis confirmed the results of the first phase analysis. In summary, the two-phase reliability analysis concluded that the Program would not adversely affect system reliability.

A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states⁶. The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

MINIMIZING ADVERSE IMPACT

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide, including those located in rural areas. Since the regulations apply equally to affected facilities statewide, rural areas are not impacted any differently than other areas in the State. The Department is implementing the Program through a cap-and-trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources, therefore the Department has attempted to minimize the adverse economic impacts of the Program to all sources on a statewide basis.

RURAL AREA PARTICIPATION

Since the announcement of the Regional Greenhouse Gas Initiative in September of 2003, Department staff held numerous stakeholder meetings with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment.

- ¹ In addition to New York, the other state participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.
- ² "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF", by the Economic Development Research Group, dated November 17, 2005.
- ³ The modeling assumptions document and the tabular results for each modeling run are located at <http://www.rggi.org/documents.htm>
- ⁴ Russel S. Berry and Jack C. Martin (RMB consulting and Research, Inc.) and Charles E. Dene (Electric Power Research Institute). "CEMS Analyzer Bias and Linearity Effects Study." rmb-consulting.com/newpaper/cable/cable.htm
- ⁵ Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSERDA, *Patterns and Trends* (December 2005).
- ⁶ REMI.

Job Impact Statement

1. Nature of Impact: On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO₂) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.¹ In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO₂ Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO₂, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

Based on analyses conducted for the RGGI states by the Economic Development Research Group, the Program is expected to have a very modest net positive impact on economic growth in New York and in the region.² As such, the Program will have minimal positive impacts on overall job and employment opportunities. Electricity generators will incur costs related to the requirements of the Program and based on the modeling this will translate into modest increases in electricity costs.

2. Categories and Numbers Affected: The Department sought input from the New York State Energy Research and Development Authority (NYSERDA) and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance of the Program. The analysis provided by NYSERDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSERDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the Program may have on the state economy.³ In addition, a jobs impact analysis has been provided based on NYSERDA's experience with the Energy Smart Program and their administration of

energy efficiency programs that are very similar to those that will be funded with auction proceeds.

Costs to the Regulated Sources and the Public

The modeling analysis and review process was coordinated by NYSERDA staff, working closely with the Department and DPS staff, as well as staff from each regional Independent System Operator (ISO, a federally regulated regional organization which coordinates, controls and monitors the operation of the electrical power system of a particular state) staff and the RGGI Staff Working Group, consisting of energy and environmental representatives from all of the states participating in the RGGI process.

To estimate the potential impacts of the Program, IPM® was used to compare a future with the Program (Program Case) to a business-as-usual (BAU) Case that projects what the electricity system would look like if the Program were not implemented. The modeling assumptions and input data were developed through an extensive stakeholder process with representatives from the electricity generation sector, business and industry, environmental advocates and consumer interest groups. Modeling results were presented to stakeholders for review and comment throughout the process of developing the RGGI proposal.

Assumptions and sources of input data are specified in detail in the "Assumption Development Document: Regional Greenhouse Gas Initiative Analysis."⁴ Key assumptions and data include regional electricity demand, load shapes, transmission system capacities and limits, generation unit level operation and maintenance costs and performance characteristics, fuel prices, new capacity and emission control technology costs and performance characteristics, zonal reliability requirements, reserve margins, Renewable Portfolio Standard requirements, national and state environmental regulations, and financial market assumptions. All estimates are based on 2003 dollars. Regional electricity demand growth projections, transmission capacities and limits, and near-term expected infrastructure additions/retirements were provided by the regional ISOs. Long range Henry Hub natural gas prices, based on forecast data from Energy and Environmental Analysis, Inc. are projected to be approximately \$7/MMBtu (constant 2003 dollars).

New coal-fired and nuclear plants were precluded as an economic choice to meet projected capacity shortfalls within the RGGI region. However, a 600 MW Integrated Gasification Combined Cycle (IGCC) coal plant with 50 percent carbon capture capability was assumed to be operational in upstate New York by 2018 in response to the State's Advanced Clean Coal Power Plant Initiative. New nuclear units were also precluded outside the RGGI region. A national 3-pollutant policy (SO₂, NO_x and mercury) that approximates the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR) is assumed as well as the achievement of RPS in individual states.

Under the BAU Case, generation from new gas-fired combined cycle units is projected to supply most of the growing electricity demand. Generation from gas-fired plants is projected to approximately double from 36,307 Gigawatt hours (GWh) in 2006 to 64,934 GWh in 2021. (However, note that as recently as 1999, New York's gas-fired generation reached as high as 46,000 GWh.) Generation from new renewable resources (primarily wind units) is projected to increase significantly in response to RPS requirements. While nuclear generation is projected to increase by about two percent between 2006 and 2021 due to capacity up-rates at existing plants, generation from coal-fired plants is projected to increase by about 17 percent between 2015 and 2018 with the addition of the new proposed IGCC plant. Finally, generation from existing oil/gas steam units is projected to decrease over time, as a result of displacement by lower-cost electricity from new gas-fired units.

Net imports of electricity into New York are projected to decrease from approximately 21,000 GWh in 2006 to approximately 10,000 GWh in 2021. Underlying the projected decrease in net imports to New York is the increasing reliance on generation from new gas-fired units in neighboring Mid-Atlantic States. Generally, electricity flows from one region to another because of price differentials between those regions. As gas-fired generation increasingly sets market-clearing electricity prices in neighboring states, their electricity prices increasingly approach those of New York, where electricity prices are already largely determined by gas-fired generation.

CO₂ emissions in the BAU Case are projected to increase from approximately 52.9 million tons in 2006 to about 58.6 million tons in 2021. This increase is due primarily to the addition of new gas-fired power plants to meet projected load growth, but also includes the emissions from the new IGCC coal plant. There are several factors that contribute to the result showing that BAU emissions from the model in 2006 are lower than actual

CO₂ emissions reported to both the EPA and the Department over the period 2000 through 2004. The first is the use of total on-site emissions from cogeneration. Actual emissions reports to EPA and the Department are inclusive of on-site emissions while the modeling analysis reflects only the emissions associated with the electricity provided to the grid. A second contributing is an upward bias in emissions recorded by continuous emissions monitoring systems and reported to EPA.⁵ As a result, it is expected that emissions reported to EPA are on the order of two to 10 percent higher than actual emission. In contrast the modeling analysis was based on carbon emissions factors that are not subject to systematic errors in measurement. Lastly, significant changes to the electricity sector also contribute to the difference between BAU emissions and 2000 to 2004 actual emissions. These include the addition of new natural gas-fired combined cycle capacity and new renewable resources as well as the updating of existing nuclear units.

Several assumptions were made to project the impacts of the Program in the Program Case. The Program was applied to electricity generators 25 MW and larger in seven northeastern and mid-Atlantic states including New York, Maine, New Hampshire, Vermont, Connecticut, New Jersey, and Delaware. For modeling purposes, the proposed initial CO₂ cap is assumed to be "current" emission levels. The initial cap level, stabilizing emissions at current levels, is implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. The Program Case allows a limited number of emission offsets to be purchased by affected generators and used for compliance. The Program Case assumes that all RGGI states extend current annual levels of public benefit expenditures on end-use energy efficiency programs through 2025. Further, the public benefit programs are assumed to continue to deliver annual electricity end-use reductions at the same incremental cost as reported in most recent years. This assumption results in regional electricity demand in each year being lower in the Program Case than in the BAU Case.

Several types of results between the Program Case and the BAU Case are compared including generation mix, net electricity imports, changes in generation capacity, CO₂ emissions, CO₂ allowance prices, and wholesale and retail electricity price impacts.

The generation mix in New York under the Program Case reflects the continuation of energy efficiency projects and the change in build mix. Electricity generation from gas-fired units in 2021 is about 10,600 GWh or 16 percent lower in the Program Case than in the BAU Case. Net imports into New York in 2021 are projected to be about 4,000 GWh or 40 percent higher in the Program Case than in the BAU Case. However, the projected imports in 2021 in the Program Case are about 7,000 GWh or 33 percent lower than BAU Case imports in 2006. The total electricity requirement (generation plus net imports) is lower in the Program Case by about 7,000 GWh (3.7 percent) in 2021, due to the higher level of end-use energy efficiency expenditures assumed in the Program Case.

Relative to the BAU Case, total capacity additions in the Program Case are 757 megawatts lower (10 percent) in 2015 and 918 megawatts lower (eight percent) in 2021. The block of avoided capacity additions due to RGGI is comprised almost entirely of gas-fired combined-cycle units.

CO₂ emissions from New York generators are projected to be 5.1 million tons or 8.7 percent lower in 2021 for the Program Case as compared to the BAU Case. The initial cap level, which stabilizes emissions at current levels, is proposed to be implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. CO₂ emissions from the electricity sector are projected to remain approximately flat between 2006 and 2021, rather than decreasing, as might be suggested by the decreasing cap level over the last five years of this period. This result is expected because RGGI-affected sources are allowed to bank emission allowances in the early years of the policy for use in later years when the cap becomes more stringent. Further, a portion of the cap is projected to be achieved by the use of offsets based on emission reduction projects implemented in sectors outside the electricity sector. Through 2021, about 70 percent of the CO₂ emission reductions resulting from RGGI are projected to be achieved by on-system reductions by the electricity sector, while about 30 percent are projected to be achieved by purchasing emission offsets.

CO₂ allowance prices (the cost of complying with RGGI) are projected to increase from approximately \$2/ton in 2009 to about \$3.00/ton in 2015 and about \$4.45/ton in 2021. The availability of emissions offsets to meet a limited portion of the emission reduction requirement (as allowed by the Program) contributes significantly to maintaining CO₂ allowance prices below the \$7/ton offset expansion threshold specified.

Under the Program Case, New York’s wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021, than the BAU Case. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 KWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.⁶

The analysis conducted by ICF did not identify any New York generation facilities as candidates for retirement due to the costs imposed by the Program. DPS, NYSEERDA and the Department developed a two phase analysis to test that result. The analyses focused on generating units that are considered necessary to the reliable operation of New York State’s bulk power system. The selection of those units was based on provisions in the New York State Reliability Council’s reliability rules which require their operation under certain conditions.

The first phase of the analysis was performed by DPS using plant specific data, combined with zone-specific modeling output (i.e. projected kWh, energy prices, etc.) from IPM®. This assessment predicted that the Program would result in small decreases in net operating revenue for certain of the units being studied while others actually did better under a future with RGGI, and supported ICF’s conclusion that the units would not retire. The second phase of the analysis conducted by the Department of Public Service consisted of more detailed modeling with General Electric’s MAPS model. The second phase analysis confirmed the results of the first phase analysis. In summary, the two-phase reliability analysis concluded that the Program would not adversely affect system reliability.

A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.⁷ The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

NYSEERDA currently administers, through the New York Energy Smart Program, energy efficiency and clean energy technology programs that are very similar to those that will be funded with auction proceeds under the CO₂ Allowance Auction Program. A 2006 Macroeconomic Impact Analysis of the New York Energy Smart Program concluded that expenditures under that program created approximately 4.8 new sustained jobs per \$1 million of program funds spent. The following chart illustrates the breakdown of jobs created per sector:

Economic Sector	2006 Update % of Total Added Jobs Through 2006
Agriculture, Forestry, and Mining	0.60%
Construction	10.52%
Products Manufacturing	5.07%
Equipment and Instrument Manufacturing	6.46%
Transportation, Communication, and Other Public Services	3.30%
Wholesale and Retail Trade	30.86%
Personal and Business Services	52.81%
Electric utilities	-9.63%
Total	100%

The results of the Macroeconomic Impact Analysis were published in the March 2007 New York Energy Smart Evaluation Report, which is available on NYSEERDA’s website at: http://www.nyserda.org/Energy_Information/evaluation.asp.

3. Regions of adverse impact: A statewide analysis was performed for the Program and the modeling predicts that the statewide average increase in wholesale electricity prices will be 1.6 percent in 2015 and 2.4 percent in 2021.

4. Minimizing Adverse Impact: The Department is implementing the Program through a cap-and-trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the Program through an allowance based cap and trade system, the Department has attempted to minimize the adverse economic impacts including the adverse employment impacts of the Program.

5. Self-Employment Opportunities: Not applicable.

¹ In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Rhode Island, and Vermont.
² “REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF” by the Economic Development Research Group, dated November 17, 2005.
³ REMI.
⁴ The modeling assumptions document and the tabular results for each modeling run are located at <http://www.rggi.org/documents.htm>
⁵ Russel S. Berry and Jack C. Martin (RMB consulting and Research, Inc.) and Charles E. Dene (Electric Power Research Institute). “CEMS Analyzer Bias and Linearity Effect Study.” rmb-consulting.com/newpaper/cable/cable.htm
⁶ Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSEERDA, *Patterns and Trends* (December 2005).
⁷ REMI.

Department of Health

EMERGENCY RULE MAKING

Serialized Official New York State Prescription Form

I.D. No. HLT-42-06-00005-E

Filing No. 1046

Filing date: Oct. 4, 2007

Effective date: Oct. 4, 2007

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

Action taken: Addition of Part 910 and amendment of Parts 80 and 85 of Title 10 NYCRR; and amendment of section 505.3 and repeal of sections 528.1 and 528.2 of Title 18 NYCRR.

Statutory authority: Public Health Law, section 21

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

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety and to meet statutory requirements. The budget proposal enacting Section 21 contains explicit authority for the Commissioner to promulgate emergency regulations. This was done recognizing the need to provide for the implementation of the use of statewide forge proof prescriptions by the April 19, 2006 date mandated by the law.

Immediate adoption of these regulations is necessary to allow the implementation of Section 21 of Public Health Law, achieve the health care cost savings and to enhance the quality of health care by preventing drug diversion resulting from forged or stolen prescriptions.

The practitioner groups affected by this proposal, PSSNY, MSSNY and the Health Plan Association of New York were consulted during budget negotiations. Their concerns are addressed in the statutory proposal set forth in the state budget and in these regulations.

Subject: Enactment of a serialized official New York State prescription form.

Purpose: To enact a serialized official New York State prescription form.

Substance of emergency rule: Part 910 (10 NYCRR)

These regulations are being proposed on an emergency basis to implement Section 21 of the Public Health Law. The purpose of the law is to combat and prevent prescription fraud by requiring the use of an official New York State prescription for all prescribing done in this state. Official prescriptions contain security features that will curtail alterations and forgeries that divert drugs to black market sale to unsuspecting patients and cost New York’s Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

The emergency regulations consist of a new Part 910 to Title 10 NYCRR. Section 910.1 defines terms used in the Part. Section 910.2 states requirements for practitioner prescribing, including that, until April 19,

2007, hospitals and comprehensive voluntary non-profit community diagnostic and treatment centers designated by the Department are exempted from the requirement for their staff practitioners to prescribe non-controlled substances on an official prescription form. The exemption will continue beyond April 19, 2007 if the hospital and the comprehensive voluntary non-profit community diagnostic and treatment center implements and utilizes an electronic prescribing system to transmit prescriptions to pharmacies capable of receiving them. The exemption also will continue beyond April 19, 2007 for those facilities approved by the Department that have implemented a computerized provider order entry system that generates paper prescriptions. This exemption will allow staff practitioners to issue printed prescriptions—which minimize medication errors due to misinterpretations of handwritten prescriptions for—non-controlled substances on the prescription form of the facility until the Department approves and provides an alternative form of serialized official New York State prescription. Section 910.3 covers registration with the Department, which practitioners and healthcare facilities are required to do to order official prescriptions. Section 910.4 states the manner in which official prescriptions will be issued by the Department, while section 910.5 lists the practitioner and facility requirements for safeguarding the official prescriptions against theft, loss or unauthorized use. Section 910.6 states pharmacy requirements for dispensing official prescriptions and out-of-state prescriptions, which may be dispensed in lieu of an official prescription. Section 910.6 also states pharmacy requirements for submission of official prescription data to the Department. Section 910.6 also authorizes pharmacies to fill prescriptions for non-controlled substances until October 19, 2006 that are not written on an official prescription provided that the pharmacy notify the Department of the prescribing practitioner so that the practitioner may be contacted and issued official prescriptions for subsequent prescribing.

Both 10 NYCRR and 18 NYCRR have been revised to reflect the above regulations, update outdated/obsolete sections and to allow for greater flexibility for changes in law. The following changes are proposed: Section 505.3 (18 NYCRR)

- Language included to reflect use of facsimile prescriptions.
- Language included to allow electronically transmitted prescriptions.
- Language included to mandate that all claims for payments of drugs or supplies under the Medicaid program shall contain the serial number of the Official NYS Prescription Form.
- Delete language prohibiting telephone orders for OTCs.
- Language amended—telephone prescriptions for non-controlled substances WILL NOT require a follow-up hard copy prescription (even with refills).
- Delete Estimated Acquisition Cost—defined in Social Services Law section 367-a(9)(b)(ii).
- Delete language referencing “triplicate” prescriptions and update to language consistent with Official NYS Prescription Form and Article 33 of the Public Health Law.
- Delete language referencing other Sections that have been deleted (i.e. 10 NYCRR 85.25).
- Delete language referencing dispensing fees—in Social Services Law section 367-a(9)(d).
- Language is added to reference prescription drugs filled in compliance with section 6810 of the Education Law, Article 33 of the Public Health Law and new 10 NYCRR Part 910.
- A change has been made to the prior version of the emergency filing for 18 NYCRR 505.3(b)(7). The words “or supplies” has been deleted since the enacting legislation (Section 21 of the Public Health Law) only mandated that forged proof prescriptions be utilized for prescription drugs. This change conforms the regulations to the law.

Part 528 (18 NYCRR)

- Section 528.1 is deleted—obsolete listing of non-prescription drugs covered under the Medicaid program. Listing of reimbursable drugs and rate is available on-line at the NYS eMedNY website.
- Section 528.2 is deleted—language regarding “dispensing fees include routine delivery charges” is moved to 18 NYCRR 505.3(f)(6). Compounding fee language in 18 NYCRR 505.3 [6] (3).

Part 85 (10 NYCRR)

- Section 85.21 amended—OTC List—quantities and dosage forms have been deleted to allow greater flexibility in coverage. Remove OTC categories that are no longer marketed.
- Section 85.22 amended—establishment of OTC prices amended to more accurately reflect OTC pricing (Ad Hoc Committee is obsolete) and removal of references to deleted Sections (i.e., 18 NYCRR 528.2 and 10 NYCRR 85.25)

- Section 85.23 deleted—Revisions to list of OTCs and Maximum Reimbursable Prices—in Social Services Law 365-a(4)(a).
- Section 85.25 deleted—Prescription drug list covered under Medicaid—obsolete. Drug list available on line at NYS eMedNY website.

Part 80 (10 NYCRR)

- Part 80 table of contents has been revised to reflect amendments in titles of sections of regulations.
- Sections have been amended throughout Part 80 to revise the previous title of ‘Bureau of Narcotic Control’ and ‘Bureau of Controlled Substances’ to the current title of ‘Bureau of Narcotic Enforcement’.
- Sections have been amended throughout Part 80 to revise the previous title of ‘Bureau of Narcotics and Dangerous Drugs’ to the current title of ‘Drug Enforcement Administration’.
- Section 80.1—language added to define ‘automated dispensing system’.
- Section 80.5—language deleted for 3b Institutional Dispenser license due to registration of facilities to be issued official prescriptions. Language added for retail pharmacy license, installation, and operation of automated dispensing system in Residential Healthcare Facility (RHCF).
- Section 80.11—language added to make requirements for supervising pharmacist of controlled substance manufacturer and distributor consistent with pharmacist licensure requirements in New York State Education Law.
- Section 80.46—language added to require supervising physician countersignature of medical order of physician’s assistant if deemed necessary by supervising physician or hospital to bring regulation into consistency with PHL 3703.
- Section 80.47—language revised to except administration of controlled substances in emergency kits to patients in Title 18 adult care facilities.
- Section 80.49—language revised from prescription serial number to pharmacy prescription number.
- Section 80.50—language added to require pharmacies to maintain separate stocks of controlled substances received for use in automated dispensing system in RHCF and to authorize storage of non-controlled substances in such system.
- Section 80.60—language added for female gender reference to practitioner.
- Section 80.63—deleted definition of written prescription and added definition of out-of-state prescription. Language added to authorize printed prescriptions generated by computer or electronic medical record system. Language added regarding practitioner oral prescribing requirement.
- Section 80.67—midazolam and quazepam added to list of benzodiazepine controlled substances, as per PHL 3306. Language added requiring quantity of dosage units to be indicated in both numerical and written word form. Language amended to include chorionic gonadotropin as controlled substance for prescribing up to a 3-month supply. Language added to assign code letters to medical conditions for prescribing more than a 30-day supply.
- Section 80.67(con’t)—language deleted regarding Department’s issuance of official New York State prescriptions, due to added language in section 80.72. Language deleted for face and back of prescription to facilitate timely pharmacist dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.
- Section 80.68—language added for certain other controlled substances. Language deleted requiring pharmacist to endorse pharmacy DEA number on official NYS prescription to facilitate timely dispensing. Language added requiring electronic transmission of prescription data to Department.
- Section 80.69—language added requiring quantity of dosage units to be indicated in numerical and written word form. Language added to assign letters for condition codes. Deleted reference to PHL sections 3335 and 3336, which were deleted by PHL section 21, and added reference PHL sections 3332 and 3333, which are now the relevant sections. Deleted written prescription and added official prescription. Deleted back of the prescription and face of the prescription to facilitate timely dispensing. Language added authorizing practitioner faxing of prescription for hospice or RHCF patient and for prescription to be compounded for direct parenteral administration to patient.

- Section 80.70—Language added specifying oral prescriptions for 30-day supply or 100 dosage units does not apply to substance limited to 5-day supply by section 80.68. Deleted serial prescription number and added pharmacy prescription number. Added female gender language in reference to pharmacist. Language added requiring filing of prescription information with Department
- Section 80.71—Deleted section (b) to reflect that practitioners are no longer required by PHL section 3331 to complete an official prescription when dispensing controlled substances. Corrected spelling of chorionic gonadotropin. Added reference to condition codes in sections 80.67 and 80.69. Added packaging and labeling requirements for practitioner dispensing of controlled substances. Added requirement for practitioners to submit dispensing information to Department by electronic transmission.
- Section 80.72—deleted all references to practitioner dispensing and labeling requirements because practitioner dispensing now covered by section 80.71. Language added regarding practitioner registration with Department and Department issuance of official NYS prescription forms.
- Section 80.73—added language specifying pharmacist dispensing of schedule II and controlled substances listed in section 80.67. Added female gender language in reference to pharmacist. Deleted requirement for pharmacist to endorse pharmacy DEA number on prescription for timely dispensing. Language added requiring pharmacy to verify identity of person picking up dispensed prescription. Language added requiring pharmacy electronic transmission of prescription data to Department.
- Section 80.73 (con't)—language added specifying emergency oral prescriptions for schedule II and controlled substances listed in section 80.67 and filing of emergency oral prescription memorandum. Language added requiring pharmacy electronic transmission of oral prescription data to Department. Language added specifying partial filling of official prescription for schedule II and controlled substances listed in section 80.67. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.
- Section 80.74—language added in section title specifying pharmacist dispensing of controlled substances. Language added for prescription labeling requirements. Added female gender reference to pharmacist. Added requirement for filing prescription data with Department. Language added authorizing pharmacist dispensing of faxed prescription and requiring delivery of original within 72 hours.
- Section 80.74 (con't)—language added for pharmacy requirement to verify identification of person picking up prescription. Deleted reference to schedule II controlled substances and those substances listed in section 80.67 because all controlled substances now require official NYS prescription. Deleted labeling requirement reference to section 80.72 and added reference to section 80.71.
- Section 80.75—deleted language regarding requirement to purchase official prescriptions. Added language regarding registration and issuance of official prescriptions for institutional dispenser.
- Section 80.78—Added a new section regarding pharmacist requirements for dispensing of out-of-state prescriptions for controlled substances, to be dispensed in conformity with provisions set forth for official prescriptions.
- Section 80.84—deleted language requiring group practice providing treatment of opiate dependence with buprenorphine to be limited to 30 patients at any one time, making New York State regulations consistent with the federal Drug Addiction Treatment Act. Deleted language requiring practitioners and pharmacies to register with Department to prescribe and dispense buprenorphine. Deleted language requiring pharmacy to file prescription data and report loss of controlled substances because redundant. Deleted reference to PHL sections 3335 and 3336 because deleted by PHL 21 and added reference to PHL sections 3332 and 3333 because now relevant sections.
- Section 80.106—added language requiring separate record-keeping for pharmacies installing automated dispensing system in RHCF.
- Section 80.107—added language authorizing Department to notify practitioner of patient treatment with controlled substances by multiple practitioners, consistent with PHL section 3371.
- Section 80.131—deleted written prescription, added official prescription and out-of-state prescription. Language added increasing oral prescription for hypodermic needles and syringes to quantity of one hundred hypodermic needles and syringes.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-42-06-00005-P, Issue of October 18, 2006. The emergency rule will expire December 2, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Katherine E. Ceroalo, 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: regsqa@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purpose and intent.

The state budget for SFY 2004-2005 enacted new Section 21 of the Public Health Law which mandates a statewide official prescription form for all prescriptions written in New York for the purpose of curtailing prescription fraud and enhancing patient safety. The law, Chapter 58 of the Laws of 2004, permits the Commissioner to promulgate emergency regulations in furtherance of this new section of law.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering and distribution of controlled substances within New York. New Section 21 of the Public Health law mandates a statewide official prescription, supports electronic prescribing and facilitates the dispensing process.

Needs and Benefits:

This regulation will support the enactment of an official New York State prescription form, which will deter fraud by curtailing theft or copying of prescriptions by individuals engaged in drug diversion. These regulations have been drafted after discussions with such provider groups as the State Health Plan Association, Medical Society of the State of New York and the Pharmacist Society of the State of New York.

Regulations are being proposed to implement Section 21 of the Public Health Law (PHL). The purpose of the law is to combat and prevent prescription fraud by requiring an official New York State prescription for every prescription written in New York. Official prescriptions contain security features designed specifically to curtail alterations, counterfeiting, and forgeries, all of which divert drugs to black market sale to unsuspecting patients and cost New York's Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

Regulations have been amended to reflect the implementation of the above Public Health Law and to update obsolete or outdated language in the existing regulations. The proposed regulations also include amendments to authorize a practitioner to deliver a controlled substance prescription to a pharmacy by facsimile transmission in specified circumstances and to authorize a pharmacist to dispense such faxed prescription. By facilitating timely prescribing and dispensing, such facsimile transmission will enhance healthcare for patients enrolled in hospice programs or residing in a Residential Healthcare Facility (RHCF) and for patients who require controlled substance prescriptions to be compounded for administration by parenteral infusion.

Regulations have also been amended to authorize the Department to license a retail pharmacy to install and operate an automated dispensing system in a RHCF, which will bring New York regulations into consistency with federal regulations. The installation and operation of such systems will significantly benefit patient care through timely and efficient dispensing of prescriptions for controlled substances. Automated dispensing systems will also lessen the cost of medications remaining from waste-age due to discontinued drug therapy and will simultaneously decrease the amount of such controlled substances that are susceptible to diversion.

These regulations are found in amendments to 10 NYCRR Part 80 and in the newly promulgated regulations in 10 NYCRR Part 910. Included in the Part 910 regulations is an exemption allowing hospital practitioners or practitioners in a comprehensive voluntary non-profit diagnostic and treatment center designated by the Department to prescribe non-controlled substances on a non-official hospital prescription until April 19, 2007. The exemption will continue beyond April 19, 2007 for hospitals and designated comprehensive voluntary non-profit diagnostic and treatment centers that implement and utilize an electronic prescription system to transmit prescriptions to pharmacies capable of receiving them. The exemption also will continue beyond April 19, 2007 for those facilities approved by

the Department that have implemented a computerized provider order entry system that generates printed paper prescriptions. This exemption will address concerns expressed by the facilities regarding the expense of safeguarding official prescription paper and purchasing and installing additional dedicated computer printers in order to comply with the regulations. The exemption will allow staff practitioners to issue printed prescriptions for non-controlled substances on the prescription form of the facility until the Department approves and provides an alternative form of serialized official New York State prescription. Printed prescriptions enhance patient care by minimizing medication errors due to misinterpretations of handwritten prescriptions.

Also included in the Part 910 regulations is an exemption allowing pharmacies to dispense prescriptions for non-controlled substances that are not issued on an official prescription until October 19, 2006 in order that optimum care may continue to be provided to patients. The regulation requires pharmacies to notify the Department so that the practitioner may be contacted and issued official prescriptions for all subsequent prescribing.

Title 18, Section 505, regulations have also been amended to clarify for providers that serial numbers reporting by billing providers is required in all instances where a prescriber or orderer of services used a serialized prescription. This change is requested in recognition of the opportunity serialized prescriptions offer to reduce the incidence of prescription theft. The reporting of prescription serial numbers on claims allows the MMIS claims system to provide feedback and alerts to pharmacy providers, at the point of service, about stolen prescriptions. Lack of serial numbers on a claim hampers this capability.

Costs:

Costs to Regulated Parties:

This program is being funded by an annual assessment on the State Insurance Department of \$16.9 million. The assessment funds the costs of providing 180 million official prescriptions annually as well as administrative and enforcement staffing to operate and enforce the program. The current fee to practitioners and institutions for the official prescription has been eliminated. Private insurers and the Medicaid program will realize, respectively, an estimated \$75 million and \$25 million in annual savings due to the reduction of fraudulent prescription claims.

The \$25 million estimated savings for the Medicaid program represents the 25% New York State share. \$50 million in estimated savings would accrue to the 50% federal government share of Medicaid, while \$25 million in estimated savings will accrue to the 25% local government share of Medicaid.

The allowance for electronic prescribing in the Medicaid program and the expeditious of the dispensing process through the use of bar coding will save valuable professional time for practitioners and pharmacists.

There will be a slight expenditure to pharmacies for software adjustments, due to minor changes in reporting requirements for controlled substance prescriptions.

Costs to State and Local Government:

There will be no costs to state or local government. Savings to State government are estimated at \$25 million. Savings to local government, from reduction in subsidizing of prescription costs for patients in their Medicaid population, will result in an estimated \$25 million.

Costs to the Department of Health:

There will be no additional costs to the Department. The decrease in prescription fraud as a result of use of the official prescription will result in savings for the Department for the Medicaid, Elderly Pharmaceutical Insurance Coverage, and Empire programs. An increase in the efficiency of investigations made possible by the official prescription program will result in additional savings for the Department.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

Paperwork:

No additional paperwork is required. The use of a single prescription form for controlled substances and non-controlled substances will simplify paperwork and recordkeeping for practitioners and institutions. Currently, practitioners use their own prescription form as well as the official prescription. The official prescription will replace existing prescriptions that are currently used in addition to the official prescription. Encouragement of electronic prescribing will significantly reduce paperwork requirements for practitioners, institutions and pharmacists.

Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

There are no alternatives that would support the approach to be taken under the regulations. The limitation on reporting requirements by pharmacies (only for controlled substances as opposed to requiring reporting on all prescriptions) was done after consultation with affected provider organizations.

As a result of consultations with the hospital community, hospitals were granted a one-year exemption, until April 19, 2007, from the requirement for their staff practitioners to prescribe non-controlled substance medications on the official prescription. The purpose of the exemption is to serve as an incentive for hospitals to develop electronic prescription systems. The exemption will be extended if the hospital implements and utilizes an electronic prescription system to transmit such prescriptions directly to a pharmacy in lieu of an official prescription. The exemption also will be extended beyond April 19, 2007 for a hospital approved by the Department that has implemented a computerized provider order entry system that generates printed paper prescriptions. This exemption will address concerns expressed by the facilities regarding the expense of safeguarding official prescription paper and purchasing and installing additional dedicated computer printers. The exemption will allow staff practitioners to issue printed prescriptions—which minimize medication errors due to misinterpretation of handwritten prescriptions—for non-controlled substances on a hospital prescription form until the Department approves and provides an alternative form of official New York State prescription.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State.

Regulatory Flexibility Analysis

Effect of Rule on Small Business and Local Government:

This proposed rule will affect practitioners, pharmacists, retail pharmacies, hospitals and nursing homes.

According to the New York State Department of Education, Office of the Professions, there are approximately 120,000 licensed and registered practitioners authorized to prescribe and order prescription drugs. According to the New York State Board of Pharmacy, there are a total of approximately 4,500 pharmacies in New York State. According to the New York State Education Department's Office of the Professions, there are approximately 18,000 licensed and registered pharmacists in New York.

Compliance Requirements:

The regulations follow the newly enacted Section 21 of the Public Health Law and require the use of the official New York State Prescription form. In addition to curtailing fraud and drug diversion, these regulations will expedite the prescribing and dispensing process. Practitioners, institutions and pharmacists will benefit from the following amendments;

- (1) Eliminating the fee to practitioners and institutions for official prescriptions;
- (2) Eliminating the requirement that pharmacists write the DEA number of the pharmacy on the official prescription;
- (3) Bar coding of the serial number on the official prescription to expedite the dispensing process; and
- (4) Eliminating multiple prescription forms practitioners currently use to prescribe drugs.

Currently, dispensing data is required from all Schedule II and benzodiazepine prescriptions. The only new requirement is the submission of dispensing data from the original dispensing of all prescriptions for controlled substances.

Professional Services:

No additional professional services are necessary.

Compliance Costs:

Pharmacies may require minor adjustments in computer software programming due to additional prescription data submission requirements.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process utilizes existing electronic systems for reporting of dispensing by pharmacies. The regulations encourage the use of electronic prescribing by practitioners. Electronic prescribing is not only more efficient than the current paper process, it is also a secure procedure that will reduce prescription fraud. Electronic prescribing will protect the public health and

result in substantial savings to the Medicaid program and private insurance as well as enhancing public safety.

Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. These requirements were negotiated with organizations representing the affected groups. The use of bar coding and the encouragement of electronic prescribing minimize any adverse impact.

Small Business and Local Government Participation:

During the drafting of the statute which is the basis of these regulations, the Department met with the Pharmacist Society of the State of New York (PSSNY), the Medical Society of the State of New York (MSSNY) and the Health Plan Association of New York. The regulations were drafted considering their comments. Local governments are not affected.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to participating pharmacies, practitioners and institutions located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain rural areas. These can range in extent from small towns and villages and their surrounding areas, to locations that are sparsely populated.

Compliance Requirements:

The only compliance requirements are the use of the official prescription provided free of charge and additional minimal reporting requirements by pharmacies. The regulations are in furtherance of new Section 21 of the Public Health Law authorizing a statewide official prescription aimed at reducing fraud. Additionally, the regulations assist practitioners and pharmacies by making the prescribing and dispensing process more efficient through the use of electronic prescribing.

Professional Services:

None necessary.

Compliance Costs:

The new law requires all pharmacies in New York State to electronically transmit information from controlled substance prescriptions to the Department on a monthly basis, for monitoring and analysis purposes in combating prescription fraud. Pharmacies may require minor adjustments in computer software programming due to this additional prescription data submission requirement.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process will utilize existing electronic systems for reporting of dispensing information by pharmacies. The regulations encourage the use of electronic prescribing, which is more efficient and more secure than a paper process. Electronic prescribing will also enhance patient safety through a reduction in medication error due to legibility issues.

Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. This requirement is minimized by permitting pharmacies to scan the bar code of the prescription serial number onto the Medicaid claim form also through the allowance of electronic prescribing. Additionally, the benefits on regulated entities resulting from these regulations and described herein outweigh any adverse impact.

Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comments from pharmacist, health plan and practitioner associations who represent these professions in rural areas. No particular issues relating to the effect of this program on rural areas was expressed.

Job Impact Statement

Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. In benefitting the public health by ensuring that drug diversion does not occur through the use of forged or stolen prescriptions, the proposed amendments are not expected to either increase or decrease jobs overall. The fiscal savings to public and private insurers will result in an economic benefit to these groups and could have a positive influence on jobs. Additionally, the anticipated time saved by practitioners and pharmacists will benefit all parties involved as well as patients.

Office of Mental Health

NOTICE OF ADOPTION

National Criminal History Background Checks

I.D. No. OMH-11-07-00007-A

Filing No. 1052

Filing date: Oct. 9, 2007

Effective date: Oct. 24, 2007

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

Action taken: Amendment of Part 550 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.35; and Executive Law, section 845-b

Subject: National criminal history background checks for certain providers of mental health services.

Purpose: To implement a nondiscretionary statutory requirement to conduct national criminal history background checks of certain providers of mental health services.

Text or summary was published in the notice of proposed rule making, I.D. No. OMH-11-07-00007-P, Issue of March 14, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Evidentiary Rules for Traffic Violations Bureau Hearings

I.D. No. MTV-43-07-00009-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 124.5(b)(2) of Title 15 NYCRR.
Statutory authority: Vehicle and Traffic Law, sections 215(a), 225(1), (3) and 227(1)

Subject: Evidentiary rules for Traffic Violations Bureau hearings.

Purpose: To preclude the need for testimony upon the introduction of certain business records in Traffic Violations Bureau hearings.

Text of proposed rule: Paragraph (2) of subdivision (b) of section 124.5 is amended to read as follows:

(2) evidence which, for constitutional reasons, would not be admissible if the case were tried in the court which has concurrent jurisdiction with the bureau over such case, *provided however, the provisions of this paragraph shall not apply to business records admissible under Civil Practice Law and Rules section 4518 in a proceeding in which such rule applies;*

Text of proposed rule and any required statements and analyses may be obtained from: Carrie L. Stone, Counsel's Office, Department of Motor Vehicles, Six Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: carrie.stone@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen, First Assistant Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 225(1) and (3) authorizes the Commissioner to promulgate regulations relative to the adjudication of traffic infractions in Traffic Violations Bureaus. VTL 227(1) authorizes the Commissioner to promulgate regulations in relation to the conduct of hearings in Traffic Violations Bureaus.

2. Legislative objectives: The Legislature, when creating the Traffic Violations Bureaus in Article 2-A of the Vehicle and Traffic Law, provided for the adjudication of non-misdemeanor/felony traffic offenses in an efficient and fair manner in order to relieve the burden on the State's criminal courts. The Legislature recognized that to enhance the efficiencies of administrative hearings, such hearings would not be subject to the Civil Practice Law and Rules that govern non-criminal proceedings. This proposed regulation accords with the legislative objective of establishing administrative hearings to process such less serious traffic offenses in an efficient and fair manner.

3. Needs and benefits: This regulation is necessary to address the potential impact upon DMV's Traffic Violations Bureaus due to the decisions rendered in *Crawford v. Washington*, 124 S. Ct 1354(2004) and *People v. Pacer*, 6 NY3d 504 (2006). In *Crawford*, the United States Supreme Court, relying on the Confrontation Clause of the U.S. Constitution, held that testimonial statements not previously subject to cross-examination are inadmissible against a criminal defendant. In *Pacer*, the New York State Court of Appeals, following the *Crawford* decision, held that a specific business record produced by DMV was testimonial in nature and, therefore, not admissible in a criminal trial without the testimony of the individual who prepared such record, i.e., the defendant had the right to confront the individual who created the record.

Neither the U.S. Supreme Court nor the New York State Court of Appeals has ruled that *Crawford* and *Pacer* apply to administrative hearings. In fact, these Courts specifically invoke the constitutional protections afforded criminal defendants. Accordingly, amendment of the subject rule is not in conflict with either of these decisions, but rather is necessary to address the concerns raised in *Crawford* and *Pacer*, without undermining the purpose of the TVB system.

The TVB system was established to relieve overburdened criminal courts in New York City, Rochester, Buffalo and part of Suffolk County by adjudicating non-criminal traffic offenses in administrative hearings. TVB hearings are designed to provide an efficient and effective means of adjudicating such offenses. The hearings are not subject to the Civil Practice Law and Rules or the Criminal Procedure Law, pursuant to 15 NYCRR Part 123.1. Supporting depositions are not authorized and motion practice is not permitted. Hearsay evidence is admissible. Thus, the rules governing TVB hearings are vastly different than those applicable to criminal trials precisely because TVBs are designed for the expeditious adjudication of traffic tickets.

The implications presented by *Crawford* and *Pacer* for the adjudication of traffic tickets is best explained by way of example. Annually, TVBs adjudicate approximately 1,600 tickets involving overweight truck violations. At such hearings, the police officer presents evidence that the truck was overweight and introduces two business records: one, the Certificate of Inspection prepared by the NYC Department of Consumer Affairs that certifies the tape measure used by the officer, and two, the Axle-Load Scale Report Test prepared by the NYS Department of Agriculture and Markets that certifies the accuracy of the scales used to weigh the truck. These documents are arguably testimonial in nature, i.e., they are prepared by these two agencies for the purpose of a hearing or trial. If an employee of these agencies were required to testify at every TVB hearing involving an overweight truck offense in order to give the motorist the opportunity to cross-examine such employee, the hearings would become lengthy and unnecessarily complicated. More significantly, since hundreds of these documents are prepared in the normal course of business, there would be little value to cross-examining such employees. It is highly unlikely that such employee would recall the details relative to any particular record that he or she prepared. Thus, requiring such employees to be witnesses would frustrate the intent of the entire TVB process — the fair and speedy adjudication of traffic summons outside the criminal courts — and would provide no real benefit to the motorist.

It is critical to note that the Administrative Law Judge is always required to assess the credibility of evidence and he or she would still be required to do so in these overweight cases. The amendment would not prohibit a truck driver or trucking company from calling a State or NYC agency employee to testify at a TVB hearing; it simply prevents an agency

employee from being required to testify. Instructively, the scores of Article 78 proceedings brought against DMV involving TVB adjudication of overweight cases have not raised the issue of the validity of the two certification documents discussed above, nor have past petitioners raised the issue of the necessity of testimony by those individuals who prepared the subject business records. The regulation in its current form, however, leaves open the possibility that future challenges might be based on those issues.

Thus, this regulatory amendment is necessary to preserve the underlying purpose of the administrative hearing process.

4. Costs: There are no costs to consumers, state agencies or to local governments.

5. Local government mandates: The proposal does not impose any mandates on local governments.

6. Paperwork: The proposal does not impose any additional paper requirements on the Department or affected entities.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: Originally, the Department contemplated repealing Part 124.5(b)(2) in its entirety. Upon further review, the Department determined that this more narrowly crafted version relating to the admissibility of business records was sufficient. The New York State Motor Truck Association was contacted about this proposed amendment and the Association expressed concern about its members' ability to call the appropriate State or City agency employee to testify at a TVB hearing if necessary. The Association's concerns were addressed in the proposal and they were satisfied with the response.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Immediately.

Regulatory Flexibility Analysis

A RFA is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A RAFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A JIS is not submitted because this rule will have no adverse impact on job creation or job development in New York State.

Public Service Commission

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

Modification of Bills by New York State Electric & Gas Corporation

I.D. No. PSC-43-07-00016-P

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

Proposed action: As discussed in an order establishing commodity program issued Aug. 29, 2007 in Case 07-E-0479, the Public Service Commission is considering a modification to the bills issued by New York State Electric & Gas Corporation (NYSEG) to reflect a "price to compare" feature that would facilitate the comparison of utility energy commodity prices to prices offered by competitors like Energy Services Companies (ESCOs).

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), 66(1), (5), (9), (10) and (12)

Subject: Modification of NYSEG's bills to facilitate the comparison of utility energy commodity prices to prices offered by ESCOs.

Purpose: To consider modification of NYSEG's bills to facilitate the comparison of utility energy commodity prices to prices offered by ESCOs.

Substance of proposed rule: As discussed in an Order Establishing Commodity Program issued August 29, 2007 in Case 07-E-0479, the Public Service Commission is considering a modification to the bills issued by New York State Electric & Gas Corporation (NYSEG) to reflect a "price to compare" feature that would facilitate the comparison of utility energy commodity prices to prices offered by competitors like Energy Services Companies (ESCOs). The Commission may adopt, reject or modify, in whole or in part, the relief and remedies proposed.

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-0479SA2)

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

Energy Services Company Introduction Program by New York State Electric & Gas Corporation

I.D. No. PSC-43-07-00017-P

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

Proposed action: As discussed in an order establishing commodity program issued Aug. 29, 2007 in Case 07-E-0479, the Public Service Commission is considering adoption of an Energy Services Company (ESCO) introduction program at New York State Electric & Gas Corporation (NYSEG) that would facilitate informed decisionmaking by new customers in selecting their energy commodity provider.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), 66(1), (5), (9), (10) and (12)

Subject: An ESCO introduction program at NYSEG to facilitate informed decisionmaking by new customers.

Purpose: To consider adoption of an ESCO introduction program at NYSEG to facilitate informed decisionmaking by new customers.

Substance of proposed rule: As discussed in an Order Establishing Commodity Program issued August 29, 2007 in Case 07-E-0479, the Public Service Commission is considering adoption of an Energy Services Company (ESCO) Introduction Program at New York State Electric & Gas Corporation (NYSEG) that would facilitate informed decisionmaking by new customers in selecting their energy commodity provider. The Commission may adopt, reject or modify, in whole or in part, the relief and remedies proposed.

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-0479SA3)

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

Submetering of Electricity by Main Street Lofts, LLC

I.D. No. PSC-43-07-00018-P

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

Proposed action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Main Street Lofts, LLC, to submeter electricity at 66 Main St., Yonkers, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Main Street Lofts, LLC, to submeter electricity at 66 Main St., Yonkers, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Main Street Lofts, LLC, to submeter electricity at 66 Main Street, Yonkers, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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-1160SA1)

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

Outdoor and Street Lighting Tariffs by New York State Electric & Gas Corporation

I.D. No. PSC-43-07-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 120—Electricity and P.S.C. No. 121—Street Lighting to become effective Jan. 1, 2008.

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

Subject: Outdoor and street lighting.

Purpose: To revise outdoor and street lighting tariffs to comply with the requirements of the Energy Policy Act of 2005 and to provide a new option to customers as mercury vapor fixtures are replaced.

Substance of proposed rule: The Commission is considering New York State Electric & Gas Corporation's (NYSEG) request to revise outdoor and street lighting tariffs to comply with the requirements of the Energy Policy Act of 2005 and to provide a new option as an alternative to mercury vapor fixtures; and to grandfather obsolete and energy inefficient fixtures. The proposed filing has an effective date of January 1, 2008. The Commission may approve, reject or modify, in whole or in part, NYSEG's request.

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-1192SA1)

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

Outdoor and Street Lighting Tariffs by Rochester Gas and Electric Corporation

I.D. No. PSC-43-07-00020-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 18—Street Lighting and P.S.C. No. 19—Electric to become effective Jan. 1, 2008.

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

Subject: Outdoor and street lighting.

Purpose: To revise outdoor and street lighting tariffs to comply with the requirements of the Energy Policy Act of 2005 and to provide a new option to customers as mercury vapor fixtures are replaced and to provide a high pressure sodium option for its arc lighting in lieu of incandescent arc lighting.

Substance of proposed rule: The Commission is considering Rochester Gas and Electric Corporation's (RG&E) request to revise outdoor and street lighting tariffs to comply with the requirements of the Energy Policy Act of 2005 and to provide a new option as an alternative to mercury vapor fixtures; and to provide a high pressure sodium option for its arc lighting in lieu of incandescent arc lighting. The proposed filing has an effective date of January 1, 2008. The Commission may approve, reject or modify, in whole or in part, RG&E's request.

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-1195SA1)

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

Gas Rates and Service by Corning Natural Gas Corporation

I.D. No. PSC-43-07-00021-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Corning Natural Gas Corporation (Corning) to make various changes in the rates, charges, rules and regulations contained in its schedules for gas service, P.S.C. No. 3—Gas and P.S.C. No. 4—Gas. The effective date of the filing has been suspended through Nov. 24, 2007.

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

Subject: Gas rates and service.

Purpose: To consider Corning's request for approval to increase annual gas revenues by approximately \$681,000 or 2.5 percent.

Substance of proposed rule: The Commission is considering a request by Corning Natural Gas Corporation (Corning) to increase its gas delivery rates. Initially, in a June 28, 2007 filing, Corning proposed an increase of \$581,000 in annual revenues, which represents a 2.2% average increase on total firm full-service gas customers and firm transportation customers (including an equivalent level of gas supply costs). By letter dated October 5, 2007, Corning increased its request to \$681,000 (2.5%) but waived any claim that the Commission might authorize an allowance exceeding the amount requested. The effective date of the filing is currently suspended through November 24, 2007 in Case 07-G-0772. The Commission will evaluate the filing and may approve or reject it in whole or part or may otherwise alter rates. The Commission may also take other actions that may alter Corning's service or management or take other actions related to the filing.

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-0772SA1)

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

Issuance of Preferred Stock by Corning Natural Gas Corporation

I.D. No. PSC-43-07-00022-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 or reject a petition filed by Corning Natural Gas Corporation (Corning, the company) to amend the commission order in this case to allow the company to issue preferred stock as well as common stock.

Statutory authority: Public Service Law, section 69

Subject: Issuance of preferred stock.

Purpose: To allow Corning to issue and sell up to \$14.9 million of preferred stock or common stock.

Substance of proposed rule: Corning Natural Gas Corporation (Corning, the Company) requires funding to support major investment in improvements to the Company's system for providing service to its customers and for refunding of debt. The Company was authorized to issue up to \$14.9 million of Common Stock. To have additional financial flexibility, the Company requests to be able to issue Preferred Stock as well as Common Stock under this authorization. The Commission is considering whether to approve or reject, Corning's request.

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-0445SA2)

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

Standards Relating to Electric and Gas Metering Equipment

I.D. No. PSC-43-07-00023-P

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

Proposed action: The New York Public Service Commission is considering whether to approve, modify or reject, in whole or in part, certain standards relating to electric and gas metering equipment used in the course of providing utility service in New York State.

Statutory authority: Public Service Law, sections 5(b), 65 and 66(1)

Subject: Standards relating to electric and gas metering equipment.

Purpose: To consider certain standards relating to electric and gas metering equipment used in the course of providing utility services in New York State.

Substance of proposed rule: The Public Service Commission (the Commission) is considering whether to approve, modify or reject, in whole or in part, certain standards relating to electric and gas metering equipment used in the course of providing utility service in New York State. The following list provides the features and functions under consideration for inclusion in a standard for AMI systems to be adopted by the Commission:

- a) ANSI compliant (must meet all ANSI standards).
- b) Bi-directional registration (supports net metering).
- c) Visual read capability for cumulative usage.
- d) Ability to provide time-stamped interval data, at hourly or shorter time intervals.
- e) On-board meter memory capable of storing at least 60 days of readings.
- f) Direct, real-time (defined as a time lag of five minutes or less) remote read-only access for customers and/or competitive providers to meter data.
- g) Capability to remotely read meters on-demand.
- h) Utilizes open standards-based communication protocols and platforms, e.g., broadband, PLC, internet, XML, MV-90, Zigbee, DNP3, etc.
- i) Two-way communications capability, including ability to remotely upgrade meter firmware.
- j) Ability to send signals to customer equipment to trigger demand response functions, and/or connect with a home area network (HAN) to provide direct or customer-activated load control.
- k) Positive notification of outage/restoration.
- l) Self diagnostics, including tamper flagging capability.
- m) Upgrade capability.

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.

(02-M-0514SA10)

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

Issuance of Securities and Amendment of Certificate of Incorporation by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York, et al.

I.D. No. PSC-43-07-00024-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by The Brooklyn

Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) seeking authority for each to establish a new class of preferred stock.

Statutory authority: Public Service Law, sections 69 and 108

Subject: Issuance of securities and amendment of certification of incorporation.

Purpose: To authorize KEDNY and KEDLI to issue a new class of preferred stock and amend both companies' certificate of incorporation.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) seeking authority for each to establish a class of preferred stock having one share, subordinate to any existing preferred stock, and to issue such share of stock (Golden Share) to a party to be determined by the Commission, for the purpose of limiting KEDNY's and KEDLI's right, in the event that National Grid plc, National Grid USA or another National Grid affiliate is in a bankruptcy proceeding, to commence any voluntary bankruptcy, liquidation, receivership, or similar proceedings without the consent of the holder of the Golden Shares. In addition, the Commission is considering who should be designated to hold the Golden Share. This petition was filed in compliance with the Commission's August 23, 2007 "Abbreviated Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island" and the September 17, 2007 "Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Delivery Long Island" in Case 06-M-0878.

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-0878SA2)

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

Provision of Steam Service Under the Certificate of Public Convenience and Necessity by AG-Energy, L.P.

I.D. No. PSC-43-07-00025-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 a petition from AG-Energy, L.P. requesting permission to cease providing steam service and to relinquish its certificate of public convenience and necessity.

Statutory authority: Public Service Law, section 83

Subject: Provision of steam service under a certificate of public convenience and necessity.

Purpose: To consider the cessation of steam service and relinquishment of a certificate of public convenience and necessity.

Substance of proposed rule: The Public Service Commission is considering a petition from AG-Energy, L.P. requesting permission to cease providing steam service and to relinquish its Certificate of Public Convenience and Necessity. The Commission may approve, reject, or modify, in whole or in part, the relief and remedies proposed.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:

Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(07-S-1074SA1)

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

Water Rates and Charges by the Birch Hill Water Supply Corporation

I.D. No. PSC-43-07-00026-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by the Birch Hill Water Supply Corporation to make a change in the rates and charges contained in its tariff schedule P.S.C. No. 3—Water, to become effective Jan. 1, 2008.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To continue Birch Hill Water Supply Corporation's escrow account to cover the cost of redeveloping two wells.

Substance of proposed rule: On October 9, 2007, the Birch Hill Water Supply Corporation (Birch Hill) filed to become effective January 1, 2008, Escrow Account Statement No. 4 to its tariff schedule P.S.C. No. 3 - Water. The proposed filing would surcharge \$195 per quarter, per customer for an additional four billing periods. The maximum balance allowed, excluding accrued interest would be \$53,040 and would recover the cost of drilling down two wells and to pay for trucked-in water and other costs associated with the redevelopment, replacement, or modification of its water supply. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(07-W-1210SA1)

Racing and Wagering Board

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

Disqualification of a Horse for Intentional or Careless Interference

I.D. No. RWB-43-07-00011-P

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

Proposed action: Amendment of section 4035.2(d) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1), 207 and 212

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

Purpose: To prohibit intentional or careless interference by a horse during the course of a race.

Text of proposed rule: Subdivision (d) of Section 4035.2 of 9E NYCRR is amended to read as follows:

(d) [If a jockey willfully strikes another horse or jockey or rides willfully or carelessly so as to injure another horse, which is in no way in fault, or so as to cause other horses to do so, his horse is disqualified.] A jockey shall not ride carelessly or willfully such that his mount, equipment, or any item or object under his or her control interferes with, impedes, intimidates, or injures another horse or jockey in the race, including that a jockey shall not carelessly or willfully strike another horse or jockey or his or her equipment with his or her whip. The stewards may disqualify the horse ridden by the jockey who committed the foul if the foul was willful or careless or may have altered the finish of the race; the stewards may also take into consideration mitigating factors such as whether the impeded horse was partly at fault or if the foul was caused by the fault of some other horse or jockey.

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: Racing, Pari-Mutuel Wagering and Breeding Law (RPWBL), subdivision 1 of section 101, section 207 and section 212. Subdivision 1 of section 101 of the RPWBL grants the Racing and Wagering Board (Board) general jurisdiction over all horse racing activities in the state. Section 207 states that all thoroughbred races or race meetings shall be subject to such reasonable rules and regulations from time to time prescribed by the Board. Section 212 of the RPWBL requires that three stewards supervise each thoroughbred race meeting, and that such stewards shall exercise powers and perform such duties at each race meeting as may be prescribed by the rules of the Board.

2. Legislative objectives: To enable the Board to assure the public's confidence in — and preserve the integrity of — racing at pari-mutuel wagering tracks located in New York State, and to ensure that the state can receive reasonable revenue in support of government arising from such wagering.

3. Needs and benefits: This rule is necessary to ensure safe and professional conduct of jockeys during the course of a thoroughbred race, to preserve the integrity of pari-mutuel racing and wagering in New York State, and to insure that the state can receive reasonable revenue in support of government arising from such wagering. This rule is designed to protect the betting public from intentional or negligent misconduct committed during the course of a horse race, and ensure that a jockey's conduct during the course of a race is both professional and beyond reproach. This rule is necessary to ensure public confidence in such events.

The purpose of section 4035.2(d) is to prohibit intentional or careless interference during the course of a race. Previously, the rule generally prohibited such interference. However, during the course of a recent administrative hearing where a horse was disqualified due to a jockey striking another horse in the head with a whip as the second horse was advancing, the appealing party successfully argued that the contact was not willful and that since subdivision (d) of Section 4035.2 of the Board's thoroughbred rules did not expressly prohibit a jockey from carelessly striking another horse, the disqualification was erroneous. In fact, Section 4035.2(d) prohibits a jockey from riding "willfully or carelessly" while the prohibition against striking another horse or jockey merely had to be willful in order to be a violation. There is no provision for "carelessness" in the rule as it pertains to striking another horse or jockey. This loophole creates a dangerous racing environment whereby stewards would have to determine that a jockey acted willfully in striking another horse or jockey with a whip before disqualifying a horse for such misconduct. This rulemaking will close that loophole and is necessary to ensure the integrity of horseracing.

This amendment is also necessary from a legal perspective in that it adopts more specific language regarding what action or actions constitute foul riding. The language of the current rule is narrow and needs to define all conduct that comprises interference. In addition to interfering with another horse or jockey, the language of the amendment also prohibits a jockey from impeding, intimidating or injuring another horse. Similarly, current language is vague as to what constitutes striking. The amendment specifies the prohibited use of a mount, equipment or other object under a jockey's control. In short, this amendment is necessary to close all technical loopholes regarding foul riding.

This amendment is necessary to grant the stewards necessary discretion in considering mitigating factors as to whether disqualification is necessary.

4. Costs:

(a) Cost to regulated parties for the implementation of continuing compliance with the rule: None. This rule pertains to the conduct of jockeys during the course of a horse race, and imposes no costs upon them.

(b) Costs to the agency, state and local governments for the implementation and continuation of the rule: None. The Board is the sole government agency responsible for the regulation of thoroughbred racing in New York State. This rule can be enforced under the existing regulatory system with no added costs.

(c) The information, including the source of such information and the methodology upon which the cost analysis is based: This cost information was determined by the Office of Counsel of the New York State Racing and Wagering Board.

(d) There are no costs associated with this rule, so no estimates have been provided.

5. Local government mandates: None. Local governments do not regulate horse racing in the State of New York.

6. Paperwork: None. Stewards would use the existing paperwork requirements for riding violations.

7. Duplication: None. The Board is the only entity whose duty is to regulate horse racing in the State of New York, and there are no other controlling rules or regulations.

8. Alternatives: There are no other alternatives to consider. This rulemaking is designed to close technical loopholes in a rule that is designed to ensure the safety of jockeys and ensure the integrity of thoroughbred horse racing in New York State. The alternative would be to leave the existing rule in place, which is unacceptable given that it is not specific enough as it applies to prohibited conduct, nor does it grant adequate discretion to stewards in cases where disqualification is not merited.

9. Federal standards: None. However, the use of whip provision of this rule amendment is consistent with the Model Rule on Interference and Use of Whip prescribed by the Association of Racing Commissioners International, which states that "No jockey shall carelessly or willfully jostle, strike or touch another jockey or another jockey's horse or equipment."

10. Compliance schedule: This rulemaking will be effective upon submission to the Department of State as an emergency rulemaking and will remain in effect for 90 days. This rulemaking will become permanent upon adoption after publication in the *State Register* and after the statutorily required 45-day public comment period.

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 the amendment addresses the conduct of jockeys during a professional sporting event. It does not diminish their substantive job duties or their opportunity to earn a living. The rule prohibits a jockey from striking or injuring another jockey or horse during a thoroughbred race, and allows race stewards to disqualify a horse if its jockey violates the rule. As is apparent from the nature of the rule, the rule neither affects small business, local governments, jobs nor rural areas. Prohibiting riding fouls during the course of a thoroughbred race, or otherwise disqualifying such horse, does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8). Nor does it affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry. The rule can be enforced using existing regulatory methods and technology.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Filing Requirements for Certain Distributors of Wine

I.D. No. TAF-43-07-00002-P

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

Proposed action: This is a consensus rule making to amend section 60.1 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 429(1); and 436 (not subdivided)

Subject: Filing requirements for certain distributors of wine registered under article 18 of the Tax Law.

Purpose: To allow certain distributors that are licensed by the State Liquor Authority as a New York State farm winery, special farm winery, micro-winery, or an out-of-state direct wine shipper to file annual rather than monthly alcoholic beverage tax returns.

Text of proposed rule: Section 1. Paragraph 1 of subdivision (a) of section 60.1 of such regulations is amended to read as follows:

(a) (1) Except as provided in paragraphs (2) [and], (3), and (4) of this subdivision, every distributor must, on or before the 20th day of each month, file with the Department of Taxation and Finance a monthly tax return, for the preceding month, on a form or forms prescribed by the department for such purpose, even though no tax may be payable. [In] *Except for a distributor as defined in clause ("a") of subparagraph (i) of paragraph (4) of this subdivision, in addition to any other required information, such return must show, the number of gallons of beers or wines (or fractional part thereof) or liters of liquors (or fractional part thereof) that are:*

- (i) on hand at the beginning of the preceding month;
- (ii) manufactured or purchased during the preceding month;
- (iii) on hand at the end of the preceding month; and
- (iv) sold or used in this State during the preceding month.

Such return must also include the number of gallons of beers or wines or liters of liquors in transit during the return period and the extent of the distributor's other receipts and distributions of alcoholic beverages in New York State during the return period. *For a distributor as defined in clause ("a") of subparagraph (i) of paragraph (4) of this subdivision, in addition to any other required information, such return must show the total number of gallons of wines (or fractional part thereof) that are sold directly to New York State residents for such residents' personal use during the preceding month.* The return must be prepared in accordance with the instructions provided by the department and must be accompanied by all supporting schedules.

Section 2. A new paragraph 4 is added to subdivision (a) of section 60.1 of such regulations to read as follows:

(4) (i) A distributor that:

("a")("1") is an out-of-state winery and is required to register as a distributor solely because such person ships its wine directly to any New York State resident for such resident's personal use; and

("2") is licensed by the State Liquor Authority of New York State as a direct shipper, pursuant to section 79-c of the Alcoholic Beverage Control Law; or

("b") is licensed by the State Liquor Authority of New York State as a farm winery, pursuant to section 76-a of the Alcoholic Beverage Control Law, as a special farm winery pursuant to section 76-d of the Alcoholic Beverage Control Law, or as a micro-winery pursuant to section 76-f of the Alcoholic Beverage Control Law; may apply to the department to file an annual tax return in lieu of the monthly returns required by paragraph (1) of this subdivision. Such annual return shall relate to the distributor's activities during the calendar year and shall be due on or before January 20th of the succeeding calendar year. Such return must show the information required in paragraph (1) of this subdivision, except that "month" shall be read as "year," and must be accompanied by proof of such distributor's continuing license as a direct shipper, farm winery, special farm winery or micro-winery.

(ii)(“a”) If a distributor meeting the requirements of subparagraph (i) of this paragraph (a “qualifying distributor”) at any time during the period to be covered by an annual return ceases to be licensed by the State Liquor Authority, such distributor must file a return reflecting the distributor’s activities from January 1st of such annual period through the end of the month during which the distributor ceased to meet the qualifications of subparagraph (i) of this paragraph. Such return must be filed on or before the 20th day of the month following the month during which the distributor ceased to meet the requirements of subparagraph (i) of this paragraph, and any tax due must be paid with filing of such return.

(“b”) If a distributor meeting the requirements of clause (“b”) of subparagraph (i) of this paragraph at any time during the period to be covered by an annual return becomes reclassified with the State Liquor Authority as a winery other than a farm winery, a special farm winery, or a micro-winery, such distributor must immediately begin filing monthly tax returns, as described in paragraph (1) of this subdivision.

(iii) If it becomes necessary for a qualifying distributor to begin filing monthly returns during an annual period, pursuant to the provisions of clause (“b”) of subparagraph (ii) of this paragraph, such distributor must also file a return reflecting the distributor’s activities from January 1st of such annual period through the end of the month during which the distributor ceased to meet the qualifications of subparagraph (i) of this paragraph. Such return must be filed on or before the 20th day of the month following the month during which the distributor ceased to meet the requirements of such subparagraph (i) of this paragraph, and any tax due must be paid with filing of such return.

(iv) If it becomes necessary for a qualifying distributor to begin filing monthly returns during an annual period, pursuant to the provisions of clause (“b”) of subparagraph (ii) of this paragraph, such distributor may apply to the department to file on an annual basis for the next or any subsequent calendar year if such distributor anticipates that it will again meet the requirements of clause (“b”) of subparagraph (i) of this paragraph. Such application must include an explanation of why the distributor was required to begin filing monthly returns during the previous annual period and why the distributor does not expect such circumstances to re-occur in the upcoming annual period.

Text of proposed 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

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

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

Consensus Rule Making Determination

The Department of Taxation and Finance has determined that no person is likely to object to the adoption of this rule as written because the amendments are not controversial in nature.

The primary purpose of this rule is to allow certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers to file annual alcoholic beverage tax returns rather than monthly returns as currently required. In addition, the rule limits the information required to be reported on the alcoholic beverage tax return by out-of-state direct wine shippers, which conforms to current department policy.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no impact on jobs and employment opportunities. The rule merely allows certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers to file annual alcoholic beverage tax returns rather than monthly returns as currently required. In addition, the rule limits the information required to be reported on the alcoholic beverage tax return by out-of-state direct wine shippers, which conforms to current department policy.

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

Tobacco Products Wholesale Dealers’ Informational Returns
I.D. No. TAF-43-07-00003-P

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

Proposed action: Addition of Part 90 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 474, subdivision (4); and 475 (not subdivided)

Subject: Tobacco products wholesale dealers’ informational returns.

Purpose: To require wholesale dealers that are not also distributors of tobacco products to file new monthly informational returns with the department detailing their purchases, sales, and prices of such products.

Text of proposed rule: Section 1. A new Part 90 is added to such regulations to read as follows:

PART 90

Wholesale Dealers

(Statutory Authority: Tax Law, sections 171, 474, 475; art. 20)

Section 90.1 Wholesale dealer’s informational returns. (Tax Law, sections 474 and 475)

(a)(1) Every licensed wholesale dealer of tobacco products must file with the Department of Taxation and Finance a monthly informational return on a form prescribed by the department for such purpose. Wholesale dealers that are also distributors of tobacco products will not be required to file separate informational returns. Information comparable to that required by this section will be included in the returns required to be filed by distributors pursuant to section 473-a of the Tax Law.

(2) The informational return must be filed on or before the twentieth day of each month and must reflect the wholesale dealer’s activities for the preceding month, or fraction thereof. Such return must show, in addition to any other information that the department may require:

(i) the quantity, by number of cigars and number of pounds of other tobacco products, on hand at the beginning of the preceding month;

(ii) the name, address, and federal employer identification number of every person from whom cigars and other tobacco products have been purchased or otherwise acquired and the quantity and purchase price of the cigars and other tobacco products purchased or acquired from each such person during the preceding month;

(iii) the name, address, and federal employer identification number of every person, other than consumers of the subject cigars and other tobacco products, to whom cigars and other tobacco products have been sold or transferred and the quantity and selling price of the cigars and other tobacco products sold or transferred to each such person during the preceding month;

(iv) the quantity of cigars and other tobacco products otherwise disposed of, including, but not limited to, those that were not suitable for sale, destroyed, or stolen during the preceding month; and

(v) the quantity of cigars and other tobacco products on hand at the end of the preceding month.

(b) In accordance with section 474 of the Tax Law, the wholesale dealer must maintain complete and accurate records to support the information reported on the informational returns required to be filed by subdivision (a) of this section.

(c) The wholesale dealer’s informational returns must be prepared and filed in accordance with the instructions provided by the department. Every return filed by or on behalf of a wholesale dealer must contain a certification to the effect that the statements in the return are true, correct, and complete. The fact that a person’s name is signed on the certification of the return is prima facie evidence for all purposes that such person is authorized to sign and certify the return on behalf of the dealer and that the return was actually signed by such person.

(d) The department may, if it deems necessary in order to insure the revenue under Article 20 of the Tax Law, require returns (from all wholesale dealers or from any particular wholesale dealer) to be made at such other times and covering such other periods as it may determine.

(e) In accordance with section 480 of the Tax Law, the license of any wholesale dealer of tobacco products may be cancelled or suspended for such dealer’s failure to comply with the provisions of this Part.

Section 2. These amendments shall take effect on the date that the Notice of Adoption is published in the State Register and shall apply to monthly reporting periods beginning more than 90 days after such date.

Text of proposed 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

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: Tax Law, sections 171, subd. First; 474(4); and 475 (not subdivided). Section 171, subd. First, provides the Commissioner of Taxation and Finance with the authority to make reasonable rules and regulations that may be necessary for the exercise of his or her powers and duties under the Tax Law. Section 475 provides the same authority as it

relates specifically to the administration of the tobacco products excise tax imposed under Article 20 of the Tax Law, and also provides that tobacco products wholesale dealers may be required to file returns at such times and containing such information as may be prescribed. Section 474(4) provides that such wholesale dealers must maintain certain records required by the Commissioner.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives that the Commissioner equitably administer the provisions of the Tax Law and protect the State's tax revenues. The rule is an exercise of the Commissioner's authority to re-examine the existing policies of the Department of Taxation and Finance with respect to the tobacco products excise tax, and to prescribe a rule that, consistent with the Tax Law, will enable the Department to better ensure compliance with the provisions contained in Article 20 as described below in Section 3 of this statement.

3. Needs and benefits: The rule seeks to remedy various compliance and enforcement issues in the tobacco products excise tax. This tax is based on the wholesale price of the tobacco product and is paid "upstream" by the distributor that imported the product, then added and collected as part of the selling price along the distribution chain, and ultimately included in the retail price. Currently, both tobacco products distributors and retail dealers are required to provide the Department with certain information regarding their purchases and/or sales of tobacco products, but tobacco products wholesale dealers that are not also distributors are not required to report such information. This rule would close the informational reporting gap within the chain of distribution by requiring tobacco products wholesale dealers that are not also distributors to file new monthly informational returns with the Department detailing their purchases, sales, and prices of tobacco products for the corresponding month. The new return will enable the Department to better track the distribution as well as the wholesale price of tobacco products in New York State. The ability to track product through the distribution chain, as provided by this rule, will better enable the Department to reconcile information about tobacco products ultimately received and sold by retail dealers in an effort to ensure better compliance with the tobacco products excise tax.

4. Costs: (a) Costs to regulated parties. The regulated parties affected by this rule are approximately 140 licensed tobacco products wholesale dealers. There will be no tax liability costs to these regulated parties for the implementation of and continuing compliance with this rule. There will, however, be administrative costs associated with the requirements of the rule including the filing of a new informational return. It is estimated that it will take an affected wholesale dealer one hour and thirty minutes to learn such new requirements, one hour for recordkeeping, and one hour and thirty minutes to complete the new returns, for a total of four hours. Assuming half of the wholesale dealers will prepare the returns themselves at \$15 per hour and half will use an accountant at \$80 per hour, the resulting average cost for each dealer to comply during the first month will be \$47.50 per hour or \$190. After the first month, the cost of learning the new requirements could be reduced to zero for these wholesale dealers, resulting in compliance costs to each of them of \$119 per month in the second month and thereafter.

These estimated administrative costs to the regulated parties were derived using information sources available to the Department such as tax return information and supplier reports, i.e., the new informational return is of similar complexity and captures much of the same information as the existing Distributor of Tobacco Products Tax Return.

(b) Costs to the state and its local governments including this agency. This rule will have no cost in terms of revenue impact on New York State or its local governments. It is anticipated that it will assist in achieving compliance with the tobacco products excise tax. There will be costs to this agency with regard to the implementation and continued administration of the rule. The rule will necessitate the development of the new forms at an estimated cost of \$4,280. The estimated annual cost to print and mail the new returns is \$11,844, which includes personal service costs of \$7,584 and non-personal service costs of \$4,260. Additional costs to the Department for developing a software package to capture data from the new returns, preparing test documents and reviewing test output, managing user support, and entering data on a monthly basis are estimated to be \$36,744 on an annual basis.

(c) Information and methodology. This analysis is based on discussions among personnel from the Department's Office of Tax Policy Analysis, Management Analysis and Project Services Bureau, and the Office of Budget and Management Analysis.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: Additional reporting and paperwork requirements will be imposed on the regulated parties affected by this rule. These tobacco products wholesale dealers that are not also distributors of tobacco products will be required to file new monthly informational returns detailing their purchases, sales, and prices of tobacco products. The new returns must be filed on or before the twentieth day of each month and must reflect the wholesale dealer's activities for the preceding month. Every return must contain a certification that the information reported on it is true, correct, and complete. Further, wholesale dealers must maintain complete and accurate records to substantiate the information reported on their returns. The rule does not require wholesale dealers that are also distributors of tobacco products to file separate informational returns; they will continue to file returns as established prior to this rule.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State government that duplicate, overlap, or conflict with this rule.

8. Alternatives: The alternative to the rule is to continue not requiring monthly informational returns be filed with the Department by tobacco products wholesale dealers that are not also distributors. This approach, however, results in a gap in the informational reporting of tobacco products purchases, sales, and prices, as described in Section 3 of this statement. Since it is the intention of the Department to close this gap, no alternatives were examined, as the only way to obtain the necessary information is to require it from these tobacco products wholesale dealers.

9. Federal standards: This rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

10. Compliance schedule: The rule will take effect on the date that the Notice of Adoption is published in the State Register and will apply to monthly reporting periods beginning more than 90 days after such date. The rule will require approximately 140 tobacco products wholesale dealers to file new monthly informational returns with the Department. It is estimated that 90 days will be a sufficient amount of time to enable these regulated parties to achieve compliance with this requirement.

Regulatory Flexibility Analysis

1. Effect of rule: The rule will affect approximately 140 licensed tobacco products wholesale dealers that are not also distributors of tobacco products, some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule does not distinguish between different business sizes. It affects all of these 140 tobacco products wholesale dealers that are not also distributors in the same manner, regardless of the size of the business operation.

2. Compliance requirements: The rule will not impose any adverse economic impact or any additional reporting, recordkeeping, or compliance requirements on local governments. The rule will require all tobacco products wholesale dealers that are not also distributors, including those that are small businesses, to file new monthly informational returns with the Department, which will be due on the twentieth day of each month, and will provide information relating to the previous month's activity. See paragraphs 3, 4, and 6 of the Regulatory Impact Statement for detailed compliance requirements.

3. Professional Services: The rule itself imposes no requirements for professional services upon small businesses or local governments. However, an affected tobacco products wholesale dealer may decide that professional services, in addition to those already employed by a business in preparing its tax returns, are needed in order for the wholesale dealer to comply with the additional reporting requirements of the rule.

4. Compliance costs: There are no compliance costs to local governments as a result of this rule. With regard to the affected tobacco products wholesale dealers, during the first month that the rule is in effect it is estimated that it will take each dealer one hour and thirty minutes to learn the new requirements of the rule, one hour for recordkeeping, and one hour and thirty minutes to prepare the new returns, for a total of four hours. Assuming that half of these wholesale dealers will prepare the returns themselves at \$15 per hour and half will use an accountant at \$80 per hour, the resulting average cost for each dealer to comply during the first month will be \$47.50 per hour or \$190. After the first month, the cost of learning the new requirements could be reduced to zero, resulting in compliance costs to each wholesale dealer of \$119 per month in the second month and thereafter. There are no variations in these costs for small businesses.

5. Economic and technological feasibility: The rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: This rule helps to level the playing field for all tobacco products wholesale dealers, including those that are small businesses, by helping to ensure universal compliance with the tobacco products excise tax. To accomplish this, the rule requires all tobacco products wholesale dealers that are not also distributors to file monthly informational returns with the Department. Recognizing the impact of these new reporting requirements, the Department has taken the following steps to minimize any adverse effects. First, the reporting requirements of the new rule are those which are minimally necessary to close the informational gap which exists within the tobacco products distribution chain. (Closing the information gap is the purpose of the rule, as discussed in more detail in the Regulatory Impact Statement.) Second, the Department has made specific changes in the text of the rule in response to a concern raised by a representative of an industry member that, under an earlier draft of the rule, affected parties would have to report the "wholesale price" of tobacco products. "Wholesale price" is defined for purposes of the tobacco products tax as the established price for which a manufacturer sells tobacco products to a distributor. Because tobacco products can be sold multiple times at the wholesale level, the representative was concerned that the wholesale price would not necessarily be readily available to the affected parties. In response to this concern, the text of the rule was changed so that the affected parties are required to report the "purchase price" and "selling price" instead of the wholesale price, as it was agreed that this information would be readily known. Third, in developing any necessary new forms (returns), the Department has modeled them after existing returns that are already required to be filed by wholesale dealers that are also distributors of tobacco products. In comparison to the existing Distributor of Tobacco Products Tax Return, the new forms actually provide more space and an improved layout for reporting the required information. Finally, allowing for a period of at least 90 days after the rule is effective for the dealers to begin compliance with the new rule provides ample time for their planning and preparation for its implementation.

7. Small business participation: The following organizations were notified that the Department was in the process of developing this rule and were given the opportunity to participate in its development: the Cigar Association of America, Inc.; the New York State Association of Tobacco and Candy Distributors; the Association of Towns of New York State; the Deputy Secretary of State for Local Government and Community Services; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; and the Retail Council of New York State. The notified groups did not submit any comments concerning the rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The rule will affect approximately 140 licensed tobacco products wholesale dealers that are not also distributors, some of which may be located in rural areas as defined by section 102(10) of the State Administrative Procedure Act. The rule affects all of these wholesale dealers in the same way; it does not distinguish between tobacco products wholesale dealers located in rural, suburban, or metropolitan areas of this State.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule will require all tobacco products wholesale dealers that are not also distributors, including those located in rural areas, to file new monthly informational returns with the Department, which will be due on the twentieth day of each month, and will provide information relating to the previous month's activity. See paragraphs 3, 4, and 6 of the Regulatory Impact Statement for detailed compliance requirements. Although not required, an affected wholesale dealer may determine that professional services, in addition to those already employed by a business in preparing its tax returns, may be necessary in order for the wholesale dealer to comply with the additional reporting requirements of the rule.

3. Costs: There are no variations in costs for public or private concerns in rural areas. With regard to affected tobacco products wholesale dealers located in rural areas or elsewhere, during the first month that the rule is in effect it is estimated that it will take each of them one hour and thirty minutes to learn the new requirements of the rule, one hour for recordkeeping, and one hour and thirty minutes to prepare the new returns, for a total of four hours. Assuming that half of these wholesale dealers will prepare the returns themselves at \$15 per hour and half will use an accountant at \$80 per hour, the resulting average cost for each dealer to comply during the first month will be \$47.50 per hour or \$190. After the first month, the cost of learning the new requirements could be reduced to zero for these

wholesale dealers, resulting in compliance costs to each of them of \$119 per month in the second month and thereafter.

4. Minimizing adverse impact: The rule does not distinguish between tobacco products wholesale dealers located in rural areas and those located elsewhere; it does not place any additional burdens on those located in rural areas. The rule helps to level the playing field for all tobacco products wholesale dealers, including those that are located in rural areas, by helping to ensure universal compliance with the tobacco products excise tax. To accomplish this, the rule requires tobacco products wholesale dealers that are not also distributors to file monthly informational returns with the Department. Recognizing the impact of these new reporting requirements, the Department has taken the following steps to minimize any adverse effects. First, the reporting requirements of the new rule are those which are minimally necessary to close the informational gap which exists within the tobacco products distribution chain. (Closing the information gap is the purpose of the rule, as discussed in more detail in the Regulatory Impact Statement.) Second, the Department has made specific changes in the text of the rule in response to concerns presented by the industry. Third, in developing any necessary new forms (returns), the Department has modeled them after existing returns that are already required to be filed by wholesale dealers that are also distributors of tobacco products. In comparison to the existing Distributor of Tobacco Products Tax Return, the new forms actually provide more space and an improved layout for reporting the required information. Finally, allowing for a period of at least 90 days after the rule is effective for the dealers to begin compliance with the new rule provides ample time for their planning and preparation for its implementation.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given the opportunity to participate in its development: the Cigar Association of America, Inc.; the New York State Association of Tobacco and Candy Distributors; the Association of Towns of New York State; the Deputy Secretary of State for Local Government and Community Services; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; and the Retail Council of New York State.

Job Impact Statement

Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. In fact, the rule will have a positive impact by helping to level the playing field for all tobacco products wholesale dealers and enabling them to compete more effectively for consumer sales.

The purpose of the rule is to close the informational reporting gap which currently exists because tobacco products wholesale dealers that are not also distributors of tobacco products are not required to report any information regarding their purchases, sales, and prices of tobacco products inventory. The rule amends the Tobacco Products Tax Regulations to reflect a change in current Department policy that will require these tobacco products wholesale dealers to file new monthly informational returns with the Department in order to help ensure compliance with the tobacco products excise tax.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Repurchase Agreements and Securities Lending Agreements Held by Registered Securities Brokers and Dealers

I.D. No. TAF-43-07-00015-P

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

Proposed action: Amendment of sections 3-3.2, 4-4.3 and 6-2.7, renumbering of section 4-4.7 to section 4-4.8 and addition of new section 4-4.7 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First and 1096(a)

Subject: Repurchase agreements and securities lending agreements held by registered securities brokers and dealers.

Purpose: To provide that repurchase agreements and securities lending agreements held by registered securities brokers or dealers may not be considered investment capital so that the income and expenses from these agreements must be included in the computation of business income for such taxpayers.

Text of proposed rule: Section 1. Paragraph (2) of subdivision (a) of section 3-3.2 of such regulations is amended by amending subparagraphs (vi) and (vii) and adding a new subparagraph (viii) to read as follows:

(vi) futures contracts and forward contracts; [and]

(vii) stocks, bonds and other securities held by the taxpayer for sale to customers in the regular course of its business and, in the case of a taxpayer that is a partner in a partnership using the aggregate method pursuant to section 3-13.3 of this Part or that is a foreign corporate limited partner that has made an election with respect to such partnership pursuant to the provisions of section 3-13.5 of this Part, its proportionate part (see section 3-13.3(a)(2) of this Part) of such items which are held by such partnership for sale to customers in the regular course of the partnership's business[.]; and

(viii) *repurchase agreements and securities lending agreements described in subdivision (g) of this section, including, in the case of a taxpayer that is a partner in a partnership that uses the aggregate method pursuant to section 3-13.3 of this Part or is a foreign corporate limited partner that has made an election with respect to such partnership pursuant to the provisions of section 3-13.5 of this Part, where such partnership is a registered securities broker or dealer as described in section 210.3(a)(9)(B) of the Tax Law, its proportionate part (see section 3-13.3(a)(2) of this Part) of such items which are held by such partnership.*

Section 2. Paragraph (1) of subdivision (f) of section 3-3.2 of such regulations is amended to read as follows:

(1) Repurchase agreement is a term used to describe a transaction in which one party (the seller/borrower) in formal terms sells securities to a second party (the purchaser/lender) and simultaneously contracts to repurchase the same or *substantially* identical securities at a later time. Depending upon the nature of the agreement, in some instances the purchaser/lender will have in fact purchased the securities, whereas in other instances the transfer of funds to the seller/borrower will in fact constitute a loan [which is collateralized by the securities]. Where the purchaser/lender is a taxpayer it is necessary to determine whether the result of such a transaction is the holding by the purchaser/lender of investment capital. If the purchaser/lender, as a result of the repurchase agreement, owns the securities, and the securities are encompassed within the definition of investment capital contained in subdivision (a) of this section, such securities will constitute investment capital in the hands of the purchaser/lender. If the purchaser/lender has not acquired ownership of the securities, then it is a lender of funds and has acquired a debt instrument issued by the seller/borrower [collateralized by the securities]. Unless such debt instrument constitutes cash pursuant to paragraph (1) of subdivision (a) of this section, where such debt instrument is encompassed within the definition of investment capital contained in subdivisions (a) and (c) of this section, such instrument will constitute investment capital in the hands of the purchaser/lender. Otherwise, it will constitute either business capital or subsidiary capital. *Provided, however, a repurchase agreement described in subdivision (g) of this section does not constitute investment capital, or cash on hand or cash on deposit pursuant to paragraph (1) of subdivision (a) of this section.*

Section 3. Section 3-3.2 of such regulations is amended by re-lettering subdivision (g) to (h) and adding a new subdivision (g) to read as follows:

(g) *Repurchase agreements and securities lending agreements held by registered securities brokers or dealers. (1) Repurchase agreements. A repurchase agreement, as described in subdivision (f) of this section, that is held by a registered securities broker or dealer, as described in section 210.3(a)(9)(B) of the Tax Law, does not constitute cash on hand or cash on deposit pursuant to paragraph (1) of subdivision (a) of this section and is not investment capital.*

(2) Securities lending agreements. (i) A securities lending agreement held by a registered securities broker or dealer, as described in section 210.3(a)(9)(B) of the Tax Law, does not constitute cash on hand or cash on deposit pursuant to paragraph (1) of subdivision (a) of this section and is not investment capital.

(ii) "Securities lending agreement" is a term used to describe a transaction in which, by its terms, one party (the securities lender) transfers stock or other securities in exchange for a promise by a second party (the securities borrower) to return substantially identical or equivalent securities at a later time. The securities borrower provides the securities lender with collateral, which may be cash or noncash collateral, such as a letter of credit or government securities. Securities lending agreements are generally characterized by the following:

(A) the securities borrower has the right to transfer the securities to a third party;

(B) the securities borrower is required to pay the securities lender an amount equal to dividends and interest paid on the securities over the term of the transaction and a fee, which may be quoted as an annualized percentage of the value of the securities, commonly known as the "borrow fee";

(C) where the agreed form of collateral in the securities lending agreement is cash, the securities lender retains any earnings from the use of the cash collateral during the term of the agreement;

(D) upon termination of the agreement, the securities borrower receives compensation for the use of the collateral commonly known as the "rebate fee" or "cash collateral fee";

(E) the net of the rebate fee and the borrow fee ("the net rebate fee") is ordinarily exchanged between the securities borrower and the securities lender; and

(F) the rebate fee generally exceeds the borrow fee and the net amount is reported as interest income by the securities borrower and interest expense by the securities lender.

Section 4. Subdivisions (c), (d) and (e) of section 4-4.3 of such regulations are repealed; subdivisions (f) and (g) are relettered to be subdivisions (d) and (e) and a new subdivision (c) is added to read as follows:

(c) *For rules for allocating receipts of registered securities or commodities brokers or dealers, see section 210.3(a)(9) of the Tax Law and section 4-4.7 of this Subpart.*

Section 5. Section 4-4.7 of such regulations is renumbered to be section 4-4.8 and a new section 4-4.7 is added to read as follows:

Section 4-4.7. Receipts of registered securities brokers or dealers (a) General. Section 210.3(a)(9) of the Tax Law provides rules for allocating receipts of registered securities or commodities brokers or dealers. Subdivision (b) of this section explains the application of the special rules to receipts of registered securities brokers or dealers from repurchase agreements and securities lending agreements.

(b) Repurchase agreements and securities lending agreements. (1) Income to a registered securities broker or dealer from repurchase agreements or securities lending agreements, as described in subdivision (g) of section 3-3.2 of Part 3 of this Subchapter, is included in determining gross income from principal transactions for the purchase or sale of stocks, bonds, and other securities and is allocated to New York State pursuant to the provisions of section 210.3(a)(9)(A)(iii) of the Tax Law.

(2) Under Section 210.3(a)(9)(A)(iii) of the Tax Law, gross income from principal transactions is determined after the deduction of any cost of the taxpayer to acquire securities or commodities. Interest expense from repurchase agreements in which the taxpayer is the seller/borrower and from securities lending agreements in which the taxpayer is the securities lender is a cost to acquire the securities in those repurchase agreements where the taxpayer is the purchaser/lender and securities lending agreements where the taxpayer is the securities borrower. The amount of such interest expense is the interest expense associated with the sum of the value of the taxpayer's repurchase agreements where it is the seller/borrower plus the value of the taxpayer's securities lending agreements where it is the securities lender, provided such sum is limited to the sum of the value of the taxpayer's repurchase agreements where it is the purchaser/lender plus the value of the taxpayer's securities lending agreements where it is the securities borrower. Such interest expense must not exceed the sum of the interest income from the taxpayer's repurchase agreements where it is the purchaser/lender plus the interest income from the taxpayer's securities lending agreements where it is the securities borrower. For purposes of item (II) of section 210.3(a)(9)(A)(iii) of the Tax Law, gross income from repurchase agreements and securities lending agreements is considered to be from the same type of security and the taxpayer shall not separately calculate such gross income from such agreements.

(c) Corporate partners. In the case of a taxpayer that is a partner in a partnership using the aggregate method pursuant to in section 3-13.3 of this Title or is a foreign corporate limited partner that has made an election with respect to such partnership pursuant to the provisions of section 3-13.5 of this Title, where such partnership is a registered securities or commodities broker or dealer, the allocation rules of section 210.3(a)(9) of the Tax Law shall apply with respect to the taxpayer's distributive share (see section 3-13(a)(1) of this Title) of such receipts from such partnership for purposes of computing the taxpayer's receipts factor pursuant to section 4-6.5 of this Part.

Section 6. Subdivision (k) of section 6-2.7 of such regulations is amended to read as follows:

(k) Receipts factor on combined reports, see section [4-4.7] 4-4.8 of this Title.

Section 7. The amendments will take effect when the Notice of Adoption is published in the State Register and shall apply to reports required to be filed, without regard to extensions of time to file, on or after January 15, 2008.

Text of proposed 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

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: Tax Law, sections 171, subdivision First; and 1096(a). Section 171, Subdivision First, provides for the Commissioner to make reasonable rules and regulations, which are consistent with law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. Section 1096(a) authorizes the Commissioner to make such rules and regulations as are necessary to enforce the New York State Franchise Tax on Business Corporations imposed by Article 9-A of the Tax Law.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives that the Commissioner administer the provisions of the Tax Law by interpreting how the business corporation franchise tax applies to repurchase agreements and securities lending agreements held by registered securities brokers and dealers. Specifically, as described in section 3, below, the rule interprets provisions of section 208 of Article 9-A of the Tax Law regarding investment capital and business capital. The rule also provides guidance on the application of receipts factor rules applicable to registered brokers and dealers contained in section 210.3(a)(9) of Article 9-A.

3. Needs and benefits: This rule sets forth what the Department views as a better interpretation of the application of certain Tax Law provisions to repurchase agreements and securities lending agreements held by a registered securities broker or dealer and provides consistent treatment for these similar agreements. The interpretation is based on a better understanding of these underlying transactions acquired through research and extensive discussions with industry members and their representatives over the course of several years. This rule also addresses the allocation of the income from such agreements under statutory receipts factor rules applicable to registered securities brokers and dealers.

The business corporation franchise tax imposed by Article 9-A of the Tax Law distinguishes investment capital and investment income from business capital and business income. Investment capital and investment income are allocated to New York according to the taxpayer's investment allocation percentage. Business capital and business income are allocated to New York according to its business allocation percentage. Since the business allocation percentage typically exceeds the investment allocation percentage, it is generally advantageous to a taxpayer to classify assets and income as investment capital and investment income rather than business capital and business income.

Under section 208.6 of the Tax Law, investment income is income from investment capital less, among other things, in the discretion of the Commissioner, any deductions allowable in computing entire net income (which is federal taxable income with certain modifications) that are directly or indirectly attributable to investment capital or investment income. Section 208.5 of the Tax Law defines investment capital, in part, as "investments in stocks, bonds and other securities". Business income means entire net income minus investment income (Tax Law, section 208.8). Cash on hand and on deposit may be treated as investment capital or as business capital as the taxpayer elects (Tax Law, section 208.7(a)). If it is treated as investment capital, the income therefrom is investment income; if it is treated as business capital, the income therefrom is business income.

A rule adopted in 1989 allowed certain short-term debt instruments to be characterized as cash on hand or on deposit subject to the election to be treated as investment capital. That rule allowed short-term repurchase agreements to be classified as cash and thus qualify for the election. A repurchase agreement is a transaction by which one party agrees to sell securities to a second party and simultaneously agrees to repurchase the same or substantially identical securities from that party at a later date. Although a purchase and repurchase in form, the current rule recognizes that, in substance, the transaction may in certain circumstances be considered a loan collateralized by the securities with the purchaser serving as a lender holding a debt instrument (the purchaser/lender is often described as

holding a reverse repurchase agreement). The agreements are usually for a short period of time.

Audits of securities brokers and dealers have shown that many have treated their cash, including qualifying reverse repurchase agreements, as investment capital. As a result, interest income from a reverse repurchase agreement gives rise to investment income. They have given similar treatment to securities lending agreements, which are not specifically addressed in the existing rule. A securities lending agreement is a transaction in which, by its terms, one party (the securities lender) transfers stock or other securities in exchange for "collateral," usually cash. The second party (the securities borrower) promises to return the same or substantially identical securities at a later date and the securities lender usually promises to return the cash plus interest to the securities borrower. While treating the income from reverse repurchase agreements and securities lending agreements as investment income, many brokers and dealers have deducted expenses related to these activities from business income rather than from investment income. This has resulted in an understatement of business corporation franchise tax.

The Department worked with the industry and the New York City Department of Finance, which administers similar provisions in its General Corporation Tax, to address the proper State and City tax treatment of these transactions. In June 2004, the State and City provided the industry with a document described as a "Vision for Investment Income and Capital." The document suggested that the rules should be amended to treat reverse repurchase agreements as business capital thus giving rise to business income and expenses and also to clarify that securities lending transactions likewise give rise to business income and expense. In September 2004, the New York City Department of Finance issued a Statement of Audit Procedure (SAP) setting forth the interpretation of current rules. The SAP indicated that the income and expense arising from securities lending transactions are business income and expenses. While recognizing that reverse repurchase agreements could qualify as cash on hand or on deposit subject to the election to be treated as investment capital, the SAP indicated that interest expense related to this activity (namely, from repurchase agreements in which the taxpayer is the seller/ borrower) had to be matched to and deducted from the income from reverse repurchase agreements. The Department did not issue similar guidelines, but indicated in conversations with the industry that it subscribed to the interpretation. In 2006 the Department sent the industry a document, known as the "settlement paradigm", outlining a specific methodology for the matching of interest expense from repurchase agreements in which the taxpayer is the seller/borrower to interest income from reverse repurchase agreements.

Through this process, the Department has gained a better understanding of the way registered securities brokers and dealers use repurchase agreements and securities lending agreements in their business. The two types of agreements are very similar and a better interpretation treats them similarly. Also, the securities transferred to the purchaser in the repurchase agreement and to the securities borrower in the securities lending agreement typically may be transferred to third parties. These activities are a core part of a securities broker or dealer's business. For example, a securities broker or dealer uses the securities acquired in these transactions to cover short sales. As a result, the Department believes that a better interpretation of the statute is to characterize repurchase agreements and securities lending agreements as business capital.

4. Costs: (a) Costs to regulated parties: The rule does not impose any new reporting, recordkeeping or other compliance costs on regulated parties. The change in interpretation of the statute may have an impact on the tax liability of particular taxpayers. This is a function of what the Department believes is a better interpretation of the statutory provisions and the particular circumstances of the taxpayer. The Department has determined that ultimately there is no measurable tax liability impact on an industry-wide basis between the interpretation of the current rule, with a proper matching of expenses to income, and this rule. The rule would facilitate voluntary compliance by providing a better interpretation of the business and investment capital provisions of the statute. This would lead to the appropriate matching of business income and expenses as well as investment income and expenses.

(b) Costs to the agency and to the State and local governments for the implementation and continuation of this rule: It is estimated that the implementation and continued administration of this rule will not impose any costs upon this agency, New York State, or its local governments. The Department has determined that there is no measurable fiscal impact between interpretation of the current rule and this rule.

(c) Information and methodology: These conclusions are based upon an analysis of the rule by the Department's Office of Tax Policy Analysis,

Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau. The Department measures the tax liability and fiscal impact of the rule by applying the revenue that would result from the application of the current interpretation known to the industry (see Needs and Benefits) and comparing it to the revenue that would result from the proposed rule. When income and expense are appropriately matched, the results of treating repurchase agreement income and repurchase agreement expense as either business income and expense or investment income and expense are nearly identical. Since the difference or spread between the expenses associated with repurchase agreements and securities lending agreements and the earnings associated with the rate of return on these agreements is extremely small, if the specific methodology for direct matching is employed, whether this extremely small amount of income is treated as business income or investment income is a matter of little tax effect within the context of the income of registered securities brokers and dealers. The Department estimates that the tax effect is too small to reliably measure.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school, district, fire district, or other special district.

6. Paperwork: The rule imposes no reporting requirements, forms or other paperwork upon regulated parties beyond those required by existing law and regulations.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: In lieu of this rule, the Department could refrain from proposing a rule and continue with its current policy of allowing short-term repurchase agreements to be classified as cash and thus qualifying for the election to be treated as investment capital and treating all securities lending agreements as business capital. Currently, the income and expense associated with repurchase agreements are, because taxpayers usually elect to treat cash as investment capital, investment income and expense and the income and expense associated with securities lending agreements are business income and expense. The Department has concluded that both of these agreements are used by registered securities brokers and dealers in their core business operations and thus, both are business capital.

Another alternative considered by the Department was to allow both repurchase agreements and securities lending agreements held by registered securities brokers and dealers to be classified as cash and to require the income to be correctly matched with the expenses that generate the income. After learning more about these transactions, as engaged in by registered securities brokers and dealers, the Department concluded that both of these agreements are used by registered securities brokers and dealers in their core business operations and thus, both are business capital. Therefore, this alternative was not pursued.

An industry group suggested a proposal similar to the one mentioned in the previous paragraph. This proposal maintained that repurchase agreements and securities lending agreements should be treated as cash, but suggested a new method of matching expenses with income. Specifically, the industry suggested that the amount of expenses matched against the income should be reduced by amounts attributed to cash generated without interest expense and to equity. The alternative was not selected for the reasons described in the previous paragraph and because of administrative considerations.

9. Federal standards: The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

10. Compliance schedule: The amendments will take effect when the Notice of Adoption is published in the State Register and shall apply to reports required to be filed, without regard to extensions of time to file, on or after January 15, 2008.

Regulatory Flexibility Analysis

1. Effect of rule: The adoption of rules that provide repurchase agreements and securities lending agreements held by registered securities brokers or dealers under Article 9-A of the Tax Law are not investment capital so that the income and expenses from the agreements must be included in the computation of business income is applicable to all registered securities brokers and dealers, large and small. There are approximately 2500 to 3000 registered securities brokers and dealers subject to the business corporation franchise tax. We do not have information to estimate the number of these registered securities brokers and dealers that might be small businesses with any degree of certainty. Local governments are not affected. The rule does not affect the New York City General Corporation Tax, but New York City could consider similar changes with respect to its tax.

2. Compliance requirements: No additional time is needed in order to comply with this rule.

3. Professional services: No additional professional services beyond those already employed by a small business in preparing its taxes will be required to comply with this rule.

4. Compliance costs: The rule does not impose any new reporting, recordkeeping or other compliance costs on regulated parties. The change in interpretation of the statute may have an impact on the tax liability of particular taxpayers. This is a function of what the Department believes is a better interpretation of the statutory provisions and the particular circumstances of the taxpayer. The Department has determined that ultimately there is no measurable tax liability impact on an industry-wide basis between the interpretation of the current rule, with a proper matching of expenses to income, and this rule. The rule would facilitate voluntary compliance by providing a better interpretation of the business and investment capital provisions of the statute. This would lead to the appropriate matching of business income and expenses as well as investment income and expenses. There would be no variation in costs for small businesses. There are no costs for local governments.

5. Economic and technological feasibility: This rule does not impose any adverse economic and technological requirements on small business or local governments.

6. Minimizing adverse impact: The rule does not distinguish between affected small businesses and other types of businesses as there is no distinction in the statute being interpreted. The rule places no burdens on small businesses or local governments.

7. Small business and local government participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; and the Retail Council of New York State. In addition, drafts of this rule were sent to the following: the Business Council of New York State, the New York State Bar Association, the Association of Bar of the City of New York, the New York State Society of CPAs, the Securities Industry and Financial Markets Association (SIFMA), and the New York City Department of Finance. The Department worked extensively with New York City Department of Finance and industry, primarily SIFMA and its predecessor, the Securities Industry Association (SIA) on the issues addressed in this rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The purpose of these amendments is to provide that repurchase agreements and securities lending agreements held by registered brokers or dealers are not investment capital so that the income and expenses from these agreements must be included in the computation of business income for such taxpayers. These businesses are concentrated in New York City. However, some taxpayers affected by these rules may have offices in rural areas throughout the State. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: No additional time is needed in order for registered brokers and dealers in rural areas to comply with this rule. Entities in rural areas will not require additional professional services to comply with this rule.

3. Costs: The rule does not impose any new reporting, recordkeeping or other compliance costs on regulated parties. The change in interpretation of the statute may have an impact on the tax liability of particular taxpayers. This is a function of what the Department believes is a better interpretation of the statutory provisions and the particular circumstances of the taxpayer. The Department has determined that ultimately there is no measurable tax liability impact on an industry-wide basis between the interpretation of the current rule, with a proper matching of expenses to income, and this rule. The rule would facilitate voluntary compliance by providing a better interpretation of the business and investment capital provisions of the statute. This would lead to the appropriate matching of business income and expenses as well as investment income and expenses. There are no variations in costs for public or private concerns in rural areas.

4. Minimizing adverse impact: The rule does not distinguish between rural areas and non-rural areas as there is no distinction in the statute being

interpreted. There is no adverse impact on public and private entities in rural areas.

5. Rural area participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; and the Retail Council of New York State. In addition, drafts of the rule were sent to the following: the Business Council of New York State, the New York State Bar Association, the Association of the Bar of the City of New York, the New York State Society of CPAs and the Securities Industry and Financial Markets Association (SIFMA).

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. The purpose of the amendments is provide that repurchase agreements and securities lending agreements held by registered securities brokers or dealers may not be considered investment capital so that the income and expenses from these agreements must be included in the computation of business income for such taxpayers. The Department has determined that this interpretation reflects a better interpretation of the applicable statutory provisions.

Office of Temporary and Disability Assistance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Change Regulatory References from “Temporary Assistance” to “Public Assistance”

I.D. No. TDA-43-07-00004-P

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

Proposed action: This is a consensus rule making to amend sections 352.8(b)(5), (c)(1)(ii), 352.23(d), 352.29(h)(2)(v)(a), (b), (c), (d), 387.17(d)(4) and 393.4(d)(1)(ix) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 2(19), 20(3)(d) and 34(3)(f)

Subject: Change regulatory references from “temporary assistance” to “public assistance.”

Purpose: To change regulatory references from “temporary assistance” to “public assistance” in order to provide consistency between statutory terms and regulatory terms.

Text of proposed rule: Paragraph (5) of subdivision (b) of section 352.8 is amended to read as follows:

(5) An additional allowance for each [temporary] *public* assistance applicant/recipient who meets the requirements of section 349.4 or section 369.4 (c) of this Title concerning temporary absences from the home and who is receiving Level 1, Level 2 or Level 3 care in a certified congregate care facility listed in paragraph (4) of this subdivision at the rates provided for care and maintenance under the Supplemental Security Income program for SSI beneficiaries residing in the same facility, less the amount of any personal needs allowance included in the SSI rate.

Subparagraph (ii) of paragraph (1) of subdivision (c) of section 352.8 is amended to read as follows:

(ii) Congregate care Level 1, Level 2 and Level 3 at the amount included in the SSI payment level as the personal needs allowance for SSI recipients residing in the particular facility. For recipients of [temporary] *public* assistance who are required to participate in appropriate residential rehabilitation programs pursuant to section 351.2(i) and section 370.2(c)(8)(ii) of this Title, such allowances must be made as restricted payments to the residential programs and must be conditional payments. If a [temporary] *public* assistance recipient required to participate in an

appropriate residential rehabilitation program pursuant to section 351.2(i) and section 370.2(c)(8)(ii) of this Title leaves the program prior to completion of the program, any accumulated personal needs allowance which is held by the program on behalf of the recipient must be considered to be an overpayment and must be returned by the program to the social services district which provided the personal needs allowance. The question of whether the recipient has left the program prior to completion will be determined solely by using the guidelines and rules of the program.

Subdivision (d) of section 352.23 is amended to read as follows:

(d) In establishing local policies and procedures for the use of resources in cases of temporary need, social services districts do not have to require the assignment of property used as a home or the assignment or adjustment of life insurance. However, social services districts may establish local policies and procedures which require the assignment of property used as a home or the assignment or adjustment of life insurance as a condition of receiving public assistance[, including temporary assistance]. Temporary need means need which, at the time of application, is expected to terminate within three months.

Clauses (a), (b), (c), and (d) of subparagraph (v) of paragraph (2) of subdivision (h) of section 352.29 are amended to read as follows:

(a) to purchase an automobile that is needed to seek or retain employment or for travel to and from work activities and which is exempt from the [temporary] *public* assistance resource limit under section 352.23(b) of this Part; or

(b) to open a separate bank account or bank accounts that are exempt from the [temporary] *public* assistance resource limit under section 352.23(b) of this Part for the purpose of purchasing an automobile to seek or retain employment or for the purpose of paying tuition at a two year post-secondary educational institution; or

(c) to purchase a burial plot that is exempt from the [temporary] *public* assistance resource limit under section 352.23(b) of this Part; or

(d) to purchase a bona-fide funeral agreement that is exempt from the [temporary] *public* assistance resource limit under section 352.23(b) of this Part.

Paragraph (4) of subdivision (d) of section 387.17 is amended to read as follows:

(4) Households subject to six-month reporting rules with able bodied adults without dependent(s) (ABAWD) may be required by the social services district to report on a monthly basis changes in working hours that would affect food stamp eligibility. For a household subject to the food stamp six-month reporting rules, the social services district must act on reported changes that affect food stamp eligibility and benefit amounts only if the information is:

- (i) that the total monthly household income exceeds 130 percent of poverty;
- (ii) verified upon receipt;
- (iii) reported on the food stamp periodic report;
- (iv) reported at recertification;
- (v) reported pursuant to [temporary] *public* assistance reporting requirements and the action is taken on the [temporary] *public* assistance budget. However, if a household in receipt of [temporary] *public* assistance and food stamps fails to submit a [temporary] *public* assistance quarterly report, no action for discontinuance of food stamps for failure to submit the report can be taken;
- (vi) voluntarily reported and verified and the information increases the food stamp benefit;
- (vii) that a household requests to have its food stamp case closed;

or

- (viii) that a household member does not meet ABAWD requirements.

For households in receipt of [temporary] *public* assistance and food stamps subject to the six-month reporting rules, workers in the social services districts must not act on, or compute food stamp overpayment amounts for, change reports other than those listed in the subparagraphs of this paragraph.

Subparagraph (ix) of paragraph (1) of subdivision (d) of section 393.4 is amended to read as follows:

(ix) has no liquid resources to ameliorate the emergency except that households otherwise eligible for replacement of essential heating equipment may have available liquid resources not exceeding \$3,000 per household. The following resources are exempt: amounts designated for an allowable current monthly living expense such as food, shelter, employment-related expenses, and other necessary and essential living expenses; money earmarked for payment of current year's property and/or school taxes for the applicant's primary residence; one burial plot per household

member; one written pre-arranged burial agreement with a cash value not exceeding \$1,500 per household member; accounts, such as plan for achieving self support (PASS) accounts, designated by the Social Security Administration as exempt from SSI resource limits; real and personal property; equipment; automobiles and other vehicles; household furnishings; livestock; Agent Orange payments; Nazi restitution payments; Attica settlement payments; college grants; earned income tax credit (EITC) payments; loans; credit cards or advances from credit cards; individual development accounts for [temporary] public assistance recipients; and payments for reverse annuity mortgages. All available liquid resources must be used to help ameliorate the emergency. However, emergency HEAP cannot be denied if available liquid resources are not sufficient to completely resolve the emergency situation; and

Text of proposed rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, Office of Temporary and Disability Assistance, 40 N. Pearl St., 16C, Albany, NY 12243-0001, (518) 474-9779, e-mail: Jeanine.Behuniak@otda.state.ny.us

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

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

Consensus Rule Making Determination

The Office of Temporary and Disability Assistance (OTDA) is proposing a rule to amend various sections of 18 NYCRR to change regulatory references from "temporary assistance" to "public assistance". OTDA has determined that no person is likely to object to the adoption of the proposed rule as written.

This proposed rule is necessary to conform the State regulations to the Social Services Law. Section 2(19) of the Social Services Law defines the term "public assistance" as referring to family assistance, safety net assistance and veteran assistance. The Social Services Law does not provide a definition for the term "temporary assistance". Thus to provide consistency between statutory terms and regulatory terms, references in the State regulations to "temporary assistance" should be replaced with "public assistance".

This proposed rule is also necessary to provide uniformity within the State regulations themselves. Section 350.1(d) of 18 NYCRR defines the term "public assistance" as referring to family assistance, safety net assistance and veteran assistance. The State regulations do not provide a definition for the term "temporary assistance". Thus to provide uniformity within the State regulations, the regulatory references to "temporary assistance" should be replaced with "public assistance". This proposed change will help eliminate any confusion and make the regulations more comprehensible to applicants for and recipients of public assistance.

It is expected that no person will object to the proposed amendments contained in this consensus rule since the rule is consistent with State law and renders the regulations in 18 NYCRR more comprehensible to the public.

Job Impact Statement

A job impact statement has not been prepared for the proposed regulatory amendments. It is evident from the technical nature of the amendments that the jobs of the workers applying the regulations impacted by the proposed amendments will not be affected in any real way. Thus, the changes will not have any impact on jobs and employment opportunities in the State.

Triborough Bridge and Tunnel Authority

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New Crossing Charge Schedule for Use of Bridges and Tunnels

I.D. No. TBA-43-07-00005-P

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

Proposed action: Repeal of section 1021.1 and addition of new section 1021.1 to Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 553(5)

Subject: New crossing charge schedule for use of bridges and tunnels operated by Triborough Bridge and Tunnel Authority.

Purpose: To raise additional revenue.

Text of proposed rule: See Appendix in this issue of the Register.

Text of proposed rule and any required statements and analyses may be obtained from: Robert O'Brien, Triborough Bridge and Tunnel Authority, Two Broadway, 24th Fl., New York, NY 10004, (646) 252-7617, e-mail: robrien@mtabt.org

Data, views or arguments may be submitted to: Judie Glaves, Triborough Bridge and Tunnel Authority, Two Broadway, 22nd Fl., New York, NY 10004, (646) 252-7276, e-mail: jglaves@mtabt.org

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

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

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

Urban Development Corporation

EMERGENCY RULE MAKING

Economic Development and Job Creation Throughout New York State

I.D. No. UDC-43-07-00007-E

Filing No. 1049

Filing date: Oct. 9, 2007

Effective date: Oct. 9, 2007

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

Action taken: Amendment of Part 4243 of Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); and L. 1968, ch. 174; L. 1994, ch. 169; L. 2001, ch. 471

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

Specific reasons underlying the finding of necessity: Effective provision of economic development assistance in accordance with the enabling legislation (including recent amendments thereto) requires clarification of the rule and elimination of inconsistencies in the rule.

Subject: Economic development and job creation throughout New York State.

Purpose: To provide the framework for administration of the Empire State Economic Development Fund, evaluation criteria, terms and conditions, and the application and evaluation process. The amended rule makes changes to expand the types of program assistance.

Substance of emergency rule:

The Empire State Economic Development Fund (the "Program") was created pursuant to Chapter 309 of the Laws of 1996 as amended by Chapter 432 of the Laws of 1997 and Chapter 471 of the Laws of 2001 (the "Enabling Legislation"). The general purpose of the Program is to promote economic development in the State by encouraging economic and employment opportunities for the State's citizen's and stimulating development of communities throughout the State.

The Enabling Legislation creates Sections 16-m and 16-l of the New York State Urban Development Corporation Act (the "UDC Act") which govern the Program. The Enabling Legislation requires the New York State Urban Development Corporation d/b/a the Empire State Development Corporation (the "Corporation") to promulgate rules and regulations for the Program (the "Rules") in accordance with the provisions of the State Administrative Procedure Act ("SAPA"). The Rules set forth the framework for the eligibility, evaluation criteria, application and project process and administrative procedures of the Program as follows:

1. Program Assistance:

a) General Development Financing for new construction, renovation or leasehold improvements; the acquisition or leasing of land, buildings, machinery and equipment; soft costs related to any of the above uses; working capital; and feasibility or planning studies.

b) Federal and Urban Site Development Financing for new construction, renovation or leasehold improvements; the acquisition or leasing of land, buildings, machinery and equipment; and preliminary planning and the soft costs related to any of the above uses.

c) Competitiveness Improvement Program for Competitiveness Improvement projects.

d) Infrastructure Development Financing for construction or renovation of basic systems and facilities on public or privately-owned property including drainage systems, sewer systems, access roads, sidewalks, docks, parking, wharves, water supply systems, and site clearance, preparation, improvements and demolition; soft costs related to any of the above uses; and preliminary planning.

e) Regional and Economic Industrial Planning Studies and Economic Development Initiatives for the purpose of preparation of strategic plans for local and or regional economic development; the analysis of business sectors; marketing and promoting regional business clusters and feasibility studies. Grants for Economic Development Initiatives may be made for the identification of new business opportunities; planning for new enterprise development; and the management of economic development projects provided that the Corporation could not undertake such project.

f) Commercial Area Development Financing for new construction, renovation or leasehold improvements; the soft costs related to any of the above uses; and preliminary planning, including feasibility studies and surveys and reports.

g) Capital Access Program funds for Capital Access Projects provided through Flexible Financing Programs may be used for new construction, renovation or leasehold improvements; the acquisition or leasing of land, buildings, machinery and equipment; soft costs related to any of the above uses; and working capital.

h) Rural Revitalization Program to support community economic development programs and activities including value added small business growth, agricultural, agribusiness and forest products and those projects that promote the family farm, increase or retain employment opportunities and otherwise contribute to the revitalization of local rural areas which are economically distressed.

The proposed amended Rule expands the types of assistance available under the Program. Specifically, the proposed Sections 4243.40-4243.41 allow for grants for the purpose of developing a statewide infrastructure that delivers financing and technical assistance to micro businesses across the state to stimulate new and existing micro business development relating to the use of agricultural products, forest products, cottage and crafts industries, tourism, and other businesses as provided for in subparagraph (i) of paragraph (e) of subdivision 2 of Section 16-1 of the section 1 of chapter 174 of the laws of 1968 and 4243.39(a)(4)(i) of this Part, provided such business employs five or fewer full-time persons and is based on the production, processing, and/or marketing of products grown or produced in New York State.

Additionally, the proposed Sections 4243.42-4243.44 provide emergency General Development Financing working capital grant assistance to small businesses, not-for-profit entities, and large businesses that were damaged by the floods that occurred in Southern Tier, Mid-Hudson, Capital and Mohawk Valley Regions and surrounding vicinity of the State of New York during the week of June 26, 2006.

Furthermore, the proposed Sections 4243.45-4243.46 allow for General Development Financing working capital assistance exclusively to State agencies and authorities that own or operate facilities used in connection with the tourism industry. With respect to this type of assistance, costs may be incurred before the application date and before the receipt of a program acceptance letter for such assistance and such assistance may be used for the reduction and repayment of outstanding debt, including payment of any tax or employee benefit arrearages, or to create a reserve for future costs and expenses.

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 January 6, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Urban Development Corporation d/b/a Empire State Development Corporation, 633 Third Ave., 37th Fl., New York, NY 10017, (212) 803-3792, e-mail: apidedjian@empire.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Chapter 84, Laws of 2002 (Unconsolidated Laws, Section 6266-m), which was originally enacted by Chapter 309, Laws of 1996 and amended by Part M1 Section 5 of the Article VII Bill of the Budget of 2003, authorized the Urban Development Corporation, d/b/a Empire State Development Corporation (the "Corporation") to implement The Empire State Economic Development Fund (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers private businesses, government entities and not-for-profit entities various forms of assistance, including loans, loan guarantees and grants. Chapter 471, Laws of 2001, (Unconsolidated Laws, Section 6266-l) authorized the Corporation to extend this type of assistance to eligible beneficiaries in rural areas of the State. Chapter 236, Laws of 2004 added micro business revolving loan assistance for rural development. Section 5(4) of the New York State Urban Development Corporation Act (Unconsolidated Laws, Section 6255(4)), which was originally enacted as Chapter 174 of the Laws of 1968, authorizes the Corporation to make rules and regulations with respect to its projects, operations, properties and facilities, in accordance with Section 102 of the Executive Law.

2. Legislative Objective:

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

3. Need and Benefits:

Currently, the Program's legislation assists job creation throughout the State by providing the following types of assistance:

1) General Development Financing for new construction, renovation or leasehold improvements; the acquisition or leasing of land, buildings, machinery and equipment; soft costs related to any of the above uses; working capital; and feasibility or planning studies.

2) Federal and Urban Site Development Financing for new construction, renovation or leasehold improvements; the acquisition or leasing of land, buildings, machinery and equipment; and preliminary planning and the soft costs related to any of the above uses.

3) Competitiveness Improvement Program for Competitiveness Improvement projects.

4) Infrastructure Development Financing for construction or renovation of basic systems and facilities on public or privately-owned property including drainage systems, sewer systems, access roads, sidewalks, docks, parking, wharves, water supply systems, and site clearance, preparation, improvements and demolition; soft costs related to any of the above uses; and preliminary planning.

5) Regional and Economic Industrial Planning Studies and Economic Development Initiatives for the purpose of preparation of strategic plans for local and or regional economic development; the analysis of business sectors; marketing and promoting regional business clusters and feasibility studies. Grants for Economic Development Initiatives may be made for the identification of new business opportunities; planning for new enterprise development; and the management of economic development projects provided that the Corporation could not undertake such project.

6) Commercial Area Development Financing for new construction, renovation or leasehold improvements; the soft costs related to any of the above uses; and preliminary planning, including feasibility studies and surveys and reports.

7) Capital Access Program funds for Capital Access Projects provided through Flexible Financing Programs may be used for new construction, renovation or leasehold improvements; the acquisition or leasing of land, buildings, machinery and equipment; soft costs related to any of the above uses; and working capital.

8) Rural Revitalization Assistance grants or contracts for services, on a competitive basis in response to requests for proposals, to eligible entities and organizations to support community economic development programs and activities which increase or retain employment opportunities in rural New York State and otherwise contribute to the revitalization of local rural areas which are economically distressed through innovative activities designed to generate economic alternatives and opportunities in rural areas.

The proposed change will improve the accessibility of the program to eligible entities throughout the State and enable the Corporation to more effectively administer the Program. The goal of such improvements is to better achieve the Program's objectives, including the retention and creation of employment opportunities, and to otherwise contribute to the economic health of New York State.

The proposed amended Rule expands the types of assistance available under the Program. Specifically, the proposed Sections 4243.40-4243.41 allow for grants for the purpose of developing a statewide infrastructure that delivers financing and technical assistance to micro businesses across the state to stimulate new and existing micro business development relating to the use of agricultural products, forest products, cottage and crafts industries, tourism, and other businesses as provided for in subparagraph (i) of paragraph (e) of subdivision 2 of Section 16-1 of the section 1 of chapter 174 of the laws of 1968 and 4243.39(a)(4)(i) of this Part, provided such business employs five or fewer full-time persons and is based on the production, processing, and/or marketing of products grown or produced in New York State.

Additionally, the proposed Sections 4243.42-4243.44 provide emergency General Development Financing working capital grant assistance to small businesses, not-for-profit entities, and large businesses that were damaged by the floods that occurred in Southern Tier, Mid-Hudson, Capital and Mohawk Valley Regions and surrounding vicinity of the State of New York during the week of June 26, 2006.

Furthermore, the proposed Sections 4243.45-4243.46 allow for General Development Financing working capital assistance exclusively to State agencies and authorities that own or operate facilities used in connection with the tourism industry. With respect to this type of assistance, costs may be incurred before the application date and before the receipt of a program acceptance letter for such assistance and such assistance may be used for the reduction and repayment of outstanding debt, including payment of any tax or employee benefit arrearages, or to create a reserve for future costs and expenses.

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

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

(i) that the proposed project would promote the economic health of the State by facilitating the creation or retention of jobs or would increase business activity within a political subdivision or region of the State or would enhance or help to maintain the economic viability the State.

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

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

4. Costs:

The changes should not increase costs for the Program.

The funding source is appropriation funds. Savings will occur as a result of the use of standard applications which allow staff to efficiently assist in the application process.

5. Local Government Mandates:

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

6. Paperwork:

There are no additional reporting or paperwork requirements as a result of this amended rule. Standard applications used for most other Corporation assistance will be employed. This simplification and consolidation is part of the Corporation's overall effort to streamline all of its programs, and, thereby, facilitate, the application process for all of the Corporation's clients.

7. Duplication:

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

8. Federal Standards:

There are no applicable federal government standards which apply.

9. Alternatives:

This Program was created by the Legislature in our representative form of government. The Corporation is implementing this legislation. It is not for the Corporation to say what harm would be caused by doing nothing. With respect to implementing legislation, doing nothing is NOT an option.

10. Compliance Schedule:

No significant time will be needed for compliance.

Regulatory Flexibility Analysis

1. Effect of Rule:

The amended Rule will improve the accessibility of the program to eligible entities throughout the State and enable the Corporation to more effectively administer the Program. The goal of such improvements is to better achieve the Program's objectives, including the retention and creation of employment opportunities, and to otherwise contribute to the economic health of New York State.

The proposed amended Rule expands the types of assistance available under the Program. Specifically, the proposed Sections 4243.40-4243.41 allow for grants for the purpose of developing a statewide infrastructure that delivers financing and technical assistance to micro businesses across the state to stimulate new and existing micro business development relating to the use of agricultural products, forest products, cottage and crafts industries, tourism, and other businesses as provided for in subparagraph (i) of paragraph (e) of subdivision 2 of Section 16-1 of the section 1 of chapter 174 of the laws of 1968 and 4243.39(a)(4)(i) of this Part, provided such business employs five or fewer full-time persons and is based on the production, processing, and/or marketing of products grown or produced in New York State.

Additionally, the proposed Sections 4243.42-4243.44 provide emergency General Development Financing working capital grant assistance to small businesses, not-for-profit entities, and large businesses that were damaged by the floods that occurred in Southern Tier, Mid-Hudson, Capital and Mohawk Valley Regions and surrounding vicinity of the State of New York during the week of June 26, 2006.

Furthermore, the proposed Sections 4243.45-4243.46 allow for General Development Financing working capital assistance exclusively to State agencies and authorities that own or operate facilities used in connection with the tourism industry. With respect to this type of assistance, costs may be incurred before the application date and before the receipt of a program acceptance letter for such assistance and such assistance may be used for the reduction and repayment of outstanding debt, including payment of any tax or employee benefit arrearages, or to create a reserve for future costs and expenses.

This should not affect the Program's accessibility to small business.

2. Compliance Requirement:

No affirmative acts will be needed to comply.

3. Professional Services:

No professional services will be needed to comply.

4. Compliance Costs:

No initial costs will be needed to comply with the amended rule.

5. Economic and Technological Feasibility:

The Rule makes The Empire State Economic Development Fund assistance feasible for small businesses, by expressly stating that small businesses are eligible for certain types of program assistance while permitting small businesses access to all other types of program assistance for which they may be eligible, notwithstanding the size of such businesses. The Rule also makes the program assistance feasible for local governments by expressly stating that government entities and municipalities are eligible for program assistance. It is also economically feasible for local governments to coordinate their respective economic development and job retention and attraction efforts with the program. There are no aspects of the Rule that make The Empire State Economic Development Fund assistance or the Rule technologically infeasible for small business or local government.

6. Minimizing Adverse Impact:

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

7. Small Business and Local Government Participation:

The Program is a product of the legislative process and, thereby, has had the input of all small businesses participating in the representative process of government. The Empire State Economic Development Fund emphasizes the effective provision of economic development throughout New York State. Small business may participate by requesting assistance when the requisite eligibility criteria are met. The Corporation will work with local governments to identify problem areas and make grant applications available.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

EMERGENCY RULE MAKING

Restore New York's Communities Initiative

I.D. No. UDC-43-07-00008-E

Filing No. 1050

Filing date: Oct. 9, 2007

Effective date: Oct. 9, 2007

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

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

Statutory authority: Urban Development Corporation Act, section 5(4); and L. 1968, ch. 174; L. 1994, ch. 169; L. 2001, ch. 471

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

Specific reasons underlying the finding of necessity: Effective provision of economic development assistance in accordance with the enabling legislation (including recent amendments thereto) requires the creation of the rule. This assistance is necessary to address the dangers to public health, safety and welfare posed by vacant, abandoned, surplus or condemned buildings in municipalities.

Subject: Economic development and job creation throughout New York State and preservation of public health and public safety via the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities.

Purpose: To provide the framework for administration of the Restore New York's Communities Initiative, evaluation criteria, terms and conditions, and the application and evaluation process.

Substance of emergency rule:

The Restore New York's Communities Initiative (the "Program") was created pursuant to Chapter 109 of the Laws of 2006 (the "Enabling Legislation"). The general purpose of the Program is to promote economic development in the State by encouraging economic and employment opportunities for the State's citizen's and stimulating development of communities throughout the State.

The Enabling Legislation creates Sections 16-n of the New York State Urban Development Corporation Act (the "UDC Act") which governs the Program. The Enabling Legislation requires the New York State Urban Development Corporation d/b/a the Empire State Development Corporation (the "Corporation") to promulgate rules and regulations for the Program (the "Rules") in accordance with the provisions of the State Administrative Procedure Act ("SAPA"). The Rules set forth the framework for the eligibility, evaluation criteria, application and project process and administrative procedures of the Program as follows:

1. Program Assistance:

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

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

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

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 January 6, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Urban Development Corporation d/b/a Empire State Development Corporation, 633 Third Ave., 37th Fl., New York, NY 10017, (212) 803-3792, e-mail: apidedjian@empire.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Chapter 109, Laws of 2006 (Unconsolidated Laws, Section 6266-n. Another Unconsolidated Laws Section 6266-n was added by another act) authorized the Urban Development Corporation, d/b/a Empire State De-

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

2. Legislative Objective:

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

3. Need and Benefits:

The Program's legislation assists job creation throughout the State by providing the following types of assistance:

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

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

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

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

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

(i) that the proposed project would promote the economic health of the State by facilitating the creation or retention of jobs or would increase business activity within a political subdivision or region of the State or would enhance or help to maintain the economic viability the State.

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

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

4. Costs:

The funding source is appropriation funds. Savings will occur as a result of the use of standard applications which allow staff to efficiently assist in the application process.

5. Local Government Mandates:

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

6. Paperwork:

There are no additional reporting or paperwork requirements as a result of this amended rule. Standard applications used for most other Corporation assistance will be employed. This simplification and consolidation is part of the Corporation's overall effort to streamline all of its programs, and, thereby, facilitate, the application process for all of the Corporation's clients.

7. Duplication:

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

8. Federal Standards:

There are no applicable federal government standards which apply.

9. Alternatives:

This Program was created by the Legislature in our representative form of government. The Corporation is implementing this legislation. It is not for the Corporation to say what harm would be caused by doing nothing. With respect to implementing legislation, doing nothing is NOT an option.

10. Compliance Schedule:

No significant time will be needed for compliance.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The proposed Rule will provide the framework for administration of the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and

employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities.

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

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

2. Compliance Requirement:

No affirmative acts will be needed to comply.

3. Professional Services:

No professional services will be needed to comply.

4. Compliance Costs:

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

5. Economic Feasibility:

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

6. Minimizing Adverse Impact:

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

7. Small Business and Local Participation:

The Program is a product of the legislative process and, thereby, has had the input of all small businesses participating in the representative process of government. The Program emphasizes the effective provision of economic development throughout New York State. Program funds are available only to municipalities. Small business will benefit from the aid to municipalities provided for this economic development. The Corporation will work with local governments to identify problem areas and make grant applications available.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Workers' Compensation Board

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules

I.D. No. WCB-43-07-00010-E

Filing No. 1051

Filing date: Oct. 9, 2007

Effective date: Oct. 9, 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 450 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 January 6, 2008.

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

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment.

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and durable medical equipment. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to designate a pharmacy or pharmacy network which requires claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost

savings are provided by the negotiating power of Medicaid with drug manufacturers. The cost savings realized by using the Medicaid fee schedule as a price index for the pharmacy fee schedule will be approximately 14 percent for brand name drugs and 25 percent for generic drugs. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days. This section describes how carriers will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation concurrently. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs and durable medical equipment.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement and pharmacy or network notification, the savings afforded to carriers and self-insured employers will be substantially the same for local governments.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. The notice posted by pharmacies will include the contact information for the listed carriers. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives such as an average wholesale price plus or minus a certain percentage plus a dispensing fee were examined but it was determined that the New York State Medicaid fee schedule for prescription drugs would provide the savings envisioned by the reform legislation.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect as of 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.