

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.

Education Department

EMERGENCY RULE MAKING

Special Education Programs and Services

I.D. No. EDU-12-07-00004-E

Filing No. 1002

Filing date: Sept. 18, 2007

Effective date: Sept. 27, 2007

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

Action taken: Amendment of sections 100.2, 120.6, 200.1-200.9, 200.13, 200.14, 200.16, 200.22 and 201.2-201.11 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 3208(1-5), 3209(7), 3214(3), 3602-c(2), 3713(1) and (2), 4002(1-3), 4308(3), 4355(3), 4401(1-11), 4402(1-7), 4403(3), 4404(1-5), 4404-a(1-7) and 4410(13)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to conform the Regulations of the Commissioner of Education to the final federal regulations to implement the Individuals with Disabilities Education Act (IDEA) 2004, as amended by Public Law 108-446. The final Federal regulations were issued August 2006 and became effective October 13, 2006. The State must amend its laws and

regulations to conform to Federal regulations by June 30, 2007 as a condition of receipt of Federal funds. The State and school districts must implement the new requirements in IDEA and the final regulations to implement the IDEA.

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 21, 2007, the proposed amendment has been substantially revised in response to public comment. A Notice of Revised Rule Making was published in the *State Register* on July 3, 2007. In addition, at the June 25-26, 2007 meeting of the Board of Regents, the Regents made a further substantial revision to the proposed rule to delete the settlement agreement provision in 200.5(j)(4)(iii), and adopted the proposed rule, as so revised, by emergency action for the preservation of the general welfare in order to immediately conform the Commissioner's Regulations regarding the provision of special education services to the requirements of the IDEA, as amended, and Part 300 of Title 34 of the Code of Federal Regulations, so that such requirements become effective by the federally required date of July 1, 2007 and to ensure they are in effect by the beginning of the 2007-08 school year, and thereby ensure the rights of students with disabilities and their parents consistent with Federal and State statutes and ensure compliance with requirements for receipt of Federal funds. A Notice of Emergency Adoption and Revised Rule Making was published in the *State Register* on July 18, 2007.

The proposed rule has been adopted as a permanent rule at the September 10-11, 2007 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is upon its publication in the *State Register* on October 3, 2007. However, the June emergency rule will expire on September 26, 2007, 90 days after its filing with the Department of State on June 29, 2007. A lapse in the rule's effectiveness could expose both the State and school districts to liability and affect their eligibility for federal funding under the IDEA, and could deny students with disabilities, parents and school districts the benefits they are intended to receive under the IDEA.

A second emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: Special education programs and services.

Purpose: To conform the commissioner's regulations to the Individuals with Disabilities Education Act (IDEA) (20 USC 1400 *et seq.*), as amended by Public Law 108-446, and the final amendments to 34 CFR 300; ensure consistency in procedural safeguards; promote timely evaluations and services; and facilitate services in the least restrictive environment for students with disabilities.

Substance of emergency rule: The Board of Regents has amended sections 100.2(ii), 120.6(a), 200.1, 200.2, 200.3, 200.4, 200.5, 200.6, 200.7, 200.8, 200.9, 200.13, 200.14, 200.16, 200.22, 201.2, 201.3, 201.4, 201.5, 201.6, 201.7, 201.8, 201.9, 201.10, and 201.11 of the Commissioner's Regulations, as an emergency action effective July 1, 2007, relating to the provision of special education to students with disabilities. Since publication of a Notice of Revised Rule Making in the *State Register* on July 3, 2007, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith. The following is a summary of the substance of the emergency rule.

Section 100.2(ii), as added, establishes minimal requirements for using a response to intervention process to determine if a student responds to scientific research-based intervention.

Section 120.6(a), as amended, incorporates by reference the federal definition of highly qualified special education teachers.

Section 200.1, as amended, revises definitions of parent, related services, school health school services and supplementary aids and services; adds the definition of interpreting services consistent with the federal definition; makes technical amendments to definitions of consultant teacher services and transition services; and corrects cross citations relating to definitions of full-day preschool program, guardian ad litem, preschool program, student with a disability and twelve-month special service and/or program.

Section 200.2, as amended, makes technical changes and corrects cross citations and incorporations by reference relating to board of education written policies and procedures, responsibilities of boards of cooperative education services, and maintenance of impartial hearing officer (IHO) lists; requires consent for release of information about nonpublic school students with disabilities; adds examples of nonacademic and extracurricular programs; requires districts to take action to ensure timely evaluation and placement of preschool students; adds that districts may use a response to intervention process to remediate a student's performance prior to referral for special education; and requires districts to publicly report on revisions to inappropriate policies, procedures or practices that resulted in a significant disproportionality by race/ethnicity in the suspension, identification, classification and/or placement of students with disabilities.

Section 200.3, as amended, corrects a cross citation relating to subcommittee membership; and conforms State regulations relating to the role of a regular education teacher on the committee on special education (CSE) to federal regulations.

Section 200.4, as amended, makes technical amendments and corrects cross citations relating to evaluation procedures, recommended special education programs and services and written notice upon graduation or aging out; conforms State regulations to federal requirements relating to: referrals, parental consent, individual evaluations and reevaluations, evaluation procedures, eligibility determinations, CSE recommendations, individualized education program (IEP) contents, and students who transfer districts; requires all IEPs developed on or after January 1, 2009 be on a form prescribed by the Commissioner of Education; and adds additional procedures for identifying students with learning disabilities.

Section 200.5, as amended, corrects cross citations relating to other required notifications, consent for release of information, and impartial hearing timelines; corrects incorporations by reference relating to parent participation in CSE meetings and confidentiality of personally identifiable data; makes a technical change relating to surrogate parent; conforms State due process requirements to federal requirements relating to prior written notice, consent, notice of meetings, procedural safeguards notice, independent educational evaluations, mediation, due process complaint notification requirements, impartial hearings, resolution process, State complaint procedures, pendency, and surrogate parents; adds, effective January 1, 2009, that prior written notice (notice of recommendation) and meeting notices be on forms prescribed by the Commissioner of Education; add steps the district must take to ensure parents participate in the resolution meeting; and adds that not more than one 30-day extension at a time may be granted to an impartial hearing.

Section 200.6, as amended, makes certain technical changes relating to the continuum of services; corrects a cross citation and timeline for providing services to students with disabilities in approved private schools; adds that the CSE may recommend that a student who needs both resource room services and consultant teacher services may receive a combination of such services for not less than three hours each week; and adds "integrated co-teaching services" option to the continuum of services and specifies that when a district provides integrated co-teaching services, the number of students with disabilities cannot, effective July 1, 2008, exceed 12 students.

Section 200.7(b), as amended, conforms State regulations relating to school conduct and discipline at private schools and State-operated and State-supported schools to federal regulations.

Section 200.8(c), as amended, corrects a cross citation relating to the submission of claims for preschool students with disabilities.

Section 200.9(f), as amended, corrects a cross citation relating to tuition reimbursement methodology.

Section 200.13, as amended, corrects cross citations relating to educational programs for students with autism.

Section 200.14(f), as amended, corrects a cross citation relating to students with disabilities enrolled in day treatment programs.

Section 200.16, as amended, makes technical changes regarding IEEs; corrects cross citations relating to referral and the continuum of services for preschool students; conforms State regulations relating to procedural safeguards to federal requirements; and allows approved preschool pro-

grams to temporarily increase the enrollment of a class up to a maximum of 13 students for the remainder of the school year.

Section 201.2, as amended, removes an incorporation by reference and adds a cross citation relating to the definition of a student presumed to have a disability for discipline purposes; conforms the definitions of disciplinary change in placement, illegal drug, and interim alternative educational setting (IAES) to the federal definitions; adds that the district has authority to determine on a case-by-case basis if a pattern of removals constitutes a disciplinary change in placement and that such determination is subject to review through due process and judicial proceedings.

Section 201.3, is repealed and a new section 201.3 is added to conform CSE responsibilities for functional behavioral assessments and behavioral intervention plans to federal requirements.

Section 201.4, as amended, requires a school district to remedy IEP deficiencies when it is determined that the student's conduct is the direct result of the district's failure to implement the IEP.

Section 201.5, as amended, removes the requirement that an expression of concern about a student's pattern of behavior be made in accordance with the district's child find and special education referral system.

Section 201.6, as amended, requires that expedited evaluations be completed no later than 15 school days after receipt of parent consent.

Section 201.7(e), as amended, corrects a cross citation. Section 201.7(f), as amended, clarifies school personnel authority to consider unique circumstances when determining whether a change in placement is appropriate.

Section 201.8, as amended, repeals the considerations that an IHO must make to order a change of placement to an IAES; and repeals that an IAES ordered by an IHO be determined by the CSE.

Section 201.9(c), as amended, corrects a cross citation relating to the procedures for suspensions of more than five school days.

Section 201.10, as amended, repeals an incorporation by reference and establishes that school personnel determine services for students removed for more than 10 school days when it is not a disciplinary change in placement; and requires the CSE to determine services and the IAES for students suspended for periods in excess of 10 school days which constitute a disciplinary change in placement.

Section 201.11, as amended, conforms procedures for expedited hearings and timelines for an expedited hearing consistent with federal regulations; clarifies that an IHO appointment for an expedited hearing must be made in accordance with the rotational selection process; and establishes pendency during an expedited impartial hearing.

A cross citation has also been corrected in section 200.22(b)(3).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-12-07-00004-P, Issue of March 21, 2007. The emergency rule will expire November 16, 2007.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations to carry out State laws regarding education.

Education Law section 3208(1-5) provides for attendance and student mental/physical examination requirements.

Education Law section 3209(7) authorizes the Commissioner to promulgate regulations regarding homeless youth.

Education Law section 3214(3) establishes requirements for discipline of students with disabilities and students presumed to have a disability.

Education Law section 3602-c(2) establishes district responsibilities for provision of special education services to students enrolled in nonpublic schools.

Education Law section 3713(1) and (2) authorizes the State and districts to accept federal law making appropriations for education.

Education Law section 4002 establishes responsibilities for education of students in child-care institutions.

Education Law sections 4308(3) and 4355(3) authorizes Commissioner's regulations regarding admission to the State School for the Blind and State School for the Deaf.

Education Law section 4401 authorizes Commissioner to approve private day and residential programs serving students with disabilities.

Education Law section 4402 establishes district's duties regarding education of students with disabilities.

Education Law section 4403 outlines Department's and district's responsibilities regarding special education programs/services to students with disabilities. Section 4403(3) authorizes Department to adopt regulations as Commissioner deems in their best interests.

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

Education Law section 4404-a establishes mediation programs for students with disabilities.

Education Law section 4410 outlines special education services and programs for preschool children with disabilities. Section 4410(3) authorizes Commissioner to adopt regulations.

LEGISLATIVE OBJECTIVES:

The amendments carry out the legislative objectives in the aforementioned statutes to ensure that students with disabilities are provided a free appropriate public education consistent with federal law and regulations.

NEEDS AND BENEFITS:

The amendments are necessary to conform the Commissioner's Regulations to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1400 *et. seq.*), as amended by Public Law 108-446, and recent amendments to 34 CFR Part 300 which became effective on October 13, 2006. The amendments are also necessary to ensure consistency in procedural safeguards; promote timely evaluations and services; and facilitate services in the least restrictive environment for students with disabilities.

COSTS:

- a. Costs to State government: None.
- b. Costs to local governments: None.
- c. Costs to regulated parties: None.
- d. Costs to the State Education Department of implementation and continuing compliance: None.

The proposed amendments are necessary to conform the Commissioner's Regulations to recent changes in the IDEA statutes and regulations; ensure consistency in procedural safeguards; to promote timely evaluations and services; and facilitate services in the least restrictive environment for students with disabilities and do not impose any additional costs beyond those imposed by federal and State statutes and regulations.

LOCAL GOVERNMENT MANDATES:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the IDEA statutes and regulations and do not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations.

Section 100.2(ii) establishes minimal requirements for using a response to intervention process to determine if a student responds to scientific research-based intervention.

Section 120.6(a) incorporates by reference the federal definition of highly qualified special education teachers.

Section 200.2 requires consent for release of information about non-public school students with disabilities; adds examples of nonacademic and extracurricular programs; requires districts to take action to ensure timely evaluation and placement of preschool students; adds that districts may use a response to intervention process to remediate a student's performance prior to referral for special education; and requires districts to publicly report on revisions to inappropriate policies, procedures or practices that resulted in a significant disproportionality by race/ethnicity in the suspension, identification, classification and/or placement of students with disabilities.

Section 200.3 conforms State regulations relating to the role of a regular education teacher on the Committee on Special Education (CSE) to federal regulations.

Section 200.4 makes technical amendments relating to evaluation procedures, recommended special education programs and services and written notice upon graduation or aging out; conforms State regulations to federal requirements relating to: referral, parental consent, individual evaluations and reevaluations, evaluation procedures, eligibility determinations, CSE recommendations, individualized education program (IEP) contents, and students who transfer districts; requires all IEPs developed on or after January 1, 2009 be on a form prescribed by the Commissioner; and adds additional procedures for identifying students with learning disabilities.

Section 200.5 makes a technical change relating to surrogate parent; conforms State due process requirements to federal requirements relating to prior written notice, consent, notice of meetings, procedural safeguards notice, independent educational evaluations (IEEs), mediation, due process complaint notification requirements, impartial hearings, resolution

process, State complaint procedures, pendency, and surrogate parents; adds, effective January 1, 2009, that prior written notice (notice of recommendation) and meeting notices be on forms prescribed by the Commissioner; adds steps the district must take to ensure parents participate in the resolution meeting; and adds that not more than one 30-day extension at a time may be granted to an impartial hearing.

Section 200.6 makes technical changes regarding continuum of services; corrects a cross citation and timeline for providing services to students with disabilities in approved private schools; provides that the CSE may recommend that a student who needs both resource room services and consultant teacher services may receive a combination of such services for not less than three hours each week; and adds "integrated co-teaching services" option to the continuum of services and specifies that when a district provides integrated co-teaching services, the number of students with disabilities cannot, effective July 1, 2008, exceed 12 students.

Section 200.7(b) conforms State regulations relating to school conduct and discipline at private schools and State-operated and State-supported schools to federal regulations.

Section 200.16 Section 200.16 makes a technical change regarding IEEs; conforms State regulations relating to procedural safeguards to federal requirements; and allows approved preschool programs to temporarily increase the enrollment of a class up to a maximum of 13 students for the remainder of the school year.

Section 201.2 conforms the definitions of disciplinary change in placement, illegal drug, and interim alternative educational setting (IAES) to the federal definitions; adds that district has authority to determine on a case by case basis if a pattern of removals constitutes a disciplinary change in placement and that such determination is subject to review through due process and judicial proceedings.

Section 201.3 is repealed and a new section 201.3 is added to conform CSE responsibilities for functional behavioral assessments (FBAs) and behavioral intervention plans (BIPs) to federal requirements.

Section 201.4 requires a school district to remedy IEP deficiencies when it is determined that the student's conduct is the direct result of the district's failure to implement the IEP.

Section 201.5 removes the requirement that an expression of concern about a student's pattern of behavior be made in accordance with the district's child find and special education referral system.

Section 201.6 requires that expedited evaluations be completed no later than 15 school days after receipt of parent consent.

Section 201.7(f) clarifies school personnel authority to consider unique circumstances when determining whether a change in placement is appropriate.

Section 201.8 repeals the considerations that an impartial hearing officer (IHO) must make to order a change of placement to an IAES; and repeals that an IAES ordered by an IHO be determined by the CSE.

Section 201.10 establishes that school personnel determine services for students removed for more than 10 school days when it is not a disciplinary change in placement; and requires the CSE to determine services and the IAES for students suspended for periods in excess of 10 school days which constitute a disciplinary change in placement.

Section 201.11 conforms procedures for expedited hearings and timelines for an expedited hearing consistent with federal regulations; clarifies that an IHO appointment for an expedited hearing must be made in accordance with the rotational selection process; and establishes pendency during an expedited impartial hearing.

PAPERWORK:

Consistent with federal requirements, districts must publicly report on revisions to inappropriate policies, procedures or practices resulting in a significant disproportionality by race/ethnicity.

If a district uses a process to determine if a student responds to scientific, research-based intervention, written notification must be given to parents when the student requires an intervention beyond that provided to all students in the general education classroom that identifies student performance data, strategies for increasing the student's rate of learning and notification of the parents' right to request an evaluation for special education programs and/or services. In addition, the CSE must develop a written document for the determination of a student with a learning disability.

Consistent with federal requirements, districts must obtain consent before: personally identifiable information about a nonpublic school student is released between the district of location of the private school and the district of residence; releasing information to a representative of any participating agency that is likely to be responsible for providing or paying

for transition services or inviting such individual to a CSE meeting; and accessing a parent's public insurance. Changes also require consent before personally identifiable information is released to officials of participating agencies when a student is determined to be at risk of a future placement in a residential school and before providing evaluative information and program recommendations for a student to a Family Court judge, a probation department, a social services district, the Office of Child and Family Services, or a preadmission certification committee established pursuant to Mental Hygiene Law section 9.51(d).

Changes to due process provisions require that districts provide parents with a copy of the procedural safeguards notice upon receipt of their first State complaint and upon a disciplinary change in placement.

DUPLICATION:

The amendments will not duplicate, overlap or conflict with any other State or federal statute or regulation.

ALTERNATIVES:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the federal IDEA statutes and regulations and to State statute and to that extent there were no significant alternatives and none were considered.

Various alternatives for establishing the staff-to-student ratio in the integrated co-teaching class option were considered, including only establishing a ratio of students with disabilities to nondisabled students, but the current proposal was selected to ensure reasonable class size. With regard to minimum levels of service requirements, the Department considered the repeal of minimum levels established for speech and language services, consultant teacher services and resource room services. The proposed amendment was selected because it is expected to maximize the participation of students with disabilities in general education classes and curriculum; will allow more students with disabilities to receive special education services without removing students from their required academic courses; and yield a more efficient and effective use of human and fiscal resources.

The Department also considered proposals to allow indirect support to be provided by related service providers; to repeal the chronological age-range limitations in middle- and secondary-level special classes; and to repeal the requirement for parent notification relating to math and reading achievement levels in special classes. The proposed amendment addresses recommendations most supported by public comment and most directly related to improved results for students with disabilities and placement in the least restrictive environment.

FEDERAL STANDARDS:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the federal IDEA statutes and regulations (20 U.S.C. 1400 *et. seq.*, as amended by Public Law 108-446, and the final federal amendments to 34 CFR Part 300) and to that extent do not exceed any minimum federal standards. The amendments relating to evaluation and placement of preschool students; standardized forms for IEPs, written notifications and meeting notices; minimal levels of services for resource room and consultant teacher services; integrated co-teaching services; and temporary increases in the class enrollment of approved preschool programs are not required by federal law or regulations, but are necessary to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and are otherwise consistent with federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the amendments by their effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendments are necessary in order to ensure compliance with federal law and regulations relating to the education of students with disabilities, ages 3-21; to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and do not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

The proposed amendments apply to all public school districts, boards of cooperative educational services (BOCES), State-operated and State-supported schools and approved private schools in the State.

COMPLIANCE REQUIREMENTS:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1400 *et. seq.*), as amended by Public Law 108-446, and recent amendments to 34 CFR Part 300 which became effective on October 13, 2006, and do not impose any additional compliance requirements upon local governments beyond those imposed by federal statutes and regulations.

The amendments relating to evaluation and placement of preschool students; standardized forms for Individualized Education Programs (IEPs), written notifications and meeting notices; minimal levels of services for resource room and consultant teacher services; integrated co-teaching services; and temporary increases in the class enrollment of approved preschool programs are not required by federal law or regulations, but are necessary to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and are otherwise consistent with federal standards.

Section 100.2(ii) establishes minimal requirements for using a response to intervention process to determine if a student responds to scientific research-based intervention.

Section 120.6(a) incorporates by reference the federal definition of highly qualified special education teachers.

Section 200.2 requires consent for release of information about non-public school students with disabilities; adds examples of nonacademic and extracurricular programs; requires districts to take action to ensure timely evaluation and placement of preschool students; adds that districts may use a response to intervention process to remediate a student's performance prior to referral for special education; and requires districts to publicly report on revisions to inappropriate policies, procedures or practices that resulted in a significant disproportionality by race/ethnicity in the suspension, identification, classification and/or placement of students with disabilities.

Section 200.3 conforms State regulations relating to the role of a regular education teacher on the Committee on Special Education (CSE) to federal regulations.

Section 200.4 makes technical amendments relating to evaluation procedures, recommended special education programs and services and written notice upon graduation or aging out; conforms State regulations to federal requirements relating to: referrals, parental consent, individual evaluations and reevaluations, evaluation procedures, eligibility determinations, CSE recommendations, IEP contents, and students who transfer districts; requires documentation of attempts, including telephone calls and correspondence, to obtain parent consent; requires all IEPs developed on or after January 1, 2009 be on a form prescribed by the Commissioner; and adds additional procedures for identifying students with learning disabilities.

Section 200.5 makes a technical change relating to surrogate parent; conforms State due process requirements to federal requirements relating to prior written notice, consent, notice of meetings, procedural safeguards notice, independent educational evaluations (IEEs), mediation, due process complaint notification requirements, impartial hearings, resolution process, State complaint procedures, pendency, and surrogate parents; adds, effective January 1, 2009, that prior written notice (notice of recommendation) and meeting notices be on forms prescribed by the Commissioner; adds steps the district must take to ensure parents participate in the resolution meeting; and adds that not more than one 30-day extension at a time may be granted to an impartial hearing.

Section 200.6 makes technical changes regarding continuum of services; corrects a cross citation and timeline for providing services to students with disabilities in approved private schools; provides that the CSE may recommend that a student who needs both resource room services and consultant teacher services may receive a combination of such services for not less than three hours each week; and adds "integrated co-teaching services" option to the continuum of services and specifies that when a district provides integrated co-teaching services, the number of students with disabilities cannot, effective July 1, 2008, exceed 12 students.

Section 200.7(b) conforms State regulations relating to school conduct and discipline at private schools and State-operated and State-supported schools to federal regulations.

Section 200.16 makes a technical change regarding IEEs; conforms State regulations relating to procedural safeguards to federal requirements; and allows approved preschool programs to temporarily increase the en-

rollment of a class up to a maximum of 13 students for the remainder of the school year.

Section 201.2 conforms the definitions of disciplinary change in placement, illegal drug, and interim alternative educational setting (IAES) to the federal definitions; adds that district has authority to determine on a case by case basis if a pattern of removals constitutes a disciplinary change in placement and that such determination is subject to review through due process and judicial proceedings.

Section 201.3 is repealed and a new section 201.3 is added to conform CSE responsibilities for functional behavioral assessments (FBAs) and behavioral intervention plans (BIPs) to federal requirements.

Section 201.4 requires a school district to remedy IEP deficiencies when it is determined that the student's conduct is the direct result of the district's failure to implement the IEP.

Section 201.5 removes the requirement that an expression of concern about a student's pattern of behavior be made in accordance with the district's child find and special education referral system.

Section 201.6 requires that expedited evaluations be completed no later than 15 school days after receipt of parent consent.

Section 201.7(f) clarifies school personnel authority to consider unique circumstances when determining whether a change in placement is appropriate.

Section 201.8 repeals the considerations that an impartial hearing officer (IHO) must make to order a change of placement to an IAES; and repeals that an IAES ordered by an IHO be determined by the CSE.

Section 201.10 establishes that school personnel determine services for students removed for more than 10 school days when it is not a disciplinary change in placement; and requires the CSE to determine services and the IAES for students suspended for periods in excess of 10 school days which constitute a disciplinary change in placement.

Section 201.11 conforms procedures for expedited hearings and timelines for an expedited hearing consistent with federal regulations; clarifies that an IHO appointment for an expedited hearing must be made in accordance with the rotational selection process; and establishes pendency during an expedited impartial hearing.

Consistent with federal requirements, districts must publicly report on revisions to inappropriate policies, procedures or practices resulting in a significant disproportionality by race/ethnicity.

If a district uses a process to determine if a student responds to scientific, research-based intervention, written notification must be given to parents when the student requires an intervention beyond that provided to all students in the general education classroom that identifies student performance data, strategies for increasing the student's rate of learning and notification of the parents' right to request an evaluation for special education programs and/or services. In addition, the CSE must develop a written document for the determination of a student with a learning disability.

Consistent with federal requirements, districts must obtain consent before: personally identifiable information about a nonpublic school student is released between the district of location of the private school and the district of residence; releasing information to a representative of any participating agency that is likely to be responsible for providing or paying for transition services or inviting such individual to a CSE meeting; and accessing a parent's public insurance. Changes also require consent before personally identifiable information is released to officials of participating agencies when a student is determined to be at risk of a future placement in a residential school and before providing evaluative information and program recommendations for a student to a Family Court judge, a probation department, a social services district, the Office of Child and Family Services, or a preadmission certification committee established pursuant to Mental Hygiene Law section 9.51(d).

Changes to due process provisions require that districts provide parents with a copy of the procedural safeguards notice upon receipt of their first State complaint and upon a disciplinary change in placement.

PROFESSIONAL SERVICES:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes to the IDEA and recent amendments to 34 CFR Part 300, and do not impose any additional professional service requirements on local governments beyond those imposed by such federal statutes and regulations and State statutes.

COMPLIANCE COSTS:

The proposed amendments are necessary to conform the Commissioner's Regulations to recent changes in the IDEA statutes and regulations; ensure consistency in procedural safeguards; to promote timely evaluations and services; and facilitate services in the least restrictive

environment for students with disabilities. School districts and other local educational agencies (LEAs) are required to comply with the IDEA as a condition to their receipt of federal funding. The proposed amendments do not impose any additional costs beyond those imposed by such federal statutes and regulations and State statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendments do not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

MINIMIZING ADVERSE IMPACT:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the federal IDEA statutes and regulations (20 U.S.C. 1400 *et. seq.*, as amended by Public Law 108-446, and the final federal amendments to 34 CFR Part 300) and to that extent do not exceed any minimum federal standards. The amendments relating to evaluation and placement of preschool students; standardized forms for IEPs, written notifications and meeting notices; minimal levels of services for resource room and consultant teacher services; integrated co-teaching services; and temporary increases in the class enrollment of approved preschool programs are not required by federal law or regulations, but are necessary to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and are otherwise consistent with federal standards.

School districts and other LEAs are required to comply with IDEA as a condition to their receipt of federal funding. The proposed conforming amendments have been carefully drafted to meet federal statutory and regulatory requirements and do not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes.

Various alternatives for establishing the staff-to-student ratio in the integrated co-teaching class option were considered, including only establishing a ratio of students with disabilities to nondisabled students, but the current proposal was selected to ensure reasonable class size. With regard to minimum levels of service requirements, the Department considered the repeal of minimum levels established for speech and language services, consultant teacher services and resource room services. The proposed amendment was selected because it is expected to maximize the participation of students with disabilities in general education classes and curriculum; will allow more students with disabilities to receive special education services without removing students from their required academic courses; and yield a more efficient and effective use of human and fiscal resources.

The Department also considered proposals to allow indirect support to be provided by related service providers; to repeal the chronological age-range limitations in middle- and secondary-level special classes; and to repeal the requirement for parent notification relating to math and reading achievement levels in special classes. The proposed amendment addresses recommendations most supported by public comment and most directly related to improved results for students with disabilities and placement in the least restrictive environment.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendments were provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. The State Education Department conducted public hearings on the proposed amendments on April 16, 19, and 23, 2007.

Rural Area Flexibility Analysis

The proposed amendments will apply to all public school districts, boards of cooperative educational services (BOCES), State-operated and State-supported schools and approved private schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1400 *et. seq.*), as amended by Public Law 108-446, and recent amendments to 34 CFR Part 300 which became effective on October 13, 2006, and do not impose any additional compliance requirements upon rural areas beyond those imposed by federal statutes and regulations.

The amendments relating to evaluation and placement of preschool students; standardized forms for Individualized Education Programs (IEPs), written notifications and meeting notices; minimal levels of ser-

vices for resource room and consultant teacher services; integrated co-teaching services; and temporary increases in the class enrollment of approved preschool programs are not required by federal law or regulations, but are necessary to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and are otherwise consistent with federal standards.

Section 100.2(ii) establishes minimal requirements for using a response to intervention process to determine if a student responds to scientific research-based intervention.

Section 120.6(a) incorporates by reference the federal definition of highly qualified special education teachers.

Section 200.2 requires consent for release of information about non-public school students with disabilities; adds examples of nonacademic and extracurricular programs; requires districts to take action to ensure timely evaluation and placement of preschool students; adds that districts may use a response to intervention process to remediate a student's performance prior to referral for special education; and requires districts to publicly report on revisions to inappropriate policies, procedures or practices that resulted in a significant disproportionality by race/ethnicity in the suspension, identification, classification and/or placement of students with disabilities.

Section 200.3 conforms State regulations relating to the role of a regular education teacher on the CSE to federal regulations.

Section 200.4 makes technical amendments relating to evaluation procedures, recommended special education programs and services and written notice upon graduation or aging out; conforms State regulations to federal requirements relating to: referrals, parental consent, individual evaluations and reevaluations, evaluation procedures, eligibility determinations, Committee on Special Education (CSE) recommendations, IEP contents, and students who transfer districts; requires documentation of attempts, including telephone calls and correspondence, to obtain parent consent; requires all IEPs developed on or after January 1, 2009 be on a form prescribed by the Commissioner; and adds additional procedures for identifying students with learning disabilities.

Section 200.5 makes a technical change relating to surrogate parent; conforms State due process requirements to federal requirements relating to prior written notice, consent, notice of meetings, procedural safeguards notice, independent educational evaluations (IEEs), mediation, due process complaint notification requirements, impartial hearings, resolution process, State complaint procedures, pendency, and surrogate parents; adds, effective January 1, 2009, that prior written notice (notice of recommendation) and meeting notices be on forms prescribed by the Commissioner; adds steps the district must take to ensure parents participate in the resolution meeting; and adds that not more than one 30-day extension at a time may be granted to an impartial hearing.

Section 200.6 makes technical changes regarding continuum of services; corrects a cross citation and timeline for providing services to students with disabilities in approved private schools; provides that the CSE may recommend that a student who needs both resource room services and consultant teacher services may receive a combination of such services for not less than three hours each week; and adds "integrated co-teaching services" option to the continuum of services and specifies that when a district provides integrated co-teaching services, the number of students with disabilities cannot, effective July 1, 2008, exceed 12 students.

Section 200.7(b) conforms State regulations relating to school conduct and discipline at private schools and State-operated and State-supported schools to federal regulations.

Section 200.16 makes a technical change regarding IEEs; conforms State regulations relating to procedural safeguards to federal requirements; and allows approved preschool programs to temporarily increase the enrollment of a class up to a maximum of 13 students for the remainder of the school year.

Section 201.2 conforms the definitions of disciplinary change in placement, illegal drug, and interim alternative educational setting (IAES) to the federal definitions; adds that district has authority to determine on a case by case basis if a pattern of removals constitutes a disciplinary change in placement and that such determination is subject to review through due process and judicial proceedings.

Section 201.3 is repealed and a new section 201.3 is added to conform CSE responsibilities for functional behavioral assessments (FBAs) and behavioral intervention plans (BIPs) to federal requirements.

Section 201.4 requires a school district to remedy IEP deficiencies when it is determined that the student's conduct is the direct result of the district's failure to implement the IEP.

Section 201.5 removes the requirement that an expression of concern about a student's pattern of behavior be made in accordance with the district's child find and special education referral system.

Section 201.6 requires that expedited evaluations be completed no later than 15 school days after receipt of parent consent.

Section 201.7(f) clarifies school personnel authority to consider unique circumstances when determining whether a change in placement is appropriate.

Section 201.8 repeals the considerations that an impartial hearing officer (IHO) must make to order a change of placement to an IAES; and repeals that an IAES ordered by an IHO be determined by the CSE.

Section 201.10 establishes that school personnel determine services for students removed for more than 10 school days when it is not a disciplinary change in placement; and requires the CSE to determine services and the IAES for students suspended for periods in excess of 10 school days which constitute a disciplinary change in placement.

Section 201.11 conforms procedures for expedited hearings and timelines for an expedited hearing consistent with federal regulations; clarifies that an IHO appointment for an expedited hearing must be made in accordance with the rotational selection process; and establishes pendency during an expedited impartial hearing.

Consistent with federal requirements, districts must publicly report on revisions to inappropriate policies, procedures or practices resulting in a significant disproportionality by race/ethnicity.

If a district uses a process to determine if a student responds to scientific, research-based intervention, written notification must be given to parents when the student requires an intervention beyond that provided to all students in the general education classroom that identifies student performance data, strategies for increasing the student's rate of learning and notification of the parents' right to request an evaluation for special education programs and/or services. In addition, the CSE must develop a written document for the determination of a student with a learning disability.

Consistent with federal requirements, districts must obtain consent before: personally identifiable information about a nonpublic school student is released between the district of location of the private school and the district of residence; releasing information to a representative of any participating agency that is likely to be responsible for providing or paying for transition services or inviting such individual to a CSE meeting; and accessing a parent's public insurance. Changes also require consent before personally identifiable information is released to officials of participating agencies when a student is determined to be at risk of a future placement in a residential school and before providing evaluative information and program recommendations for a student to a Family Court judge, a probation department, a social services district, the Office of Child and Family Services, or a preadmission certification committee established pursuant to Mental Hygiene Law section 9.51(d).

Changes to due process provisions require that districts provide parents with a copy of the procedural safeguards notice upon receipt of their first State complaint and upon a disciplinary change in placement.

The amendments do not impose any additional professional service requirements on rural areas, beyond those imposed by such federal statutes and regulations and State statutes.

COSTS:

The proposed amendments are necessary to conform the Commissioner's Regulations to the IDEA statutes and regulations; to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities. School districts and other local educational agencies (LEAs) are required to comply with the IDEA as a condition to their receipt of federal funding. The proposed amendments do not impose any additional costs beyond those imposed by such federal statutes and regulations and State statutes.

MINIMIZING ADVERSE IMPACT:

In general, the amendments are necessary to conform the Commissioner's Regulations to recent changes in the federal IDEA statutes and regulations (20 U.S.C. 1400 *et. seq.*, as amended by Public Law 108-446, and the final federal amendments to 34 CFR Part 300) and to that extent do not exceed any minimum federal standards. The amendments relating to evaluation and placement of preschool students; standardized forms for IEPs, written notifications and meeting notices; minimal levels of services for resource room and consultant teacher services; integrated co-teaching

services; and temporary increases in the class enrollment of approved preschool programs are not required by federal law or regulations, but are necessary to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and are otherwise consistent with federal standards.

School districts and other Local Education Agencies are required to comply with IDEA as a condition to their receipt of federal funding. The proposed conforming amendments have been carefully drafted to meet federal statutory and regulatory requirements and do not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for school districts in rural areas.

Various alternatives for establishing the staff-to-student ratio in the integrated co-teaching class option were considered, including only establishing a ratio of students with disabilities to nondisabled students, but the current proposal was selected to ensure reasonable class size. With regard to minimum levels of service requirements, the Department considered the repeal of minimum levels established for speech and language services, consultant teacher services and resource room services. The proposed amendment was selected because it is expected to maximize the participation of students with disabilities in general education classes and curriculum; will allow more students with disabilities to receive special education services without removing students from their required academic courses; and yield a more efficient and effective use of human and fiscal resources.

The Department also considered proposals to allow indirect support to be provided by related service providers; to repeal the chronological age-range limitations in middle- and secondary-level special classes; and to repeal the requirement for parent notification relating to math and reading achievement levels in special classes. The proposed amendment addresses recommendations most supported by public comment and most directly related to improved results for students with disabilities and placement in the least restrictive environment.

RURAL AREA PARTICIPATION:

The proposed rule was submitted for discussion and comment to the Department’s Rural Education Advisory Committee that includes representatives of school districts in rural areas. The State Education Department conducted public hearings on the proposed amendments on April 16, 19, and 23, 2007.

Job Impact Statement

The proposed amendments are necessary in order to ensure compliance with federal law and regulations and State law relating to the education of students with disabilities, ages 3-21; to ensure consistency in procedural safeguards; to promote timely evaluations and services; and to facilitate services in the least restrictive environment for students with disabilities, and will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

**EMERGENCY
RULE MAKING**

Universal Prekindergarten Programs

I.D. No. EDU-24-07-00027-E

Filing No. 999

Filing date: Sept. 18, 2007

Effective date: Sept. 18, 2007

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

Action taken: Repeal of Subpart 151-1 and addition of new Subpart 151-1 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided) and 3602-e(1), (2) and (5)-(16); and L. 2007, ch. 57, section 19

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, by establishing uniform quality standards and other requirements for universal prekindergarten

programs, and to otherwise conform the Commissioner’s regulations to the statute.

Chapter 57 of the Laws of 2007 amended Education Law section 3602-e to:

(1) eliminate the requirement that a district form a prekindergarten policy advisory board to make a recommendation to the Board of Education regarding whether the district should implement a prekindergarten program;

(2) allow one or more school districts to submit a joint application to operate a joint universal prekindergarten program with a maximum grant award equal to the sum of the grant awards computed for each participating district;

(3) require that universal prekindergarten programs provide for: (i) an assessment of the development of language, cognitive and social skills; (ii) staff development and teacher training for staff and teachers in all settings in which prekindergarten services are provided; and (iii) selection of eligible children to receive prekindergarten program services on a random basis, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program;

(4) require the Department to prescribe uniform quality standards for universal prekindergarten programs. This section also requires that the regulations of the Commissioner establish minimum curriculum standards to ensure that universal prekindergarten programs include curricula aligned with the State learning standards, that ensures continuity with instruction in the early elementary grades and is integrated with the district’s instructional program in kindergarten through grade twelve. Further, such regulations must include performance standards for prekindergarten programs, including procedures for assessing the performance of programs and mechanisms for tracking the progress of programs and reporting such progress to parents and the public. In addition, this section provides the Department with the authority to grant a waiver of any inconsistent provisions of the regulations to allow school districts that operated targeted prekindergarten programs in the 2006-2007 school year to continue to operate under the regulations that applied to the targeted prekindergarten program in that year.

The proposed amendment was adopted at the May 21-22, 2007 Regents meeting as an emergency measure, effective May 29, 2007, in order to immediately establish uniform quality standards and other requirements for universal prekindergarten programs that are consistent with Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, so that affected school districts may timely plan and implement such programs for the 2007-2008 school year pursuant to statutory requirements. A Notice of Emergency Adoption and Proposed Rule Making was published in the *State Register* on June 13, 2007.

A second emergency adoption was taken at the July 25, 2007 Regents meeting for the preservation of the general welfare to ensure that the emergency rule adopted at the May Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Revisions have been made to the proposed rule in response to public comment and a Notice of Revised Rule Making was published in the *State Register* on September 12, 2007. Pursuant to the State Administrative Procedure Act (SAPA) section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the *State Register*. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be adopted by regular action, after expiration of the 30-day public comment period for a revised rule making, is the October 22-23, 2007 Regents meeting, and pursuant to SAPA section 203(1), the earliest the adopted rule can become effective is upon its publication in the *State Register* on November 14, 2007. However, the July emergency action will expire on October 25, 2007, 60 days after its filing with the Department of State on August 27, 2007. A lapse in the rule’s effectiveness would disrupt implementation of universal prekindergarten programs under Education Law section 3602-e.

A third emergency adoption is therefore necessary for the preservation of the general welfare to immediately adopt revisions to the rule in response to public comment and to otherwise ensure that the emergency rule adopted at the May Regents meeting, and readopted at the July Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the October meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 30-day public comment period prescribed by the State Administrative Procedure Act.

Subject: Universal prekindergarten programs.

Purpose: To conform Subpart 151-1 of the commissioner's regulations to Education Law, section 3602-e, as amended by chapter 57 of the Laws of 2007, by establishing uniform quality standards for prekindergarten programs, criteria relating to program design, procedures for applying for universal prekindergarten grants, procedures by which districts select eligible agency collaborators through a competitive process, and facility requirements.

Substance of emergency rule: The proposed amendment was adopted as an emergency rule at the May and July Regents meetings. Substantial revisions were subsequently made to the proposed rule in response to public comment. A Notice of Revised Rule Making was published in the *State Register* on September 12, 2007 and the rule, as so revised, was adopted as an emergency rule at the September Regents meeting, effective September 18, 2007. The following is a summary of the provisions of the emergency rule.

Section 151-1.1 specifies that the purpose of this Subpart is to provide four-year-old children with universal opportunity to access prekindergarten programs.

Section 151-1.2 defines approved expenditures, eligible agencies, eligible child, and universal prekindergarten program plan.

Section 151-1.3 establishes uniform quality standards for all universal prekindergarten classrooms, including both district-based and eligible agency-based settings. Such standards require:

(1) use of curricula, aligned with the State learning standards, that ensures continuity with instruction in the early elementary grades and is integrated with the district's instructional program in kindergarten through grade twelve;

(2) early literacy and emergent reading instruction based on effective, evidence-based practices;

(3) activities to be learner-centered and to designed promote a child's total growth and development;

(4) a process for assessing the developmental baseline and progress of all children participating in the program, which shall at a minimum provide for on-going assessment of the development of language, cognitive and social skills in children;

(5) all prekindergarten students shall be screened as new entrants as set forth in Part 117 of Title 8; prekindergarten programs operating less than three hours shall provide a nutritional meal and/or snack; and programs operating more than three hours shall provide appropriate meals and snacks to ensure the nutritional needs of the children are met;

(6) a maximum class size of 20 children and that there be one teacher and one paraprofessional for classes up to 18 children and one teacher and two paraprofessionals for classes of 19 or 20 children;

(7) universal prekindergarten program teachers and paraprofessionals in both school district and eligible agency settings to meet minimum staff qualifications;

(8) school districts to provide fiscal and program oversight and be accountable for student progress in all prekindergarten classrooms in district and agency settings;

(9) professional development be based on the instructional needs of children and be provided to all teachers and staff in both district and agency settings;

(10) the development of procedures to ensure active engagement of parents and/or guardians in the education of their children; and

(11) school districts to provide, either directly or through referral, support services to children and their families necessary to support the child's participation in the program.

Section 151-1.4 sets forth provisions related to the design of programs. Programs may be either full-day or half-day and must operate five days per week a minimum of 180 days per year. A district may operate a summer only program during the months of July and August only upon demonstrating to the Commissioner's satisfaction that the school district is unable to operate the program during the regular school session because of a lack of available space in both district buildings and eligible agencies. Unless waived by the Commissioner, a minimum of 10 percent of the total grant must be used for the provision of the instructional program through collaborative efforts with eligible agencies.

Section 151-1.4(d) provides that school districts must establish a process to select eligible children to receive universal prekindergarten services on a random basis where there are more eligible children than can be served in a given school year, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program.

Section 151-1.4(e) provides that the environment and learning activities of the program shall be designed to promote and increase inclusion of preschool children with disabilities.

Section 151-1.4(f) provides that the program be designed to ensure that participating children with limited English proficiency are provided equal access to the program and opportunities to achieve the same program goals and standards as other participating children.

Section 151-1.5 establishes to application process by which school districts access their Universal Prekindergarten allocations. Two or more school districts may submit a joint application to operate a joint program with a maximum grant that is the sum of the allocation computed for each participating district. Provision is made for a written request to the Commissioner for a variance: (1) of the 10 percent set aside for collaboration as set forth in Education Law section 3602-e(5)(e); (2) class size requirements; (3) for districts that operated a targeted program under Subpart 151-2 in the 2006-2007 school year; and (4) for a summer only program, for district unable to operate during the regular school session.

Section 151-1.5(b)(7)(iii) allows districts that operated a targeted prekindergarten program in the 2006-2007 school year to seek variances of certain universal prekindergarten provisions and to continue to operate under the targeted prekindergarten regulations. The amount of funding supporting classrooms to which such variances apply may not exceed the amount of targeted prekindergarten grant funds received by the district for the 2006-2007 school year.

Section 151-1.5(a) and (b)(8) allow two or more school districts to submit a joint application to operate a joint universal prekindergarten program.

Section 151-1.6 provides that school districts must use a competitive process to determine which eligible agencies will collaborate with the district for the provisions of the instructional program. This section establishes minimum requirements for the request for proposals and identified criteria to be used when evaluating responses to such request. Section 151-1.6(e) requires school districts to conduct a minimum of one site visit to settings where the universal prekindergarten program will be located prior to contracting for services.

Section 151-1.7 states the facilities requirements for Universal Prekindergarten programs. These requirements are unchanged from the current regulation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-24-07-00027-EP, Issue of June 13, 2007. The emergency rule will expire November 16, 2007.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 3602-e(12) authorizes the Regents and the Commissioner to adopt regulations to implement the provisions of that section, relating to universal prekindergarten programs.

Chapter 57 of the Laws of 2007 amended Education Law section 3602-e(3) and (4) to eliminate the requirement that a district form a prekindergarten policy advisory board to make a recommendation to the Board of Education regarding whether the district should implement a prekindergarten program.

Chapter 57 of the Laws of 2007 amended Education Law section 3602-e(5) to allow one or more school district to submit a joint application to operate a joint universal prekindergarten program with a maximum grant award equal to the sum of the grant awards computed for each participating district.

Chapter 57 of the Laws of 2007 amended Education Law section 3602-e(7) to require that universal prekindergarten programs provide for: (1) an assessment of the development of language, cognitive and social skills; (2) staff development and teacher training for staff and teachers in all settings

in which prekindergarten services are provided; and (3) selection of eligible children to receive prekindergarten program services on a random basis, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program.

Chapter 57 of the Laws of 2007 amended Education Law section 3602-e(12) to require the Department to prescribe uniform quality standards for universal prekindergarten programs. This section also requires that the regulations of the Commissioner establish minimum curriculum standards to ensure that universal prekindergarten programs have strong instructional content aligned with the State learning standards and integrated with the school district's instructional program in grades kindergarten through twelve. Further, such regulations must include performance standards for prekindergarten programs, including procedures for assessing the performance of programs and mechanisms for tracking the progress of programs and reporting such progress to parents and the public. In addition, this section provides the Department with the authority to grant a waiver of any inconsistent provisions of the regulations to allow school districts that operated targeted prekindergarten programs in the 2006-2007 school year to continue to operate under the regulations that applied to the targeted prekindergarten program in that year.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement changes to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007.

NEEDS AND BENEFITS:

The proposed amendment is necessary to conform Subpart 151-1 to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007. Subpart 151-1 is repealed and a new Subpart 151-1 is added incorporating the required changes. Below is a summary of the new or enhanced provisions of the amended Subpart 151-1.

Section 151-1.2(b) redefines "eligible agencies" to include libraries and museums.

Section 151-1.2(d) eliminates the requirement that the program plan be developed and submitted to the Board by a prekindergarten policy advisory board.

Section 151-1.3 establishes uniform quality standards for universal prekindergarten classrooms, including both district-based and eligible agency-based settings, including that school districts:

- (1) adopt and implement curricula, aligned with the State learning standards, that ensures strong continuity with instruction in the early elementary grades and is integrated with the district's instructional program in kindergarten through grade twelve;
- (2) provide early literacy and emergent reading instruction based on effective, evidence-based practices;
- (3) establish a process for assessing the developmental baseline and ongoing assessment of the development of language, cognitive and social skills in children;
- (4) use child assessment data to inform classroom instruction and monitor and track prekindergarten program effectiveness;
- (5) require school districts to monitor compliance by collaborating eligible agencies with all fiscal and program requirements and to assess student progress;
- (6) ensure that professional development based on the instructional needs of children is provided to all teachers and staff in district and agency settings;
- (7) develop procedures to ensure active engagement of parents and/or guardians in the education of their children; and
- (8) provide, either directly or through referral, support services to children and their families necessary to promote the child's participation in the program.

Section 151-1.4 requires:

(1) school districts to establish a process to select eligible children to receive universal prekindergarten services on a random basis where there are more eligible children than can be served in a given school year, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program;

(2) that the environment and learning activities of the program shall be designed to promote and increase inclusion of preschool children with disabilities; and

(3) that the program be designed to ensure that participating children with limited English proficiency are provided equal access to the program and opportunities to achieve the same program goals and standards as other participating children;

Section 151-1.5(b)(7)(iii) allows districts that operated a targeted prekindergarten program in the 2006-2007 school year to seek variances of certain universal prekindergarten provisions and to continue to operate under the targeted prekindergarten regulations. The amount of funding supporting classrooms to which such variances apply may not exceed the amount of targeted prekindergarten grant funds received by the district for the 2006-2007 school year.

Section 151-1.5(a) and (b)(8) allow two or more school districts to submit a joint application to operate a joint universal prekindergarten program.

Section 151-1.6(e) requires school districts to conduct a minimum of one site visit to settings where the universal prekindergarten program will be located prior to contracting for services.

COSTS:

The proposed amendment is necessary to implement Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, and will not impose any costs beyond those inherent in the statute.

(a) Costs to State government: None.

(b) Costs to local government: Universal Prekindergarten is not a mandated program. For school districts opting to participate, the provisions that could be expected to have a cost impact are those associated with selection and implementation of curricula and assessments. These costs will vary depending on the curricula and assessment(s) selected, the familiarity of the district's staff with those products and the size of the program. However, the anticipated cost for school districts would be minimal.

(c) Costs to private regulated parties: Eligible agencies contracting with school districts for the provision of the instructional program may be expected to initially experience some additional costs should they need to acquire additional materials and supplies necessary to implement the curricula and assessment(s) selected by the school district. These costs will be offset, in part if not entirely, by the fee for service paid by the school district.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, and does not impose any additional program, service, duty or responsibility on local governments. Universal Prekindergarten is not a mandated program.

Section 151-1.3 establishes uniform quality standards for all universal prekindergarten classrooms, including both district-based and eligible agency-based settings. Such standards require school districts to:

- (1) adopt and implement curricula, aligned with the State learning standards, that ensures strong continuity with instruction in the early elementary grades and is integrated with the district's instructional program in kindergarten through grade twelve;
- (2) provide early literacy and emergent reading instruction based on effective, evidence-based practices;
- (3) establish a process for assessing the developmental baseline and ongoing assessment of the development of language, cognitive and social skills in children;
- (4) use child assessment data to inform classroom instruction and monitor and track prekindergarten program effectiveness;
- (5) require school districts to monitor compliance by collaborating eligible agencies with all fiscal and program requirements and to assess student progress;
- (6) ensure that professional development based on the instructional needs of children is provided to all teachers and staff in district and agency settings;
- (7) develop procedures to ensure active engagement of parents and/or guardians in the education of their children; and
- (8) provide, either directly or through referral, support services to children and their families necessary to promote the child's participation in the program.

Section 151-1.4(d) provides that school districts must establish a process to select eligible children to receive universal prekindergarten services on a random basis where there are more eligible children than can be served in a given school year, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program.

Section 151-1.5(b)(4)(iii) allows districts that operated a targeted prekindergarten program in the 2006-2007 school year to seek variances of certain universal prekindergarten provisions and to continue to operate under the targeted prekindergarten regulations. The amount of funding

supporting classrooms to which such variances apply may not exceed the amount of targeted prekindergarten grant funds received by the district for the 2006-2007 school year.

Section 151-1.5(b)(5) allows two or more school districts to submit a joint application to operate a joint universal prekindergarten program.

Section 151-1.6(e) requires school districts to conduct a minimum of one site visit to settings where the universal prekindergarten program will be located prior to contracting for services.

PAPERWORK:

Each school district planning to receive an allocation to operate a universal prekindergarten program shall submit an application to the Department for approval, in a format and pursuant to a timeline prescribed by the Commissioner. The application shall include a written request for a variance where applicable.

Two or more school districts may submit a joint application to operate a joint program, in which case the application must also include a partnership agreement that specifies the roles and responsibilities of each school district for implementation and oversight of the program.

A final report, including such program and fiscal information as requested by the Department, shall be submitted within 30 days after the program ends.

School districts shall develop a competitive process, using a request for proposals, to determine which eligible agencies it will collaborate with to implement the program, including at minimum:

- (1) a description of the services to be provided;
- (2) a detailed narrative describing how the agency will meet the program's goals and objections;
- (3) a description of the agency's staff qualifications; and
- (4) a budget of proposed expenditures for services.

DUPLICATION:

The proposed amendment does not duplicate existing State or Federal requirements.

ALTERNATIVES:

In developing the proposed amendment, the Department reviewed the requirements established for prekindergarten programs in several other states. Staff reviewed the quality program benchmarks established by the National Institute for Early Education Research, which publishes the annual State Preschool Yearbook, to identify areas of "best practice" where New York State could strengthen its requirements. In addition, staff reviewed and discussed a comparison of targeted and universal prekindergarten program requirements to identify areas where greater consistency could be achieved.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that school districts will be able to comply with the provisions of this amendment by September 1, 2007.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely conforms Subpart 151-1 of the Commissioner's Regulations to the provisions of Section 3602-e of Education Law as amended by Chapter 57 of the Laws of 2007, relating to universal prekindergarten programs operated by public school districts, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that small businesses will not be affected, no further measures are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to all universal prekindergarten programs operated by public school districts, regardless of the setting in which such services are provided.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform Subpart 151-1 to section 3602-e of Education Law, as amended by Chapter 57 of the Laws of 2007.

Section 151-1.3 establishes uniform quality standards for all universal prekindergarten classrooms, including both district-based and eligible agency-based settings. Such standards require school districts to:

- (1) adopt and implement curricula, aligned with the State learning standards, that ensures strong continuity with instruction in the early elementary grades and is integrated with the district's instructional program in kindergarten through grade twelve;

- (2) provide early literacy and emergent reading instruction based on effective, evidence-based practices;

- (3) establish a process for assessing the developmental baseline and ongoing assessment of the development of language, cognitive and social skills in children;

- (4) use child assessment data to inform classroom instruction and monitor and track prekindergarten program effectiveness;

- (5) require school districts to monitor compliance by collaborating eligible agencies with all fiscal and program requirements and to assess student progress;

- (6) ensure that professional development based on the instructional needs of children is provided to all teachers and staff in district and agency settings;

- (7) develop procedures to ensure active engagement of parents and/or guardians in the education of their children; and

- (8) provide, either directly or through referral, support services to children and their families necessary to promote the child's participation in the program.

Section 151-1.4(d) provides that school districts must establish a process to select eligible children to receive universal prekindergarten services on a random basis where there are more eligible children than can be served in a given school year, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program.

Section 151-1.5(b)(4)(iii) allows districts that operated a targeted prekindergarten program in the 2006-2007 school year to seek variances of certain universal prekindergarten provisions and to continue to operate under the targeted prekindergarten regulations. The amount of funding supporting classrooms to which such variances apply may not exceed the amount of targeted prekindergarten grant funds received by the district for the 2006-2007 school year.

Section 151-1.5(b)(5) allows two or more school districts to submit a joint application to operate a joint universal prekindergarten program.

Section 151-1.6(e) requires school districts to conduct a minimum of one site visit to settings where the universal prekindergarten program will be located prior to contracting for services.

Each school district planning to receive an allocation to operate a universal prekindergarten program shall submit an application to the Department for approval, in a format and pursuant to a timeline prescribed by the Commissioner. The application shall include a written request for a variance where applicable.

Two or more school districts may submit a joint application to operate a joint program, in which case the application must also include a partnership agreement that specifies the roles and responsibilities of each school district for implementation and oversight of the program.

A final report, including such program and fiscal information as requested by the Department, shall be submitted within 30 days after the program ends.

School districts shall develop a competitive process, using a request for proposals, to determine which eligible agencies it will collaborate with to implement the program, including at minimum:

- (1) a description of the services to be provided;
- (2) a detailed narrative describing how the agency will meet the program's goals and objections;
- (3) a description of the agency's staff qualifications; and
- (4) a budget of proposed expenditures for services.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to implement Education Law section 3602-e, as added by Chapter 57 of the Laws of 2007, and does not impose any additional costs beyond those inherent in the statute. The new requirements will result in additional costs to school districts and eligible agencies, as follows:

- (1) Universal Prekindergarten is not a mandated program. For school districts opting to participate, the provisions that could be expected to have a cost impact are those associated with selection and implementation of curricula and assessments. These costs will vary depending on the curricula and assessment(s) selected, the familiarity of the district's staff with those products and the size of the program. However, the anticipated cost for school districts would be minimal.

- (2) Eligible agencies contracting with school districts for the provision of the instructional program may be expected to initially experience some additional costs should they need to acquire additional materials and sup-

plies necessary to implement the curricula and assessment(s) selected by the school district. These costs will be offset, in part if not entirely, by the fee for service paid by the school district.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose new technological requirements on school districts. Economic feasibility is address in the Compliance requirements section above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establishing differing requirements or to exempt school districts and eligible agencies from coverage by the rule, except where such waiver authority is statutorily stated. Nevertheless, in establishing the uniform quality standards and other provisions necessary to conform Subpart 151-1 of the Commissioner's Regulations to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, the Department has considered a variety of options and selecting those approaches that will achieve the goal of increased program quality while minimizing additional costs and compliance requirements upon school districts and eligible agencies. For example, the proposed rule provides a transition period for eligible agencies to comply with the minimum staff qualifications and establishes an alternative to teacher certification for teachers employed by eligible agencies.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. The proposed amendment will also be posted on the Universal Prekindergarten web site to facilitate a wide distribution. In addition, the proposed amendment will be disseminated to the Department's External Work Group on Universal Prekindergarten, which includes representatives from small businesses and local government.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to conform Subpart 151-1 to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007.

Section 151-1.3 establishes uniform quality standards for all universal prekindergarten classrooms, including both district-based and eligible agency-based settings. Such standards require school districts to:

- (1) adopt and implement curricula, aligned with the State learning standards, that ensures strong continuity with instruction in the early elementary grades and is integrated with the district's instructional program in kindergarten through grade twelve;
- (2) provide early literacy and emergent reading instruction based on effective, evidence-based practices;
- (3) establish a process for assessing the developmental baseline and ongoing assessment of the development of language, cognitive and social skills in children;
- (4) use child assessment data to inform classroom instruction and monitor and track prekindergarten program effectiveness;
- (5) require school districts to monitor compliance by collaborating eligible agencies with all fiscal and program requirements and to assess student progress;
- (6) ensure that professional development based on the instructional needs of children is provided to all teachers and staff in district and agency settings;
- (7) develop procedures to ensure active engagement of parents and/or guardians in the education of their children; and
- (8) provide, either directly or through referral, support services to children and their families necessary to promote the child's participation in the program.

Section 151-1.4(d) provides that school districts must establish a process to select eligible children to receive universal prekindergarten services on a random basis where there are more eligible children than can be served in a given school year, provided, however, that a school district that operated a targeted prekindergarten program in the base year may use the selection process established for such program.

Section 151-1.5(b)(4)(iii) allows districts that operated a targeted prekindergarten program in the 2006-2007 school year to seek variances of

certain universal prekindergarten provisions and to continue to operate under the targeted prekindergarten regulations. The amount of funding supporting classrooms to which such variances apply may not exceed the amount of targeted prekindergarten grant funds received by the district for the 2006-2007 school year.

Section 151-1.5(b)(5) allows two or more school districts to submit a joint application to operate a joint universal prekindergarten program.

Section 151-1.6(e) requires school districts to conduct a minimum of one site visit to settings where the universal prekindergarten program will be located prior to contracting for services.

Each school district planning to receive an allocation to operate a universal prekindergarten program shall submit an application to the Department for approval, in a format and pursuant to a timeline prescribed by the Commissioner. The application shall include a written request for a variance where applicable.

Two or more school districts may submit a joint application to operate a joint program, in which case the application must also include a partnership agreement that specifies the roles and responsibilities of each school district for implementation and oversight of the program.

A final report, including such program and fiscal information as requested by the Department, shall be submitted within 30 days after the program ends.

School districts shall develop a competitive process, using a request for proposals, to determine which eligible agencies it will collaborate with to implement the program, including at minimum:

- (1) a description of the services to be provided;
- (2) a detailed narrative describing how the agency will meet the program's goals and objections;
- (3) a description of the agency's staff qualifications; and
- (4) a budget of proposed expenditures for services.

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to implement Education Law section 3602-e, as added by Chapter 57 of the Laws of 2007, and does not impose any additional costs beyond those inherent in the statute. The new requirements will result in additional costs to school districts and eligible agencies, as follows:

- (1) Universal Prekindergarten is not a mandated program. For school districts opting to participate, the provisions that could be expected to have a cost impact are those associated with selection and implementation of curricula and assessments. These costs will vary depending on the curricula and assessment(s) selected, the familiarity of the district's staff with those products and the size of the program. However, the anticipated cost for school districts would be minimal.

- (2) Eligible agencies contracting with school districts for the provision of the instructional program may be expected to initially experience some additional costs should they need to acquire additional materials and supplies necessary to implement the curricula and assessment(s) selected by the school district. These costs will be offset, in part if not entirely, by the fee for service paid by the school district.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establishing differing requirements or to exempt school districts and eligible agencies from coverage by the rule, except where such waiver authority is statutorily stated. Nevertheless, in establishing the uniform quality standards and other provisions necessary to conform Subpart 151-1 of the Commissioner's Regulations to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, the Department has considered a variety of options and selecting those approaches that will achieve the goal of increased program quality while minimizing additional costs and compliance requirements upon school districts and eligible agencies. For example, the proposed rule provides a transition period for eligible agencies to comply with the minimum staff qualifications and establishes an alternative to teacher certification for teachers employed by eligible agencies. Because this amendment implements statutory provisions that are applicable to school districts across the State, it was not possible to provide for a lesser standard or an exemption for school districts in rural areas.

RURAL AREA PARTICIPATION:

The proposed amendment has been sent for review and comment to members of the Department's Rural Advisory Committee, which includes representatives from rural areas. The proposed amendment will also be posted on the Universal Prekindergarten web site to facilitate a wide

distribution. Additionally, the proposed amendments will be disseminated to the Department's External Work Group on Universal Prekindergarten, which includes representatives from small businesses and local government located in rural areas.

Job Impact Statement

The proposed amendment is necessary to conform Subpart 151-1 of the Commissioner's Regulations to Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, relating to universal prekindergarten programs operated by public school districts, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the proposed amendment 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

Since publication of Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on June 13, 2007, the State Education Department received the following comments on the proposed rule.

1. COMMENT:

Section 151-1.2(b): Eligible agencies now may include libraries and museums which meet the standards and requirements of this Subpart. Based on the requirements in the Competitive Process 151-1.6(b) 7, 13, 14, 16, libraries and museums cannot qualify as an eligible agency.

DEPARTMENT RESPONSE:

Libraries and museums that met the requirements of Subpart 151-1 have been eligible agencies since inception of the Universal Prekindergarten program. The addition of libraries and museums to this section is a technical revision to clarify that such entities are eligible agencies. The variety and types of programs offered by libraries and museums vary greatly throughout the State. While the libraries and museums in the commenter's area may not meet the above-cited standards, there may be libraries and museums in other locales that do. No change to the proposed rule is required.

2. COMMENT:

Section 151-1.3(a)(2) requires districts operating a prekindergarten program to "provide an early literacy and emergent reading program based on effective, evidence-based instructional practices." Unless there is specific reference to the intent of this regulation, it becomes easy for Districts to misinterpret the word "program" and lead to the use of inappropriate developmentally appropriate practice. The commenter recommends replacing the word "program" with "instruction."

DEPARTMENT RESPONSE:

The Department agrees that the recommendation clarifies the intent of the regulation. The proposed rule has been revised to require school districts operating a prekindergarten program to "provide early literacy and emergent reading instruction based on effective, evidence-based practices."

3. COMMENT:

Section 151-1.3(b)(2) states that "School districts shall use the results of such assessments to annually monitor and track prekindergarten program effectiveness. A program shall be considered effective if the enrolled children demonstrate significant gains, as determined by the Commissioner, in language, cognitive and social skills." The commenter recommended that the term "significant gains" be defined and that the research that correlates program effectiveness and significant gains in children be shared. The commenter also recommended that, in addition to the selected assessment being reliable and valid, the new regulations must also require that it have a strong emphasis on progress monitoring to determine student growth and development in measurable terms.

DEPARTMENT RESPONSE:

The Department believes that these concerns can be best addressed in guidance.

4. COMMENT:

Section 151-1.3(b)(3) requires school districts to annually report the percentage of children making significant gains and said data shall be made part of a school's performance report to the parents and the public. The commenter recommended that consideration must be given to a child's self-esteem given the fact that the social and emotional development of children is mentioned in the amended regulations. Additionally, four year old children should not be adversely affected by an assessment that determines "significant gains."

DEPARTMENT RESPONSE:

Education Law section 3602-e, as amended by Chapter 57 of the Laws of 2007, requires that the effectiveness of school districts' prekindergarten programs be reported to parents and the public. The Department recog-

nizes the validity of the concerns expressed and believes that these concerns can be best addressed in guidance.

5. COMMENT:

Section 151-1.3(f) requires fiscal and program oversight of the collaborating eligible agencies. The commenter recommended that a statement must be added to include the oversight of the public schools.

DEPARTMENT RESPONSE:

The Department disagrees with the recommendation. Prekindergarten classrooms operated by the public schools are already subject to the district's fiscal policies and procedures, including oversight and monitoring. No change to the proposed rule is required.

6. COMMENT:

Section 151-1.3(g) requires that professional development be provided based on the instructional needs of children. The commenter recommended that consideration must be given to improving the pedagogical capacity of the adults who deliver instruction to the children. This includes the professional development of the Social Worker as well as the Family Worker.

DEPARTMENT RESPONSE:

The Department agrees that the primary purpose of professional development is to improve the pedagogical capacity of the adults who deliver instruction to children. However, when prioritizing the professional development needs of the adults, efforts should be focused first on improving instruction in those areas where the instructional needs of students is greatest. No change to the proposed rule is required.

7. COMMENT:

Section 151-1.4(d) determines the selection of children. The commenter recommended that clarity is needed here as the new regulations require that the selection process established in the base year of the targeted prekindergarten program may continue to be used to select children to receive universal prekindergarten services.

DEPARTMENT RESPONSE:

The proposed rule is consistent with the provisions of Education Law section 3602-e of Education Law, as amended by Chapter 57 of the Laws of 2007, requiring that districts establish a random selection methodology and permitting districts that operated a Targeted Prekindergarten program in the 2006-2007 school year the option of using the selection methodology established for that program. The Department believes that further clarification is best provided in guidance. No change to the proposed rule is required.

8. COMMENT:

Section 151-1.4(a) requires that programs operate 180 days. The time constraints inherent in this requirement impede the ability of newly implementing districts and those wishing to expand their programs to identify possible collaborators and build the capacity to serve additional children. The commenter recommended that increased flexibility be provided to allow a district to operate for fewer days in the year that it first implements a program or for expansion classes in subsequent years.

DEPARTMENT RESPONSE:

The Department agrees that such flexibility may increase the ability of districts to implement and expand prekindergarten programs. The proposed rule has been revised to require that programs operate ". . . a minimum of 180 days per year; except that districts implementing programs for the first time or expansion classes in other districts may operate a minimum of 90 days, provided that in such instances the aid per prekindergarten pupil shall be reduced by one one-hundred eightieth for each day less than 180 that such program or expansion class is in session, except that the commissioner may disregard such reduction for any deficiency that may be disregarded in computing total foundation aid pursuant to Education Law section 3604(7) or (8)."

EMERGENCY RULE MAKING

Students with Limited English Proficiency

I.D. No. EDU-26-07-00008-E

Filing No. 1000

Filing date: Sept. 18, 2007

Effective date: Sept. 27, 2007

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

Action taken: Amendment of Part 154 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 215, 2117(1), 3204(2), (2-a), (3) and (6); and L. 2007, ch. 57, section 10

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary for the Department to come into compliance with Chapter 57 of the Laws of 2007. Changes to the Education Law related to the education of pupils with limited English proficiency, as enacted under Chapter 57 of the Laws of 2007, are no longer in line with the current Part 154 regulations. Current Part 154 regulations prescribe requirements for school districts claiming State limited English proficiency aid as well as for districts not claiming State limited English proficiency aid for the education of pupils with limited English proficiency. Under Chapter 57 of the Laws of 2007, schools will no longer claim State limited English proficiency aid. Beginning in 2007-2008, all districts will receive total foundation aid.

Furthermore, Education Law section 3204(2-a)(1), as amended by section 10 of Chapter 57 of the Laws of 2007, requires each school district which is receiving total foundation aid to develop a comprehensive plan consistent with requirements as the Commissioner may establish in regulations to meet the educational needs of pupils of limited English proficiency. Such plan shall include a description of the programs, activities and services used to meet the educational needs of such pupils that comply with the regulations of the Commissioner governing such programs.

Consistent with Education Law section 3204(2-a)(1), as amended by section 10 of Chapter 57 of the Laws of 2007, the proposed amendment will require school districts receiving total foundation aid to develop a comprehensive plan for the education of students with limited English proficiency. Each school district receiving total foundation aid must develop a comprehensive plan consistent with Education Law section 3204(2-a)(1) and Part 154 of the Commissioner's Regulations, commencing with the 2007-2008 school year. As a result, it is critically important to expedite the submission and approval of the proposed amendment.

The proposed amendment was adopted at the June 25-26, 2007 Regents meeting as an emergency measure, effective June 29, 2007, in order to immediately establish requirements for the development of comprehensive plans for students with limited English proficiency by school districts pursuant to Education Law section 3204, as amended by Chapter 57 of the Laws of 2007, and to otherwise conform Part 154 of the Commissioner's Regulations to the statute, so that school districts may timely prepare and implement such plans pursuant to statutory requirements for the 2007-2008 school year. A Notice of Emergency Adoption and Proposed Rule Making was published in the *State Register* on June 27, 2007.

The proposed rule has been adopted as a permanent rule at the September 10-11, 2007 Regents meeting. Pursuant to the State Administrative Procedure Act section 203(1), the earliest the adopted rule can become effective is upon its publication in the *State Register* on October 3, 2007. However, the June emergency rule will expire on September 26, 2007, 90 days after its filing with the Department of State on June 29, 2007. A lapse in the rule's effectiveness would disrupt development of comprehensive plans and other services provided for students with limited English proficiency by school districts pursuant to Education Law section 3204, as amended by Chapter 57 of the Laws of 2007.

A second emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: Students with limited English proficiency.

Purpose: To prescribe requirements for the development of comprehensive plans for students with limited English proficiency by school districts pursuant to Education Law section 3024, as amended by chapter 57 of the Laws of 2007, and to otherwise conform Part 154 of the commissioner's regulations to the statute.

Text of emergency rule: 1. The title of Part 154 of the Regulations of the Commissioner of Education is amended, effective September 27, 2007, as follows:

Part 154

[APPORTIONMENT AND] SERVICES FOR PUPILS WITH LIMITED ENGLISH PROFICIENCY

2. Paragraph (1) of subdivision (d) of section 154.2 of the Regulations of the Commissioner of Education is amended, effective September 27, 2007, as follows:

(1) The language arts instructional component shall include English language arts instruction and English as a second language instruction. The learning standards for English language arts (ELA) and English as a second language (ESL), and key ideas and performance indicators for such

standards, shall serve as the basis for the [(ELA)] ELA and ESL curriculums, respectively.

(i) . . .

(ii) . . .

3. Section 154.3 of the Regulations of the Commissioner of Education is repealed, effective September 27, 2007.

4. A new section 154.3 of the Regulations of the Commissioner of Education is added, effective September 27, 2007, as follows:

154.3 School District Responsibility.

The provisions of this section shall apply to programs operated in the 2007-08 school year and thereafter. All limited English proficient students shall be entitled to receive services in accordance with subdivision 2 and 2(a) of section 3204 of the Education Law.

(a) *Each school district receiving total foundation aid, including each community school district of the city of New York, shall develop a comprehensive plan to meet the educational needs of pupils with limited English proficiency. Such plan shall be kept on file in the district and made available for department review upon request of the department. The plan shall include:*

(1) *the district's philosophy for the education of such pupils;*

(2) *administrative practices and procedures to:*

(i) *diagnostically screen pupils for limited English proficiency pursuant to Part 117 of this Title;*

(ii) *identify such pupils with limited English proficiency;*

(iii) *annually evaluate each such pupil including each such pupil's performance in content areas to measure the pupil's academic progress.*

(3) *a description of the nature and scope of the bilingual and/or English as a second language instructional program and services available to limited English proficient pupils;*

(4) *a description of the criteria used by the district to place limited English proficient pupils in appropriate bilingual or free-standing English as a second language programs;*

(5) *a description by building of the curricular and extracurricular services provided to pupils with limited English proficiency;*

(6) *a description of the district and school level procedures for the management of the program, including staffing, site selection, parental notification, coordination of funds, training and program planning;*

(b) *School related information shall be distributed to parents or other persons in parental relationship to pupils with limited English proficiency in English or when necessary the language they understand;*

(c) *The school district shall submit to the commissioner the results of the annual evaluation of limited English proficient pupils, including test data and any additional data required by the commissioner, in the format and timeframe specified by the commissioner;*

(d) *The school district shall ensure that the provisions of section 3204 of the Education Law with respect to the instruction of limited English proficient pupils are adhered to.*

(e) *The school district shall refer limited English proficient pupils who are suspected of having a disability to the committee on special education in accordance with Part 200 of this Title and assure that a bilingual multidisciplinary assessment is conducted in accordance with section 200.4(b) of this Title before the committee identifies pupils with limited English proficiency as having a disability.*

(f) *The school district shall submit to the commissioner the following documents in a form and by a date specified by the commissioner:*

(1) *an assurance:*

(i) *of access to appropriate instructional and support services for such pupils, including guidance programs pursuant to section 100.2(j) of this Title;*

(ii) *that each such pupil has equal opportunities to participate in all school programs and extracurricular activities as non-limited English proficient pupils;*

(iii) *that the minimum ESL and ELA requirements prescribed in section 154.2(d) of this Part for the freestanding ESL programs are adhered to;*

(iv) *that the minimum ESL, ELA and NLA requirements prescribed in section 154.2(e) of this Part for bilingual education programs are adhered to;*

(v) *that teachers in the district's free-standing ESL and bilingual education programs are appropriately certified pursuant to Part 80 of this Title;*

(vi) *the district will comply with the requirements of this Part and the provisions of the Education Law governing programs for pupils with limited English proficiency;*

(vii) that programs for limited English proficient pupils will be administered in accordance with applicable federal and state law and regulations and the district's comprehensive plan;

(2) a report by building of the number of pupils identified as being limited English proficient in the preceding year, including their grade level, native language and instructional program;

(3) a report by building of the number of limited English proficient pupils served in the preceding year, including their grade level, native language and instructional program;

(4) a report by building of the number of pupils that took the NYSES-LAT in the preceding school year;

(5) a report by building of the number and qualifications of teachers and support personnel providing services to pupils with limited English proficiency;

(6) a fiscal report containing such data concerning the preceding school year as may be required by the commissioner; and

(7) beginning in July 2008 and annually thereafter, a report on the expenditure of state, local and federal funds in the prior year on programs, activities and services for pupils with limited English proficiency.

(g) Types of programs.

(1) Bilingual Education Program. Each school district which has an enrollment of 20 or more pupils with limited English proficiency of the same grade level assigned to a building, all of whom have the same native language which is other than English, shall provide such pupils with bilingual education programs.

(2) Free-standing English as a Second Language Program. Each school district which has pupils with limited English proficiency of the same grade level assigned to a building, but which does not have 20 of such pupils with the same native language which is other than English, shall provide either a free-standing English as a second language program, or a bilingual education program to such pupils.

(h) Support services. Each school district with limited English proficient pupils participating in bilingual or free-standing English as a second language programs shall provide appropriate support services needed by such pupils to achieve and maintain a satisfactory level of academic performance. Such services may include, but need not be limited to, individual counseling, group counseling, home visits, and parental counseling. Where appropriate, such services shall be provided in the first language of the pupil and the pupil's parents or other persons in parental relation to the pupil.

(i) Transitional services. Each school district shall ensure a transition for former limited English proficient pupils transferring from a bilingual or free-standing English as a second language program into an English mainstream program. Transitional services shall be provided for the first year after the pupil is placed in the English mainstream instructional program.

(j) In-service training. Each school district with limited English proficient pupils shall provide in-service training to all personnel providing instruction or other services to such pupils in order to enhance their appreciation for the pupils' native languages and cultures and their ability to provide appropriate instructional and support services.

(k) Parental notification. (1) The parents or other persons in a parental relation to a pupil designated as limited English proficient shall be notified, in English and the language they understand, of their child's placement in an instructional bilingual or free-standing English as a second language program and their options as set forth in paragraphs (2) and (3) of this subdivision. School districts offering programs to limited English proficient pupils shall make an effort to meet with the parents or other persons in parental relation to such pupils, at least twice a year, to help them understand the goals of the program and how they might help their children.

(2) The parents or other persons in parental relation to a pupil designated as limited English proficient shall have the option to withdraw their child only from participation in an instructional bilingual education program, provided that:

(i) the parents or other persons in parental relation to a pupil designated as limited English proficient meet with the school principal along with the school or district supervisor of bilingual education to discuss and explain further the nature, purposes, educational values of the program and the skills required of personnel;

(ii) as a minimum such pupil shall participate in a free-standing English as a second language program.

(3) In a school building where the number of eligible pupils does not require the offering of a bilingual education program, parents or other persons in parental relation to a pupil identified as limited English profi-

cient shall have the option of transferring their child to a school within the district provided such program is available at such other school. A parent who chooses not to exercise the transfer option shall be informed that his or her child shall participate in a free-standing English as a second language program.

(4) Parents or other persons in parental relation to a pupil designated as limited English proficient who is a new entrant, as defined in section 117.2 (d) of this Title, shall be provided an orientation session on the state standards, assessments, school expectations and general program requirements for the bilingual education program and the free-standing English as a second language program. Such orientation shall take place within the first semester of their child's enrollment in the school and, when needed, shall be provided in the first language of the pupil's parents or other persons in parental relation to the pupil.

(1) A pupil whose score on the LAB-R or the NYSESLAT, as specified in section 154.2(a),(b) and (c) of this Part, is a result of a disability shall be provided special education programs and services in accordance with the individualized education program (IEP) developed for such pupil pursuant to Part 200 of this Title, and shall also be eligible for services pursuant to this Part when such services are recommended in the IEP. A pupil with a disability receiving services in accordance with the provisions of this section shall be counted as a pupil with limited English proficiency, as well as a student with a disability, for purposes of calculating State aid pursuant to section 3602 of the Education Law.

5. Section 154.4 of the Regulations of the Commissioner of Education is repealed, effective September 27, 2007.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-26-07-00008-P, Issue of June 27, 2007. The emergency rule will expire November 16, 2007.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 215 authorizes the Board of Regents and the Commissioner of Education to require school districts to prepare and submit reports containing such information as they may prescribe.

Education Law section 2117(1) empowers the Board of Regents and the Commissioner of Education to require school districts to submit any information they deem appropriate.

Education Law section 3204(2) and (2-a) provide for instructional programs for pupils with limited English proficiency to be conducted in accordance with regulations of the Commissioner. Education Law section 3204(3) authorizes the Commissioner to establish standards for the instruction of children with limited English proficiency, and section 3204(6) requires the Commissioner to establish such standards by regulation.

Education Law section 3204(2-a)(1), as amended by section 10 of Chapter 57 of the Laws of 2007, requires each school district which is receiving total foundation aid to develop a comprehensive plan consistent with requirements as the Commissioner may establish in regulations to meet the educational needs of pupils of limited English proficiency. Such plan shall include a description of the programs, activities and services used to meet the educational needs of such pupils that comply with the regulations of the Commissioner governing such programs.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement Education Law section 3204(2-a)(1), as amended by section 10 of Chapter 57 of the Laws of 2007.

NEEDS AND BENEFITS:

The proposed amendment is necessary to comply with the requirements of section 10 of Chapter 57 of the Laws of 2007. Changes to the Education Law related to the education of pupils with limited English proficiency, as enacted under Chapter 57 of the Laws of 2007, are no longer in line with the current Part 154 regulations. Current Part 154 regulations prescribe requirements for districts claiming state limited English proficiency aid as well as for districts not claiming state limited English proficiency aid for the education of pupils with limited English proficiency. Pursuant to Chapter 57 of the Laws of 2007, school districts

will no longer claim State limited English proficiency aid. Beginning in 2007-08, all districts will receive total foundation aid. Each school district that receives total foundation aid must develop a comprehensive plan consistent with Education Law section 3204(2-a)(1) and Part 154 of the Commissioner's Regulations.

COSTS:

- (a) Costs to State government: None.
 - (b) Cost to local government: It is anticipated that any costs to school districts would be minimal and will be absorbed using existing staff and resources, and/or State funded technical assistance resources.
 - (c) Cost to private regulated parties: None.
 - (d) Cost to Regulating agency: It is anticipated that the Statewide cost associated with the training and submission of required documents will be minimal and will be covered through State and federal funds.
- For the 2008-2009 school year and thereafter, it is expected that costs associated with the development of the comprehensive plans will decrease since some of the activities were only carried out initially during the training phases and development of the initial plan.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform Part 154 of the Regulations of the Commissioner of Education to Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007.

Section 154.3 prescribes the specific requirements for school districts receiving total foundation aid. The amendment requires that each school district receiving foundation aid:

- (1) develop a comprehensive plan. The plan must include the district's philosophy for the education of pupils with limited English proficiency (LEP) and the administrative practices and procedures to screen, identify and annually evaluate LEP pupils. The plan must also include a description of the bilingual or English as a Second Language (ESL) program to be implemented, the criteria for placement in such programs, the types of curricular and extracurricular activities and the program management procedures;
- (2) distribute school related information to parents in the language that they understand;
- (3) submit assessment data to the Department as prescribed by the Commissioner;
- (4) refer students suspected of having a disability to the Committee on Special Education;
- (5) submit a signed statement of assurances certifying that pupils with limited English proficiency will have access and equal opportunities to participate in appropriate instructional programs, extracurricular activities and support services; that such pupils will be provided the minimum language arts requirements prescribed under Part 154 of the Commissioner's Regulations; that teachers in free-standing and bilingual education programs are appropriately certified; and that programs for pupils with limited English proficiency will be administered in accordance with applicable statutes, regulations and the district's plan;
- (6) submit a report by building of the number of students identified, served and who took the New York State English as a Second Language Achievement Test;
- (7) submit a report of the number of teachers and their qualifications;
- (8) beginning in July 2008 and annually thereafter, submit a report of the expenditures of State, local and federal funds in the prior year for programs and activities for pupils with limited English proficiency.

PAPERWORK:

Each school district receiving total foundation aid shall develop a comprehensive plan for the education of pupils with limited English proficiency. Such plan shall be kept on file in the district and made available for Department review upon request of the Department. The plan shall include:

- (1) the district's philosophy for the education of such pupils;
- (2) administrative practices and procedures to:
 - (i) diagnostically screen pupils for limited English proficiency pursuant to Part 117 of this Title;
 - (ii) identify such pupils with limited English proficiency;
 - (iii) annually evaluate each such pupil including each such pupil's performance in content areas to measure the pupil's academic progress.
- (3) a description of the nature and scope of the bilingual and/or English as a second language instructional program and services available to limited English proficient pupils;
- (4) a description of the criteria used by the district to place limited English proficient pupils in appropriate bilingual or free-standing English as a second language programs;

(5) a description by building of the curricular and extracurricular services provided to pupils with limited English proficiency; and

(6) a description of the district and school level procedures for the management of the program, including staffing, site selection, parental notification, coordination of funds, training and program planning.

The school district shall submit to the Commissioner the results of the annual evaluation of limited English proficient pupils, including test data and any additional data required by the Commissioner, in the format and timeframe specified by the Commissioner.

The school district shall submit to the Commissioner the following documents in a form and by a date specified by the Commissioner:

- (1) an assurance:
- (i) of access to appropriate instructional and support services for such pupils, including guidance programs pursuant to section 100.2(j) of the Commissioner's Regulations;
- (ii) that each pupil has equal opportunities to participate in all school programs and extracurricular activities as non-limited English proficient pupils;
- (iii) that the minimum ESL and ELA requirements prescribed in section 154.2(d) of the Commissioner's Regulations for the freestanding ESL programs are adhered to;
- (iv) that the minimum ESL, ELA and NLA requirements prescribed in section 154.2(e) of this Part for bilingual education programs are adhered to;
- (v) that teachers in the district's free-standing ESL and bilingual education programs are appropriately certified pursuant to Part 80 of the Commissioner's Regulations;
- (vi) that the district will comply with the requirements of Part 154 and the provisions of the Education Law governing programs for pupils with limited English proficiency;
- (vii) that programs for limited English proficient pupils will be administered in accordance with applicable federal and state law and regulations and the district's comprehensive plan;
- (2) a report by building of the number of pupils identified as being limited English proficient in the preceding year, including their grade level, native language and instructional program;
- (3) a report by building of the number of limited English proficient pupils served in the preceding year, including their grade level, native language and instructional program;
- (4) a report by building of the number of pupils that took the NYSES-LAT in the preceding school year;
- (5) a report by building of the number and qualifications of teachers and support personnel providing services to pupils with limited English proficiency;
- (6) a fiscal report containing such data concerning the preceding school year as may be required by the Commissioner; and
- (7) beginning in July 2008 and annually thereafter, a report on the expenditure of state, local and federal funds in the prior year on programs, activities and services for pupils with limited English proficiency.

DUPLICATION:

The proposed amendment will not duplicate or exceed any other existing federal or State statute or regulation.

ALTERNATIVES:

The proposed amendment is necessary to comply with the requirements of Education Law section 3204(2-a), as amended by section 10 of Chapter 57 of the Laws of 2007. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment does not exceed any federal rule in a similar area.

COMPLIANCE REQUIREMENTS:

The proposed amendment provides that the new requirements for the development of the comprehensive plan be fully implemented by the 2007-2008 school year.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the establishment of revised requirements for the development of comprehensive plans for pupils with limited English proficiency by school districts receiving total foundation aid. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. No further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local governments:

EFFECT OF RULE:

The proposed amendment applies to all school districts in the State that receive total foundation aid.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform Part 154 of the Regulations of the Commissioner of Education to Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007.

Section 154.3 prescribes the specific requirements for school districts receiving total foundation aid. The amendment requires that each school district receiving foundation aid:

(1) develop a comprehensive plan. The plan must include the district's philosophy for the education of pupils with limited English proficiency (LEP) and the administrative practices and procedures to screen, identify and annually evaluate LEP pupils. The plan must also include a description of the bilingual or English as a Second Language (ESL) program to be implemented, the criteria for placement in such programs, the types of curricular and extracurricular activities and the program management procedures;

(2) distribute school related information to parents in the language that they understand;

(3) submit assessment data to the Department as prescribed by the Commissioner;

(4) refer students suspected of having a disability to the Committee on Special Education;

(5) submit a signed statement of assurances certifying that pupils with limited English proficiency will have access and equal opportunities to participate in appropriate instructional programs, extracurricular activities and support services; that such students will be provided the minimum language arts requirements prescribed under Part 154 of the Commissioner's Regulations; that teachers in free-standing and bilingual education programs are appropriately certified; and that programs for pupils with limited English proficiency will be administered in accordance with applicable statutes, regulations and the district's plan;

(6) submit a report by building of the number of students identified, served and who took the New York State English as a Second Language Achievement Test;

(7) submit a report of the number of teachers and their qualifications;

(8) beginning in July 2008 and annually thereafter, submit a report of the expenditures of State, local and federal funds in the prior year for programs and activities for pupils with limited English proficiency.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

It is anticipated that any costs to school districts would be minimal and will be absorbed using existing staff and resources, and/or State funded technical assistance resources.

It is further anticipated that the Statewide cost associated with the training of required documents will be minimal and will be covered through State and federal funds. For the 2008-2009 school year and thereafter, it is expected that costs associated with the development of the comprehensive plans will decrease since some of the activities were only carried out initially during the training phases and development of the initial plan.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements on school districts. Economic feasibility is addressed above under compliance costs.

MINIMIZE ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing requirements or to exempt school districts and eligible agencies from coverage by the rule. Nevertheless, in establishing the uniform provisions necessary to conform Part 154 of the Commissioner's Regulations to the statute, the Department has considered a variety of options and selected those approaches that will achieve the goal of increased program quality while minimizing additional costs and compliance requirements upon school districts. Since school districts are directly responsible for the instruction of LEP pupils, it is not feasible to apply any of the approaches for minimizing adverse economic impacts pursuant to State Administrative Procedure Act section 202-b(1).

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule will be solicited from school districts through the offices of the district superintendents of each supervisory

district in the State. The proposed amendment will also be posted on the Department's New York State Bilingual Education (NYSBEN) web site to facilitate a wide distribution. Additionally, the proposed amendment will be shared with the Department's Committee of Practitioners on the Education of English Language Learners, the regional Bilingual Education Technical Assistance Centers and selected professional organizations.

Rural Area Flexibility Analysis**TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to all school districts in the State that receive total foundation aid, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to conform Part 154 of the Regulations of the Commissioner of Education to Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007.

Section 154.3 prescribes the specific requirements for school districts receiving total foundation aid. The amendment requires that each school district receiving foundation aid:

(1) develop a comprehensive plan. The plan must include the district's philosophy for the education of pupils with limited English proficiency (LEP) and the administrative practices and procedures to screen, identify and annually evaluate LEP pupils. The plan must also include a description of the bilingual or English as a Second Language (ESL) program to be implemented, the criteria for placement in such programs, the types of curricular and extracurricular activities and the program management procedures;

(2) distribute school related information to parents in the language that they understand;

(3) submit assessment data to the Department as prescribed by the Commissioner;

(4) refer students suspected of having a disability to the Committee on Special Education;

(5) submit a signed statement of assurances certifying that pupils with limited English proficiency will have access and equal opportunities to participate in appropriate instructional programs, extracurricular activities and support services; that such students will be provided the minimum language arts requirements prescribed under Part 154 of the Commissioner's Regulations; that teachers in free-standing and bilingual education programs are appropriately certified; and that programs for pupils with limited English proficiency will be administered in accordance with applicable statutes, regulations and the district's plan;

(6) submit a report by building of the number of students identified, served and who took the New York State English as a Second Language Achievement Test;

(7) submit a report of the number of teachers and their qualifications;

(8) submit a report of the expenditures of State, local and federal funds in the prior year for programs and activities for pupils with limited English proficiency.

The proposed amendment does not impose any additional professional services requirements on school districts.

COMPLIANCE COSTS:

It is anticipated that any costs to school districts would be minimal and will be absorbed using existing staff and resources, and/or State funded technical assistance resources.

It is further anticipated that the Statewide cost associated with the training of required documents will be minimal and will be covered through State and federal funds. For the 2008-2009 school year and thereafter, it is expected that costs associated with the development of the comprehensive plans will decrease since some of the activities were only carried out initially during the training phases and development of the initial plan.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law section 3204(2-a), as amended by Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing requirements or to exempt school districts and eligible agencies from coverage by the rule. Nevertheless, in establishing the uniform provisions necessary to conform Part 154 of the Commissioner's Regulations to the statute, the Department has considered a variety of options and selected those approaches that will achieve the goal of increased program quality while minimizing additional costs and compliance requirements upon school districts. Because this amendment implements statutory provisions that are applicable to school districts

across the State, it was not possible to provide for a lesser standard or an exemption for school districts in rural areas.

RURAL AREA PARTICIPATION:

The proposed amendment will be sent for review and comment to members of the Department's Rural Advisory Committee, which includes representatives from rural areas. The proposed amendment will also be posted on the Department's New York State Bilingual Education (NYS-BEN) web site to facilitate a wide distribution. Additionally, the proposed amendment will be shared with the Department's Committee of Practitioners on the Education of English Language Learners, the regional Bilingual Education and Technical Assistance Centers and selected professional organizations.

Job Impact Statement

The proposed amendment relates to the establishment of revised requirements for the development of comprehensive plans for pupils with limited English proficiency by school districts receiving total foundation aid, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the proposed amendment 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.

EMERGENCY RULE MAKING

State Aid Awards

I.D. No. EDU-26-07-00009-E

Filing No. 998

Filing date: Sept. 18, 2007

Effective date: Sept. 27, 2007

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

Action taken: Amendment of section 150.2 and addition of section 150.4 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 6401-a(4), and L. 2007, ch. 57, Part E-4

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

Specific reasons underlying the finding of necessity: Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, became effective on July 1, 2007. This section authorizes the Commissioner of Education to award State aid to certain eligible independent colleges and universities for high needs nursing programs. In order to implement the requirements of section 6401-a of the Education Law, the proposed amendment is needed to establish the eligibility criteria for such awards, the application process and the reporting requirements for independent colleges and universities that wish to apply for State aid for high needs nursing programs under this section.

The proposed amendment was adopted at the June 25-26, 2007 Regents meeting as an emergency measure, effective July 1, 2007, in order to immediately comply with the State statute. A Notice of Proposed Rule Making was published in the *State Register* on June 27, 2007. The proposed amendment has been adopted as a permanent rule at the September 10-11, 2007 Regents meeting. Pursuant to the State Administrative Procedure Act section 203(1), the earliest the adopted rule can become effective is upon its publication in the *State Register* on October 3, 2007. However, the June emergency rule will expire on September 26, 2007, 90 days after its filing with the Department of State on June 29, 2007. A lapse in the rule's effectiveness would disrupt the application process of eligible independent colleges and universities for State aid for high needs nursing programs for the 2007-2008 academic year, awarded pursuant to section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, and would disrupt the colleges and universities timely receipt of such awards.

A second emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: State aid awards for high needs nursing programs at certain independent colleges and universities.

Purpose: To set forth the eligibility criteria and the requirements and procedures for certain eligible independent colleges and universities to follow when applying for, or awarding, State aid awards for high needs

nursing programs in order to implement the requirements of chapter 57 of the Laws of 2007.

Text of emergency rule: 1. Section 150.2 of the Regulations of the Commissioner of Education is amended, effective September 27, 2007, as follows:

No portion of any State aid paid to an institution of higher education pursuant to the provisions of [section] sections 6401 and 6401-a of the Education Law shall be used for the religious instruction or religious worship or for the advancement or inhibition of religion.

2. Section 150.4 of the Regulations of the Commissioner of Education is added, effective September 27, 2007, as follows:

§ 150.4 State aid for high needs nursing program.

(a) Purpose. The purpose of this section is to establish the eligibility criteria and requirements for certain independent colleges and universities applying for State aid awards for high needs nursing programs pursuant to section 6401-a of the Education Law.

(b) Definitions. For purposes of this section:

(1) Enrolled shall mean that a student is registered full-time in the fall semester at an eligible institution in an associate or baccalaureate degree program in nursing that is registered by the department pursuant to section 52.12 of this Title;

(2) Eligible institution shall mean a higher education institution that meets the following requirements:

(i) the institution shall be a non-profit or independent college or university incorporated by the Regents or the Legislature that is geographically located in New York State;

(ii) the institution shall maintain an earned nursing degree program registered by the department, culminating in an associate degree or higher, excluding any online nursing degree program offered via the internet;

(iii) the institution shall meet such standards of educational quality applicable to comparable public institutions of higher education, as may be from time to time established by the Regents; and

(iv) the institution shall meet the requirements for State aid under the constitutions of the United States and the State of New York.

(3) Fall semester means that part of the academic year that begins between late August and November 1.

(4) Department shall mean the New York State Education Department.

(5) Full-time student shall mean a student that is enrolled at an eligible institution in full-time study, as defined in section 145-2.1 of this Title.

(6) High needs nursing program shall mean any nursing program registered by the department pursuant to section 52.12 of this Title at an eligible institution as defined in this section, and shall not include online or internet nursing degree programs.

(c) Application. Eligible institutions that wish to apply for State aid pursuant to section 6401-a of the Education Law shall submit an application to the commissioner by September 15 of the academic year in which they are seeking State aid, on a form prescribed by the commissioner.

(d) Awards.

(1) The commissioner shall grant State aid awards to each eligible institution within the amounts appropriated for such purpose, not to exceed one million dollars and based on the availability of funds. Such awards shall be computed by multiplying an amount not to exceed two hundred fifty dollars for each student enrolled in a high needs nursing program at an eligible two year degree institution and an amount not to exceed five hundred dollars for each student enrolled in a high needs nursing program at an eligible four year degree institution in the fall semester preceding the annual period for which such an apportionment is made.

(2) For purposes of this section, an eligible two year degree institution which has received authority to confer baccalaureate degrees shall continue to be considered an eligible two year degree institution until such time as it has actually begun to confer baccalaureate degrees.

(3) In the case of a jointly registered nursing degree program at more than one eligible institution, the eligible institution granting the degree shall receive the State aid award under this section.

(4) In the event that the appropriation cannot fully fund such awards, the commissioner will appropriate the monies to each eligible institution proportionately based on the amount of available funds and pursuant to a schedule determined by the commissioner.

(e) Institutional reports. Beginning July 1, 2007, each eligible institution applying for State aid pursuant to section 6401-a of the Education Law shall submit an annual certification by their chief executive officer to

the commissioner by November 15 of each year, certifying the number of students enrolled in a high needs nursing program at such institution for the fall semester and any other information the commissioner may require, in a form prescribed by the commissioner.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-26-07-00009-P, Issue of June 27, 2007. The emergency rule will expire November 16, 2007.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent colleges and universities and to promulgate any regulations necessary to implement the requirements of this section.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives set forth in the aforementioned statutes in that it establishes the eligibility criteria and the requirements and procedures certain independent colleges and universities and the Commissioner of Education must follow when applying for, or awarding state aid for high needs nursing programs, in order to implement the requirements of Chapter 57 of the Laws of 2007.

3. NEEDS AND BENEFITS:

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State. In order to conform with the new requirements set forth in section 6401-a of the Education Law, the proposed amendment establishes eligibility criteria and the requirements and procedures for certain eligible institutions and the Commissioner of Education to follow when applying for, and awarding, state aid under this section.

Specifically, the amendment makes the following changes:

The amendment authorizes the Commissioner of Education to grant State aid awards to each eligible institution within the amounts appropriated for such purpose, not to exceed one million dollars and based on the availability of funds. In the event that the appropriation cannot fully fund such awards, the proposed amendment allows the Commissioner to appropriate the monies to each eligible institution proportionately based on available funds and pursuant to a schedule determined by the Commissioner.

The awards are computed by multiplying an amount not to exceed two hundred fifty dollars for each full-time student enrolled in a high needs nursing program at an eligible two year degree institution and an amount not to exceed five hundred dollars for each full-time student enrolled in a high needs nursing program at an eligible four year degree institution in the fall semester preceding the annual period for which such an appropriation is made.

This amendment defines an eligible institution as a higher education institution that meets the following requirements: (1) the institution must be a non-profit or independent college or university incorporated by the Regents or the Legislature that is geographically located in New York State; (2) the institution must maintain an earned nursing degree program registered by the department, culminating in an associate degree or higher, excluding any online nursing degree program offered via the internet; (iii) the institution must meet such standards of educational quality applicable to comparable public institutions of higher education, as may be from time to time established by the Regents; and (iv) the institution must meet the requirements for State aid under the constitutions of the United States and the State of New York. The amendment also defines high needs nursing program as any nursing program registered by the department at an eligible institution and shall not include online or internet nursing degree programs.

The proposed amendment requires each eligible institution that wishes to apply for State aid pursuant to this section to apply to the Commissioner by September 15 of the academic year in which they are seeking State aid. It also requires each eligible institution applying for State aid under this

section to submit a certification by their chief executive officer to the Commissioner, by November 15 of each year, certifying the number of full-time students enrolled in a high needs nursing program at such institution in the fall semester.

The proposed amendment clarifies that an eligible two year degree institution which has received authority to confer bachelor degrees shall continue to be considered an eligible two year degree institution until such time as it has actually begun to confer bachelors' degrees. Also, in the case of a jointly registered nursing degree program at more than one eligible institution, the proposed amendment clarifies that the eligible institution granting the degree shall receive the State aid award under this section.

Other than the annual application and certified enrollment report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities, including those located in rural areas. The amendment will not require regulated parties to acquire professional services.

4. COSTS:

a. Costs to the State government. The proposed amendment will not impose additional costs on State government.

b. Costs to local government. None.

c. Costs to private regulatory parties. The proposed amendment may impose negligible costs on regulated entities when applying for state aid awards under Section 6401-a of the Education Law. Specifically, an annual negligible cost may be imposed on regulated parties to complete the required application form and the certified enrollment report.

d. Costs to the regulatory agency. The proposed amendment, which provides for State aid for high needs nursing programs for certain independent institutions of higher learning will add one time negligible additional responsibilities for the State Education Department to develop a basic application and an enrollment report form. The Department will administer the program using existing staff and resources.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any new mandates on local governments.

6. PAPERWORK:

Other than the annual application and certified enrollment report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities, including those located in rural areas. The amendment will not require regulated parties to acquire professional services.

7. DUPLICATION:

The proposed amendment does not duplicate any other existing State or Federal requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment at this time.

9. FEDERAL STANDARDS:

The proposed amendment provides for State aid for high needs nursing programs for certain independent institutions of higher learning, and requires institutions to be eligible for state aid under the provisions of the constitution of the United States and the constitution of the State of New York.

10. COMPLIANCE SCHEDULE:

Consistent with the effective date of the statute, the proposed amendment applies to certain eligible independent colleges and universities applying for state aid for high needs nursing programs beginning on July 1, 2007.

Regulatory Flexibility Analysis

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State. In order to conform with the new requirements set forth in Section 6401-a of the Education Law, the proposed amendment establishes the eligibility criteria and requirements and procedures for eligible institutions and the Commissioner of Education to follow when applying for, and awarding state aid under this section.

Based on 2005-2006 academic year data, the Department estimates that approximately 43 colleges and universities will be eligible for state aid for high needs nursing programs under Section 6401-a of the Education Law. However, in order to be eligible for state aid under this section, the institution must be a non-profit or independent college or university. Accordingly, the institutions applying for state aid under this section are not small businesses.

Because it is evident from the nature of the proposed amendment that it will not affect small businesses or local governments, no further steps were

needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to certain independent colleges and universities in New York State with high needs nursing programs registered by the State Education Department. Based on 2005-2006 academic year data, the Department estimates that approximately 43 colleges and universities will be eligible for state aid under the proposed regulation. Of these, approximately 12 are located in rural areas, defined as the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State. In order to conform with the new requirements set forth in Section 6401-a of the Education Law, the proposed amendment establishes eligibility criteria and the requirements and procedures for certain eligible institutions and the Commissioner of Education to follow when applying for, and awarding, state aid under this section.

Specifically, the amendment makes the following changes:

The amendment authorizes the Commissioner of Education to grant State aid awards to each eligible institution within the amounts appropriated for such purpose, not to exceed one million dollars and based on the availability of funds. In the event that the appropriation cannot fully fund such awards, the proposed amendment allows the Commissioner to appropriate the monies to each eligible institution proportionately based on available funds and pursuant to a schedule determined by the Commissioner.

The awards are computed by multiplying an amount not to exceed two hundred fifty dollars for each full-time student enrolled in a high needs nursing program at an eligible two year degree institution and an amount not to exceed five hundred dollars for each full-time student enrolled in a high needs nursing program at an eligible four year degree institution in the fall semester preceding the annual period for which such an appropriation is made.

This amendment defines an eligible institution as a higher education institution that meets the following requirements: (1) the institution must be a non-profit or independent college or university incorporated by the Regents or the Legislature that is geographically located in New York State; (2) the institution must maintain an earned nursing degree program registered by the department, culminating in an associate degree or higher, excluding any online nursing degree program offered via the internet; (iii) the institution must meet such standards of educational quality applicable to comparable public institutions of higher education, as may be from time to time established by the Regents; and (iv) the institution must meet the requirements for State aid under the constitutions of the United States and the State of New York. The amendment also defines high needs nursing program as any nursing program registered by the department at an eligible institution and shall not include online or internet nursing degree programs.

The proposed amendment requires each eligible institution that wishes to apply for State aid pursuant to this section to apply to the Commissioner by September 15 of the academic year in which they are seeking State aid. It also requires each eligible institution applying for State aid under this section to submit a certification by their chief executive officer to the Commissioner, by November 15 of each year, certifying the number of full-time students enrolled in a high needs nursing program at such institution in the fall semester.

The proposed amendment clarifies that an eligible two year degree institution which has received authority to confer bachelor degrees shall continue to be considered an eligible two year degree institution until such time as it has actually begun to confer bachelors' degrees. Also, in the case of a jointly registered nursing degree program at more than one eligible institution, the proposed amendment clarifies that the eligible institution granting the degree shall receive the State aid award under this section.

Other than the annual application and certified enrollment report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities, including those located in rural areas. The amendment will not require regulated parties to acquire professional services.

3. COSTS:

The proposed amendment implements specific statutory requirements for certain eligible independent colleges and universities. However, the proposed regulation may result in minimal costs to these regulated entities in order to complete the application form and the certified enrollment report.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements the requirements of Chapter 57 of the Laws of 2007. The statute makes no exception and does not impose different requirements for eligible independent colleges and universities located in rural areas. The proposed amendment has been carefully drafted to implement the statutory mandates. The intent of the statute is to establish the eligibility criteria and the requirements and procedures for eligible institutions and the Commissioner of Education to meet, when applying for and/or awarding state aid under this section. Because of the nature of the proposed amendment, imposing different standards for rural entities would be inappropriate.

5. RURAL AREA PARTICIPATION:

A copy of the proposed amendment was shared with each of the independent colleges and universities in New York State with high needs nursing programs, including those located in rural areas.

In addition, comments on the proposed amendment were solicited from the Rural Education Advisory Committee, whose membership includes, among others, representatives of school districts, BOCES, business interests, and government entities located in rural areas.

Job Impact Statement

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid to certain eligible independent colleges and universities for high needs nursing programs. In order to implement the requirements of section 6401-a, the proposed amendment is need to establish the eligibility criteria for such awards, the application process and the reporting requirements for independent colleges and universities that wish to apply for State aid for high needs nursing programs under this section.

The amendment implements statutory requirements and will have no impact on jobs or employment opportunities. Because it is evident from the nature of this proposed amendment 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 was not prepared.

NOTICE OF ADOPTION

Special Education Programs and Services

I.D. No. EDU-12-07-00004-A

Filing No. 1003

Filing date: Sept. 18, 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: Amendment of sections 100.2, 120.6, 200.1-200.9, 200.13, 200.14, 200.16, 200.22 and 201.2-201.11 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 3208(1-5), 3209(7), 3214(3), 3602-c(2), 3713(1) and (2), 4002(1-3), 4308(3), 4355(3), 4401(1-11), 4402(1-7), 4403(3), 4404(1-5), 4404-a(1-7) and 4410(13)

Subject: Special education programs and services.

Purpose: To conform the commissioner's regulations to the Individuals with Disabilities Education Act (IDEA) (20 USC 1400 *et seq.*), as amended by Public Law 108-446, and the final amendments to 34 CFR 300; ensure consistency in procedural safeguards; promote timely evaluations and services; and facilitate services in the least restrictive environment for students with disabilities.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-12-07-00004-P, Issue of March 21, 2007.

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

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the *State Register* on July 18, 2007, the State Education Department received the following new comments that were not otherwise addressed in the Summary of Assessment of Public Comment published in the *State Register* on July 3, 2007.

Section 100.2(ii) - Response to Intervention (RTI) Programs

COMMENT:

Add a new section (d) which states that school districts must notify parents in writing of how, and the frequency with which, progress reporting will take place throughout the RTI process. Require districts to provide information on the district's RTI program to all parents of students who are participating in the RTI program. Add that the school district must also select and define the timeframe for completion of the RTI process and report to the Department which program it has selected and the scientific research upon which the program is based.

DEPARTMENT RESPONSE:

The proposed regulation requires parent notification when a student is receiving instructional interventions beyond that provided to all students in the general education classroom that specifies the strategies for increasing the student's rate of learning, the amount and nature of the data to be collected and the general education services to be provided to the student. The school district must select and define the components of the RTI program and therefore the decision regarding a time period for participation of a student in the RTI process is best left to the professionals who have knowledge about the individual student and the RTI instructional model used in the district. The proposed regulation requires each board of education to adopt written policy that establishes administrative practices and procedures for implementing schoolwide approaches in order to remediate a student's performance prior to referral for special education, which may include an RTI process. Such policy is subject to review by the Department upon request.

Section 200.1(ff) - Transition Services

COMMENT:

Define the terms "results oriented" and "coordinated set of activities."

DEPARTMENT RESPONSE:

It is not necessary to define these terms in regulations. "Results oriented" in the context of transition services is generally understood to refer to a process that focuses on improving academic and functional achievement to assist the student to reach his or her post secondary and annual goals. "Coordinated set of activities" is generally understood to mean that there is a relationship among transition services and activities that is reasonably calculated to assist the student in moving from school to post-school activities based on the individual student's needs, taking into account the student's strengths, preferences and interests.

Section 200.4(b)(iv) - Observation

COMMENT:

Add language to section 200.4(b)(iv) to give the evaluation team the discretion to determine "an environment appropriate for a student of that age" for observations of students of less than school age or out of school.

DEPARTMENT RESPONSE:

It is not necessary to add a regulation to address this comment since the CSE is responsible to initiate the evaluation. For a child who is less than school age or out of school, the determination of the environment in which to conduct an observation can only be made on a case-by-case basis and the committee on special education (CSE) is in the best position to make this determination.

Section 200.4 - Individualized Education Program (IEP)

COMMENT:

Include a specific timeline of not later than 30 days after the CSE meeting in which the CSE must provide a copy of the IEP to the parent to allow the parent time to review the IEP prior to the start of the school year.

DEPARTMENT RESPONSE:

We decline to further regulate when a parent must be provided a copy of the IEP since current section 200.5(a) requires that a parent be provided prior written notice of the CSE's recommendation a reasonable time before the IEP is implemented.

Section 200.4(j) - Additional Procedures for Identifying Students with Learning Disabilities (LD)

COMMENT:

Remove language that allows the 60-day timeline for the completion of the individual evaluation to be extended by mutual agreement of the student's parents and the CSE. Remove the sunset date for the use of severe discrepancy criteria in kindergarten through grade four in the area of reading until and only when RTI has been effectively demonstrated on a statewide basis. Retain section 200.4(j)(5)(ii) to allow a school to use a student's pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development in LD determination.

DEPARTMENT RESPONSE:

The proposed language allows the parent and the CSE to agree to extend the time period in which to complete the initial evaluation when the purpose is to gather further evaluative information on how the student responds to research based instruction and interventions. The Department believes that it would be appropriate to reach agreement for this purpose and federal regulations provide the parent with the right to reach such an agreement. With regard to the sunset date for the use of severe discrepancy criteria, the use of a severe discrepancy criteria to determine if a student has a LD in the area of reading is generally not supported by the research. There are many school districts currently implementing RTI programs and the Department believes five years is a sufficient time period for most other schools to develop RTI programs. In addition, the State's criteria after 2012 will continue to allow a CSE to determine that an individual student has a LD based on the student's pattern of strengths and weaknesses in performance, achievement, or both, relative to age or state approved grade level standards. The comment to retain using a student's pattern or strengths and weaknesses in the eligibility determination for a student suspected having LD is supportive in nature and no response is necessary.

Section 200.5(g) - Independent Educational Evaluations (IEE)

COMMENT:

For clarity and consistency across the State, reference to the "school district criteria" in sections 200.5(g)(1)(v) and 200.5(g)(1)(vi)(a) relating IEEs should be changed to the "State Education Department criteria."

DEPARTMENT RESPONSE:

The State's regulation conforms to federal regulations which references criteria for IEEs as developed by individual school districts. Since such criteria includes the location of the IEE and the qualifications of the examiner must be the same as the criteria the school district uses when it initiates an evaluation, it is not appropriate for State to develop a school district's criteria for IEEs.

Section 200.6 - Continuum of Services

COMMENT:

Require that the maximum number of special education students receiving integrated co-teaching services not exceed one-third of the class enrollment or 12 students, whichever number is lower. Limit the number of students with disabilities to no more than five students in a class. Delete proposed language to limit co-teaching services to no more than 12 students with disabilities to avoid overrepresentation of special education students in the class.

DEPARTMENT RESPONSE:

The proposed regulation establishes a maximum number of students with disabilities receiving co-teaching services in a class. Recommendations for each student receiving co-teaching services must be made on an individual basis in accordance with the individual needs of the student. It is unlikely that the number of students with disabilities in such classes would exceed the number of nondisabled students, since both a general education teacher and a special education teacher must be assigned to the class. To meet the individual needs of the students in such classes, schools could assign additional staff to the class, such as teaching assistants. This regulation is expected to maximize the participation of students with disabilities in general education classes and curriculum. An integrated co-teaching classroom composed of more students with disabilities than nondisabled students would be inconsistent with the intent of this option on the continuum of services.

Other

COMMENT:

One commenter urged Governor Spitzer to sign Assembly bill 5396-A to restore the burden of proof in an impartial hearing to school districts.

DEPARTMENT RESPONSE:

The comment is beyond the scope of the proposed rule making.

NOTICE OF ADOPTION**Loan of Instructional Computer Hardware**

I.D. No. EDU-24-07-00025-A

Filing No. 992

Filing date: Sept. 18, 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: Amendment of sections 21.3 and 100.12 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 753(1) and 754(1); and L. 2007, ch. 57, sections 7-a and 7-b

Subject: Loan of instructional computer hardware.

Purpose: To implement Education Law sections 753 and 754, as added by chapter 57 of the Laws of 2007, to provide for the loan of instructional computer hardware from public school districts to nonpublic school students.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. EDU-24-07-00025-EP, Issue of June 13, 2007.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Students with Limited English Proficiency

I.D. No. EDU-26-07-00008-A

Filing No. 1001

Filing date: Sept. 18, 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: Amendment of Part 154 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 215, 2117(1), 3204(2), (2-a), (3) and (6); and L. 2007, ch. 57, section 10

Subject: Students with limited English proficiency.

Purpose: To prescribe requirements for the development of comprehensive plans for students with limited English proficiency by school districts pursuant to Education Law, section 3024, as amended by chapter 57 of the Laws of 2007, and to otherwise conform Part 154 of the commissioner's regulations to the statute.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-26-07-00008-P, Issue of June 27, 2007.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

State Aid Awards

I.D. No. EDU-26-07-00009-A

Filing No. 997

Filing date: Sept. 18, 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: Amendment of section 150.2 and addition of section 150.4 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 6401-a(4); and L. 2007, ch. 57, part E-4

Subject: State aid awards for high needs nursing programs at certain independent colleges and universities.

Purpose: To set forth the eligibility criteria and the requirements and procedures for certain eligible independent colleges and universities to follow when applying for, or awarding, State aid awards for high needs nursing programs in order to implement the requirements of chapter 57 of the Laws of 2007.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-26-07-00009-P, Issue of June 27, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Anne Marie Koschnick, Legal Assistant, Office of Coun-

sel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Diagnostic Screening for Students who are New Entrants or who have Low Test Scores in Reading or Mathematics

I.D. No. EDU-26-07-00011-A

Filing No. 996

Filing date: Sept. 18, 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: Amendment of Part 117 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 3208(5) and 4403(3)

Subject: Diagnostic screening for students who are new entrants or who have low test scores in reading or mathematics.

Purpose: To provide for the diagnostic screening of students who are new entrants to school or who have low test scores on the statewide reading or mathematics assessments; and provide consistency between definitions in Part 117 and other provisions of the commissioner's regulations, specifically, conforming the definition of "handicapping condition" to the definitions of a "preschool student with a disability" and a "student with a disability".

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-26-07-00011-P, Issue of June 27, 2007.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Program Requirements for Students in Prekindergarten and Kindergarten

I.D. No. EDU-26-07-00012-A

Filing No. 995

Filing date: Sept. 18, 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: Amendment of section 100.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 215 (not subdivided), 305(1) and (2), 308 (not subdivided) and 309 (not subdivided)

Subject: Program requirements for students in prekindergarten and kindergarten.

Purpose: To align program requirements for prekindergarten and kindergarten programs operated by school districts and voluntarily registered nonpublic schools with those established for State-funded universal kindergarten programs.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-26-07-00012-P, Issue of June 27, 2007.

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

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on June 27, 2007, the State Education Department received the following comment on the proposed rule.

COMMENT:

Currently, section 100.3(a)(3) requires schools operating prekindergarten and kindergarten programs to develop procedures "to actively involve each child's parents or guardians in such programs." The proposed

rule would replace this with a requirement in new section 100.3(a)(4) to develop procedures "to ensure the active engagement of parents and guardians in the education of their children." The commenter requested clarification on whether the proposed change in phraseology is intended to change the focus of the regulations with regard to parental involvement.

DEPARTMENT RESPONSE:

The intent of the proposed new language, as well as the existing language, is to reinforce the importance of parents playing an active role in the education of their children. The terms parent involvement and parent engagement are used interchangeably in much of the literature on this subject. The revised Board of Regents policy on parent and family partnerships defines partnership as active engagement between parents and families and the education community supporting student achievement. The proposed language in section 100.3(a)(4) is consistent with the Regents policy and no change to the proposed rule is required.

NOTICE OF ADOPTION

Requirements for Teachers' Certification and Teaching Practice

I.D. No. EDU-26-07-00013-A

Filing No. 994

Filing date: Sept. 18, 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: Amendment of Subparts 80-1, 80-3, 80-4 and 80-5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 208 (not subdivided), 305(1), (2) and (7), 308 (not subdivided), 3001(2), 3004(1), 3006(1)(b), 3007 (not subdivided) and 3009

Subject: Requirements for teachers' certification and teaching practice.

Purpose: To clarify existing standards and procedures that must be met by classroom teachers, school leaders and pupil personnel professionals when seeking certification; and provide flexibility to accept candidates who substantially meet certain certification requirements and/or who have a valid certificate from another state or an authorization to practice from another country evidencing knowledge, skills and abilities comparable to those required for certification in New York State.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-26-07-00013-P, Issue of June 27, 2007.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Student Eligibility for the Higher Education Opportunity Program

I.D. No. EDU-26-07-00014-A

Filing No. 993

Filing date: Sept. 18, 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: Amendment of section 27-1.1 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 6451(1)

Subject: Student eligibility for the Higher Education Opportunity Program.

Purpose: To update the current economic eligibility criteria for the Higher Education Opportunity Program at independent colleges and universities.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-26-07-00014-P, Issue of June 27, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Anne Marie Koschnick, Legal Assistant, Office of Coun-

sel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

**EMERGENCY
RULE MAKING**

Setting of Body Gripping Traps on Land

I.D. No. ENV-40-07-00001-E

Filing No. 988

Filing date: Sept. 13, 2007

Effective date: Sept. 13, 2007

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

Action taken: Amendment of section 6.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

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

Specific reasons underlying the finding of necessity: These amendments to the department's trapping regulations are intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons. The regulations will immediately enhance the general welfare by improving the selectivity of trapping when body gripping traps are used. Specifically, the potential for dogs to be captured, injured or killed in these traps will be reduced.

The department first proposed a regulation to address this issue on May 30, 2007 (ENV-22-07-00010-P) and received a large number of comments during the 45-day public comment period. Consequently, the department is making significant revisions to the original proposed rule, and will be filing a Notice of Revised Rule Making with the Department of State for publication in the *State Register*. The Revised Rule Making will provide for an additional 30 day comment period. However, the department has determined that, in order to protect the general welfare, it is necessary to adopt this regulation on an emergency basis so that it will be in effect for the 2007-2008 trapping season, which begins on October 25, 2007.

These amendments are necessary to protect dogs that may come in contact with a trap while the dogs are being walked by their owners or are being used for hunting. At the same time, the regulation should not diminish the effectiveness of traps used for catching the intended furbearers, primarily fisher and raccoon.

Subject: Setting of body gripping traps on land.

Purpose: To prevent the capture of dogs in body gripping traps on land.

Text of emergency rule: See Appendix in the back of this issue of the *Register*.

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 December 11, 2007.

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

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

Regulatory Impact Statement

1. Statutory Authority

Section 11-0303 Environmental Conservation Law (ECL) addresses the general purposes and policies of the Department of Environmental Conservation (Department) in managing fish and wildlife resources. Sections 11-1101 and 11-1103 of the ECL authorize the Department to regu-

late the taking, possession and disposition of beaver, fisher, otter, bobcat, coyote, fox, raccoon, opossum, weasel, skunk, muskrat, pine marten and mink ("furbearers"). This regulation addresses restrictions on the use of certain sizes of body gripping traps, traps which are used primarily to take fisher and raccoon.

2. Legislative Objectives

The legislative objective behind the statutory provisions listed above is to authorize the Department to establish the methods by which furbearers may be taken by trapping.

3. Needs and Benefits

These amendments to the Department's trapping regulations are intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons. The regulations will immediately enhance the general welfare by improving the selectivity of trapping when body gripping traps are used. Specifically, the potential for dogs to be captured, injured or killed in these traps will be reduced.

The Department first proposed a regulation to address this issue on May 30, 2007 (ENV 22-07-00010-P) and received a large number of comments during the 45-day public comment period. Consequently, the Department is making significant revisions to the original proposed rule, and will be filing a Notice of Revised Rulemaking with the Department of State for publication in the *State Register*. The Revised Rulemaking will provide for an additional 30 day comment period. However, the Department has determined that, in order to protect the general welfare, it is necessary to adopt this regulation on an emergency basis so that it will be in effect for the 2007-2008 trapping season, which begins on October 25, 2007.

The regulation would address the manner in which body gripping traps, measuring five and one-half inches or more in the open position, are set on land with the aid of baits, lures, or other attractants. Body-gripping traps are to be measured in accordance with paragraph 11-1101(6)(b) of the Environmental Conservation Law (ECL), which reads in part as follows:

The dimension of the body gripping trap shall be ascertained when the trap is set in the extreme cocked position and shall be the maximum distance between pairs of contacting body gripping surfaces except for rectangular devices which shall be the maximum perpendicular distance between pairs of contacting body gripping surfaces.

The Department has included diagrams in the regulation to clearly demonstrate how body-gripping traps are measured. For further clarity, the Department has also included diagrams in the regulations that illustrate leg-gripping traps ("foothold traps") and how they are measured pursuant to ECL 11-1101(6)(a).

For traps of this size set on land, the regulations require that certain precautions be taken to avoid capturing a dog in body-gripping traps. These traps must be set in compliance with one of three options: (1) set four feet above the ground; or (2) set within one of three different types of enclosures which have restricted openings and other features designed to prevent a dog from entering and triggering the trap; or (3) set within an enclosure which is fastened to a tree or post in a vertical position, has only one opening which faces the ground, and is set so that the opening is no more than six inches from the ground.

The regulations also restrict the setting of body-gripping traps that are set without the use of baits, lures, or other attractants in so called "blind run sets." In these cases, trappers will not be allowed to use body-gripping traps more than six inches in size, and when using smaller traps (six inches or less), they must be set close to the ground, below the typical level of a domestic dog.

The also prohibit the setting of body-gripping traps on public lands within one hundred feet of "trails," which are defined as designated, marked, and maintained paths or ways designed for recreational, non-motorized traffic. The Department selected the one-hundred foot distance because there is an existing restriction in the Environmental Conservation Law that prohibits the setting of traps within one-hundred feet of homes, and a person walking a dog could reasonably be expected to be capable of controlling a dog with voice and visual commands within a distance of about one-hundred feet. The purpose of this restriction is to provide further protection to dogs being walked along trails. These restrictions do not effect traps set in water on public lands along trails, and do not effect the setting of leg-gripping traps because the purpose of this rulemaking is to reduce or eliminate the killing of dogs captured in body-gripping traps. However, while monitoring the implementation of the regulation, the Department will also closely monitor and evaluate any incidents involving the capture of dogs in leg-gripping traps within one hundred feet of trails on public lands.

The traps that will be impacted by this rule are mainly used to target raccoons and fisher. Raccoons and fisher are smaller than most dogs and are well adapted for crawling into small holes to find food or shelter or both. These species are natural cavity dwellers. Dogs, on the other hand, are generally not well adapted for climbing into small holes.

The regulations require that body-gripping traps used in conjunction with baits, lures, or other attractants be set within a container designed to exclude dogs. The regulations require that traps be set at least four inches from the opening of an enclosure with a six inch or smaller opening; and that traps be set at least eighteen inches from the opening of an enclosure with ten inch or smaller openings. Traps placed in enclosures made of natural materials are allowed if they are set at least eight inches from an entrance hole, and the entrance hole does not exceed six inches measured vertically. A trap that is set in an enclosure affixed to a tree or post must have its only opening positioned no more than 6 inches from the ground.

Collectively, these choices of design options provide flexibility for trappers while greatly reducing the chance that a dog may be captured, injured, or killed in body-gripping traps. Department staff believe that such requirements will make these traps very selective to catching raccoons and fisher, and relatively inaccessible to dogs. Similar techniques have been used in other states with effectiveness.

Traps adapted pursuant to the requirements should remain effective for capturing raccoons and fisher because these species readily enter small holes to seek shelter or food or both. For this reason, the modified trap sets are not expected to significantly reduce the ability of trappers to catch these species. However, the rule will increase the selectivity of trapping and reduce or eliminate the capture of most dogs. A very small dog, however, may still be vulnerable to capture, injury, or death.

If a trapper opts to comply with the regulation by placing the trap at least four feet above the ground, dogs will be at very low risk of capture because the traps will be out of reach of most dogs. Raccoons and fisher, however, are well adapted to climbing, and traps will remain effective in catching these species if they are placed four feet or more above ground. The Environmental Conservation Law prohibits the suspension of animals caught in traps, and trappers will need to use techniques that will prevent the suspension in the air of any animal caught above the ground in a body-gripping trap.

The regulation is needed to protect dogs that may come in contact with a trap while the dogs are being walked by their owners or are being used for hunting. At the same time, the regulation should not negatively affect the effectiveness of traps used for catching the intended furbearers, primarily fisher and raccoon.

4. Costs

Trappers will be required to purchase or construct an enclosure made of wood, metal, plastic, or wire that will be used in the setting of certain body gripping traps. Alternatively, they may fashion an enclosure from natural materials, such as rocks or logs. Additionally, they may choose to set their traps at least four feet above the ground. For trappers who decide to use an enclosure, the Department estimates that trappers will need to spend approximately five (5) dollars in materials to comply with the regulation. In some cases, the expense will be lower because suitable buckets, wire, and lumber may be used to construct the container and are available at very low expense or salvageable as scrap.

5. Local Government Mandates

This rule making does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork

The rules do not impose additional reporting requirements upon the regulated public (trappers).

7. Duplication

There are no other local, state or federal regulations concerning the taking of fisher and raccoons.

8. Alternatives

An alternative to making the changes is to leave the trapping regulations unchanged. However, this would mean that dogs would continue to be vulnerable to capture, injury, or death in traps set for the capture of furbearers.

9. Federal Standards

There are no federal government standards for the taking of fisher and raccoons.

10. Compliance Schedule

Trappers will be required to comply with the new rule as soon as it takes effect.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. Trappers will not be allowed to set body-gripping traps on public lands within one hundred feet of designated and marked trails. The regulations apply statewide.

The regulations do not apply directly to local governments or small businesses. Therefore, the Department has determined that this rule making will not impose an adverse economic impact on small businesses or local governments since it will not affect these entities.

Fisher trappers must report their take to the Department to lawfully possess a trapped fisher. The rule making does not affect this requirement. All other reporting or recordkeeping requirements associated with trapping are administered by the Department. Therefore, the Department has determined that this rule making will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

Based on the above, the Department has concluded that a regulatory flexibility analysis is not required.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulation will apply statewide, and would affect trapping in all rural areas of New York.

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

The purpose of this rule making is to amend the trapping regulations for body gripping traps. It will apply to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. They will also be prohibited from setting body-gripping traps on public lands within one hundred feet of designated and marked trails.

No professional services are needed for trappers to comply with the new regulations. Fisher trappers are currently required to report the harvest of fisher to the Department. The rule making does not affect this requirement. All other reporting or recordkeeping requirements associated with fisher trapping are administered by the Department. There are no reporting requirements for raccoon trappers.

3. Costs:

The cost of equipping a single trap with a dog resistant container is estimated to be \$5 or less in material expenditures. Trappers will be required to purchase or construct suitable boxes, buckets, or wire cages for setting body gripping traps. Alternatively, they may choose to set their traps at least five feet above the ground. For trappers who decide to enclose their traps in a container, the Department estimates that the average trapper will need to spend a total of \$85 (\$5 per trap × an average of 17 traps of the type affected by the regulation) in materials to comply with the regulation. The Department estimates that trappers will spend an additional \$15 on annual maintenance costs. In some cases, the expense will be nearly zero because suitable buckets, wire, and lumber are available at very low expense or salvageable as scrap.

4. Minimizing adverse impact:

The regulations will primarily affect the trapping of fisher and raccoons. They are intended to prevent the capture, injury, or killing of dogs in body-gripping traps. Under the terms of the regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog-resistant container, as specified in the regulations.

The regulations should protect dogs without reducing trapper effectiveness in trapping raccoon and fisher. These requirements are not expected to significantly change the number of trappers or the frequency of trapping in rural areas.

5. Rural area participation:

Prior to proposing this regulation, the Department conducted seminars in all areas of the State to teach trappers about techniques to avoid catching dogs, and incorporated these techniques in the Department's mandatory trapper education curricula. The Department also published information on methods to avoid catching dogs. This publication was sent to all licensed trappers in the State of New York on two separate occasions. The Department has adopted this regulation because it is essential that all trappers use techniques to avoid the capture and killing of dogs in body-gripping traps.

Job Impact Statement

The purpose of this rule making is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies statewide to traps set on land which have an opening that measures five and one-half inches or larger.

Due to the size of the trap involved, this regulation will primarily affect the trapping of fisher and raccoons. Under the terms of the regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog resistant container, as specified in the regulations. The proposal also prohibits the setting of body-gripping traps on lands within one hundred feet of designated and marked trails.

Trappers derive only a small portion of their annual income from the sale of animals taken by trapping. Moreover, the rule making is not expected to significantly change the number of participants (trappers), the frequency of participation in the regulated activities, or trapping success by each trapper. The regulations do not prohibit trapping activity, so long as each trap complies with the measures designed to protect dogs. Effective methods for capturing fisher and raccoons will remain available to trappers under the regulations, while the likelihood of injuring or killing a dog will be reduced, if not eliminated. For these reasons, the Department anticipates that this rule making will have no negative impacts on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

EMERGENCY RULE MAKING

Special Fish Regulations for the Salmon River

I.D. No. ENV-40-07-00003-E

Filing No. 989

Filing date: Sept. 14, 2007

Effective date: Sept. 14, 2007

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

Action taken: Amendment of Part 10 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 10.2(g) of NYCRR designates catch and release, fly-fishing only areas on the Salmon River. The lower fly fishing catch and release area, which is ¼ mile in length, is located in that portion of the Salmon River that lies immediately downstream of the Salmon River Hatchery and upstream of the County Rt. 52 bridge in Altmar. The upper boundary of the area is just downstream from Beaverdam Brook. Fish gain access to the Department's Salmon River Hatchery from the Salmon River through Beaverdam Brook.

The Salmon River Reservoir is managed through a license from the Federal Energy Regulatory Commission (FERC) to provide year round base flows to the lower 18 miles of the Salmon River which is accessible to lake-run trout and salmon. The prescribed base flow for the fall salmon season is 335 cubic feet per second (cfs). The recent drought has left the reservoir at an historic low level (14 feet below dam crest on September 10, 2007) with no significant rain in the forecast. As a result, the executive committee of the Salmon River Flow Management Team recently agreed to conserve water in the reservoir and to reduce the base flow in the Salmon River to 100 cfs, which is less than ⅓ of normal for this time of year.

The lower fly fishing, catch and release area on the Salmon River is scheduled to open to fishing on September 15, 2007. This same portion of the River is a staging area for various species of fish, including chinook and coho salmon as they prepare to enter the hatchery. A high number of salmon are already present in the staging area. 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 the Salmon River are not conducive to ethical fly fishing and would likely result in numerous fish being illegally hooked (snagged). Third, the Department is responsible for ensuring that adequate numbers of fish will enter the Department's hatchery on the Salmon River in order to provide eggs for the hatchery operations that support the Lake Ontario and tributaries fishery. If the fishery were to remain open, the first two concerns noted above could interfere with the Department's ability to obtain sufficient numbers of fish at the hatchery.

In response to this situation, the Department has determined that it is necessary to delay the opening of the lower fly fishing area until October 15, 2007. The egg taking activities at the Salmon River Hatchery are scheduled to begin on October 9, 2007. Delaying the opening to October 15, 2007 should allow adequate numbers of fish to enter the hatchery. In addition, water temperatures should be lower by October 14 and, with some precipitation, base flows may be higher.

Although the Department is hopeful that conditions will return to levels that will allow fishing to resume in this area on October 15, 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 the Salmon River.

Purpose: To prevent salmon mortality due to drought conditions.

Text of emergency rule: Subdivision 10.2(g) of 6 NYCRR is amended to read as follows:

(g) Additional special fishing regulations for the Salmon River, Oswego County, from County Route 52 bridge upstream to Lighthouse Hill Reservoir. No person may fish at any time except from County Route 52 bridge in Altmar upstream to a marked boundary at Beaverdam Brook from [September 15] *October 15* through May 15, and from a marked boundary upstream of the New York State Salmon River Fish Hatchery property upstream approximately 0.6 mile to a marked boundary at the Lighthouse Hill Reservoir tailrace from April 1 through November 30. No person, while fishing in these places during these times, shall:

- (1) fish from one-half hour after sunset to one-half hour before sunrise;
- (2) use fishing tackle other than a traditional fly fishing rod, reel and line;
- (3) use other than single artificial flies, including weighted flies, which are permitted;
- (4) use a hook with more than one hook point or with a gap of greater than one-half inch;
- (5) use a leader, including tippet, measuring in excess of 15 feet;
- (6) place additional weight on the line or leader, whether fixed or sliding at a distance exceeding four feet from the fly; and
- (7) fail to immediately release all fish without unnecessary injury.

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 December 12, 2007.

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 10.2(g) of NYCRR designates catch and release, fly-fishing only areas on the Salmon River. The lower fly fishing catch and release area, which is ¼ mile in length, is located in that portion of the Salmon River that lies immediately downstream of the Salmon River Hatchery and upstream of the County Rt. 52 bridge in Altmar. The upper boundary of the area is just downstream from Beaverdam Brook. Fish gain access to the Department's Salmon River Hatchery from the Salmon River through Beaverdam Brook.

The Salmon River Reservoir is managed through a license from the Federal Energy Regulatory Commission (FERC) to provide year round base flows to the lower 18 miles of the Salmon River which is accessible to lake-run trout and salmon. The prescribed base flow for the fall salmon season is 335 cubic feet per second (cfs). The recent drought has left the reservoir at an historic low level (14 feet below dam crest on 9/10/07) with no significant rain in the forecast. As a result, the executive committee of the Salmon River Flow Management Team recently agreed to conserve water in the reservoir and to reduce the base flow in the Salmon River to 100 cfs, which is less than ⅓ of normal for this time of year.

The lower fly fishing, catch and release area on the Salmon River is scheduled to open to fishing on September 15, 2007. This same portion of the River is a staging area for various species of fish, including chinook and coho salmon as they prepare to enter the hatchery. A high number of salmon are already present in the staging area. 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 the Salmon River are not conducive to ethical fly fishing and would likely result in numerous fish being illegally hooked (snagged). Third, the Department is responsible for ensuring that adequate numbers of fish will enter the Department's hatchery on the Salmon River in order to provide eggs for the hatchery operations that support the Lake Ontario and tributaries fishery. If the fishery were to remain open, the first two concerns noted above could interfere with the Department's ability to obtain sufficient numbers of fish at the hatchery.

In response to this situation, the Department is delaying the opening of the lower fly fishing area until October 15, 2007. The egg take at the Salmon River Hatchery is scheduled to begin on October 9, 2007, so delaying the opening to October 15, 2007 should allow adequate numbers of fish to enter the hatchery. In addition, water temperatures should be lower by October 14 and, with some precipitation, base flows may be higher.

Although the Department is hopeful that conditions will return to levels that will allow fishing to resume in this area on October 15, 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 reach the Salmon River Hatchery for egg taking operations, fish may be vulnerable to large scale 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 September 15, 2007.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule is intended to protect brood fish staging below the Salmon River Hatchery and to avoid potential 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 September 15th (the scheduled opening day) through and including October 14th. Absent further action by the Department, the area would open on October 15th.

3. Professional services:

NA

4. Compliance Costs:

NA

5. Economic and technological feasibility:

Recent creel surveys on the Salmon River estimate from 76,000 to 91,000 angler trips for the entire river during the September through November time period. The fly fishing catch and release areas (upper and lower sections combined) have accounted for about 10 percent of the overall fishing effort.

6. Minimizing adverse impact:

The lower fly fishing catch and release fishing area is ¼ of a mile in length which leaves anglers with approximately 15 miles of river to fish, including the upper fly fishing catch and release fishing area. The upper fly fishing catch and release fishing area is located upstream of the Salmon River Fish Hatchery, is open to fishing from April 1 through November 30, and provides anglers with a similar fishing opportunity as the lower fly fishing catch and release fishing area. The opening of the lower fly fishing catch and release fishing area is delayed only as long as is estimated to be necessary. The delay is intended to ensure sufficient numbers of chinook salmon and coho salmon enter the Salmon River Fish Hatchery for spawning and egg-take purposes. Providing for an adequate egg take for hatchery operations in support of the Lake Ontario and tributary fisheries will benefit fishing-dependent businesses in future years as the fish resulting from the hatchery operations are available to be caught by anglers for the next four years.

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. In addition, 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 the Salmon River and is very popular with anglers.

Rural Area Flexibility Analysis

This emergency rule making will delay the open fishing season on a small portion of the Salmon River, ¼ of a mile in length. Anglers have approximately 15 other miles of river to fish, including the upper fly fishing catch and release fishing area. The additional protection afforded fish destined for the egg take operations at the Salmon River Hatchery will help ensure that subsequent hatchery production resulting from these fish will support the Lake Ontario and Salmon River fisheries into the future. Hatchery operations are beneficial to the rural communities and the businesses in those communities that rely on robust fisheries. Therefore, the Department of Environmental Conservation has determined that this rule will not impose any significant adverse impact on rural areas.

The rule making simply closes an area to fishing for approximately one month. 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 rule making 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 the Salmon River, the effects are limited and temporary. This emergency rule making delays the opening, by one month, for only a ¼ -mile portion of the Salmon River. There are approximately 15 additional miles of river not impacted by this rule making that are open to anglers and fishing guides. Protection of the fish in the staging area prior to their entry into the Salmon River Hatchery will benefit angling businesses and jobs by ensuring that sufficient hatchery production will be available to support the fisheries in future years.

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

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Recreational Harvest and Possession of Summer Flounder

I.D. No. ENV-40-07-00005-EP

Filing No. 990

Filing date: Sept. 17, 2007

Effective date: Sept. 17, 2007

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

Action taken: Amendment of Part 40 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0105 and 13-0340-b

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

Specific reasons underlying the finding of necessity: The Department is adopting an amendment to 6 NYCRR Part 40 which will implement a closure of the recreational summer flounder season, effective September 17, 2007. These regulations are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for Summer Flounder as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Pursuant to § 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). The Commission facilitates cooperative management of marine and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105 and 13-0340-b, which authorize the adoption of regulations for the management of summer flounder, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest if the state's regulations remained unchanged and harvest patterns and rates remained the same as the previous year. ASMFC reviews each state's regulations and determines if they are compliant with the FMP. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations

so that they are sufficiently restrictive to prevent the state from exceeding its assigned quota. Failure by a state to adopt, in a timely manner, revised regulations may result in a determination of non-compliance by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder in that state, which could result in significant adverse impacts to the state's economy.

New York's assigned recreational harvest limit for 2007 is 430,262 fish. Under existing regulations, which were adopted on April 24, 2007, New York's recreational harvest of summer flounder for 2007 was projected to be within the assigned harvest limit. Data provided by the National Marine Fisheries Service from a coast-wide angler survey estimated that New York marine anglers had harvested in excess of 357,379 fish, or 83% of the State's quota, by the end of June 2007. Having considered data collected in previous years, Department staff believe that it is highly probable that the recreational fluke harvest in New York has by now exceeded New York's 2007 harvest limit, perhaps by a wide margin. The promulgation of this regulation on an emergency basis is necessary in order for the Department to immediately end the current harvest of summer flounder in New York for 2007 and maintain compliance with the FMP. It is also necessary in order to prevent more stringent management measures for fluke in 2008 based on exceeding 2007's harvest limit.

Subject: Recreational harvest and possession of summer flounder.

Purpose: To control the recreational harvest and possession of summer flounder consistent with fishers management plans.

Text of emergency/proposed rule: Section 40.1(f) is amended as follows:

40.1(f) Table A - Recreational Fishing:

Species	Open Season	Minimum Length	Possession Limit
Striped Bass (except the Hudson River north of the George Washington Bridge)	Apr 15 - Dec 15	Licensed Party/ Charter Boat anglers	2
		28" TL	1
		All other anglers	
		28" to 40" TL >40" TL (Total Length)	
Red Drum	All year	No minimum size limit	No limit for fish less than 27" TL Fish greater than 27" TL shall not be possessed
Tautog	Oct 1 - May 31	14" TL	10
American Eel	All year	6" TL	50
Pollock	All year	19" TL	No limit
Haddock	All year	19" TL	No limit
Atlantic cod	All year	22" TL	No limit
Summer flounder	[All year] None (closed as of September 17, 2007)	[19.5"]	[4]
Yellowtail Flounder	All year	13" TL	No limit
Atlantic Sturgeon	No possession allowed		
Spanish Mackerel	All year	14" TL	15
King Mackerel	All year	23" TL	3
Cobia	All year	37" TL	2
Monkfish (Goosefish)	All year	17" TL	No limit
Weakfish	All year	11" tail length # 16" TL 10" Fillet length + 12" Dressed length**	6
Bluefish	All year	No minimum size limit for the first 10 fish; 12" TL for the next 5 fish.	15, no more than 10 of which shall be less than 12" TL.
Winter Flounder	April 1 - May 30	12" TL	10
Scup (porgy)	June 1 - Aug. 31	10.5" TL	25
Licensed Party/ Charter Boat anglers ****	Sept. 1 - Oct. 31	10.5" TL	60
Scup (porgy)	June 1 - Oct. 31	10.5" TL	25
All other anglers			
Black Sea Bass	All year	12" TL	25
American Shad	All year	No minimum size limit	5
Hickory Shad	All year	No minimum size limit	5
Oyster toadfish	Jan 1 - May 14 and July 16 - Dec 31	10" TL	3

Large & Small Coastal Sharks ##, ###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
Pelagic Sharks ++, ###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
Prohibited Sharks***, ###	No possession allowed		

* Total length is the longest straight line measurement from the tip of the snout, with the mouth closed, to the longest lobe of the caudal fin (tail), with the lobes squeezed together, laid flat on the measuring device.

The tail length is the longest straight line measurement from the tip of the caudal fin (tail) to the fourth cephalic dorsal spine (all dorsal spines must be intact), laid flat on the measuring device.

+ The fillet length is the longest straight line measurement from end to end of any fleshy side portion of the fish cut lengthwise away from the backbone, which must have the skin intact, laid flat on the measuring device.

** Dressed length is the longest straight line measurement from the most anterior portion of the fish, with the head removed, to the longest lobe of the caudal fin (tail), with the caudal fin intact and with the lobes squeezed together, laid flat on the measuring device.

Large and Small Coastal Sharks include those shark species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.

++ Pelagic sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.

*** Prohibited sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.

Applicable provisions of the following are incorporated herein by reference: 50 CFR Part 635-Atlantic Highly Migratory Species, final rule as adopted by U.S. Department of Commerce as published in the Federal Register, Volume 64, Number 103, pages 29135-29160, May 28, 1999, and as amended in volume 68, Number 247, pages 74746-74789, December 24, 2003. A copy of the federal rule incorporated by reference herein may be viewed at: New York State Department of Environmental Conservation, Bureau of Marine Resources, 205 N. Belle Mead Road, East Setauket, New York, 11733.

**** See Special Regulations contained in 6NYCRR 40.1(h)(3).

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 15, 2007.

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 444-0435, e-mail: swheins@gw.dec.state.ny.us

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

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

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) Sections 3-0301, 13-0105 and 13-0340-b authorize the Department of Environmental Conservation (DEC or Department) to establish by regulation, open season, size, catch limits, possession and sale restrictions and manner of taking for summer flounder.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manage marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies and interstate FMPs.

3. Needs and benefits:

The Department is adopting an amendment to 6 NYCRR Part 40 which will implement a closure of the recreational summer flounder season, effective September 17, 2007. These regulations are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for Summer Flounder as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Pursuant to § 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). The Commission facilitates cooperative management of marine and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105 and 13-0340-b, which authorize the adoption of regulations for the management of summer flounder, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest if the state's regulations remained unchanged and harvest patterns and rates remained the same as the previous year. ASMFC reviews each state's regulations and determines if they are compliant with the FMP. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding its assigned quota. Failure by a state to adopt, in a timely manner, revised regulations may result in a determination of non-compliance by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder in that state, which could result in significant adverse impacts to the state's economy.

New York's assigned recreational harvest limit for 2007 is 430,262 fish. Under existing regulations, which were adopted on April 24, 2007, New York's recreational harvest of summer flounder for 2007 was projected to be within the assigned harvest limit. Data provided by the National Marine Fisheries Service from a coast-wide angler survey estimated that New York marine anglers had harvested in excess of 357,379 fish, or 83% of the State's quota, by the end of June 2007. Having considered data collected in previous years, Department staff believe that it is highly probable that the recreational fluke harvest in New York has by now exceeded New York's 2007 harvest limit, perhaps by a wide margin. The promulgation of this regulation on an emergency basis is necessary in order for the Department to immediately end the current harvest of summer flounder in New York for 2007 and maintain compliance with the FMP. It is also necessary in order to prevent more stringent management measures for fluke in 2008 based on exceeding 2007's harvest limit.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

Certain regulated parties (party/charter vessels, bait and tackle shops) will experience some adverse economic effects due to closure of the summer flounder season. Many charter operations have already booked fishing trips for summer flounder into September and October and have paid for advertisements. Most bait and tackle shops have ordered and purchased summer flounder bait, and bait dealers have done the same. There will be some economic loss to these businesses.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The Department of Environmental Conservation will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

5. Local government mandates:

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

6. Paperwork:

None.

7. Duplication:

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

8. Alternatives:

The following significant alternatives have been considered by the Department and rejected for the reasons set forth below:

(1) One alternative that was considered was to close the fishery September 4th, which would have prevented even more over-harvest than

closing on September 17th. However, the potential economic consequences of such a short-notice shutdown for one of the most important recreational fisheries in New York are believed to be particularly damaging to the industry, resulting in significant economic loss to bait and tackle shops, party and charter boat businesses and the supporting local economy. This situation was immediately brought to the attention of the Commissioner when this alternative was announced as the choice. The resultant outcry forced a rejection of this alternative.

(2) Another alternative considered and rejected was to wait until September 30th to close the recreational fishery. This was rejected in favor of limiting any overharvest for 2007, thus protecting the fishery stock, and also limiting any negative consequences to New York's harvest limit for 2008. In addition, if open through September 30, New York's fluke season would be two weeks longer than any neighboring state. An influx of these fishermen would increase fishing pressure in New York and add to the over-harvest of New York's quota.

(3) No Action (no amendment to regulations).

The "no action" alternative would leave current regulations in place and defer the consequences of over-harvest until next fishing season. This option would, however, put New York in a position to further exceed the 2007 harvest limit and over-harvest by a wide margin, which would be contrary to the objectives of the fishery management plan and forcing New York into even more restrictive management measures in 2008. For these reasons, this alternative was rejected.

9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs.

10. Compliance schedule:

The emergency regulations will take effect immediately upon filing with the Department of State, and compliance will be required as of September 17, 2007. Regulated parties will be notified of the changes to the regulations by mail, through appropriate news releases and via the Department's website.

Regulatory Flexibility Analysis

1. Effect of rule:

Pursuant to § 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). The Commission facilitates cooperative management of marine and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

In 2006, ASMFC adopted annual quota changes and recreational harvest projections for summer flounder (fluke) for the 2007 fishing season. New York's assigned recreational harvest limit for 2007 is 430,262 fish. Under existing regulations which were adopted on April 24, 2007, New York's recreational harvest of summer flounder for 2007 was projected to be within the assigned harvest limit. Data provided by the National Marine Fisheries Service from a coast-wide angler survey estimated that New York marine anglers had harvested 357,379 fish, or 83% of the State's quota. Based upon data from previous years, it is highly probable that NY's anglers have by now exceeded the harvest limit, perhaps by a wide margin. The result is that we are currently over-fishing on summer flounder. The Department has chosen to amend its fluke regulations to comply with the requirements of the FMP. Failure to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

There were 503 licensed party/charter vessels operating in New York during 2006. In 2006, there were also retail and wholesale marine bait and tackle shop businesses operating in New York; however, the Department does not have a record of the absolute number. The Department consulted the Marine Resources Advisory Council regarding the proposed action. The Board voted on the Department's proposed action, and a majority voted to support the Department's decision to close the fishery in order to comply with the FMP.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected by these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the Department to maintain compliance with the FMP for summer flounder, immediately end the current over-fishing, and prevent more stringent management measures for 2008. Since these regulatory amendments are consistent with federal and interstate fishery management plans, the Department anticipates limited or no adverse impacts.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, including party and charter boat fisheries, as well as wholesale and retail outlets and other support industries for recreational fisheries. Failure to comply with an FMP and take required actions to protect a marine fishery could cause the collapse of the stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being proposed in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

6. Small business and local government participation:

The development of this proposal has drawn upon input from the Marine Resources Advisory Council, which is comprised of representatives from recreational and commercial fishing interests, including recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners, and recreational anglers. The Department consulted the Marine Resources Advisory Council regarding the proposed action. The Board voted on the Department's proposed action, and a majority voted to support the Department's decision to close the fishery in order to comply with the FMP.

Local governments were not contacted because the rule does not affect them.

7. Economic and technological feasibility:

The proposed regulations do not require any expenditures on the part of affected businesses in order to comply with the changes. The changes required by this action have been determined to be economically feasible for the affected parties. There is no additional technology required for small businesses, and this action does not apply to local governments. Therefore, there are no economic or technological impacts for any such bodies.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder fishery directly affected by the emergency rule is entirely located within the marine and coastal district, and is not located adjacent to any rural areas of the state. Further, the emergency rule does not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas.

Since no rural areas will be affected by the emergency amendments of Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The Department of Environmental Conservation (Department) has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities as per SAPA § 201-A. Therefore, a job impact statement is not required.

The promulgation of this regulation is necessary in order for the Department to stop over-fishing of summer flounder relative to New York's allowable harvest limit for 2007 and to avoid the more stringent management measures that would be required in the summer flounder recreational fishery if it were allowed to continue, and the economic hardship that would be associated with such management measures.

There were 503 licensed party/charter vessels operating in New York during 2006. In 2006, there were also retail and wholesale marine bait and tackle shop businesses operating in New York; however, the Department does not have a record of the absolute number. Many currently licensed party and charter boat owners and operators hire seasonal employees during the fishing season, the majority of which occurs from May through October, with a peak in the summer months. These businesses also make purchases of bait and tackle and take out advertisements in local media. A longer fishing season provides more opportunity to fish for summer flounder and may, thereby, result in more angler trips made than in a shorter

season. Conversely, there may be an adverse affect on the number of fishing trips during the current fishing season as a result of the closure on September 17, 2007. The closure of the summer flounder fishery may, therefore, result in an early end to seasonal employment for an unknown number of industry employees. In addition, there is the potential for isolated cases of business losses severe enough to jeopardize individual business operations.

The 2007 summer flounder fishing season has been open since April 24th. The proposed closure is for September 17th, which means the season will have been open for 147 days. The early closure of the fishery means the loss of 44 fishing days based upon general fishing activity for summer flounder through October. For comparison, the summer flounder season in 2004 was open May 15th through September 6th, in 2005 April 29th through October 31st, and in 2006 May 6th through September 12th. In addition, over-harvest of New York's 2007 summer flounder recreational harvest limit has occurred and is on-going, so the industry has already taken the maximum benefit available from this fishery. Seasonal employment beyond the time period in which New York's limit was taken could not have been relied upon reasonably. Therefore, the premature closure of this fishery is seen to have a limited impact on seasonal employment, with no opportunities for new employment lost as a result. Further, the Department anticipates that there will be an open season for summer flounder in 2008, but the duration of that season is unknown at this time. The closure is, therefore, a temporary condition which will have a limited impact on future seasonal employment.

The Department consulted the Marine Resources Advisory Council regarding the proposed action. The Board voted on the Department's proposed action, and a majority voted to support the Department's decision to close the fishery in order to comply with the FMP.

In the long term, the maintenance of sustainable fisheries will have a positive effect on employment for the fisheries in question, including party and charter boat owners and operators. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the summer flounder resource is essential to the survival of the party and charter boat operations and bait and tackle businesses that support in these fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest and to continue to rebuild or maintain them for future utilization.

Based on the above and Department staff's knowledge and past experience with similar regulations, the Department has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of this rule making. Therefore, a job impact statement is not required.

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

Setting of Body Gripping Traps on Land

I.D. No. ENV-22-07-00010-RP

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

Revised action: Amendment of section 6.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

Subject: Setting of body gripping traps on land.

Purpose: To prevent the capture of dogs in body gripping traps on land.

Text of revised rule: See Appendix in the back of this issue of the Register.

Revised rule compared with proposed rule: Substantial revisions were made in section 6.3(a)(13).

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

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

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

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

Revised Regulatory Impact Statement

1. Statutory Authority

Section 11-0303 Environmental Conservation Law (ECL) addresses the general purposes and policies of the Department of Environmental Conservation (Department) in managing fish and wildlife resources. Sections 11-1101 and 11-1103 of the ECL authorize the Department to regulate the taking, possession and disposition of beaver, fisher, otter, bobcat, coyote, fox, raccoon, opossum, weasel, skunk, muskrat, pine marten and mink ("furbearers"). This proposed regulation addresses restrictions on the use of certain sizes of body gripping traps, traps which are used primarily to take fisher and raccoon.

2. Legislative Objectives

The legislative objective behind the statutory provisions listed above is to authorize the Department to establish the methods by which furbearers may be taken by trapping.

3. Needs and Benefits

The Department proposes to establish a new trapping regulation that is intended to prevent the accidental capture, injury, or killing of dogs in body gripping traps primarily set to catch fisher or raccoons.

The proposed regulation would address the manner in which body gripping traps, measuring five and one-half inches or more in the open position, are set on land with the aid of baits, lures, or other attractants. Body-gripping traps are to be measured in accordance with paragraph 11-1101(6)(b) of the Environmental Conservation Law (ECL), which reads in part as follows:

The dimension of the body gripping trap shall be ascertained when the trap is set in the extreme cocked position and shall be the maximum distance between pairs of contacting body gripping surfaces except for rectangular devices which shall be the maximum perpendicular distance between pairs of contacting body gripping surfaces.

The Department has included diagrams in the proposed regulation to clearly demonstrate how body-gripping traps are measured. For further clarity, the Department has also included diagrams in the proposed regulations that illustrate leg-gripping traps ("foothold traps") and how they are measured pursuant to ECL 11-1101(6)(a).

For traps of this size set on land, the Department is proposing that certain precautions must be taken to avoid capturing a dog in body-gripping traps. The Department proposes that these traps must be set in compliance with one of three options: (1) set four feet above the ground; or (2) set within one of three different types of enclosures which have restricted openings and other features designed to prevent a dog from entering and triggering the trap; or (3) set within an enclosure which is fastened to a tree or post in a vertical position, has only one opening which faces the ground, and is set so that the opening is no more than six inches from the ground.

The Department further proposes to restrict the setting of body-gripping traps that are set without the use of baits, lures, or other attractants in so called "blind run sets." In these cases, trappers would not be allowed to use body-gripping traps more than six inches in size, and when using smaller traps (six inches or less), they must be set close to the ground, below the typical level of a domestic dog.

The Department also proposes to restrict the setting of body-gripping traps on public lands within one hundred feet of "trails," which are defined as designated, marked, and maintained paths or ways designed for recreational, non-motorized traffic. The Department selected the one-hundred foot distance because there is an existing restriction in the Environmental Conservation Law that prohibits the setting of traps within one-hundred feet of homes, and a person walking a dog could reasonably be expected to be capable of controlling a dog with voice and visual commands within a distance of about one-hundred feet. The purpose of this restriction is to provide further protection to dogs being walked along trails. These restrictions would not effect traps set in water on public lands along trails, and it would not effect the setting of leg-gripping traps because the purpose of this rule making is to reduce or eliminate the killing of dogs captured in body-gripping traps. However, while monitoring the implementation of the proposed regulation, the Department will also closely monitor and evaluate any incidents involving the capture of dogs in leg-gripping traps within one hundred feet of trails on public lands.

The traps that will be impacted by this rule are mainly used to target raccoons and fisher. Raccoons and fisher are smaller than most dogs and are well adapted for crawling into small holes to find food or shelter or both. These species are natural cavity dwellers. Dogs, on the other hand, are generally not well adapted for climbing into small holes.

The proposed regulations require that body-gripping traps used in conjunction with baits, lures, or other attractants be set within a container designed to exclude dogs. The Department proposes that traps be set at least four inches from the opening of an enclosure with a six inch or

smaller opening; and that traps be set at least eighteen inches from the opening of an enclosure with ten inch or smaller openings. Traps placed in enclosures made of natural materials would be allowed if they are set at least eight inches from an entrance hole, and the entrance hole does not exceed six inches measured vertically. A trap that is set in an enclosure affixed to a tree or post must have its only opening positioned no more than 6 inches from the ground.

Collectively, these choices of design options provide flexibility for trappers while greatly reducing the chance that a dog may be captured, injured, or killed in body-gripping traps. Department staff believe that such requirements will make these traps very selective to catching raccoons and fisher, and relatively inaccessible to dogs. Similar techniques have been used in other states with effectiveness.

Traps adapted pursuant to the proposed requirements should remain effective for capturing raccoons and fisher because these species readily enter small holes to seek shelter or food or both. For this reason, the modified trap sets are not expected to significantly reduce the ability of trappers to catch these species. However, the proposed rule will increase the selectivity of trapping and reduce or eliminate the capture of most dogs. A very small dog, however, may still be vulnerable to capture, injury, or death.

If a trapper opts to comply with the proposed regulation by placing the trap at least four feet above the ground, dogs will be at very low risk of capture because the traps will be out of reach of most dogs. Raccoons and fisher, however, are well adapted to climbing, and traps will remain effective in catching these species if they are placed four feet or more above ground. The Environmental Conservation law prohibits the suspension of animals caught in traps, and trappers will need to use techniques that will prevent the suspension in the air of any animal caught above the ground in a body-gripping trap.

The proposed regulation is needed to protect dogs that may come in contact with a trap while the dogs are being walked by their owners or are being used for hunting. At the same time, the proposed regulation should not negatively affect the effectiveness of traps used for catching the intended furbearers, primarily fisher and raccoon.

4. Costs

Trappers will be required to purchase or construct an enclosure made of wood, metal, plastic, or wire that will be used in the setting of certain body gripping traps. Alternatively, they may fashion an enclosure from natural materials, such as rocks or logs. Additionally, they may choose to set their traps at least four feet above the ground. For trappers who decide to use an enclosure, the Department estimates that trappers will need to spend approximately five (5) dollars in materials to comply with the regulation. In some cases, the expense will be lower because suitable buckets, wire, and lumber may be used to construct the container and are available at very low expense or salvageable as scrap.

5. Local Government Mandates

This rule making does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork

The proposed rules do not impose additional reporting requirements upon the regulated public (trappers).

7. Duplication

There are no other local, state or federal regulations concerning the taking of fisher and raccoons.

8. Alternatives

An alternative to making the proposed changes is to leave the trapping regulations unchanged. However, this would mean that dogs would continue to be vulnerable to capture, injury, or death in traps set for the capture of furbearers.

9. Federal Standards

There are no federal government standards for the taking of fisher and raccoons.

10. Compliance Schedule

Trappers will be required to comply with the new rule as soon as it takes effect.

Regulatory Flexibility Analysis

The purpose of this proposed rule making is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. Trappers will not be allowed to set body-gripping traps on

public lands within one hundred feet of designated and marked trails. The proposed regulations apply statewide.

The proposed regulations do not apply directly to local governments or small businesses. Therefore, the Department has determined that this rule making will not impose an adverse economic impact on small businesses or local governments since it will not affect these entities.

Fisher trappers must report their take to the Department to lawfully possess a trapped fisher. The proposed rule making does not affect this requirement. All other reporting or record-keeping requirements associated with trapping are administered by the Department. Therefore, the Department has determined that this rule making will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

Based on the above, the Department has concluded that a regulatory flexibility analysis is not required.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed regulation would apply statewide, and would affect trapping in all rural areas of New York.

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

The purpose of this rule making is to amend the trapping regulations for body gripping traps. It will apply to traps set on land with an opening that measures five and one half inches or larger. Trappers using these traps will be required to either use dog resistant containers with their traps or set their traps at least four feet above ground. They will also be prohibited from setting body-gripping traps on public lands within one hundred feet of designated and marked trails.

No professional services are needed for trappers to comply with the new regulations. Fisher trappers are currently required to report the harvest of fisher to the Department. The proposed rule making does not affect this requirement. All other reporting or recordkeeping requirements associated with fisher trapping are administered by the Department. There are no reporting requirements for raccoon trappers.

3. Costs:

The cost of equipping a single trap with a dog resistant container is estimated to be \$5 or less in material expenditures. Trappers will be required to purchase or construct suitable boxes, buckets, or wire cages for setting body gripping traps. Alternatively, they may choose to set their traps at least five feet above the ground. For trappers who decide to enclose their traps in a container, the Department estimates that the average trapper will need to spend a total of \$85 (\$5 per trap × an average of 17 traps of the type affected by the proposed regulation) in materials to comply with the regulation. The Department estimates that trappers will spend an additional \$15 on annual maintenance costs. In some cases, the expense will be nearly zero because suitable buckets, wire, and lumber are available at very low expense or salvageable as scrap.

4. Minimizing adverse impact:

The proposed regulations will primarily affect the trapping of fisher and raccoons. They are intended to prevent the capture, injury, or killing of dogs in body-gripping traps. Under the terms of the proposed regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog-resistant container, as specified in the proposed regulations.

The Department has proposed regulations that should protect dogs without reducing trapper effectiveness in trapping raccoon and fisher. These requirements are not expected to significantly change the number of trappers or the frequency of trapping in rural areas.

5. Rural area participation:

Prior to proposing this regulation, the Department conducted seminars in all areas of the State to teach trappers about techniques to avoid catching dogs, and incorporated these techniques in the Department's mandatory trapper education curricula. The Department also published information on methods to avoid catching dogs. This publication was sent to all licensed trappers in the State of New York on two separate occasions. The Department has proposed this regulation because it is essential that all trappers use techniques to avoid the capture and killing of dogs in body-gripping traps.

Job Impact Statement

The purpose of this proposed rule making is to amend the Department's trapping regulations in an effort to prevent the capture, injury, or killing of dogs by body-gripping traps intended to capture wildlife. It applies statewide to traps set on land which have an opening that measures five and one-half inches or larger.

Due to the size of the trap involved, this regulation will primarily affect the trapping of fisher and raccoons. Under the terms of the proposed regulations, trappers may comply with the new requirements by setting their traps at least four feet above ground level. Alternatively, they may choose to set their traps within a dog resistant container, as specified in the proposed regulations. The proposal also prohibits the setting of body-gripping traps on lands within one hundred feet of designated and marked trails.

Trappers derive only a small portion of their annual income from the sale of animals taken by trapping. Moreover, the proposed rule making is not expected to significantly change the number of participants (trappers), the frequency of participation in the regulated activities, or trapping success by each trapper. The proposed regulations do not prohibit trapping activity, so long as each trap complies with the measures designed to protect dogs. Effective methods for capturing fisher and raccoons will remain available to trappers under the proposed regulations, while the likelihood of injuring or killing a dog will be reduced, if not eliminated. For these reasons, the Department anticipates that this rule making will have no negative impacts on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

Assessment of Public Comment

The Department received comments on the proposed rule-making to amend Section 6.3 of 6 New York Codes, Rules and Regulations pertaining to the manner of setting body-gripping traps. Most of the comments pertained to several technical aspects of the original proposal, along with concerns about the continuation of trapping in areas used by people walking their dogs. As a result of the public comments, the Department has made substantive changes to the original proposal. Therefore, a Notice of Revised Rule Making has been filed with the Department of State, and there will be a 30-day public comment period on the revised rule making.

Comments were received expressing concern about the definition of "body-gripping traps," and requesting clarity about how these traps are legally measured. Consequently, a new paragraph has been added which includes diagrams of typical body-gripping traps, along with leg-gripping traps ("foothold traps"), with clear arrows depicting the lawful means of measuring both. A total of five diagrams are included, depicting the most common design of both trap categories.

Comments were received expressing concern about any trapping near trails typically used by the public for recreation, including the walking of dogs. The Department has added a new paragraph that provides for a restriction on the setting of body-gripping traps on public lands near trails. Specifically, the Department proposes prohibiting setting body-gripping traps on public lands within one-hundred feet of a trail. The Department's proposal does not include a restriction on the setting of leg-gripping traps near trails because the purpose of the proposal is to prevent the killing of dogs in body-gripping traps. Moreover, a dog caught in a leg-gripping trap typically may be released unharmed or with minimal injury. The one-hundred foot distance is proposed because this is consistent with an existing restriction on setting traps within one-hundred feet of a home, and a dog owner could reasonably walk a dog along a trail and still maintain visual and verbal control of their dog within about one-hundred feet of the trail, path or way. The Department's proposal provides an extra measure of safety for dogs being handled under these circumstances. A "trail" is defined as a "designated, marked, and maintained path or way designed for non-motorized recreational use."

Comments were received expressing concern that the original proposal was overly restrictive, by including small body-gripping traps that have not been documented as traps likely to capture, injure, or kill dogs. Consequently, the Department has revised the proposal to apply to traps measuring five and one-half inches in size or larger, rather than traps measuring five or more inches in size.

Comments were received about one of the options described in the original proposal allowing body-gripping traps to be set a minimum of five feet off the ground. Several individuals commented that this was too high, especially for persons who are shorter in stature. Others commented that this option will allow animals to be suspended in violation of an existing restriction in the Environmental Conservation Law. The Department has revised the original proposal to allow for body-gripping traps to be set a minimum of four feet from the ground. The Department's proposal does not violate or interfere with the statutory prohibition on suspension. Trappers who use traps in a so-called "running pole set" must assure that captured animals are not suspended in the air. The trap sets must be securely fastened so that the captured animal and trap rests on a solid object (e.g., tree, pole, or limb) at all times.

Comments were received stating that trappers should be allowed to use natural materials (e.g., rocks and logs) in constructing enclosures designed to reduce or eliminate the capture, injury, or killing of dogs. The Department agrees with this suggestion, and has added a provision that allows the use of natural materials in complying with the regulation.

Comments were received expressing concern about the requirement to securely fasten traps to the ground when they are placed in an enclosure. The Department determined that this requirement is not essential to the proper functioning of the regulation and the intent to reduce or eliminate the capture or killing of dogs. It has been removed from the revised proposal.

Comments were received suggesting the addition of another option to the acceptable trap sets for body-gripping traps. This involves an enclosure with a larger opening (ten inches versus six inches), but with a more deeply recessed trap (eighteen inches versus four inches). The Department agrees that this is a reasonable option that retains features believed to reduce or eliminate the capture or killing of dogs in body-gripping traps.

Comments were received suggesting the accommodation of the so-called "blind run set." In this trap set, a body-gripping trap is placed without the use of any bait, lure, or attractant (e.g., fish oil). Instead of using baits, lures, or attractants, trappers place traps in "runs" primarily created by raccoons, and attractants are not needed. The Department has revised the proposal to distinguish between traps that use baits, lures, or attractants and those that do not. In the case of the former, trappers will need to set their traps using one of the options described in the proposal. In the case of the latter, trappers will be restricted to using only the smaller body-gripping traps, measuring six inches or less.

Finally, comments were received requesting that trapping be regulated at the county level of government, that trapping be unlawful, or that body-gripping traps be prohibited. The Department is unable to respond to these suggestions because each of these changes would require action by the New York State Legislature. The Department does not have the authority to adopt these suggestions.

Insurance Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Excess Line Placements Governing Standards

I.D. No. INS-40-07-00002-P

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

Proposed action: Amendment of Part 27 (Regulation 4) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2105, 2118 and art. 21

Subject: Excess line placements governing standards.

Purpose: To change the amount of funds required to be held in trust by alien excess line insurers and an association of insurance underwriters; and require the report required by section 27.14(f) to be certified by an actuary.

Text of proposed rule: Section 27.14(f) is hereby amended to read as follows:

(f)(1) In the case of an alien insurer, except as provided for in subdivisions (g), (h) and (i) of this section, the amount of funds in trust shall be, [the lesser of US \$60,000,000, or US \$5,400,000 plus,] for liabilities arising from business written on or after January 1, 1998, 30 percent of the *first US\$200,000,000 plus 25 percent of the next US\$300,000,000 plus 20 percent of the next US\$500,000,000 plus 15 percent of the amount in excess of US\$1,000,000,000* of estimated gross liabilities, as of the end of each calendar year, attributable to excess line business written in the United States (exclusive of marine insurance as set forth in section 2117(b)(3) of the Insurance Law). *In no event shall the trust fund minimum amount be less than US\$5,400,000.*

(2) *Notwithstanding paragraph (1) of this subdivision, an insurer that has written United States excess line business between January 1, 1998 and January 1, 2007 shall not be required to maintain more than US\$100,000,000 in the trust fund until December 31, 2011.*

(3) [Such] *The liabilities of the insurer are to be determined no less than annually and reported to the trustee and the Superintendent of Insurance of the State of New York no later than seven months after the insurer's accounting year-end. Such liabilities shall also be certified by an actuary who is a member of a recognized professional actuarial society.*

Section 27.14(i) is hereby amended to read as follows:

(i)(1) In the case of a group whose members consist of individual incorporated alien insurers who are not engaged in any business other than underwriting as a member of the group and individual unincorporated insurers, provided all the members are subject to the same level of solvency regulation and control by the group's domiciliary regulator:

(i) each syndicate in the group shall maintain a trust fund in the form of a trustee account representing the syndicate's gross liabilities attributable to excess line business written in the United States (exclusive of [any] marine insurance [business, excluded from excess line business pursuant to] as set forth in section 2117(b)(3) of the Insurance Law); and

(ii) the group shall maintain in the form of a trustee account a surplus in the amount of US\$100,000,000 which shall be held jointly for the benefit of United States excess line policyholders of any member of the group.

(2) The superintendent may determine that a syndicate need not maintain in trust the full amount required by subparagraph (1)(i) of this subdivision, based on such factors as the amount and nature of the business written by the syndicate, the quality and completeness of financial information provided to the superintendent, information provided to the superintendent by the group's domiciliary regulator, and the amount of jointly held funds which the group maintains in excess of the amount required by subparagraph (1)(ii) of this subdivision. In no event, however, shall the superintendent determine that a syndicate may maintain *an amount less than 30 percent of the first US\$200,000,000 plus 25 percent of the next US\$300,000,000 plus 20 percent of the next \$500,000,000 plus 15 percent of an amount in excess of US\$1,000,000,000* of its gross United States excess line liabilities.

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

Data, views or arguments may be submitted to: Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: bcheung@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 2105, 2118 and Article 21 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing the placement of insurance with eligible foreign and eligible alien excess line insurers through licensed excess lines brokers.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Article 21 sets forth the duties and obligations of insurance brokers and excess line brokers. Section 2105 sets forth licensing requirements for excess line brokers.

Section 2118 sets forth the duties of excess line brokers with regard to placement of insurance with eligible foreign and eligible alien excess line insurers.

2. Legislative objectives: Article 21 of the Insurance Law establishes minimum standards for the placement of New York risks with eligible excess line insurers.

3. Needs and benefits: Regulation 41 governs the placement of excess lines insurance. The purpose of the excess line insurance market is to enable consumers who are unable to obtain insurance from licensed insurers to instead obtain coverage from eligible excess line insurers. The New York State Insurance Department monitors the financial standards imposed upon such insurers. Some eligible excess line insurers are located outside of the United States. These insurers are referred to as "alien excess line insurers". Regulation 41 requires alien excess line insurers to maintain trust funds in the United States to support their United States excess lines business. These trust requirements have not been updated for several years. The National Association of Insurance Commissioners (NAIC) International Insurers Department (IID), which reviews alien insurer applications for inclusion on the NAIC Quarterly Listing of Alien Insurers, updated its trust funding standards for alien excess line insurers and an association of insurance underwriters (Association). Currently, Underwriters at Lloyd's, London (Lloyd's) is the only Association in existence at this time. These

new standards will change the amount of funds required to be held in trust by alien excess line insurers and an Association, and will address and resolve the existing inequity in the trust fund obligations imposed upon alien excess line insurers, as opposed to the obligations imposed upon an Association. The amount of funds to be held in trust by alien excess line insurers will increase, and the amount of funds to be held in trust by an Association will decrease. For competitive reasons, it is no longer necessary for Lloyd's to maintain the higher amounts, due to the fact that over the last few years, the source of the funding for Lloyd's has changed from individuals to corporate capital. Therefore, the Department feels the financial standards set forth by this rule are adequate.

As noted above, the purpose of this rule is to update the United States trust requirements imposed upon alien excess lines insurers and an Association to be consistent with the changes that were implemented by the IID. In addition, the trust agreement requires the report required by Section 27.14(f) to be certified by an actuary, because the report addresses the subject of liabilities.

4. Costs: The rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. The alien excess line insurer may have additional costs related to the one-time submission of new trust agreements, which will incorporate the new funding requirements to the Department. However, by having the Department's requirements consistent with the IID, there will be one standard for the amounts to be held in trust instead of two.

5. Local government mandates: None.

6. Paperwork: The alien excess line insurer may have additional paperwork related to the one time submission of new trust agreements to the Department.

The regulation requires that the liabilities of an alien excess line insurer are to be reported to the trustee and to the Superintendent. The rule requires the liabilities to be reported no later than seven months after the insurer's accounting year end. The rule also requires the liabilities to be certified by an actuary who is a member of a recognized professional actuarial society. These provisions in the rule only apply to alien excess line insurers, codify existing practice regarding alien excess line insurers, and are consistent with NAIC rules.

7. Duplication: None.

8. Alternatives: The alternative was to not change the regulation. However, the IID has implemented the new alien trust funding standards and without this rule, these entities will have to comply with two separate funding requirements, which will increase the costs for these entities. Therefore, the Department is amending the regulation to conform to the new standards.

The rule provides that an alien excess line insurer that has written United States excess line business between January 1, 1998 and January 1, 2007 shall not be required to maintain more than US\$100,000,000 in the trust fund until December 31, 2011. It is the Department's intent to eventually eliminate this "cap", which only applies to alien excess line insurers.

9. Federal standards: None.

10. Compliance schedule: Since the NAIC adopted the trust fund standards effective January 1, 2007, it is expected that all parties will be able to comply with this rule as soon as it is promulgated.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed at alien excess line insurers and an association of insurance underwriters subject to this rule, none of which come within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act. The Insurance Department has monitored Annual Statements of alien excess line insurers and an association of insurance underwriters subject to this rule, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at alien excess line insurers and an association of insurance underwriters, none of which are local governments.

Rural Area Flexibility Analysis

The amendment will not impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The rule applies to alien excess line insurers and an association of insurance underwriters, which do business in every county of the state, including rural areas as defined under State Adminis-

trative Procedure Act Section 102(13). Since the rule applies to the excess line market throughout New York, not only to rural areas, the same regulation will apply to regulated entities across the state. Therefore, there is no adverse impact on rural areas as a result of this rule.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for the amount of funds required to be held in trust by alien excess line insurers and an association of insurance underwriters. The regulation is unlikely to impact jobs and employment opportunities.

Department of Motor Vehicles

NOTICE OF ADOPTION

Restricted Use Licenses

I.D. No. MTV-30-07-00003-A

Filing No. 987

Filing date: Sept. 13, 2007

Effective date: Oct. 3, 2007

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

Action taken: Amendment of Part 135 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 530(9)

Subject: Restricted use licenses.

Purpose: To conform the rule to newly enacted law; to make disqualification for a restricted use license consistent with disqualification for a conditional license.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-30-07-00003-P, Issue of July 25, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Michele L. Welch, Counsel's Office, 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

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Purchases of Installed Capacity by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-40-07-00007-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 Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 9—Electricity to become effective Dec. 17, 2007.

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

Subject: Rider P—purchases of installed capacity.

Purpose: To revise the penalty provision of Rider P—purchases of installed capacity pursuant to the rules of the New York independent system operator.

Substance of proposed rule: The Commission is considering Consolidated Edison Company of New York, Inc.'s (Con Edison or the company) request to revise the penalty provision of Rider P – Purchase of Installed Capacity pursuant to the rules of the New York Independent System Operator (NYISO). Con Edison proposes to eliminate specific language regarding the assessment and calculation of Rider P penalties. Instead, Con Edison proposes to indicate that, when the company is assessed a deficiency penalty by the NYISO, the company will assign a pro rata share of the penalty to customers who failed to perform as committed. The Commission may approve, reject or modify, in whole or in part, Con Edison'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-1092SA1)

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

Purchased Power Adjustment by Massena Electric Department

I.D. No. PSC-40-07-00008-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 Massena Electric Department to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service, P.S.C. No. 2—Electricity to become effective Jan. 1, 2008.

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

Subject: Purchased power adjustment.

Purpose: To revise the method it uses in calculating its purchased power adjustment.

Substance of proposed rule: The Commission is considering Massena Electric Department's (Massena's) request to revise the method Massena uses in calculating its Purchased Power Adjustment. The Commission may approve, reject or modify, in whole or in part, Massena'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-1097SA1)

Department of State

**EMERGENCY
RULE MAKING**

Manufacturer's and Installer's Warranty Seals

I.D. No. DOS-40-07-00006-E

Filing No. 991

Filing date: Sept. 17, 2007

Effective date: Sept. 17, 2007

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

Action taken: Addition of Part 1210 to Title 19 NYCRR.

Statutory authority: Executive Law, section 604(4), (5), (9), (10) and (11)

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

Specific reasons underlying the finding of necessity: This rule is adopted as an emergency measure to preserve the general welfare and because time is of the essence. This rule implements the provisions of article 21-B (Manufactured Homes) of the Executive Law, which was added by chapter 729 of the Laws of 2005, and which became effective on Jan. 1, 2006. This rule establishes procedures for obtaining the manufacturer's warranty seals and installer's warranty seals required by article 21-B of the Executive Law; establishes standards regarding the initial training, certification, and continuing education of manufacturers, retailers, installers, and mechanics of manufactured homes; establishes procedures for the resolution of disputes relating to manufactured homes; and otherwise implements the provisions article 21-B of the Executive Law. Adoption of this rule on an emergency basis preserves the general welfare by permitting the continuation of all aspects of the manufactured housing industry in this State without interruption.

Subject: Obtaining and attaching manufacturer's warranty seals and installer's warranty seals to manufactured homes; certification of manufacturers, retailers, installers, and mechanics of manufactured homes; and administrative procedures for resolution of disputes relating to the construction, installation, or servicing of manufactured homes.

Purpose: To implement article 21-B of the Executive Law, as added by chapter 729 of the Laws of 2005.

Substance of emergency rule: Chapter 729 of the Laws of 2005 added Article 21-B (Manufactured Homes) of the Executive Law. This rule has been adopted to implement the provisions of Article 21-B. This rule establishes procedures for obtaining and the manufacturer's warranty seals and installer's warranty seals which must be attached to manufactured homes. This rule establishes the qualifications for certification of manufacturers, retailers, installers, and mechanics of manufactured homes. This rule establishes administrative procedures for resolution of disputes relating to the construction, installation, or servicing of manufactured homes. This rule also establishes fees relating to warranty seals, certifications, approval of instructional providers and approval of courses.

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 December 13, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: joseph.ball@dos.state.ny.us

Regulatory Impact Statement

1. STATUTORY AUTHORITY.

The statutory authority for this rule is Executive Law section 604(4), (5), (9), (10), and (11), as added by Chapter 729 of the Laws of 2005. Article 21-B of the Executive Law (Article 21-B) requires persons and business entities engaged in the manufacture, sale, installation and service of manufactured homes to be certified by the Department of State (DOS). Subdivisions (4), (5), (9), (10), and (11) of section 604 of the Executive Law provide that DOS has the power and duty to promulgate rules and regulations relating to the provisions of Article 21-B. This rule implements Article 21-B.

2. LEGISLATIVE OBJECTIVES.

Article 21-B was enacted for the purpose of ensuring that manufactured homes are installed and serviced in a professional manner; ensuring that disputes regarding the manufacture, installation, and servicing of manufactured homes be resolved fairly and expeditiously; providing a degree of security for the payment of legitimate claims; and otherwise implementing the provisions of the federal Manufactured Housing Improvement Act of 2000 (PL 106-569). The Manufactured Housing Improvement Act of 2000 requires States to enact requirements for the licensing or certification of installers of manufactured homes, training, dispute resolution, and other matters relating to manufactured homes. Article 21-B requires manufacturers and installers to attach warranty seals to manufactured homes installed in this State, requires manufacturers, retailers, installers, and mechanics to be certified by DOS, and requires DOS to provide administrative procedures for the resolution of disputes.

This rule establishes procedures for obtaining and attaching the warranty seals required by Article 21-B; establishes standards for certification as a manufacturer, retailer, installer, or mechanic of manufactured homes; establishes administrative dispute resolution procedures; and establishes fees.

3. NEEDS AND BENEFITS.

This rule establishes procedures regarding manufacturer's and installer's warranty seals. These procedures are necessary to implement the warranty seal provisions of Article 21-B. These provisions permit manufacturers and installers to obtain the warranty seals, specify the manner in which and place where the warranty seals are to be attached, establish the fees to be paid by manufacturers and installers for obtaining the warranty seals, and establish the maximum fees that can be charged by manufacturers and installers for attaching the warranty seals.

This rule establishes qualifications and procedures for obtaining certification as a manufacturer, retailer, installer, or mechanic. These qualifications and procedures are necessary to implement the certification provisions of Article 21-B. The qualifications established by this rule include minimum experience and education requirements for retailers, installers, and mechanics; initial training requirements for installers and mechanics; and continuing education requirements for all classes of certificate holders. These provisions in this rule will benefit purchasers of manufactured homes by helping to ensure that homes will be installed in a professional manner.

This rule requires each certificate holder to file a deposit account control agreement ("DACA") evidencing the existence of a deposit account which is maintained with a financial institution and which is pledged to DOS, a letter of credit ("LOC"), or a surety bond. (However, a person holding a limited certificate will not be required to file his or her own DACA, LOC, or surety bond if he or she is covered by his or her employer's DACA, LOC, or surety bond). These financial responsibility requirements will benefit owners of manufactured homes by providing a measure of assurance that legitimate claims relating to the delivered condition, installation, service, or construction of a manufactured home will be satisfied.

The rule establishes procedures for the resolution of disputes involving the delivered condition, installation, service or construction of manufactured homes. These procedures are necessary to implement the dispute resolution provisions of Article 21-B. These procedures will benefit manufacturers, retailers, installers, mechanics, lending entities, and manufactured home owners by permitting expeditious and cost-effective resolution of disputes.

The rule establishes fees, as required by Article 21-B. The fees will defray the cost of administering Article 21-B.

4. COSTS.

a. Cost to regulated parties for the implementation of and continuing compliance with this rule.

This rule will require manufacturers and installers to obtain warranty seals to be attached to manufactured homes. Manufacturers will pay \$125 per seal. Installers will pay \$35 per seal if they request 5 or fewer, or \$25 per seal if they request 6 or more. This rule will also permit manufacturers and installers to charge purchasers a fee for attaching such seals; such fees will cover the manufacturer's and installer's costs of obtaining the seals and an additional sum (between \$15 and \$25) to cover anticipated administrative expenses.

This rule will require manufacturers, retailers, installers, and mechanics to be certified by DOS. The fee for certification for a period of 2 years will be \$200 for manufacturers, retailers, and installers, and \$100 for mechanics. However, a person employed by a person who or a business entity which is certified may apply for a limited certificate, which is valid only while such person is acting within the scope of his or her employment

by his or her certified employer. The fee for limited certification for a period of 2 years will be \$25.

A certified party (other than a person holding a limited certificate) must file a DACA, LOC, or surety bond with DOS. DOS estimates that the premiums to be paid for a surety bond having a term of 2 years will be between \$800 and \$1,200 for the \$50,000 surety bond filed by a manufacturer, between \$400 and \$600 for the \$25,000 surety bond filed by a retailer, approximately \$200 for the \$10,000 surety bond filed by an installer, and approximately \$200 for the \$5,000 surety bond filed by a mechanic. DOS estimates that the fee for obtaining a LOC will typically be 1% of the face amount of the LOC per year, subject to a minimum fee of \$100 per year; this indicates that the fee for a \$50,000 LOC will be \$500 per year (or \$1,000 for 2 years), the fee for a \$25,000 LOC will be \$250 per year (or \$500 for 2 years), the fee for a \$10,000 LOC will be \$100 per year (or \$200 for 2 years), and the fee for a \$5,000 LOC will be \$100 per year (or \$200 for 2 years).

A person certified as an installer will be required to complete 16 hours of initial training prior to certification, and a business entity certified as an installer will be required to employ at least one person who has completed such initial training and who is certified by DOS. DOS estimates that the fees charged by instructional providers who provide such initial training will be between \$200 and \$300.

A person certified as a mechanic will be required to complete 6 hours of initial training prior to certification, and a business entity certified as a mechanic will be required to employ at least one person who has completed such initial training and who is certified by DOS. DOS estimates that the fees charged by instructional providers who provide such initial training will be between \$100 and \$125.

A person certified as a manufacturer, retailer, installer, or mechanic will be required to complete 3 hours of continuing education every 2 years, and a business entity certified as a manufacturer, retailer, installer, or mechanic will be required to employ at least one person who has completed such continuing education and who is certified by DOS. DOS estimates that the fees charged by instructional providers who provide such continuing education will be approximately \$50.

A private trade association or other entity applying for approval as an instructional provider will be required to pay \$100 once every 2 years. An approved instructional provider applying for approval of a course it wishes to provide will be required to pay \$50 plus \$5 for each student who takes the course.

b. Costs to DOS:

DOS anticipates that the cost to DOS to administer the programs contemplated by Article 21-B will be approximately \$490,000 per year. Those costs include the costs associated with the 5 employees that DOS anticipates it will need to administer the programs. The costs of administering Article 21-B are largely attributed to the statute and not significantly to this implementing rule.

c. Costs to other State agencies:

This rule does not impose any costs on other State agencies.

d. Cost to local governments:

This rule does not impose any costs on local governments.

5. PAPERWORK.

Under this rule, manufacturers and installers will be required to file written requests for warranty seals; manufacturers will be required to file quarterly reports of homes completed; installers will be required to file quarterly reports of installations performed; manufacturers, retailers, installers, and mechanics will be required to file written applications for certification and for periodic renewal of certification; a private trade organization or other entity wishing to provide initial training or continuing education will be required to file a written application for approval as an instructional provider and for periodic renewals of such approval; approved instructional providers will be required to file written applications for approval or courses to be provided; and instructional providers will be required to file reports of each course presented. It is the intention of DOS to develop and implement request, application, and report forms, to post such forms on DOS's web page, and otherwise to make such forms freely available to regulated parties.

6. LOCAL GOVERNMENT MANDATES.

This rule does not impose any duty on local governments.

7. DUPLICATION.

DOS is not aware of any relevant rule or other legal requirement of the State or Federal government which duplicates, overlaps or conflicts with this rule.

8. ALTERNATIVES.

DOS considered adopting provisions requiring individuals applying for certification as a retailer, installer or mechanic to have at least a high school diploma. This alternative was not adopted in this rule because such a requirement would preclude a person who holds a high school equivalency diploma, or the equivalent certification from the United States Armed Forces, from acting as a retailer, installer, or mechanic.

DOS considered adopting provisions making the filing of a surety bond the only permissible means of satisfying the financial responsibility requirements. This alternative was not adopted in this rule because such a provision would preclude the use of other acceptable instruments (viz., LOCs and DACAs) to satisfy the financial responsibility requirements.

DOS considered adopting provisions setting financial responsibility requirements at levels higher or lower than those specified in this rule (viz., \$50,000 for a manufacturer, \$25,000 for a retailer, \$10,000 for an installer, and \$5,000 for a mechanic). The alternative of setting higher financial responsibility requirements was not adopted in this rule because DOS believes that increasing those requirements would increase the cost of obtaining the required surety bond, LOC or DACA (which, in turn, would increase the costs to be passed on to homeowners), and may make it more difficult, or even impossible, for some individuals to obtain the required surety bond, LOC, or DACA (which, in turn, would limit homeowner's options in choosing installers and mechanics). The alternative of setting lower financial responsibility requirements was not adopted because DOS believes that lowering those requirements would not provide adequate protection to the owner of a manufactured home with a substantial defect in its delivered condition, installation, service or construction.

9. FEDERAL STANDARDS.

DOS is not aware of any instance in which this rule exceeds any minimum standards of the federal government for the same or similar subject areas.

10. COMPLIANCE SCHEDULE.

This rule can be complied with immediately. Rules substantially similar to this rule have been in effect since December 22, 2005. Previous versions of this rule established the qualifications for certification, and provided regulated parties with the information necessary to apply for and obtain the required certification prior to the date certification was first required (July 1, 2006). This rule continues, without substantial change, the qualifications for certification first established on December 22, 2005.

Summary of Regulatory Flexibility Analysis

1. EFFECT OF RULE.

This rule applies to all persons and all business entities who manufacture, sell, install, or service manufactured homes, including all small businesses that manufacturer, sell, install, or service manufactured homes. The Department of State estimates that this rule will apply to approximately 268 small businesses engaged in the retail selling of manufactured homes and approximately 100 small businesses engaged in the installation manufactured homes for buyers. This rule will also apply to small businesses that "service" (i.e., modify, alter or repair the structural systems of) manufactured homes; however, the Department of State is unable to determine at this time the number of small businesses that service manufactured homes. This rule will also apply to any small business that manufactures or produces manufactured homes. The Department of State estimates that this rule will apply to approximately 36 manufacturers; however, the Department of State believes that few, if any, of such manufacturers are small businesses.

This rule does not apply directly to local governments. However, this rule does specify that no certificate of occupancy shall be issued for any manufactured home installed on or after January 1, 2006 unless the required warranty seals have been attached to the home. This provision will affect every local government that issues certificates of occupancy.

2. COMPLIANCE REQUIREMENTS.

This rule requires manufacturers and installers of manufactured homes to obtain warranty seals from the Department of State, and to attach the warranty seals to manufactured homes that are installed on or after January 1, 2006. (The rule specifies certain situations in which a manufacturer's warranty seal is not required.) This rule requires manufacturers and installers to file quarterly reports with the Department of State.

This rule requires each person and each business entity that manufactures, sells, installs, or services manufactured homes to obtain certification from the Department of State. The qualifications for obtaining and retaining certification include (1) the filing of a surety bond, letter of credit, or deposit account control agreement; (2) having have at least a high school education, or the equivalent; (3) satisfying specified experience requirements; (4) satisfying specified initial training requirements; (5) in the case

of an installer or mechanic, passing a written examination; and (6) satisfying specified continuing education requirements. In addition, a certified manufacturer must be approved by the United States Department of Housing and Urban Development to construct manufactured homes.

Each certified business entity must employ at least one certified person.

At least one person certified by the Department of State as an installer must be present at the home site during the installation or a manufactured home.

At least one person certified by the Department of State as a mechanic must be present at the home site during the performance of any service.

Any person or business entity owning or operating more than one manufacturing plant that manufactures, delivers, or sells manufactured homes in the State of New York shall be required to obtain a separate certification as a manufacturer for each such manufacturing plant.

Any person or business entity owning or operating more than one retail sales location in the State of New York shall be required to obtain a separate certification as a retailer for each such retail sales location. This rule establishes requirements for approval of instructional providers.

This rule provides that no governmental agency or department or other person or entity responsible for issuing certificates of occupancy in any jurisdiction shall issue a certificate of occupancy for any manufactured home installed in such jurisdiction at any time on or after January 1, 2006 unless the manufacturer's warranty seal has been attached to such manufactured home (unless such manufacturer's warranty seal is not required by reason of an exception set forth in the rule) and the installer's warranty seal has been attached to such manufactured home.

3. PROFESSIONAL SERVICES.

Professional services are not likely to be required to comply with the reporting, record keeping and other requirements of this rule.

4. COMPLIANCE COSTS.

Manufacturers will be required to pay \$125 for each manufacturer's warranty seal, and will be permitted to charge up to \$150 for attaching a seal to a manufacture home.

Installers will be required to pay between \$25 and \$35 for each installer's warranty seal, and will be permitted to charge up to \$50 for attaching a seal to a manufacture home.

The initial cost of obtaining certification will include (1) the cost of obtaining the required surety bond, letter of credit, or deposit account control agreement, (2) the certification fee to be paid to the Department of State, and (3) in the case of certification as an installer or mechanic, the cost of the required initial training. The Department of State estimates that the initial cost of obtaining certification as a manufacturer will be between \$1,000 and \$1,400, the initial cost of obtaining certification as a retailer will be between \$600 and \$800, the initial cost of obtaining certification as an installer will be between \$600 and \$700, and the initial cost of obtaining certification as a mechanic will be between \$400 and \$425.

A person applying for a limited certificate is not required to provide his or her own surety bond, letter of credit, or deposit account control agreement. In addition, the fee to be paid to the Department of State for a limited certificate is lower than the fee to be paid for a corresponding non-limited certificate. The Department of State estimates that the initial cost of obtaining limited certification as a manufacturer or retailer will be \$25, the initial cost of obtaining limited certification as an installer will be between \$225 and \$325, and the initial cost of obtaining limited certification as a mechanic will be between \$125 and \$150.

The cost of maintaining certification will include (1) the cost of renewing the required surety bond, letter of credit, or deposit account control agreement, (2) the renewal fee to be paid to the Department of State, and (3) the cost of the required continuing education courses. The Department of State estimates that the cost of maintaining certification as a manufacturer will be between \$1,050 and \$1,450 every 2 years (or between \$525 and \$725 per year), the cost of maintaining certification as a retailer will be between \$650 and \$850 every 2 years (or between \$325 and \$425 per year), the cost of maintaining certification as an installer will be \$450 every 2 years (or \$225 per year), and the cost of maintaining certification as a mechanic will be \$350 every 2 years (or \$175 per year).

A person holding a limited certificate will not incur the expense of renewing his or her own surety bond, letter of credit or deposit account control agreement. In addition, the fee to be paid to the Department of State to renew a limited certificate will be less than the fee to be paid to renew a corresponding non-limited certificate. The Department of State estimates that the cost of maintaining limited certification in any category (manufacturer, retailer, installer or mechanic) will be \$75 every 2 years (or \$37.50 per year).

The foregoing compliance costs are not likely to vary significantly by reason of the size of the business. Local governments are not likely to incur any costs in complying with this rule.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

The Department of State will print the warranty seals required by this rule. The Department of State has already prepared all or most of the application forms that will be required by this rule, and has posted such forms on the Department's web page. The Department will otherwise make such forms freely available to the regulated parties. The Department of State believes that it will be economically and technologically feasible for small businesses to comply with this rule.

6. MINIMIZING ADVERSE IMPACT.

It appears that the Legislature intended that purchasers of manufactured homes be afforded the full measure of the consumer protections contemplated by Article 21-B without regard to the size of the businesses involved in the manufacture, sale, installation, or servicing of the home. Further, the Department of State is not aware of any information suggesting that compliance with this rule will be significantly more difficult for small businesses than for it will be for larger businesses. Accordingly, this rule makes no special provisions for small businesses.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

The Department of State has solicited comments from the manufactured home industry, including manufacturers, retailers, and installers, and from the insurance industry.

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices published in *Building New York*, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. The Department of State will publish a notice of the emergency adoption of this rule in a future edition of *Building New York*. In addition, the Department of State will post a notice of the emergency adoption of this rule, and the full text of this rule, on the Department's website.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule implements Article 21-B of the Executive Law. Both Article 21-B and this rule apply uniformly throughout the State, including all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

This rule requires manufacturers and installers of manufactured homes to obtain warranty seals from the Department of State, and to attach the warranty seals to manufactured homes that are installed on or after January 1, 2006. (The rule specifies certain situations in which a manufacturer's warranty seal is not required.) The seals are to be requested in writing, on a form to be supplied by or otherwise acceptable to the Department of State.

This rule requires manufacturers to file quarterly reports with the Department of State specifying, with respect to each manufactured home completed by the manufacturer during the reporting period covered by such report, the type or model of such manufactured home and, if applicable, the name and address of the retailer to which such manufactured home was delivered. The quarterly reports are to be filed on forms provided by or otherwise acceptable to the Department of State.

This rule requires installers to file quarterly reports with the Department of State specifying, with respect to each manufactured home installed by the installer during the reporting period covered by such report, the location where such manufactured home was installed, the owner of such manufactured home at the time of installation, the type or model of such manufactured home, the manufacturer of such manufactured home; and the written certification of the installer that the installation of such manufactured home meets the standards of the New York State Uniform Fire Prevention and Building Code. The quarterly reports are to be filed on forms provided by or otherwise acceptable to the Department of State.

This rule requires each person and each business entity that manufactures, sells, installs, or services manufactured homes to obtain certification from the Department of State. Applications for certification are to be in writing, on forms provided by or otherwise acceptable to the Department of State. The qualifications for obtaining and retaining certification are summarized in paragraph 2 of the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

This rule requires any private trade association or other entity wishing to provide initial training courses or continuing education courses to apply to the Department of State for approval as an instructional provider. This rule requires approved instructional providers to apply to the Department of State for approval of each course it proposes to provide. All applications are to be submitted in writing, on forms provided by or otherwise acceptable to the Department of State. Instructional providers are required to keep records showing the date and location of each course presentation and the names and addresses of each student taking the course, and to file reports showing such information with the Department of State.

This rule provides that no governmental agency or department or other person or entity responsible for issuing certificates of occupancy in any jurisdiction shall issue a certificate of occupancy for any manufactured home installed in such jurisdiction at any time on or after January 1, 2006 unless the manufacturer's warranty seal required by this rule has been attached to such manufactured home (unless such manufacturer's warranty seal is not required by reason of an exception set forth in the rule), the installer's warranty seal required by this section has been attached to such manufactured home, and the governmental agency or department or other person or entity responsible for issuing certificates of occupancy has independently determined that such manufactured home has been installed in accordance with the applicable provisions of the New York State Uniform Fire Prevention and Building Code.

Professional services are not likely to be required in rural areas in order to comply with the reporting, recordkeeping and other compliance requirements imposed by this rule.

3. COSTS.

Manufacturers will be required to pay \$125 for each manufacturer's warranty seal, and will be permitted to charge up to \$150 for attaching a seal to a manufacture home.

Installers will be required to pay between \$25 and \$35 for each installer's warranty seal, and will be permitted to charge up to \$50 for attaching a seal to a manufacture home.

The initial cost of obtaining certification will include (1) the cost of obtaining the required surety bond, letter of credit, or deposit account control agreement, (2) the certification fee to be paid to the Department of State, and (3) in the case of certification as an installer or mechanic, the cost of the required initial training. The Department of State estimates that the initial cost of obtaining certification as a manufacturer will be between \$1,000 and \$1,400, the initial cost of obtaining certification as a retailer will be between \$600 and \$800, the initial cost of obtaining certification as an installer will be between \$600 and \$700, and the initial cost of obtaining certification as a mechanic will be between \$400 and \$425.

A person applying for a limited certificate is not required to provide his or her own surety bond, letter of credit, or deposit account control agreement. In addition, the fee to be paid to the Department of State for a limited certificate is lower than the fee to be paid for a corresponding non-limited certificate. The Department of State estimates that the initial cost of obtaining limited certification as a manufacturer or retailer will be \$25, the initial cost of obtaining limited certification as an installer will be between \$225 and \$325, and the initial cost of obtaining limited certification as a mechanic will be between \$125 and \$150.

The cost of maintaining certification will include (1) the cost of renewing the required surety bond, letter of credit, or deposit account control agreement, (2) the renewal fee to be paid to the Department of State, and (3) the cost of the required continuing education courses. The Department of State estimates that the cost of maintaining certification as a manufacturer will be between \$1,050 and \$1,450 every 2 years (or between \$525 and \$725 per year), the cost of maintaining certification as a retailer will be between \$650 and \$850 every 2 years (or between \$325 and \$425 per year), the cost of maintaining certification as an installer will be \$450 every 2 years (or \$225 per year), and the cost of maintaining certification as a mechanic will be \$350 every 2 years (or \$175 per year).

A person holding a limited certificate will not incur the expense of renewing his or her own surety bond, letter of credit or deposit account control agreement. In addition, the fee to be paid to the Department of State to renew a limited certificate will be less than the fee to be paid to renew a corresponding non-limited certificate. The Department of State estimates that the cost of maintaining limited certification in any category (manufacturer, retailer, installer or mechanic) will be \$75 every 2 years (or \$37.50 per year).

Such costs are not likely to vary significantly for different types of public and private entities in rural areas. An installer who requests fewer than 6 installer's warranty seals at a time will be required to pay \$35 per seal, or \$10 per seal more than an installer who requests at least 6 warranty

seals at a time. In addition, the fee for a letter of credit or premium for a surety bond may be dependent, in part, on the location of the business for which the letter of credit or surety bond is issued.

4. MINIMIZING ADVERSE IMPACT.

It appears that the Legislature intended that purchasers of manufactured homes be afforded the full measure of the consumer protections contemplated by Article 21-B without regard to the location of the businesses involved in the manufacture, sale, installation, or servicing of the home. Further, the Department of State is not aware of any information suggesting that compliance with this rule will be significantly more difficult for regulated parties located in rural areas than for it will be for regulated parties located in suburban or metropolitan areas. Accordingly, this rule makes no special provisions for regulated parties located in rural areas.

5. RURAL AREA PARTICIPATION.

The Department of State has solicited comments from the manufactured home industry, including manufacturers, retailers, and installers, and from the insurance industry.

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices published in *Building New York*, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. The Department of State will publish a notice of the emergency adoption of this rule in a future edition of *Building New York*. In addition, the Department of State will post a notice of the emergency adoption of this rule, and the full text of this rule, on the Department's website.

Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities.

This rule establishes the procedures for obtaining and attaching the manufacturer's warranty seal and installer's warranty seal required by Article 21-B of the Executive Law, the fees to be paid by the manufacturer and installer to obtain the warranty seals, and the maximum fees that may be charged to the customer for attaching the warranty seals to the manufactured home. The maximum fee that may be charged to a customer for attaching the required seals will be \$200. The typical delivered and installed cost of a manufactured home in this State is approximately \$70,000. Therefore, the cost of the warranty seals will be less than 0.3% of the cost of a home, and the statutory requirement that warranty seals be attached, as implemented by this rule, should not have a substantial impact on the market for manufactured homes or on jobs or employment opportunities in the manufactured home industry.

This rule also establishes procedures for determination of certain disputes regarding manufactured homes by the Department of State. Article 21-B directs the Department of State to establish such procedures. It is anticipated that by providing for administrative determination of disputes, this rule will reduce the litigation expenses for all parties involved in such disputes. Therefore, the statutory requirement that the Department of State provide for administrative resolution of disputes, as implemented by this rule, should not have a substantial impact on jobs or employment opportunities in the manufactured home industry.

This rule also established the qualifications for obtaining certification as a manufacturer, retailer, installer, or mechanic of manufactured homes. A person or business entity applying for certification will incur the following costs:

(1) Generally, the cost of obtaining a certification will be \$100 per year in the case of a manufacturer, retailer, and installer, and \$50 per year in the case of a mechanic. However, a person who is employed by a person who or a business entity which is certified may apply for a limited certification, which is valid only while such person is acting within the scope of his or her employment by his or her certified employer; the cost of obtaining such a limited certificate will be \$12.50 per year.

(2) Installers and mechanics may be required to pay fees to the instructional providers who present the initial training courses required for certification, and all certificate holders may be required to pay fees to the instructional providers who present the continuing education courses required to maintain certified status.

(3) Generally, each certificate holder will be required to file a deposit account control agreement, letter of credit, or surety bond. Those certificate holders who file a letter of credit will be required to pay fees to the financial institutions that issue such letters of credit, and those certificate holders who file a surety bond will be required to pay premiums to the

insurance companies that issue such bonds. However, the holder of a limited certificate will not be required to file a deposit account control agreement, letter of credit, or surety bond, provided that his or her certified employer has filed an acceptable deposit account control agreement, letter of credit, or surety bond.

It is anticipated that the total cost of certification, instruction, and bonding will be relatively modest, particularly when these costs are spread over all the units manufactured by a certified manufacturer, sold by a certified retailer, installed by a certified installer, or serviced by a certified mechanic, during the course of a year. Therefore, the statutorily mandated certification process, as implemented by this rule, should not add a significant sum to the total cost of a manufactured home in this State, and should not have a substantial impact on jobs or employment opportunities in the manufactured home industry.

NOTICE OF ADOPTION

Energy Conservation Construction Code

I.D. No. DOS-02-07-00009-A

Filing No. 1004

Filing date: Sept. 14, 2007

Effective date: Jan. 1, 2008

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

Action taken: Amendment of section 1240.1 of Title 19 NYCRR.

Statutory authority: Energy Law, sections 11-103(2) and 11-104

Subject: Efficient utilization of energy expended in the construction, use and occupancy of building (the New York State Energy Conservation Construction Code).

Purpose: To amend the New York State Energy Conservation Construction Code to assure that it effectuates the purposes of art. 11 of the Energy Law and the specific objectives and standards set forth in such article.

Text of final rule: Section 1240.1 of Title 19 NYCRR is amended to read as follows:

(a) 2007 ECCCNYS. Requirements for the design of building envelopes for adequate thermal resistance and low air leakage and for the design and selection of mechanical, electrical, service water-heating and illumination systems and equipment which enables effective use of energy in new building construction are set forth in a publication entitled Energy Conservation Construction Code of New York State, publication date: [May 2002] August 2007, published by the [International Conference of Building Officials (ICBO)] *International Code Council, Inc.* Copies of said publication (*hereinafter referred to as the 2007 ECCCNYS*) may be obtained from the publisher at the following address:

[International Conference of Building Officials] *International Code Council, Inc.*

[5360 Workman Mill Road] 500 New Jersey Avenue, NW, 6th Floor
[Whittier, CA 90601-2298] Washington, D.C. 20001.

Said publication is available for public inspection and copying at:

New York State, Department of State

Codes Division

41 State Street

Albany, NY 12231-0001

(b) *Referenced standards.*

(1) *Certain published standards are denoted in the 2007 ECCCNYS as incorporated by reference into 19 NYCRR Part 1240. Such standards are incorporated by reference into this Part 1240. Such standards are identified in the 2007 ECCCNYS, and the names and addresses of the publishers of such standards from which copies of such standards may be obtained are specified in the 2007 ECCCNYS. Such standards are available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.*

(2) *For the purposes of applying the 2007 ECCCNYS in this State, and for the purposes of paragraph (1) of this subdivision, the 2002 edition of standard AAMA 101/I.S.2/NAFS, entitled Voluntary Performance Specifications for Windows, Skylights and Glass Doors, published by American Architectural Manufacturers Association (said standard being hereinafter referred to as AAMA 101/I.S.2/NAFS-02) shall be deemed to be one of the standards denoted as incorporated by reference into 19 NYCRR Part 1240. Said standard AAMA 101/I.S.2/NAFS-02 is incorporated by reference in this Part 1240. The name and address of the publisher of AAMA 101/I.S.2/NAFS-02 from which copies of said standard may be obtained are:*

American Architectural Manufacturers Association

1827 Walden Office Square, Suite 104, Schaumburg, IL 60173-4268.

AAAMA 101/I.S.2/NAFS-02 is available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 1240.1.

Text of rule and any required statements and analyses may be obtained from: Raymond J. Andrews, Department of State, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: Raymond.Andrews@dos.state.ny.us

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

A Revised Regulatory Impact was previously prepared, and a Summary of the Revised Regulatory Impact Statement was published in the State Register on February 28, 2007.

Although nonsubstantive changes were made to the proposed rule prior to its adoption, these changes do not necessitate further revision of the Regulatory Impact Statement, and these changes do not necessitate revision of the Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

The nonsubstantive changes made to the rule text since publication of the Notice of Proposed Rule Making include the following:

(1) Minor corrections were made in the text of the publication entitled Energy Conservation Construction Code of New York State (the 2007 ECCCNYs).

(2) A revised version of the 2007 ECCCNYs, reflecting the changes described in (1) above, was prepared, and the text of 19 NYCRR section 1240.1 was changed to reflect the incorporation by reference in that section of the revised version of the 2007 ECCCNYs.

(3) The address of the publisher of the 2007 ECCCNYs as specified in 19 NYCRR section 1240.1 was corrected.

(4) Statements were added to 19 NYCRR section 1240.1 to indicate that certain published standards which are denoted in the 2007 ECCCNYs as being incorporated by reference into the NYCRR are so incorporated; to indicate that copies of such standards are available for inspection and copying at the office of the Department of State; and to indicate that one standard which is not denoted in the 2007 ECCCNYs as being incorporated by reference into the NYCRR is so incorporated, and to provide the name and address of the publisher of such standard.

None of these nonsubstantive changes affects the issues addressed in the Regulatory Impact Statement, the Revised Regulatory Impact Statement, the Regulatory Flexibility Analysis for Small Businesses and Local Governments, the Rural Area Flexibility Analysis, or the Job Impact Statement and, therefore, no further revision of the Regulatory Impact Statement is necessary and no revision of the Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, or Job Impact Statement is necessary.

Summary of Assessment of Public Comments

Comment 1: Adopt the 2003 model International Energy Conservation Code (IECC), with the residential provisions of the 2004 Supplement, without modifications.

Response: No changes were made to address this comment. The amended version of the State Energy Conservation Construction Code (Energy Code) implemented by this rule making will be included in a publication entitled Energy Conservation Construction Code of New York State (the 2007 ECCCNYs). For the most part, the 2007 ECCCNYs follows the 2003 IECC, with certain provisions from the 2004 Supplement in the residential section. However, the 2007 ECCCNYs also incorporates certain provisions which are specific to New York State, all of which were determined by the Code Council to be appropriate.

Comment 2: The notice published in the State Register regarding this rule making is incorrect, because it indicates that the amended Energy Code will be based on the 2003 ICC, while the amended Energy Code is primarily based on the 2004 Supplement.

Response: No changes were made to address this comment. The notice in the State Register is correct. Although certain provisions in the 2004 Supplement are in the residential section, the 2007 ECCCNYs is based primarily on the 2003 IECC. As indicated in the Summary of the Regulatory Impact Statement published in the State Register, certain modifications have been made to the text of the IECC to address specific New York needs.

Comment 3: The notice published in the State Register did not mention the proposed changes to the energy chapter in the proposed new Residential Code of New York State (RCNYS), and the notice published in the

State Register regarding the rule making for the proposed amendment of the RCNYS did not contain a single reference to energy.

Response: No changes were made to address this comment. The RCNYS is designed to be a single publication that includes all provisions relating to the construction of one and two-family dwellings. In furtherance of that intent, Chapter 11 of the RCNYS includes energy-related provisions. However, all of the provisions included in Chapter 11 of the RCNYS are contained in the 2007 ECCCNYs. Therefore, the provisions contained in Chapter 11 of the RCNYS are part of the Energy Code, as amended by this rule making.

Comment 4: Section 402.5.1 of the 2007 ECCCNYs unnecessarily limits flexibility by mandating area weighted average maximum fenestration U-factor of 0.40.

Response: No changes were made to address this comment. Section 402.3.3 exempts up to 15 square feet of glazed fenestration from the requirements of table 402.1, thus allowing some decorative glazing without regard to its energy efficiency. In addition, RES-check is a permitted compliance path that does not incorporate the limit on area weighted average U-factor.

Comment 5: Requiring R-8 insulation for ducts outside of the thermal envelope is not cost effective, as required by Energy Law section 11-103.2.

Response: No changes were made to address this comment. First, no documentation was submitted to support the comment. Second, taken as a whole, the Energy Code, as amended by this rule, is cost effective as required by the Energy Law.

Comment 6: New York should accept compliance documentation based on current software developed by the U.S. Department of Energy, rather than older versions, or New York should designate the version of RES-check based on the 2006 IECC as acceptable compliance software, in that it more closely related to the 2004 Supplement than the current version of RES-check.

Response: Calculations made using the Res-Check Software based on 2006 IECC will not properly reflect the 2007 ECCCNYs. However, New York Version 4.0.1 of RES-check is available and appropriate for use in this State. To clarify this, 2007 ECCCNYs section 101.5.1 was changed to specify that the New York Version 4.0.1 of RES-check can be used.

Comment 7: The 2007 ECCCNYs will increase R values, and will disadvantage certain insulation manufacturers. The wall insulation values in Table 402.1 should be changed to R-19 in climate zones 5 and 6, and to R-13 in climate zone 4, as in the 2006 IECC.

Response: No changes were made to address this comment. The 2007 ECCCNYs will include amended climate zone designations, reducing the number of zones in New York State from seven to three. The net effect will be to increase minimum wall insulation values increase in four counties and decrease values in eight counties. In addition, use of the software compliance path in RES-check would eliminate even that minor change. As there is no substantive change in wall insulation requirements, no manufacturer is expected to be affected.

Comment 8: Comments regarding the 2007 ECCCNYs and the wall bracing requirements in the RCNYS raised the following related issues:

Issue 1: R-15 and R-21 wall cavity insulation cost is disproportionately high (approximately 30 percent over the cost of R-13 and R-19), and the additional cost in wall cavity insulation will influence builders to substitute structural wall sheathing with foam wall sheathing.

Issue 2: The use of non-structural wall sheathing, even used between bracing panels, may significantly limit the ability of builders to meet the most basic code requirements for wall bracing set forth in RCNYS section 602.10.

Issue 3: The limited energy savings that would result from increased R values does not warrant the additional costs that the builders will be subjected to in meeting the wall bracing requirements.

Response: No changes were made to address these comments. First, the assertion of a 30 percent increase in cost is unsupported by cost data. Second, Table 402.1(1) in the 2007 ECCCNYs provides that in Climate Zones 5 and 6, if cavity insulation is R-15, R-5 insulated wall sheathing must be used; however, there will be no conflict with the wall bracing requirements of the RCNYS because: (i) footnote "f" in Table 402.1(1) provides that if structural sheathing covers 25 percent of less of the exterior, the R-5 sheathing is not required where structural sheathing is used; (ii) footnote "f" provides that if structural sheathing covers more than 25 percent of the exterior, it shall be supplemented with R-2 insulated sheathing, and R-2 can be achieved using siding backer board, which typically ranges from R-1.5 to R3; (iii) insulated sheathing is not required in Climate Zone 4; (iv) the RES-Check software method of compliance does not require the addition of insulated sheathing to exterior walls; and (v) the

RCNYS provides a number of options to meet wall bracing requirements, in addition to the basic prescriptive wall bracing methods. Third, persons raising Issue 2 appear to assume that the Energy Code requires insulation in unheated vehicular storage; the Energy Code has no such requirement. Further, the RCNYS provides a number of options relating to wall bracing, and in the event such options are exhausted, the RCNYS permits use of the engineered design method, which allows the use of pre-engineered methods, such as APA narrow wall, or actual engineering practice methods.

Comment 9: Duct leakage testing should be required in one and two-family dwellings.

Response: No changes were made to address this comment. Where tested leakage meets a specified standard, the amendment proposed by this comment would permit a reduced thermal envelope. The comment does not provide any data indicating that mandating a tested duct leakage rate would be cost effective, as required by the Energy Law.

Comment 10: In the trade-off exception to Section 402.1, the efficiency of oil-fired boiler and furnaces and natural gas-fired boilers should be increased to 90 percent AFUE.

Response: No changes were made to address this comment. In selecting appliance efficiency ratings for the Section 402.1 trade-off exception, the incremental costs for 90 percent AFUE appliances would result in a payback period exceeding 10 years. This would violate Energy Law Section 11-103.2.

Comment 11: Exception 3 in Section 402.1 should not be adopted, because thermal envelope efficiency should not be traded off for mechanical equipment efficiency.

Response: No changes were made to address this comment. The trade-offs would result in additional energy savings, relative to the base code.

Comment 12: 2007 ECCCNY section 402.5.1 unnecessarily limits flexibility and prohibits the use of glass block.

Response: No changes were made to address this comment. Section 402.3.3 exempts up to 15 square feet of glazed fenestration from the requirements of table 402.1, thus allowing some glazing without regard to its energy efficiency.

Comment 13: 2007 ECCCNY section 402.5.1 restricts the use of skylights, which fall within the definition of fenestration.

Response: No changes were made to address this comment. Table 402.1(1) requires fenestration to have U-factors of 0.40 or 0.35, and requires skylights to have a U-factor of 0.60. Since the Table is more specific in its requirements than the definition, section 402.5.1 is not considered to be applicable to skylights.

Comment 14: The 2007 ECCCNY does not account for the improved air-sealing performance of wet spray applied insulation systems.

Response: No changes were made to address this comment. The proposed amendments include a trade-off methodology that permits reduced R-values in walls and roofs where infiltration is demonstrated to meet a specified standard.

Comment 15: Errors exist in the on-line publication of the proposed texts of the new ECCCNY and Chapter 11 of the new Residential Code of New York State (RCNYS).

Response: These typographical errors have been corrected.

Comment 16: The Energy Code should be based on the 2006 IECC and that the commercial provisions of the Energy Code should be based on the 2004 Supplement or the 2006 IECC.

Response: No changes were made to address this comment. It has been the policy of the Code Council to use the published versions of the ICC model codes as the basis for the Uniform Code and the Energy Code. The Department of State intends to start its review of the 2006 ICC codes in the near future, and to make recommendations to the Code Council on an expedited basis.

Comment 17: Basement walls should be insulated to ten feet below grade or the basement floor, whichever is less.

Response: No changes were made to address this comment. The provision relating to insulation of basement walls was modified from the 2000 IECC because an analysis found that the additional insulation depth would not be cost effective as defined in Article 11 of the Energy Law.

Comment 18: Simulated performance alternative provisions should be modified with regard to the reference design glazing area, so that it is consistent with the 2006 IECC provisions.

Response: No changes were made to address this comment. The Department of State intends to start its review of the 2006 ICC codes in the near future, and to make recommendations to the Code Council on an expedited basis.

Comment 19: Wall insulation R values should not be changed from R-13 to R-15, due to the inherent inability of cellulose to meet R-values

beyond R-13 in a 2x4 construction. Cellulose insulation performs better than traditional insulation materials.

Response: No changes were made to address these comments. Although Table 402.1(1) requires R-15 cavity wall insulation and R-5 insulating wall sheathing in Zones 5 and 6, Exception 1 allows the use of RES-Check software to demonstrate compliance, and Exception 3 allows compliance with Table 402.1(2) (which allows R-13 in Climate Zones 4, 5 and 6) if certain criteria are satisfied. Further, as discussed in the Response to Comment 8, there is no conflict between the 2007 ECCCNY and the wall bracing requirements of the RCNYS, and a building may be continuously sheathed while still meeting the Energy Code requirements. Further, all of New York's wind zones of 110-120 mph wind design are located within Climate Zone 4. Finally, the parties making these comments provided no documentation to support their opinion that some insulation products perform better than others.

NOTICE OF ADOPTION

Uniform Fire Prevention and Building Code

I.D. No. DOS-02-07-00010-A

Filing No. 1005

Filing date: Sept. 14, 2007

Effective date: Jan. 1, 2008

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

Action taken: Repeal of Parts 1220-1226 and addition of new Parts 1219-1227 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Standards for the construction and maintenance of buildings and structures and for protection from the hazards of fire (the New York State Uniform Fire Prevention and Building Code).

Purpose: To amend the New York State Uniform Fire Prevention and Building Code to assure that it effectuates the purposes of article 18 of the Executive Law and the specific objectives and standards set forth in such article.

Substance of final rule: Section 377 of the Executive Law directs the State Fire Prevention and Building Code Council (the "Code Council") to review the entire New York State Uniform Fire Prevention and Building Code (the "Uniform Code") from time to time to assure that it effectuates the purposes of the Law, and authorizes the Code Council to amend the Uniform Code from time to time to achieve that end. The rule making would repeal the existing version of the Uniform Code (which is now found in 19 NYCRR Parts 1220 to 1226, inclusive, and in the publications incorporated by reference therein) and replace it with a new version of the Uniform Code, to be contained in new 19 NYCRR Parts 1219 to 1227, inclusive, and the new publications to be incorporated therein by reference.

The new version of the Uniform Code will include eight components: the Residential Code (Part 1220), the Building Code (Part 1221), the Plumbing Code (Part 1222), the Mechanical Code (Part 1223), the Fuel Gas Code (Part 1224), the Fire Code (Part 1225), the Property Maintenance Code (Part 1226), and the Existing Building Code (Part 1227).

The Residential Code addresses one- and two-family dwellings and townhouses not more than three stories in height with a separate means of egress and their accessory structures.

The Building Code establishes life safety construction requirements for assembly, business, educational, factory industrial, high hazard, institutional, mercantile, multi-family residential, storage and utility and miscellaneous buildings.

The Plumbing Code, Mechanical Code and Fuel Gas Code address the erection, installation, alteration, repair, relocation, replacement, addition to, use or maintenance of plumbing systems, mechanical systems and fuel gas systems.

The Fire Code provides requirements for life safety and property protection from the hazards of fire, explosion or dangerous conditions in new and existing buildings.

The Property Maintenance Code provides minimum requirements to safeguard public safety, health and general welfare insofar as they are affected by the occupancy and maintenance of structures and premises.

The Existing Building Code provides minimum requirements to safeguard public safety, health and general welfare insofar as they are affected by the repair, alteration, change of occupancy, addition and relocations of existing buildings.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1220.1, 1221.1, 1222.1, 1223.1, 1224.1, 1225.1, 1226.1 and 1227.1.

Text of rule and any required statements and analyses may be obtained from: Raymond J. Andrews, Department of State, 41 State St., Albany, NY 12231, (518) 474-4073, e-mail: Raymond.Andrews@dos.state.ny.us

Additional matter required by statute: Executive Law section 378 (15)(b) authorizes the State Fire Prevention and Building Code Council (the Code Council) to provide that during the period between the adoption of changes to the Uniform Fire Prevention and Building Code (the Uniform Code) and the date on which such changes become effective, a person shall have the option of complying either with the provisions of the Uniform Code as changed or the provisions of the Uniform Code as they existed immediately prior to adoption of the change.

At its meeting held on September 11, 2007, the Code Council voted to adopt this rule amending the Uniform Code. The Code Council also voted to provide that during the transition period between the adoption of this rule and the date on which the changes made to the Uniform Code by this rule become effective, a person shall have the option of complying with either the provisions of the Uniform Code as changed by this rule or with the provisions of the Uniform Code as in effect immediately prior to the adoption of this rule. The Code Council also voted to direct that without regard to which version of the Uniform Code a person elects to comply with during the transition period, such person shall also be required, during the transition period, to comply with any and all other provisions of the Uniform Code which are adopted after the adoption of this rule and which become effective during the transition period.

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

A Revised Regulatory Impact Statement was previously prepared, and a Summary of the Revised Regulatory Impact Statement was published in the *State Register* on February 28, 2007.

Although nonsubstantive changes were made to the proposed rule prior to its adoption, these changes do not necessitate further revision of the Regulatory Impact Statement, and these changes do not necessitate revision of the Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

The nonsubstantive changes made to the rule text since publication of the Notice of Proposed Rule Making include the following:

(1) To clarify that a freeboard is to be added to the design flood elevation, the phrase “plus freeboard” was to four sections of the Sections R323.1.5, R323.2.1.1, R323.2.1.3 and R323.3.2.1 of the publication entitled Residential Code of New York State (RCNYS).

(2) To clarify that home occupations must meet all requirements for habitable space, “home occupation” was added to the definition of habitable space in Chapter 2 of the new RCNYS, and Condition 1 of Section RAJ102.5.1 of the new RCNYS was changed to read as follows: “1. The home occupation shall meet all requirements for habitable space and shall not exceed 15 percent of the floor area of the primary structure.”

(3) The address of the Truss Plate Institute, as stated in the RCNYS, was corrected.

(4) Notations were added to the margins in the publication entitled Existing Building Code of New York State (EBCNYS) to indicate places where the EBCNYS differs from the model International Existing Building Code.

(5) Section 2308 of the publication entitled Building Code of New York State (BCNYS) was modified so that the 10 feet height limitation applies to stud height as permitted in Table 2308.9.1, and to add a maximum floor-to-floor limitation of 11 feet 7 inches to accommodate floor framing and other construction features recognized in other code provisions.

(6) The address of the Truss Plate Institute, as stated in the BCNYS, was corrected.

(7) The reference standard mentioned in Section 3801.1 of the publication entitled Fire Code of New York State (FCNYS) was changed from the 2001 Edition of NFPA 58 to the 2004 Edition of NFPA 58. In addition, Section 3801.1 was changed to provide a phase-in period of four years for inspection of LP tanks.

(8) Section 611 of the FCNYS was changed to require carbon monoxide alarms in the occupancies specified in Executive Law Section 378(5-a), with the effective dates specified in Executive Law Section 378(5-a).

(9) An appendix which includes sketches and commentary relating to fittings was added to the publication entitled Plumbing Code of New York State (PCNYS).

(10) Additional minor corrections were made in the text of the previously mentioned publications (the RCNYS, EBCNYS, BCNYS, FCNYS and PCNYS), and minor corrections were made in the text of the publications entitled Mechanical Code of New York State (MCNYS), Fuel Gas Code of New York State (FGCNYS), and Property Maintenance Code of New York State (PMCNYS).

(11) Revised versions of the RCNYS, BCNYS, PCNYS, MCNYS, FGCNYS, FCNYS, PMCNYS and EBCNYS, reflecting the changes described in (1) to (10) above, were prepared, and the text of 19 NYCRR sections 1220.1, 1221.1, 1222.1, 1223.1, 1224.1, 1225.1, 1226.1, and 1227.1 was changed to reflect the incorporation by reference in those sections of the revised versions of the RCNYS, BCNYS, PCNYS, MCNYS, FGCNYS, FCNYS, PMCNYS and EBCNYS. In addition, typographical errors in the text of sections 1227.2(a) and 1227.2(f) were corrected, and the definition of “existing building” in section 1227.1(d) was changed to the definition set forth in the EBCNYS.

(12) The address of the publisher of the RCNYS, BCNYS, PCNYS, MCNYS, FGCNYS, FCNYS, PMCNYS and EBCNYS, as stated in 19 NYCRR sections 1220.1, 1221.1, 1222.1, 1223.1, 1224.1, 1225.1, 1226.1, and 1227.1, was corrected.

(13) Statements were added to 19 NYCRR sections 1220.1, 1221.1, 1222.1, 1223.1, 1224.1, 1225.1, 1226.1, and 1227.1 to indicate that those published standards which are denoted in the RCNYS, BCNYS, PCNYS, MCNYS, FGCNYS, FCNYS, PMCNYS and EBCNYS as being incorporated by reference into the NYCRR are so incorporated; to indicate that copies of such standards are available for inspection and copying at the office of the Department of State; to correct errors in the edition dates of certain of such standards; to specify the name and address of the publisher of one such standard (the name and address of such publisher not being specified in the RCNYS); and to indicate that one standard which is denoted in the FCNYS as being incorporated by reference into the NYCRR is not so incorporated.

None of these nonsubstantive changes affects the issues addressed in the Regulatory Impact Statement, the Revised Regulatory Impact Statement, the Regulatory Flexibility Analysis for Small Businesses and Local Governments, the Rural Area Flexibility Analysis, or the Job Impact Statement and, therefore, no further revision of the Regulatory Impact Statement is necessary and no revision of the Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, or Job Impact Statement is necessary.

Summary of Assessment of Public Comment

Several comments supported the general approach taken in this rule making, viz., adoption of the 2003 model International Codes, with the New York modifications.

A comment supported the New York accessibility modifications in the Building Code of New York State and the Existing Building Code of New York State.

Comment 1: In section R323.1.3.3 of the new Residential Code of New York State (RCNYS), “freeboard” is required to be added to the design flood elevation or other elevation required. Freeboard is not referenced again in any other provision in section R323.

Response: To clarify that a freeboard is to be added to the design flood elevation, the phrase “plus freeboard” was to four sections of the RCNYS sections R323.1.5, R323.2.1.1, R323.2.1.3 and R323.3.2.1.

Comment 2: In footnote “a” for Table R802.5.1(1) in the RCNYS, and in footnote “a” of all of the following tables for rafter spans for common lumber species, the values “ $\frac{3}{8}$ or greater” and “ $\frac{1}{2}$ ” for HC/HR and their rafter span adjustment factors, should be removed as they do not exist in the 2006 International Residential Code (IRC). The chart for footnote “a” should be relocated to the same page as the table so as to be less confusing and easier to read for the end user.

Response: No changes were made to address this comment. The subject values in footnote “a” of Table R802.5.1(1), and in footnote “a” of all of the following tables for rafter spans for common lumber species, reflects the content of the 2003 IRC, upon which the new RCNYS is based. Table R802.5.1(1) and all of the following tables for rafter spans for common lumber species, occupies two pages, and the chart for footnote “a” in the new RCNYS will be in the same general location as is found in all versions of IRC.

Comment 3: New section RAJ102.5 in Appendix J of the new RCNYS, regarding Home Occupation, does not include a definition of home occupation.

Response: To clarify that home occupations must meet all requirements for habitable space, “home occupation” was added to the definition of habitable space in Chapter 2 of the RCNYS, and Condition 1 of RCNYS

section RAJ102.5.1 was changed to read as follows: "1. The home occupation shall meet all requirements for habitable space and shall not exceed 15 percent of the floor area of the primary structure."

Comment 4: Section R402.3 in the current version of the RCNYS provides that "approved precast concrete foundations shall be designed and installed in accordance with the provisions of this code and the manufacturer's installation instructions." The provision is not included in the new RCNYS. The deletion of former section 402.3 negatively affects members of the National Precast Concrete Association, as well as New York State Precast Concrete Producers.

Response: No changes were made to address this comment. The deletion of Section R403.2 does not prohibit precast concrete foundation systems, since the code allows the use of foundations designed in accordance with accepted engineering practice.

Comment 5: The Uniform Code should reference the "most current edition" of the National Electrical Code (NEC); the new RCNYS should reference the 2005 NEC; and RCNYS Part VIII (Electrical) should be deleted.

Response: No changes were made to address these comments. Existing laws relating to amendments of the Uniform Code do not permit automatic inclusion of future versions of a published standard, such as the NEC. The RCNYS does not prohibit use of the 2005 NEC, since compliance with another appropriate code, in lieu of compliance with the prescriptive provisions of Chapters 4 through 42, is not prohibited. RCNYS section R103.3 also allows the use of the current version of the NEC. Finally, the presence of Part VIII in the RCNYS reflects the intent that the RCNYS be a comprehensive, stand-alone document.

Comment 6: The phrase "on all sheathable areas of all exterior walls, and interior braced wall lines, where required" in the first sentence in RCNYS section R602.10.5 should be deleted.

Response: No changes were made to address this comment. The requested change would not make clear that alternate approved methods of wall bracing may be used in other areas of the structure.

Comment 7: The address of the Truss Plate Institute, as stated in the RCNYS, is incorrect.

Response: The RCNYS was changed to include the correct address.

Comment 8: The standard referenced in RCNYS section R502.11.2 should be changed from "TPI, HIB" to "TPI/WTCA BCSI."

Response: No changes were made to address this comment. "TPI, HIB" was the correct title of the standard when the 2003 ICC International Residential Code was published.

Comment 9: (1) Table R301.5 in the RCNYS should be updated with an accepted code change in the ICC 2006/2007 Code Development Cycle; requirements regarding the increase in dead load should be clarified and harmonized with the IBC footnote to Table 1607.1 and with BOCA requirements. (2) A parallel change in Section R802.10.6 should be made. (3) Editorial errors in Table R301.5 and section R802.10.6 should be corrected.

Response: (1) No changes were made to address the first request. Footnotes in Table R301.5 were amended to address sections specific to ceiling joists and truss construction, which makes the footnotes substantially different than the IRC footnotes. The subcommittee elected to retain storage requirements regardless of insulation depth. (2) To address the second request, the table reference was corrected. (3) To address the third request, the following changes were made: (a) In Table R301.5, the footnote reference in the second row was designated as g (not b); the table reference has been corrected. (b) In Table R301.5, the section references of footnotes b and g were transposed; the references have been corrected. (c) In section R802.10.6, the reference to Table R301.4 has been changed to Table R301.5.

Comment 10: RCNYS section R301.3 (entitled "Story height") specifies certain limits on story heights, each of which includes provision for "a height of floor framing not to exceed sixteen inches." A comment was received requesting the addition of the following immediately after the first sentence in the above-quoted provision: "Floor framing height shall be permitted to exceed these limits provided the story height does not exceed 11'- 7"."

Response: No changes were made to address this comment. The new RCNYS is based on the 2003 International Residential Code (IRC). The change requested by this comment is based on amendments to the 2006 IRC. This matter may be considered in the next code revision cycle.

Comment 11: Indications should be added to the Existing Building Code of New York State (EBCNYS) to show the New York modifications to the ICC International Existing Building Code (IEBC), so the reader can know how the EBCNYS differs from the IEBC.

Response: The EBCNYS now includes indications showing how it differs from the model IEBC.

Comment 12: Exempting most existing buildings constructed prior to 2003 from the seismic provisions of the EBCNYS does not serve the public interest. Seismic engineers should be included as voting members of the technical subcommittee during the next review cycle.

Response: No changes were made to address this comment. The issue of seismic provision applicability was presented to the technical subcommittee at four subcommittee meetings. Seismic engineers made presentations to the subcommittee before it voted to exclude most existing buildings from the requirements.

Comment 13: Section 1612 of the new Building Code of New York State (BCNYS), which also regulates residential construction, does not mention "freeboard" (as found in the new RCNYS), or require a higher design flood elevation.

Response: No changes were made to address this comment. The design and construction of buildings in flood hazard areas must be in compliance with reference standard ASCE/SEI 24. Compliance with ASCE/SEI 24 replaces the lesser, prescriptive requirements found in the new RCNYS, including "freeboard."

Comment 14: Footnote B in Table 1604.5 in the BCNYS reduces the wind factor (I_w) in hurricane prone regions, where the basic wind speed V is greater than 100 mph (V > 100), from 0.87 to 0.77

Response: No changes were made to address this comment. The wind factors are identical to those which first appeared in the ASCE 7-98, Minimum Design Loads for Buildings and other Structures.

Comment 15: BCNYS section 1504.5 should be modified so as not to require the edge securement for low-slope membrane roof systems be designed in accordance with ANSI/SPRI ES-1. The new BCNYS does not accommodate historic buildings where unique detailing may not meet the ES-1 standard.

Response: No changes were made to address these comments. The current code has required low-slope membrane roof systems metal edge securement to be designed in accordance with ANSI/SPRI ES-1 since it became effective on January 1, 2003; the only proposed changes to Section 1504.5 are (1) to clarify that it does not apply to gutters and (2) to reflect the update of ES-1 from the 1998 edition to the 2003 edition. EBCNYS section 1002.1 allows repairs of existing buildings with original or like materials and original methods of construction; therefore, BCNYS section 1504.5 should not affect historic buildings.

Comment 16: Item #2 of BCNYS section 2308 should be modified to allow the floor-to-floor height to be 11' 7", and maximum stud height to be 10'.

Response to Comment 16: Section 2308 was modified so that the 10' height limitation applies to stud height, as permitted in Table 2308.9.1, and to add a maximum floor-to-floor limitation of 11' 7" to accommodate floor framing and other construction features recognized in other code provisions.

Comment 17: The address of the Truss Plate Institute, as stated in the BCNYS, is incorrect.

Response: The BCNYS was changed to include the correct address.

Comment 18: The new Fire Code of New York State (FCNYS) should be amended to remove the exception that allows fire extinguishers to be substituted with an automatic sprinkler system with quick response heads in assembly, business, and educational occupancies (Groups A, B and E, respectively).

Response: No changes were made to address these comments. This exception is part of the current edition of the FCNYS, and has been part of the ICC's model International Fire Code since its inception in 2000

Comment 19: FCNYS section 3801.1 should be amended to reflect the 2004 Edition of NFPA 58, and the FCNYS should be amended to include a phase-in period for the re-certification requirements for stationary liquefied petroleum gas (propane) cylinders.

Response: To address these comments, the reference standard mentioned in FCNYS section 3801.1 was changed from the 2001 Edition of NFPA 58 to the 2004 Edition of NFPA 58, and FCNYS section 3801.1 was changed to provide a phase-in period of four years.

Comment 20: The elimination from FCNYS section 508 of the requirement to provide fire hydrants for one- and two-family dwellings is detrimental to the operation of fire departments that are in response areas fully protected by fire hydrants.

Response: No changes were made to address these comments. Under the current FCNYS, if a municipal water system is accessible to the premises, a hydrant must always be provided within 400 feet (or 600 feet in some cases), without regard to the level of hazard. It is illogical that a one-

family dwelling being constructed with no municipal water supply is not required to have any fire hydrants, while an identical one-family dwelling being constructed in an area accessible to a municipal water supply may be required to add more hydrants.

Comment 21: Comment was received supporting the requirements in FCNYS section 611 for carbon monoxide alarms in multi-family dwellings.

Response: Requirements for carbon monoxide alarms must comply with Executive Law section 378(5-a). Therefore, FCNYS section 611 was changed to apply to the occupancies specified in the Executive Law, with the effective dates specified in Executive Law.

Comment 22: A comment requested added clarifications for fitting shapes and names in the Plumbing Code of New York State (PCNYS).

Response: Sketches with commentary were added in an appendix.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Annual Sales and Use Tax Returns

I.D. No. TAF-40-07-00004-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 section 533.3(d) and (g)(1) of Title 20 NYCRR. This rule is proposed pursuant to [SAPA § 207(3)], 5-year Review of Existing Rules.

Statutory authority: Tax Law, section 171, subd. First; 1136, subds. (a), (b), (c) and (d); 1142, subds. (1) and (8); 1250 (not subdivided); and 1251, subds. (a), (b), (c) and (d)

Subject: Annual sales and use tax returns.

Purpose: To update the sales and use tax regulations concerning annual returns.

Text of proposed rule: Section 1. Subdivision (d) of section 533.3 of the regulations is amended to read as follows:

(d) "Annual return." (1) Every person required to register with the Department of Taxation and Finance (see section 533.1 of this Part and Parts 539 and 540 of this Title) only because such person is purchasing or selling tangible personal property for resale[,] and who is not required to collect any tax or pay any tax directly to the [Department of Taxation and Finance,] *department* must file a return annually in accordance with the provisions [schedule provided in paragraph (4)] of this subdivision.

(2) Any person required to file quarterly returns whose total tax due for the four most recent quarterly periods for which data is available for such person within the most recent six quarters for which data is available did not exceed \$3,000[,] may [be notified by the department or may elect to] file [returns] *a return* annually in lieu of *filing* quarterly.

(3)(i) *Each year, the department will review its records in order to identify persons who may have become eligible to file annual returns.* The department will notify *such* persons [required to file returns, by regular mail,] of the change in their filing status to annual filing. Such a notice [shall] *will* include:

"(a)" the effective date and period for which the person's first annual return will be required to be filed; and

"(b)" instructions [for filing] *as to when* the person's last quarterly return *is* required to be filed.

(ii) Where a person [required to file returns] *so notified* wishes to continue its current filing status *or is, in fact, not eligible to file on an annual basis*, such person[: "(a)"] must [return the department's notice to] *contact* the department[, within 30 days of receipt, properly completed, at the address indicated on such notification;] and ["(b)"] must indicate [on the notice] that the person does not wish to file annually, but wishes to continue its current filing status, *or that the person is not eligible to file annual returns. The department should be contacted within 30 days of the date of the notice.*

(iii) Those persons eligible to file annual returns under paragraph (2) of this subdivision who are, *for any reason*, not notified by the department to file returns annually may *contact the department* to elect to file returns annually in lieu of *filing* quarterly [returns,] provided [the] *such a person's* total tax *due* for the succeeding 12-month period can reasonably be expected not to exceed \$3,000 [and the election is made on a form furnished by the Processing Division, Registration and Returns Processing Bureau, Sales Tax Section, which must be filed on or before the 20th day of the annual period described in paragraph (4) of this subdivision for which the election is made]. *Upon confirmation that such a person is eligible to file annually, the department will reclassify the person as an annual filer.*

(4) [An annual return is to be filed in accordance with the following schedule.] (i) Annual filers [for years commencing on or after June 1, 1998, including those persons who are not required to collect any tax or pay any tax directly to the department, shall] *must* file their returns[: "(a)" For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999. "(b)" For] *for* annual periods beginning on [or after March 1, 1999, which annual periods shall begin on] March 1st and [end] *ending* with the last day of February in the subsequent year[.]. *The returns must be filed with the department* on or before March 20th of each such subsequent year.

(ii) [Quarterly filers who are notified by the department that they shall file annually must file annual returns (unless they timely notify the department in accordance with subparagraph (3)(ii) of this subdivision that they wish to continue filing quarterly returns) as follows: "(a)" For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999. "(b)" For annual periods beginning on or after March 1, 1999, the annual period shall begin on March 1st and end with the last day of February in the subsequent year, with the annual return being due on or before March 20th of each such subsequent year. "(c)"] Quarterly filers who become annual filers [shall] *pursuant to the department's yearly reclassification must file their last quarterly [return] returns* for the quarterly period [which] *that* ends immediately prior to the date on which the *next* annual period begins [and] ("*i.e.,*" *December – February*) in accordance with instructions provided in the notification issued pursuant to paragraph (3) of this subdivision and in accordance with such other applicable instructions. Annual returns must then be filed for *the next and* subsequent annual periods succeeding this last quarterly period.

(iii) *Quarterly filers electing to file annually who are reclassified to annual filers after the date on which an annual period has begun must report their sales and use tax activities for that entire annual period and may claim a credit for taxes paid with any quarterly returns previously filed during such annual period.*

(5) A properly completed annual return is to be prepared in accordance with the instructions provided by the [Department of Taxation and Finance] *department*. [It] *The return* must include completed schedules, if required, and must show, *for example, the following information:*

(i) the name, address, and identification number of the vendor, recipient of amusement charges, or operator of [a] *the* hotel;

(ii) *the* gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges, and rents;

(iii) *the* amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges, and rents for each jurisdiction, and *the* totals of all jurisdictions;

(iv) *the* amount, to the nearest whole dollar, of purchases subject to [use] tax[,] for each jurisdiction, and *the* totals of all jurisdictions;

(v) *the* amount of sales and use taxes for each jurisdiction, and *the* totals of all jurisdictions;

(vi) credits claimed and prepayments, if any;

(vii) *the* sales and use taxes due;

(viii) late filing [charge] *charges*, penalties, and interest, if any, and *the* total amount due;

(ix) the signature of the vendor, *recipient of amusement charges, or hotel operator (or of the officer, partner, or employee [of the vendor] signing the return on the entity's behalf)* and the individual's title;

(x) the signature and address of [a] *the* preparer[,] —if other than the vendor, *recipient of amusement charges, or hotel operator;* and

(xi) the date [prepared] *signed by (or on behalf of) the vendor, recipient of amusement charges, or hotel operator.*

(6) If [, at any time during the course of the annual periods described in paragraph (4) of this subdivision,] the total tax due from a person required to file [returns] *a return* is in excess of \$3,000 *at any time during*

the course of the annual period, such person must commence filing [a] quarterly or monthly [return] returns as required by section 1136 of the Tax Law and the preceding provisions of this section. On the first [quarterly] return so required, such person must report and pay any tax due for the period commencing with the beginning of the abridged annual period. Failure to do so may result in penalty and interest being charged from the date a quarterly or monthly return should have been filed.

Section 2. Paragraph (1) of subdivision (g) of section 533.3 of the regulations is amended to read as follows:

(1) [Holders of a certificate of authority for show vendors are] A show vendor is required to file a New York State and local sales and use tax return whether or not the vendor participated in a show or made any sales in the period covered by the return. [Returns must be mailed to the address listed on the New York State and local sales and use tax return.]

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: Marilyn Kaltenborn, Director, Taxpayer Guidance Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: tax_regulations@tax.state.ny.us

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

Statement of Reasoned Justification for Modification of the Rule

The Department of Taxation and Finance submitted for publication in the Rule Review section of the January 3, 2007, *State Register* summaries of rules that were adopted by the Commissioner of Taxation and Finance in 1997 and 2002, and a notice of the Department's intent to review such rules pursuant to section 207 of the State Administrative Procedure Act. This information was also posted to the Departments Web site (<http://www.tax.state.ny.us/rulemaker/regulations/fiveyearrev.htm>) on January 2, 2007. Comments from the public concerning the continuation or modification of these rules were invited until February 20, 2007.

No public comments were received by the Department concerning the 1997 amendments to section 533.3(d), "Annual return," (or to the other technical amendments made at sections 533.3[g] and 561.13[b][1]) of the Sales and Use Taxes Regulations, as published in Subchapter A of Chapter IV of Title 20 NYCRR. These regulations were amended in substance to extend the benefits of annual filing and to change the annual filing period from June-May to March-February. Such amendments were adopted by the Commissioner on June 25, 1997, and published in the *State Register* on July 16, 1997, (I.D. # TAF-18-97-00008-A).

This notwithstanding, the Department determined as a result of its 2007 review that many of the supporting amendments that were adopted in 1997 were dated and could not be continued without modification. This rule updates section 533.3(d) of the regulations to delete obsolete information – such as references to a discontinued form, an operating division of the Department that no longer exists, and transitional rules applicable to 1998 and 1999. The rule also better reflects the existing policies of the Department, which have evolved over the past ten years with the administration of the very popular and successful annual-filing program. It is noted that approximately 280,000 of the 585,000 taxpayers that file sales and use tax returns file annually, substantially reducing the number of returns required to be filed by taxpayers and, in turn, processed by this Department. Non-controversial editorial, clarifying, and technical changes have also been made in this rule. For example, section 533.3(g)(1) is being amended not only to balance the sentence structure, but also to delete a dated and redundant reference to mailing a return, which may now be filed electronically in certain circumstances.

Not every amendment that was made in 1997 is being amended by this rule; for example, the rule does not affect the filing benefits or filing period codified in the regulations. Therefore, such 1997 amendments remain valid and are continued without modification.

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 these amendments merely repeal regulatory provisions that are no longer applicable to any person and clarify section 533.3(d) of the sales and use tax regulations by bringing it into conformity with existing annual filing policies and procedures. The editorial, clarifying, and technical changes are not controversial in nature.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter that the rule will have no impact on jobs or

employment opportunities beyond that required by statute. The primary purpose of the rule is simply to update section 533.3(d) of the sales and use tax regulations concerning annual returns. Editorial, clarifying, and technical changes have also been made.