

RULE MAKING ACTIVITIES

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

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

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

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00004-A
Filing No. 961
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00004-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00005-A
Filing No. 962
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00005-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00006-A
Filing No. 964
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00006-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00008-A
Filing No. 969
Filing date: Sept. 7, 2007
Effective date: Sept. 29, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Department of Health.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00008-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00009-A
Filing No. 974
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00009-P, Issue of June 6, 2007

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00010-A
Filing No. 968
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Mental Hygiene.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00010-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00011-A
Filing No. 975
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Mental Hygiene.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00011-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00012-A
Filing No. 963
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from the exempt class in the Department of Health.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00012-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00013-A
Filing No. 965
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00013-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00014-A
Filing No. 972
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00014-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00015-A
Filing No. 967
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the non-competitive class in the State University of New York.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00015-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00016-A
Filing No. 966
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00016-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00017-A
Filing No. 970
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete positions from and classify positions in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00017-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00018-A
Filing No. 973
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete positions from and classify positions in the non-competitive class in the Department of Transportation.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00018-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00019-A
Filing No. 960
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class and delete a position from the non-competitive class in the Department of Civil Service.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00019-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-23-07-00020-A
Filing No. 971
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class and delete a position from the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-23-07-00020-P, Issue of June 6, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-24-07-00003-A
Filing No. 976
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Law.

Text was published in the notice of proposed rule making, I.D. No. CVS-24-07-00003-P, Issue of June 13, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-24-07-00004-A
Filing No. 977
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-24-07-00004-P, Issue of June 13, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-24-07-00005-A
Filing No. 978
Filing date: Sept. 7, 2007
Effective date: Sept. 26, 2007

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete positions from the non-competitive class in the State Department Service.

Text was published in the notice of proposed rule making, I.D. No. CVS-24-07-00005-P, Issue of June 13, 2007.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

State Consumer Protection Board

NOTICE OF ADOPTION

U.S. Consumer Product Safety Commission's Handbook for Public Playground Safety

I.D. No. CPR-27-07-00006-A
Filing No. 957
Filing date: Sept. 6, 2007
Effective date: Sept. 26, 2007

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

Action taken: Addition of Part 4605 to Title 21 NYCRR.

Statutory authority: General Business Law, section 399-dd

Subject: U.S. Consumer Product Safety Commission's Handbook for Public Playground Safety.

Purpose: To create rules pursuant to the statutory requirements of General Business Law, section 399-dd.

Text or summary was published in the notice of proposed rule making, I.D. No. CPR-27-07-00006-P, Issue of July 3, 2007.

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

Text of rule and any required statements and analyses may be obtained from: Lisa R. Harris, Consumer Protection Board, Five Empire State Plaza, Suite 2101, Albany, NY 12223, (518) 474-2348, e-mail: lisa.harris@consumer.state.ny.us

Assessment of Public Comment

The Consumer Protection Board received three (3) comment submissions. The comments were received from Utica National Insurance Group, Onondaga Cortland Madison (OCM) BOCES and Tompkins Seneca Tioga (TST) BOCES. The comments from Utica National related to the publication and effective date of the Rule as well as the availability of any educational information on compliance. Comments received from TST and OCM BOCES related to the drafting of law and suggested that the law should have been drafted to reflect compliance with American Society for Testing Materials (ASTM) standards instead of the Consumer Product Safety Commission (CPSC) Handbook for Public Playground Safety.

The CPB has received no substantive comment regarding the text of the Rule. Further, the proposed rule is necessary to comply with General Business Law Section 399-dd.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Disaster Planning

I.D. No. EDU-39-07-00021-P

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

Proposed action: Amendment of sections 50.1(w), 52.2(c)(4) and 145-2.1(g) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 202(1), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), and 305(1), (2) and (20)

Subject: Disaster planning.

Purpose: To permit an institution to provide a statement of academic standards establishing equivalency of instruction and study in the temporary closure of an institution as a result of a disaster.

Text of proposed rule: 1. Subdivision (w) of section 50.1 of the Regulations of the Commissioner of Education is added, effective January 3, 2008, as follows:

(w) *Disaster means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural, technological, radiological or man-made causes, such as fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, windstorm, wave action, epidemic, air contamination, drought, explosion, water contamination, chemical accident, war or civil disturbance as declared by state or local governments pursuant to sections 24 or 28 of the Executive Law.*

2. Paragraph (4) of subdivision (c) of section 52.2 of the Regulations of the Commissioner of Education is amended, effective January 3, 2008, as follows:

(4) A semester hour of credit may be granted by an institution for fewer hours of instruction and study than those specified in subdivision (o) of section 50.1 of this Subchapter only;

(i) when approved by the commissioner as part of a registered curriculum; [or]

(ii) when the commissioner has granted prior approval for the institution to maintain a statement of academic standards that defines the considerations which establish equivalency of instruction and study and such statement has been adopted by the institution[.]; or

(iii) *in the event of a temporary closure of an institution by the state or local government as a result of a disaster, as defined in section 50.1(w) of this Title, when the commissioner has granted approval for the institution to maintain a statement of academic standards that defines the considerations which establish equivalency of instruction and study and such statement has been adopted by the institution.*

3. Subdivision (g) of section 145-2.1 of the Regulations of the Commissioner of Education is added, effective January 3, 2008, as follows:

(g) *Upon presentation of satisfactory evidence that the commissioner has granted approval for the institution to maintain a statement of academic standards that defines the considerations which establish equivalency of instruction of study and such statement has been adopted by the institution as a result of a disaster as defined in section 50.1(w) of this Part, a semester hour of credit may be granted by an institution for fewer hours of instruction and study for purposes of a scholarship, tuition assistance program or other benefits.*

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law Section 202(1) grants to the Board of Regents the authority to govern and exercise the corporate powers of the University of the State of New York.

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

Education Law Section 210 grants to the Board of Regents the authority to register domestic and foreign institutions in terms of New York standards.

Education Law section 215 authorizes the Regents, the Commissioner, or their representatives, to visit, examine and inspect any institution admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

Education Law section 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents' educational policies. Section 305(2) authorizes the Commissioner to have general supervision over schools subject to the Education Law. Section 305(20) provides that the Commissioner shall also have and execute such further powers and duties as the Commissioner shall be charged by the Board of Regents.

2. LEGISLATIVE OBJECTIVES:

The proposed rule provide for the legislative objective of the above-referenced statutes and regulations by amending the requirements for registration of postsecondary curricula concerning the maintenance of a statement of academic standards that define and establish an equivalency of instruction and study.

3. NEEDS AND BENEFITS:

The proposed rule is needed in order to provide regulatory relief in the event of a temporary closure of an institution as a result of a disaster. Such a closure may prevent an institution from meeting the semester hour requirements, and may adversely impact an institution in terms of compliance with the Regulations of the Commissioner of Education and in meeting financial aid requirements of the Tuition Assistance Program (TAP).

The need for the proposed rule was identified by representatives from the City University of New York, the State University of New York, independent colleges and universities, proprietary colleges, the Higher Education Services Corporation and the State Education Department's Office of Higher Education, who met and reached a consensus on the proposed rule.

4. COSTS:

a. Costs to the State government. None.

b. Costs to local government. None.

c. Costs to private regulatory parties. None.

d. Costs to the regulatory agency. None. The proposed rule, will not add any new responsibilities for the State Education Department to administer.

5. LOCAL GOVERNMENT MANDATES:

The proposed rule will not impose any new mandates on local governments. The proposed rule is needed in order to provide regulatory relief in the event of a temporary closure of an institution as a result of a disaster.

6. PAPERWORK:

The proposed rule will require institutions to submit to the Commissioner of Education for approval, a statement of academic standards that defines the considerations which establish equivalency of instruction of study and such statement must be adopted by the institution as a result of a disaster as defined in proposed section 50.1(w). It does not include any new reporting requirements for regulated parties. The rule will not increase the paperwork requirements for students of the institutions of higher education.

7. DUPLICATION:

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

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

The proposed rule concerns the criteria for registration of postsecondary curricula and the State student aid program. Federal standards are inapplicable.

10. COMPLIANCE SCHEDULE:

The proposed rule would go into effect on January 3, 2008. Institutions of higher education must comply with the regulation on its effective date. However, the event of a disaster would trigger the requirements of the rule.

Regulatory Flexibility Analysis

(a) Small Businesses:

EFFECT OF RULE:

The proposed rule would provide regulatory relief in the event of the temporary closure of an institution of higher education as a result of a disaster. Accordingly, the proposed rule is applicable to each such institution in the State, including the 40 degree-granting proprietary colleges (for-profit entities). Of the 40 degree-granting proprietary colleges in New York State, 29 are small businesses with 100 or fewer employees that will be affected by the rule.

COMPLIANCE REQUIREMENTS:

The proposed rule is needed in order to provide regulatory relief in the event of a temporary closure of an institution if higher education as a result of a disaster. Such a closure may prevent an institution from meeting the semester hour requirements, and may adversely impact an institution in terms of compliance with the Regulations of the Commissioner of Education and in meeting financial aid requirements of the Tuition Assistance Program (TAP).

The proposed rule will require institutions to submit to the Commissioner of Education for approval, a statement of academic standards that defines the considerations which establish equivalency of instruction of study and such statement must be adopted by the institution as a result of a disaster as defined in proposed section 50.1(w). It does not include any new reporting requirements for regulated parties. The rule will not increase the paperwork requirements for students of the institutions of higher education.

PROFESSIONAL SERVICES:

The State Education Department expects that existing faculty and staff at institutions of higher education will be sufficient to meet the requirements of the proposed rule. Therefore, the proposed rule imposes no additional professional services requirements for small businesses.

COMPLIANCE COSTS:

The proposed rule does not impose any significant costs on small businesses. Institutions of higher education falling under the definition of small business would be required to submit to the Commissioner of Education for approval, a statement of academic standards that defines the considerations which establish equivalency of instruction of study. Such statement must be adopted by the institution as a result of a disaster as defined in proposed section 50.1 (w). It is anticipated that existing faculty and staff at institutions will be sufficient to prepare such statement.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties. Because the proposed rule is not expected to impose significant additional monetary costs on institutions of higher education, including small businesses, compliance with the proposed requirements is economically feasible.

MINIMIZING ADVERSE IMPACT:

The proposed rule is needed in order to provide regulatory relief to institutions of higher education in the event of a temporary closure of an institution as a result of a disaster. Such a closure may prevent an institution from meeting the semester hour requirements, and may adversely impact an institution in terms of compliance with the Commissioner's Regulations and in meeting financial aid requirements of the Tuition Assistance Program. The proposed rule minimizes adverse impact by providing a means for institutions to maintain a statement of academic standards that defines the considerations which establish an equivalency of instruction and study in circumstances defined by the amendment to section 50.1. Upon presentation of satisfactory evidence and approval by the Commissioner, an institution may grant a semester hour of credit for fewer hours of instruction and study for purposes of a scholarship, tuition assistance program or other benefits.

SMALL BUSINESS PARTICIPATION:

Degree-granting proprietary institutions of higher education located in New York State, including those that are small businesses, had opportunities to participate in the development of the proposed rule. The need for the proposed rule was identified by representatives from the City University of

New York, the State University of New York, independent colleges and universities, proprietary colleges, including those that are small businesses, the Higher Education Services Corporation and the State Education Department's Office of Higher Education, who met and reached a consensus on the proposed rule.

(b) Local Governments:

The proposed rule permits an institution of higher education to establish an equivalency of instruction and study, as approved by the Commissioner, in the event of a temporary closure of the institution by the State or local government as a result of a disaster. It is evident from the subject matter of the rule that it will have no effect on local governments. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all public and private institutions of higher education in New York State including those 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:

The proposed rule is needed in order to provide regulatory relief in the event of a temporary closure of an institution as a result of a disaster. Such a closure may prevent an institution from meeting the semester hour requirements, and may adversely impact an institution in terms of compliance with the Regulations of the Commissioner of Education and in meeting financial aid requirements of the Tuition Assistance Program (TAP).

The rule does not add or alter reporting or recordkeeping requirements for institutions of higher education in rural areas. It does require the submission of a statement of academic to the Commissioner of Education in the event of a disaster necessitating the temporary closure of an institution of higher education. This statement would define the considerations which establish equivalency of instruction and study, and must be adopted by the institution.

The rule does not impose reporting or recordkeeping requirements for students of such institutions in rural areas. In addition, the rule will not require regulated parties to acquire professional services.

3. COSTS:

The proposed rule will not impose any capital costs on the public and private institutions of higher education located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is needed in order to provide regulatory relief to institution of higher education in the event of a temporary closure of an institution as a result of a disaster. The proposed rule minimizes adverse impact by providing a means for institutions to maintain a statement of academic standards that defines the considerations which establish an equivalency of instruction and study in circumstances defined by the amendment to Section 50.1. Upon presentation of satisfactory evidence and approval by the Commissioner, an institution may grant a semester hour of credit for fewer hours of instruction and study for purposes of a scholarship, tuition assistance program or other benefits.

5. RURAL AREA PARTICIPATION:

The need for the proposed rule was identified by representatives from the City University of New York, the State University of New York, independent colleges and universities, proprietary colleges, the Higher Education Services Corporation and the State Education Department's Office of Higher Education, who met and reached a consensus on the proposed rule. During the development of the proposed rule, the content of the amendments was discussed with representatives of public, private, and proprietary institutions who represent institutions in rural areas.

Job Impact Statement

The proposed rule permits an institution of higher education to establish an equivalency of instruction and study as approved by the Commissioner, in the event of a temporary closure of an institution by the State or local government as a result of a disaster. The rule will not affect jobs and employment opportunities in New York State. Because it is evident from the nature of this rule that it will have no impact on job 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.

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

Local Government Records Management

I.D. No. EDU-39-07-00022-P

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

Proposed action: Amendment of sections 185.1, 185.2, 185.3, 185.5, 185.6, 185.7, 185.8, 185.9 and 185.10 of Title 8 NYCRR.

Statutory authority: Education Law, section 207 (not subdivided); and Arts and Cultural Affairs Law, section 57.23(3)

Subject: Local government records management.

Purpose: To revise and clarify various provisions of Part 185 of Title 8 NYCRR, especially those pertaining to replacing original records with microforms or digital images, the retention and preservation of electronic records, and the use of alternative records disposition schedules.

Substance of proposed rule (Full text is not posted on a State website):

The State Education Department proposes to amend sections 185.1, 185.2, 185.3, 185.5, 185.6, 185.7, 185.8, 185.9 and 185.10 of the Regulations of the Commissioner of Education, effective January 3, 2008, which establish requirements for local government records management, to revise and clarify various provisions of the Part, especially those pertaining to replacing original records with microforms or digital images, the retention and preservation of electronic records, and the use of alternative records disposition schedules. The following significant changes have been proposed:

Section 185.1. Definitions used in the Part are revised.

Section 185.2. Procedures for notifying the Commissioner of new records management officers are revised, including removing the current requirement that notifications be in writing.

Section 185.3. The number of members of the Local Government Records Advisory Council is increased from 25 to 27 and the criteria for selecting such members are broadened. The Commissioner of the New York City Department of Records, a representative of the chief administrative judge, and the New York City Clerk are designated as permanent members of the Council. The number of required annual meetings of the Local Government Records Advisory Council is decreased from four to three.

Section 185.5. The current provision enabling a special purpose unit of local government located in a city with a population of one million or more to adopt and use its own records disposition schedule with approval of the Commissioner of Education is broadened to enable any local government in New York to adopt and use its own records disposition schedule or schedule items with approval of the Commissioner. Such a schedule or schedule items can be used in lieu of or in addition to a schedule issued by the Commissioner.

Section 185.6. The current provision through which a local government can obtain the Commissioner's approval to destroy records damaged by a natural or manmade disaster is broadened to cover situations where the damaged records constitute a risk to human health or safety.

Section 185.7. Requirements for replacing original records with microforms or electronic images are revised based on current industry standards. The provision which authorizes digital images of public records with a retention period of less than 10 years to replace paper originals or micrographic copies is broadened to cover digital images of all public records regardless of their retention period.

Section 185.8. Requirements for the retention and preservation of electronic records are revised based on current industry standards.

Section 185.9. The requirement that contracts for the storage of local government records in facilities other than those owned or maintained by the local government meet criteria established by the Commissioner is broadened to cover any agreement, contractual or otherwise, for such storage and to require that these agreements must be specifically approved by the Commissioner.

Section 185.10. Requirements for local government records management improvement grants are revised to eliminate the requirement that a copy of archival records that are reformatted through such grants must be deposited with the State Archives.

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

Data, views or arguments may be submitted to: Jeffrey Cannell, Deputy Commissioner, Education Department, Office of Cultural Education,

Cultural Education Center, Rm. 10A33, Albany, NY 12230, (518) 474-5976, e-mail: jcannell@mail.nysed.gov

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

STATUTORY AUTHORITY:

General rule making authority for the Board of Regents and the Commissioner of Education is granted by Education Law section 207. Article 57-A of the Arts and Cultural Affairs Law provides for the systematic management of local government records. Arts and Cultural Affairs Law section 57.23(3) authorizes the Commissioner of Education to promulgate regulations to implement the provisions of Article 57-A with advice from the New York State Local Government Records Advisory Council.

LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes by updating and clarifying various provisions of Part 185 of the Regulations of the Commissioner of Education, especially provisions relating to replacing original records with microforms or digital images, the retention and preservation of electronic records, and the use of alternative records disposition schedules.

NEEDS AND BENEFITS:

The proposed amendment updates and clarifies various provisions of Part 185. In particular, revisions to section 185.5 enable local governments in New York to use records disposition schedules or schedule items in lieu of or in addition to schedules issued by the Commissioner, provided that approval of the Commissioner to such schedules or schedule items is obtained. Revisions to section 185.7 clarify and modernize requirements for replacing original records with microforms or digital images. Revisions to section 185.8 clarify and modernize requirements for the retention and preservation of electronic records. These changes establish improved and uniform standards that local governments can follow in their records management operations.

The proposed amendment has been recommended by the State Education Department after consultation with and review by the New York State Local Government Records Advisory Council.

COSTS:

(a) Costs to the State: None, other than those inherent in Article 57-A of the Arts and Cultural Affairs Law.

(b) Costs to local governments: None. The proposed amendments to Part 185 will modernize and clarify various requirements, but will impose no costs on local governments other than those inherent in Article 57-A of the Arts and Cultural Affairs Law.

(c) Costs to private, regulated parties: None.

(d) Costs to agency for implementation and continued administration of the rule: None, other than those inherent in Article 57-A of the Arts and Cultural Affairs Law.

LOCAL GOVERNMENT MANDATES:

Local governments are required to follow records management requirements of Part 185 of the Regulations of the Commissioner of Education. The amendments to Part 185 modernize and clarify those requirements but do not impose any additional program, service, duty or responsibility on local governments.

PAPERWORK:

The proposed amendment imposes no added paperwork requirements on local governments.

DUPLICATION:

The proposed amendment duplicates no existing state or federal requirements for local government records.

ALTERNATIVES:

There are no significant alternatives to the issuance of these requirements for local government records management and none were considered.

FEDERAL STANDARDS:

The proposed amendment is promulgated pursuant to the specific requirements of Article 57-A of the Arts and Cultural Affairs Law. The federal government has issued no records management standards specifically intended for use by local governments of New York.

COMPLIANCE SCHEDULE:

It is anticipated that local governments will be able to immediately comply with the proposed amendment upon its effective date.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment relates solely to local government records management and does not impose any reporting, recordkeeping or other compliance requirements on small businesses, nor will it impose any

adverse economic impact on them. Because it is evident from the nature of the proposed amendment that it will not affect 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 was not prepared.

(b) Local Government:

EFFECT OF RULE:

The proposed amendment will affect all local governments in New York that are subject to the records management requirements of the Commissioner of Education. The amendment revises and clarifies various requirements, including those concerning replacing paper records with microforms or digital images, the retention and preservation of electronic records, and the use of alternative records disposition schedules.

COMPLIANCE REQUIREMENTS:

Local governments in New York are currently required to comply with records management requirements of the Commissioner of Education. The amendments to Part 185 impose no new compliance requirements but instead modernize and clarify those requirements now in place.

PROFESSIONAL SERVICES:

The proposed amendment proposes no additional professional services requirements on local governments other than those already required by law.

COMPLIANCE COSTS:

The proposed amendments to Part 185 will modernize and clarify various requirements, but will not impose any compliance costs on local governments other than those inherent in Article 57-A of the Arts and Cultural Affairs Law.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment includes revisions to standards for replacing original records with microforms or digital images and for retaining and preserving electronic records and is technologically feasible. Economic feasibility is addressed under the Compliance Costs section set forth above.

MINIMIZING ADVERSE IMPACT:

Local governments in New York are currently required to comply with records management requirements of the Commissioner of Education. The proposed amendments to Part 185 impose no new compliance requirements or additional costs but instead modernize and clarify those requirements now in place, including those concerning replacing paper records with microforms or digital images, the retention and preservation of electronic records, and the use of alternative records disposition schedules.

LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment was reviewed and approved by the Local Government Records Advisory Council, established by State law to advise the Commissioner of Education on records management matters.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will apply to all municipalities and miscellaneous local governments in New York State, including the 44 rural counties with less than 200,000 inhabitants and the 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 revises and clarifies the records management requirements of the Commissioner of Education. These compliance requirements are already in place and affected local governments are now required to follow the current requirements of the Commissioner. The proposed amendment proposes no additional professional services requirements on local governments, other than those already required by law.

COMPLIANCE COSTS:

The proposed amendments to Part 185 will modernize and clarify various requirements, but will not impose any compliance costs on local governments other than those inherent in Article 57-A of the Arts and Cultural Affairs Law.

MINIMIZING ADVERSE IMPACT:

The proposed amendment will have no adverse impact on municipalities and miscellaneous local governments in rural areas or elsewhere in New York State. Local governments in New York are currently required to comply with records management requirements of the Commissioner of Education. The proposed amendments to Part 185 impose no new compliance requirements or additional costs but instead modernize and clarify those requirements now in place, including those concerning replacing paper records with microforms or digital images, the retention and preservation of electronic records, and the use of alternative records disposition schedules.

RURAL AREA PARTICIPATION:

The proposed amendment was reviewed and approved by the Local Government Records Advisory Council, established by State law to advise the Commissioner of Education on records management matters, and which includes members from rural areas.

Job Impact Statement

The proposed amendment relates solely to local government records management and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

PROPOSED RULE MAKING HEARING(S) SCHEDULED

New Major Facilities and Major Modifications to Existing Facilities

I.D. No. ENV-39-07-00006-P

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

Proposed action: Amendment of Parts 200, 201 and 231 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303 and 19-0305; and Federal Clean Air Act, sections 160-169 and 171-193 (42 U.S.C. 7470-7479; 7501-7515)

Subject: Requirements for proposed new major facilities and major modifications to existing facilities located in attainment and nonattainment areas of the State.

Purpose: To comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rule making is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the Federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

Public hearing(s) will be held at: 2:00 p.m., Nov. 13, 2007 at Department of Environmental Conservation, Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, NY; 2:00 p.m., Nov. 15, 2007 at Department of Environmental Conservation, Public Assembly Rm. 129, 625 Broadway, Albany, NY; and 2:00 p.m., Nov. 16, 2007 at Department of Environmental Conservation, Region 2 Annex, Hearing Rm. 106, 11-15 47th Ave., Long Island City, NY.

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

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

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): The Department of Environmental Conservation (DEC) proposes to amend Parts 200, 201 and 231 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, entitled "General Provisions," "Permits and Registrations" and

“New Source Review in Nonattainment Areas and Ozone Transport Regions.”

The Part 200 amendments will add a definition for Routine Maintenance, Repair, or Replacement (RMRR), codifying current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. In addition, the Department is revising Part 200 (Sections 200.9 and 200.10). Section 200.9 is being amended to include all federal materials referenced in the proposed amendments to Part 231. Section 200.10(a) is being amended to reflect that the Department is no longer delegated responsibility for implementation of the Federal Prevention of Significant Deterioration (PSD) Program.

The proposed amendments to Part 201 revise the definition for “major stationary source or major source” at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term “major facility” and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to a nominal 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed. Reg. 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area.

The existing nonattainment New Source Review program at Part 231 will be re-titled “New Source Review for New and Modified Facilities” and will include new Subparts 231-3 through 231-13. The new subparts will implement nonattainment New Source Review (NNSR) and attainment New Source Review (PSD). The NNSR requirements are based on New York’s existing NNSR program Subpart 231-2, with revisions to include selected provisions from the December 31, 2002 Federal NSR reform rule. The PSD requirements are also based largely on the December 31, 2002 Federal NSR reform rule as codified at 40 CFR 52.21.

The proposed revisions to Part 231 will change the basis of applicability for modifications and emission reduction credits (ERCs) from an “Emission Unit” basis to an “Emission Source” basis, incorporate various federal requirements, provide clarification of existing requirements, and require comprehensive reporting, monitoring, and recordkeeping that will conform to the requirements of Title V. Through this rulemaking, the Department will also establish a new method for determining baseline actual emissions. Baseline actual emissions will be determined by using any 24 consecutive month period of emissions in the previous five years. All facilities (no separate baseline period for electric utility steam generating units) will be required to determine their baseline actual emissions using this method.

The Department will retain existing Subpart 231-1 “Requirements for emission sources subject to the regulation prior to November 15, 1992” and Subpart 231-2, “Requirements for emission units subject to the regulation on or after November 15, 1992”. These regulations are currently cited in many air permits issued throughout the State and retaining them will facilitate implementation and enforcement of the NSR program. Existing Subpart 231-2 will be revised only to indicate that the Subpart will not apply after the date the proposed revisions to Part 231 become effective. Thus, permit applications received on or after the effective date of revised Part 231 will be processed according to the provisions of Subparts 231-3 through 231-13, as applicable.

New Subparts 231-3 through 231-13 have been added to include provisions from the EPA December 31, 2002 NSR Rule, and incorporate the Federal PSD program. The NNSR provisions currently specified in Subpart 231-2 are being updated and incorporated into these new subparts. The Department is also adopting a State PSD program which is based largely on the Federal PSD rule and included in Subparts 231-7, 231-8, and 231-12. The subparts of the proposed regulation are being organized to ease determinations of applicability, to collect common requirements into groups, and to streamline the regulation. The organization of the new regulation strives to make a more coherent series of requirements and obligations.

Subpart 231-3 General Provisions specifies provisions which apply generally including a transition plan, general permit requirements, general prohibitions, exemptions, and circumvention.

Subpart 231-4 defines the terms used throughout Part 231 and incorporates terms from both the existing Subpart 231-2 and the Federal PSD rule, 40 CFR 52.21. The Department has made minor revisions to terms used in existing Subpart 231-2 and 40 CFR 52.21 so that definitions are consistent for both nonattainment and attainment NSR and with New York’s regulations.

To facilitate the implementation and administration of Part 231, the Department has included the requirements for new and modified facilities in four main subparts (231-5 to 231-8) depending on the facility’s location in an attainment or nonattainment area.

Subpart 231-5 is applicable to new facilities and to modifications at existing non-major facilities in nonattainment areas. Proposed new major facilities will continue to be subject to the requirements to install Lowest Achievable Emission Rate (LAER) and obtain emission offsets as they are under existing Subpart 231-2. The subpart also specifies that non-major facilities undertaking projects which are major by themselves, or increase the emissions of the facility above major thresholds must obtain permits which limit emissions.

Subpart 231-6 applies to modifications at existing major facilities in nonattainment areas. The subpart continues the requirements for LAER technology and emission offsets that exist in the Department’s current nonattainment NSR program. The subpart also specifies that facilities can perform a netting exercise to determine whether the modification, when considering other contemporaneous activities at the facility, would exceed applicable emissions thresholds.

Subpart 231-7 applies to new facilities and to modifications at existing non-major facilities in attainment areas. The subpart implements the requirements for determination of air quality impacts through modeling, and the application of Best Available Control Technology (BACT). The subpart also specifies that non-major facilities undertaking projects which are major by themselves, or increase the emissions of the facility above major thresholds must obtain permits which limit emissions.

Subpart 231-8 applies to modifications at existing major facilities in attainment areas of the State. The subpart implements the requirements for determination of air quality impacts through modeling and the application of BACT in the case of facilities which undertake a NSR major modification. These requirements address Federal PSD requirements. The subpart also specifies that facilities can perform a netting exercise to determine whether the modification, when combined with other contemporaneous activities at the facility, would exceed emissions thresholds.

The remaining five subparts include general provisions that apply to both new and modified subject facilities.

Subpart 231-9 sets forth the requirements for establishing Plantwide Applicability Limitations (PAL) at Title V facilities. A PAL allows a facility to undertake modifications without being subject to NSR review as long as the facility does not exceed its PAL emission limit. Subpart 231-9 is based on the PAL provisions from the December 31, 2002 Federal NSR rule (67 Fed Reg at 80278), which specify PAL creation, duration, and expiration. The Department has made a few revisions to the federal regulatory language to take into account Subpart 201-6, New York’s approved Title V regulation and to ensure that reduced emissions and improved air quality will result. PALs are established in Title V permits and are subject to Title V permit application and processing procedures for creation, modification, or renewal. PALs are created for an initial period of 10 years, less if established during the middle of a Title V permit term, and can be renewed for 10 years, subject to certain restrictions. The proposed regulation requires that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The Department may authorize a reduction in the PAL to a level that would reflect the emissions from the facility if all major PAL emission sources are operated at full capacity after complying with BACT and/or LAER, as applicable.

Subpart 231-10 defines emission offset and Emission Reduction Credit (ERC) creation and use. The provisions for ERC creation and use are substantially the same as existing Subpart 231-2.

Subpart 231-11 sets forth specific permit, monitoring, reporting and recordkeeping requirements that apply to new major facilities, NSR major modifications and minor modifications. These requirements are in addition to any Part 201 requirements that may apply.

Subpart 231-12 specifies the ambient air quality impact analysis requirements for facilities in attainment areas. These requirements emanate from the Federal PSD rule which is codified at 40 CFR 52.21.

Subpart 231-13 includes several tables which list applicable emission thresholds for proposed new and modified facilities, emission offset ratios, federal Class I variance maximum allowable increase concentrations, and maximum allowable increase in SO₂ concentrations for gubernatorial variances. Table 9—Source Category List includes the new chemical process

plant exclusion for ethanol production facilities that produce ethanol by natural fermentation (included in NAICS codes 325193 or 312140). This exclusion was promulgated in the EPA May 1st, 2007 Final Rule for 40 CFR Parts 51, 52, 70, and 71 Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the Major Emitting Facility" definition.

Text of proposed rule and any required statements and analyses may be obtained from: Ricky Leone, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, e-mail: 231nsr@gw.dec.state.ny.us

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

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

Additional matter required by statute: Pursuant to art. 8 of the State Environmental Quality Review Act, a short environmental assessment form, a negative declaration and a coastal assessment form have been prepared and are on file. This rule must be approved by the Environmental Board.

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

Summary of Regulatory Impact Statement

1. STATUTORY AUTHORITY:

The statutory authority for these regulations is found in the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303 and 19-0305, and in Sections 160-169 and 171-193 of the Federal Clean Air Act (42 USC Sections 7470-7479; 7501-7515) (Act or CAA).

2. LEGISLATIVE OBJECTIVES:

Articles 1 and 3, of the ECL, set out the overall State policy goal of reducing air pollution and providing clean air for the citizens of New York. They provide general authority to adopt and enforce measures to do so, including the regulation of mobile sources of air pollution. In addition to the general powers and duties of the New York State Department of Environmental Conservation (Department) and Commissioner to prevent and control air pollution found in Articles 1 and 3, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air 'quality' of New York from pollution. To facilitate this purpose, the Legislature bestowed specific powers and duties on the Department, including the power to formulate, adopt, promulgate, amend and repeal regulations for preventing, controlling and prohibiting air pollution.

The Clean Air Act (Act) requires states to have a preconstruction and operating permit program for new and modified major stationary sources. In 1970, Congress amended the Act "to provide for a more effective program to improve the quality of the Nation's air." The statute directed EPA to adopt National Ambient Air Quality Standards (NAAQS) and required states to develop implementation plans known as State Implementation Plans (SIPs) which prescribed the measures needed to attain the NAAQS. The 1970 Act amendments mandated that SIPs contain "a procedure for review (prior to construction or modification) of the location of any new or modified air pollution source." When it became clear that the goals of the 1970 Act amendments would not be achieved, Congress amended the Act in 1977 to provide additional safeguards to protect the nation's air quality. The 1977 amendments required states to identify areas that did not meet the NAAQS which were then designated as "nonattainment" areas. In particular, the 1977 amendments strengthened the Act by (1) expressly creating a preconstruction review program for new or modified major sources located in "nonattainment" areas (*i.e.*, areas which failed to meet NAAQS) ('see generally' 42 USC Sections 7501-7515); and (2) expressly providing a parallel preconstruction review program for new or modified sources located in "attainment" areas (*i.e.*, areas which met NAAQS or where there was insufficient information to evaluate whether NAAQS were met) ('see generally *id.*' Sections 7470-7492).

In 1978, EPA promulgated a NSR regulation, followed by multiple sets of regulations including regulations applying to PSD and NNSR in states with and without approved SIPs. In 1996, EPA proposed a NSR rule revision that it described as "the first comprehensive overhaul of the program in 15 years" (61 Fed Reg 38250 [July 23, 1996] [1996 Draft Rule]). The proposed changes were "intended to reduce costs and regulatory burdens for permit applicants" without sacrificing air quality ('*id.*' at 38251) EPA estimated that the changes, if finalized, would result in approximately 50 percent fewer sources being subject to NSR ('*see id.*' at 38319). On December 31, 2002, the EPA published a final rule revising the regulations that implement the PSD and NNSR provisions of the Act ('*see*' 67 Fed Reg 80185 [2002 Federal NSR Rule]). EPA stated that the rule was

designed to "reduce burden, maximize operating flexibility, improve environmental quality, provide additional certainty, and promote administrative efficiency" ('*id.*' at 80189). The 2002 Federal NSR Rule required States with approved PSD and NNSR programs to submit a SIP revision by January 2006. The Department NNSR regulation at 6 NYCRR Part 231 is subject to this SIP submittal requirement. The Department implemented the PSD program on behalf of EPA pursuant to a delegation agreement with EPA that had been in effect since the mid 1980s. The Department could have continued to implement the PSD program as a delegated State but objected to several aspects of EPA's 2002 Federal NSR Rule and determined that it could not implement the 2002 Federal NSR Rule in its entirety and EPA declined to have the Department implement the PSD program on a partial agreement. On May 24, 2004, the Department returned delegation of the PSD program to EPA after failing to reach agreement on a partial implementation of the program. The Department advised EPA that it intended to adopt a State PSD program that would be protective of the State's air resources and submit the regulations to EPA for SIP approval.

3. NEEDS AND BENEFITS:

The Department is undertaking this rule making to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rule making is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

From the State's perspective, major NSR is a critical tool in meeting the Legislature's air quality objectives. The program ensures that air quality is preserved in areas of the state that meet the NAAQS and does not further degrade, but actually improves, in areas of the State which currently are not in attainment of the NAAQS. The State of New York currently has areas that are designated nonattainment for ozone, PM-10, and particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). As a result, the Department must have a NNSR program that meets the requirements of Part D of Title I of the Act to adopt permit programs for the construction, modification, and operation of major stationary sources in non-attainment areas.

The proposed regulation is one in a series of programs intended to track pollution, ensure that sources are meeting their regulatory obligations, and maintain permits. These permits contain provisions to limit emissions of ozone precursors (volatile organic compounds and nitrogen oxides), fine particulate matter, sulfur dioxide, carbon monoxide, and lead.

The proposed regulation is being organized to facilitate its implementation. The organization of the new regulation strives to make a more coherent series of requirements and obligations. The existing subparts 231-1 and 231-2 are being retained with only modifications of the applicability dates. The initial subparts, Subpart 231-3 General Provisions and Subpart 231-4 Definitions, specify those provisions and definitions applicable throughout the regulation. The next four subparts address new and modified facilities in nonattainment and attainment areas. These specific subparts are intended to clearly indicate which provisions apply to facilities in different areas of the state. Subpart 231-5 provisions apply to new facilities and existing non-major facilities in nonattainment areas and Subpart 231-6 applies to modifications to existing major facilities in nonattainment areas. Subpart 231-7 applies to new facilities and to existing non-major facilities in attainment areas and Subpart 231-8 applies to existing major facilities in attainment areas of the State. The remaining five subparts specify how various major provisions apply to the four scenarios in Subparts 5 through 8. Subpart 231-9 defines how Plantwide Applicability Limitations can be applied to facilities that choose to undertake them. Subpart 231-10 sets forth requirements for Emission Reduction Credit (ERC) creation and use as emission offsets and for netting. Subpart 231-11 provides specific permit, monitoring, reporting, and recordkeeping requirements. Subpart 231-12 embodies the Ambient Air Quality Impact Analysis requirements for facilities in attainment areas. Subpart 231-13 compiles tables and lists emission thresholds applicable throughout the proposed regulation.

The proposed revisions to Part 231 will change the basis of applicability for modifications and emission reduction credits (ERCs) from an "Emission Unit" basis to an "Emission Source" basis, incorporate various federal requirements, provide clarification of existing requirements, and require comprehensive reporting, monitoring, and recordkeeping that will conform to the requirements of Title V. The revisions are expected to make the regulations less burdensome to the business community without compromising air quality. The revisions are not expected to have any measurable impact on employment opportunities in the State. The proposed regulations will make revisions to the current Part 231 to address deficiencies previously identified by the EPA.

In May 2004, the Department convened a workgroup to discuss the development and adoption of a State NSR rule. Participants included members of the regulated community, State and Federal agencies, and environmental organizations. The Department held meetings in 2004, 2006, and 2007 to discuss the major NSR reform provisions. The Department has also provided outreach through Part 231 rule making presentations at the NYS Business Council's 2005 Annual Industry-Environmental Conference held on October 13 & 14, 2005 in Saratoga Springs, NY, and at the Air & Waste Management's Ninth Annual Environmental, Health & Safety Seminar held in Rochester, NY on February 15, 2006.

4. COSTS:

NSR reviews are done on a case-by-case basis so the costs of compliance with either the Federal NSR rules or the proposed Part 231 revisions will be very facility specific. Under proposed Part 231, the following types of costs may be incurred by a facility located in a rural area. New facilities or facilities that undertake modifications will have costs associated with determining regulatory applicability in the first instance. Some facilities that undertake minor modifications will only incur the costs associated with maintaining records while others may be also subject to some emission monitoring depending on the other activities at the facility. Facilities that require emission caps will have the costs of preparing permit applications and emissions monitoring, recordkeeping and reporting. Facilities that are subject to NSR in its entirety will have costs associated with preparing permit applications, including control technology and environmental impact assessments, emission offsets for nonattainment areas, and emissions monitoring, recordkeeping, and reporting. The proposed amendments to Part 231, in general, add provisions for increased regulatory flexibility and provide for a coordinated review process for NSR affected projects. The technology assessment requirements of LAER, for facilities subject to the Department's existing Part 231, remain unchanged in the Department's proposed amendments to Part 231. While some aspects of the regulatory applicability determination will be more restrictive for nonattainment NSR than current Part 231, i.e. the baseline actual emissions to projected actual emissions methodology will replace the maximum annual potential (MAP) methodology calculation, other aspects of the proposed regulation will be more flexible than the current regulation. For example, for baseline determinations facilities will have the option to choose any 24 consecutive month period in the past five years while the current Part 231 requires facilities to use the most recent 24 consecutive month period unless they can demonstrate that another period is more representative. It is possible that the proposed revisions to Part 231 will result in more facilities being subject to nonattainment NSR review than under current Part 231 since the Department is eliminating the maximum annual potential (MAP) applicability concept. It is also possible that more facilities will be subject to NSR under revised Part 231 than under the Federal regulations since the Department is proposing to determine baseline actual emissions based on a five-year look back period rather than a 10-year look back as in the Federal NSR rule. Although the Department anticipates that more facilities will be subject than under the federal NSR rule since there will be less opportunity for an emission look back, the Department does not have definitive data to determine for certain that this will be the case. As far as the costs of compliance are concerned the Department does not envision significant increased costs. Since the proposed amendments to Part 231 apply to proposed major facilities and major modifications, annual compliance and administrative costs would remain consistent with those currently incurred to comply with the Department's 6 NYCRR Part 201 Title V requirements.

The proposed regulation requires that for any facility seeking the establishment of a PAL, that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The capital, operation and maintenance,

and monitoring costs associated with the acceptance of a PAL, if any, will vary on a case-by-case basis. The requirement to reduce the PAL may cause an increase in cost to the facility that chooses to use a PAL, if a facility chooses a capital-intensive means of achieving the emission reductions. However, some facilities may meet the 25 percent reduction without incurring any additional costs, such as when a facility already plans to reduce the usage of a less efficient source within the facility, or implements efficiency improvements that reduce emissions and the cost of operation. Since PALs are a new compliance option, no specific cost estimates are available to determine if the PAL provisions will cause a monetary burden on any facility that chooses to use a PAL.

The proposed amendments to Part 231 set forth PM 2.5 applicability requirements for new major facilities and NSR major modifications consistent with new federal PM 2.5 requirements. The Department must include PM 2.5 in its proposed amendments to Part 231 to receive SIP approval. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 nonattainment area, the proposed rule requires the application of LAER and emission offsets of PM 2.5 at a ratio of one to one. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 attainment area, the proposed rule requires the application of BACT and preparation of an ambient air quality impact analysis. Facilities which meet the PM 2.5 applicability criteria will incur additional costs above those in existing Part 231 since PM 2.5 is not a regulated contaminant under existing Part 231 and was not previously a regulated contaminant under federal 40 CFR 52.21 (PSD). The most significant cost increase will be for new facilities and modifications that need to obtain PM 2.5 emission offsets. These costs will, however, vary greatly being dependent on the amount (tons per year) of emission offsets needed and the availability of approved reductions to be used as PM 2.5 offsets.

5. PAPERWORK:

Most of the proposed amendments to Part 231 are not expected to entail any significant additional paperwork for the Department, industry, or state and local governments beyond that which is already required to comply with the Department's existing permitting program under 6 NYCRR Part 201-6 and existing NSR regulations under 6 NYCRR Part 231, and federal 40 CFR 52.21. Also, while Part 231 may include more specific recordkeeping requirements than the Federal NSR rule, as discussed above, EPA appears to be changing its approach. Another area where revised Part 231 may entail additional paperwork is with the initial PAL review, which is a voluntary program. Applicants that seek to justify a reduction of less than 25 percent in the PAL will have to conduct control technology assessments that will increase the amount of paperwork beyond that required if the applicant chose not to avail itself of the option to agree to a PAL.

6. STATE AND LOCAL GOVERNMENT MANDATES:

The adoption of the proposed amendments to Part 231 are not expected to result in any additional burdens on industry, state, or local governments beyond those currently incurred to comply with the requirements of the existing NSR process under 6 NYCRR 201-6, 6 NYCRR 231-2, and 40 CFR 52.21.

7. DUPLICATION:

This proposal is not intended to duplicate any other Federal or State regulations or statutes. The proposed amendments to Part 231 will ultimately conform to the Act. In the short term, some duplication may occur. Currently, EPA Region 2 implements the PSD program for new and modified major facilities in attainment areas of New York State. Once the proposed revisions are in effect, and approved by EPA into the SIP, the Department will have sole responsibility for the PSD provisions, and no duplication will occur.

8. ALTERNATIVES:

Adoption of the proposed amendments to Part 231 is necessary to conform to federal requirements. The Department returned delegation of the PSD rules in a letter to EPA dated May 24, 2004, retroactively effective March 3, 2003. As a result, the Department must develop its own regulations in order to implement the PSD program. The Department is taking the opportunity to resolve issues cited by the USEPA and the regulated community, while incorporating the EPA NSR Reform provisions, in modified form. The amendments will provide further clarification of existing rules, coordinate review and requirements in both attainment and nonattainment areas, and make Part 231 less burdensome to the regulated community. The Department believes that no viable alternatives to this rule making are available.

The following is a discussion of the available alternatives:

Take no action. – This option is not a legitimate option. The State is required to either incorporate the Federal NSR regulations into the SIP or adopt its own program.

Adopt the federal NSR Rule – The Department does not believe that adoption of the Federal NSR Rule is consistent with the policy objectives of the State as articulated in the ECL and therefore has determined that this is not a viable option.

Adoption a State-specific NSR program – Because neither option discussed above is acceptable, the Department proposes to adopt a State specific NSR program. The program will consist of modifications to the Department's existing Part 231 NNSR program and adoption of a State PSD program. The rule making will incorporate some of the provisions of the 2002 Federal NSR Rule as well as other provisions tailored to New York's air quality needs and objectives.

9. FEDERAL STANDARDS:

The proposed amendments are incorporating federal regulatory language, and will align the state regulation with federal standards for the most part, and exceed minimum federal standards for other items.

Provisions of the regulation which exceed federal standards include: use of a uniform baseline period (any consecutive 24 month period over the previous five years) for all facilities; limiting projects to the use of only one baseline period for all NSR regulated pollutants for determining whether a project is subject to the regulation; modifications that would otherwise not be subject to the regulation according to the EPA Rule due to their insignificance are required to keep records of such a modification under the Department regulation; certified emission reduction credits are being required for netting analyses for PSD areas that would not otherwise be required by the EPA Rule; the PAL allowance is being limited to 10 years or less depending on the renewal of the applicable Title V permit, whereas EPA would allow 10 years regardless of permit duration, and the PAL will be required to be reduced up to 25 percent by year six of its duration.

On May 1, 2007 EPA promulgated rule revisions to 40 CFR Parts 51, 52, 70, and 71 Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the Major Emitting Facility" definition; Final Rule—with an effective date of July 2, 2007. To remain consistent with this rule making, the Department proposes to modify the definition of "Major stationary source or major source or major facility" under Part 201, and Table 9—Source Category List under Subpart 231-13 to exclude ethanol production facilities that produce ethanol by natural fermentation (included in NAICS codes 325193 or 312140) from chemical process plants.

10. COMPLIANCE SCHEDULE:

The proposed amendments do not involve the establishment of any compliance schedules. The regulation will take effect 30 days after publication in the *State Register*.

Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rule making will apply statewide. The Part 231 applicability thresholds for facilities in New York State (excluding New York City, Long Island, and Lower Orange, Rockland and Westchester Counties) is large enough that it is unlikely any small business or local government that owns or operates a facility would be subject to the applicability requirements of Part 231. For New York City, Long Island, and Lower Orange, Rockland and Westchester Counties, the Part 231 applicability threshold is very small, thus it is likely that some small businesses and local governments would be subject to the proposed revisions.

The Department is undertaking this rule making to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rule making is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. Specific recordkeeping and monitoring requirements have been included in the proposed amendments to address minor modifications. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. New York is also requiring facilities which obtain Plant-wide Applicability Limits (PAL) to reduce emissions or make a demonstration that they operate with current pollution control technology. This additional PAL requirement, however, is only applicable to facilities which choose to obtain a PAL, not all facilities. The Department has added under Part 200 a regulatory definition for Routine Maintenance, Repair, or Replacement (RMRR), which codifies the current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed Reg 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area. Collectively, these additional requirements will not affect all major facilities, only new facilities or those which undertake major modifications. Many of the significant requirements are not changing; new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews.

COMPLIANCE REQUIREMENTS:

As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. The proposed amendments to Part 231 require facilities which undertake modifications with a project emission potential which does not exceed the applicable significant project threshold (with or without demand growth emissions) to maintain records which support their emissions calculations and provide them to the Department upon request. The 2002 Federal NSR Rule does not contain such a requirement. In addition, facilities that undertake modifications that would exceed the applicable significant project threshold if demand growth emissions were considered or would equal or exceed fifty (50) percent of the applicable significant project threshold will be required to maintain records of their demand growth determinations, monitor post-modification emissions, and submit an annual report to the Department to verify the accuracy of their emission calculations. The federal regulations require the same recordkeeping, monitoring, and reporting for modifications that the facility believes have a "reasonable possibility" of causing a significant emissions increase. The Department believes that, in order for the regulations to be enforceable, that a more objective standard must be adopted as a trigger for recordkeeping, monitoring, and reporting. The amendments to Part 231 instead use two approaches; 1) whether demand growth emissions, if considered, would result in post-modification emissions exceeding the significance threshold, or 2) the project emission potential would equal or exceed fifty (50) percent of the applicable significant project threshold. Given the difficulty of separating post-modification emission increases attributable to demand growth versus those attributable to the modification, the Department's approach is faithful to the "reasonable possibility" concept but uses a more objective standard to improve enforceability. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and comply with the proposed amendments to Part 231. Because facilities will have to generate this information to determine whether they are subject to the proposed amendments to Part 231, there should be little if any additional cost associated with maintaining the records. In the case of netting at existing

major facilities, and for minor modifications, the proposed recordkeeping, monitoring, and reporting requirements are more extensive than those included in the 2002 Federal NSR Rule. For netting, the proposed regulation is consistent with current Department practice which requires permits to include enforceable emission limits and appropriate recordkeeping, monitoring, and reporting. For minor modifications, the proposed regulation requires that facilities maintain records of the modification and comply with any other requirements that may be applicable, including Part 201 permitting requirements. While proposed Part 231 recordkeeping, monitoring, and reporting requirements may be more extensive than the 2002 Federal NSR Rule, from the perspective of New York State's implementation of NSR, the requirements are not significantly changing. Accordingly, these requirements are not anticipated to place any undue burden of compliance on small businesses and local governments.

PROFESSIONAL SERVICES:

The professional services for any small business or local government that is subject to Part 231 are not anticipated to significantly change from the type of services which are currently required to comply with NNSR and PSD requirements. The need for consulting engineers to address NSR applicability and permitting requirements for any new major facility or major modification proposed by a small business or local government will continue to exist.

COMPLIANCE COSTS:

NSR reviews are done on a case-by-case basis so the costs of compliance with either the Federal NSR rules or the proposed Part 231 revisions will be very facility specific. Under proposed Part 231, the following types of costs may be incurred by small businesses and local governments. New facilities or facilities that undertake modifications will have costs associated with determining regulatory applicability in the first instance. Some facilities that undertake minor modifications will only incur the costs associated with maintaining records while others may be also subject to some emission monitoring depending on the other activities at the facility. Facilities that require emission caps will have the costs of preparing permit applications and emissions monitoring, recordkeeping and reporting. Facilities that are subject to NSR in its entirety will have costs associated with preparing permit applications, including control technology and environmental impact assessments, emission offsets for nonattainment areas, and emissions monitoring, recordkeeping, and reporting. The proposed amendments to Part 231, in general, add provisions for increased regulatory flexibility and provide for a coordinated review process for NSR affected projects. The technology assessment requirements of LAER, for facilities subject to the Department's existing Part 231, remain unchanged in the Department's proposed amendments to Part 231. While some aspects of the regulatory applicability determination will be more restrictive for non-attainment NSR than current Part 231, *i.e.*, the baseline actual emissions to projected actual emissions methodology will replace the maximum annual potential (MAP) methodology calculation, other aspects of the proposed regulation will be more flexible than the current regulation. For example, for baseline determinations facilities will have the option to choose any 24 consecutive month period in the past five years while the current Part 231 requires facilities to use the most recent 24 consecutive month period unless they can demonstrate that another period is more representative. It is possible that the proposed revisions to Part 231 will result in more facilities being subject to nonattainment NSR review than under current Part 231 since the Department is eliminating the maximum annual potential (MAP) applicability concept. It is also possible that more facilities will be subject to NSR under revised Part 231 than under the Federal regulations since the Department is proposing to determine baseline actual emissions based on a five-year look back period rather than a 10-year look back as in the Federal NSR rule. Although the Department anticipates that more facilities will be subject than under the federal NSR rule since there will be less opportunity for an emission look back, the Department does not have definitive data to determine for certain that this will be the case. As far as the costs of compliance are concerned the Department does not envision significant increased costs. Since the proposed amendments to Part 231 apply to proposed major facilities and major modifications, annual compliance and administrative costs would remain consistent with those currently incurred to comply with the Department's 6 NYCRR Part 201 Title V requirements.

The proposed regulation requires that for any facility seeking the establishment of a PAL, that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable,

on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The capital, operation and maintenance, and monitoring costs associated with the acceptance of a PAL, if any, will vary on a case-by-case basis. The requirement to reduce the PAL may cause an increase in cost to the facility that chooses to use a PAL, if a facility chooses a capital-intensive means of achieving the emission reductions. However, some facilities may meet the 25 percent reduction without incurring any additional costs, such as when a facility already plans to reduce the usage of a less efficient source within the facility, or implements efficiency improvements that reduce emissions and the cost of operation. Since PALs are a new compliance option, no specific cost estimates are available to determine if the PAL provisions will cause a monetary burden on any facility that chooses to use a PAL.

The proposed amendments to Part 231 set forth PM 2.5 applicability requirements for new major facilities and NSR major modifications consistent with new federal PM 2.5 requirements. The Department must include PM 2.5 in its proposed amendments to Part 231 to receive SIP approval. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 nonattainment area, the proposed rule requires the application of LAER and emission offsets of PM 2.5 at a ratio of one to one. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 attainment area, the proposed rule requires the application of BACT and preparation of an ambient air quality impact analysis. Facilities which meet the PM 2.5 applicability criteria will incur additional costs above those in existing Part 231 since PM 2.5 is not a regulated contaminant under existing Part 231 and was not previously a regulated contaminant under federal 40 CFR 52.21 (PSD). The most significant cost increase will be for new facilities and modifications that need to obtain PM 2.5 emission offsets. These costs will, however, vary greatly being dependent on the amount (tons per year) of emission offsets needed and the availability of approved reductions to be used as PM 2.5 offsets.

MINIMIZING ADVERSE IMPACT:

The proposed rule making revisions as described above are not expected to create significant adverse impacts on any small business or local government. The proposed revisions to Part 231 involve a major restructuring of the rule which will make it less burdensome for the Department to implement and easier for the regulated community to comprehend. The Department has provided a more flexible approach for determining the baseline period (any 24 consecutive month period in the previous five years) than under the current Part 231 (immediate 24 consecutive month period in the previous five years). NNSR and PSD review requirements will now be included in one regulation rather than in separate State and Federal rules. The rule also includes PAL provisions which allow a facility to accept a 10 year facility-wide emission cap for a particular pollutant and then make changes at the facility avoiding NSR applicability provided the facility remains in compliance with its PAL.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

In May 2004, the Department convened a workgroup to discuss the development and adoption of a State NSR regulation (revised Part 231). Participants included members of the regulated community, State and Federal agencies, and environmental organizations: American Lung Association; the Business Council of New York State, Inc. (BCNYS); the Chemical Alliance; the National Federation of Independent Businesses; Consolidated Edison Company of New York; the Energy Association of New York State; EPA Region II; Independent Power Producers of New York; the Natural Resources Defense Council (NRDC); the New York Public Interest Research Group (NYPIRG); New York Department of Public Service (NYSDPS); New York State Office of the Attorney General (NYSOAG); and the Governor's Office of Regulatory Reform (GORR).

The Department held four meetings in the summer and fall of 2004 to discuss the major reform provisions included in EPA's 2002 Federal NSR Rule and Equipment Replacement Provision (ERP). The following issues were discussed: the Clean Unit and Pollution Control Project exemptions; whether the 2002 Federal NSR Rule adequately addressed compliance monitoring, reporting and recordkeeping; the methodology for determining baseline actual emissions, including the appropriate look-back period (five years versus 10 years); the "reasonable possibility" test; the method for determining whether a significant emission increase occurred - the baseline actual emission to projected actual emissions test; whether "demand growth" should be excluded from the projection of post-modification actual emissions; routine maintenance, repair, and replacement, including the ERP rule, and the practice of conducting case-by-case determinations; and the PAL provision.

The workgroup reconvened on February 16, 2006 to discuss proposed amendments to Part 231. The Department presented an overview of the proposed amendments to Part 231 and discussed the differences between the proposed amendments to Part 231, EPA's 2002 Federal NSR Rule and the Department's existing NNSR Regulation (6 NYCRR Subpart 231-2). The workgroup commented on provisions which might be too broadly (e.g., permit modification triggers) or too narrowly construed (e.g., definition for routine maintenance repair and replacement). The attendees were also interested in the timing of the regulation and other pending and anticipated EPA regulations which might impact NSR review. The Department requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received. On September 6, 2006, the Department publicly noticed for hearings and comment proposed amendments to Part 231. Following this proposal and receipt of comments, the workgroup reconvened once again on March 28, 2007 to discuss further changes that the Department planned to make to its proposed amendments to Part 231. The workgroup attendees were interested in the Department's proposed changes to baseline emissions, exemptions, PALs, and monitoring/reporting/recordkeeping requirements particularly as they relate to minor modifications and demand growth emissions. The Department once again requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received.

The Department has also provided outreach through Part 231 rule making presentations at the New York State Business Council's 2005 Annual Industry-Environmental Conference held on October 13 & 14, 2005 in Saratoga Springs, New York, and at the Air & Waste Management's Ninth Annual Environmental, Health & Safety Seminar held in Rochester, New York on February 15, 2006. Comments from these presentations were also considered during development of the proposed amendments to Part 231. Furthermore, public notice and hearings will be held to obtain additional comments on the Department's proposed revisions to Parts 200, 201 and 231. Participation by every affected party will be actively sought through these hearings.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed revisions do not substantially alter the requirements for subject facilities as compared to those that currently exist. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. Therefore, the Department believes there are no additional economic or technological feasibility issues to be addressed by any small business or local government that may be subject to the proposed rule making.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

Rural areas are defined as rural counties in New York State that have populations less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile and villages within those towns.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rule making will apply statewide and all rural areas of New York State will be affected.

The Department is undertaking this rule making to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rule making is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting

in a manner consistent with New York's Title V operating permit program. Specific recordkeeping and monitoring requirements have been included in the proposed amendments to address minor modifications. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. New York is also requiring facilities which obtain Plant-wide Applicability Limits (PAL) to reduce emissions or make a demonstration that they operate with current pollution control technology. This additional PAL requirement, however, is only applicable to facilities which choose to obtain a PAL, not all facilities. The Department has added under Part 200 a regulatory definition for routine maintenance, repair, or replacement (RMRR), which codifies the current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed Reg 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area. Collectively, these additional requirements will not affect all major facilities, only new facilities or those which undertake major modifications. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews.

COMPLIANCE REQUIREMENTS:

As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. As such, the professional services that will be needed by any facility located in a rural area are not anticipated to significantly change from the type of services which are currently required to comply with NNSR and PSD requirements. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. The proposed amendments to Part 231 require facilities which undertake modifications with a project emission potential which does not exceed the applicable significant project threshold (with or without demand growth emissions) to maintain records which support their emissions calculations and provide them to the Department upon request. The 2002 Federal NSR Rule does not contain such a requirement. In addition, facilities that undertake modifications that would exceed the applicable significant project threshold if demand growth emissions were considered or would equal or exceed fifty (50) percent of the applicable significant project threshold will be required to maintain records of their demand growth determinations, monitor post-modification emissions, and submit an annual report to the Department to verify the accuracy of their emission calculations. The federal regulations require the same recordkeeping, monitoring, and reporting for modifications that the facility believes have a "reasonable possibility" of causing a significant emissions increase. The Department believes that, in order for the regulations to be enforceable, that a more objective standard must be adopted as a trigger for recordkeeping, monitoring, and reporting. The amendments to Part 231 instead use two approaches; 1) whether demand growth emissions, if considered, would result in post-modification emissions exceeding the significance threshold, or 2) the project emission potential would equal or exceed fifty (50) percent of the applicable significant project threshold. Given the difficulty of separating post-modification emission increases attributable to demand growth versus those attributable to the modification, the Department's approach is faithful to the "reasonable possibility" concept but uses a more objective standard to improve enforceability. The Department believes these requirements are necessary to ensure that facilities take into account the emissions from such projects in any future Part 231 applicability determination or netting analysis and comply with the proposed amendments to Part 231. Because facilities will have to generate this information to determine whether they are subject to the proposed amendments to Part 231, there should be little if any additional cost associated with maintaining the records. In the case of netting at existing major facilities, and for minor modifications, the proposed recordkeeping, monitoring, and reporting requirements are more extensive than those

included in the 2002 Federal NSR Rule. For netting, the proposed regulation is consistent with current Department practice which requires permits to include enforceable emission limits and appropriate recordkeeping, monitoring, and reporting. For minor modifications, the proposed regulation requires that facilities maintain records of the modification and comply with any other requirements that may be applicable, including Part 201 permitting requirements. While proposed Part 231 recordkeeping, monitoring, and reporting requirements may be more extensive than the 2002 Federal NSR Rule, from the perspective of New York State's implementation of NSR, the requirements are not significantly changing. Accordingly, these requirements are not anticipated to place any undue burden of compliance on businesses in rural areas.

COSTS:

NSR reviews are done on a case-by-case basis so the costs of compliance with either the Federal NSR rules or the proposed Part 231 revisions will be very facility specific. Under proposed Part 231, the following types of costs may be incurred by a facility located in a rural area. New facilities or facilities that undertake modifications will have costs associated with determining regulatory applicability in the first instance. Some facilities that undertake minor modifications will only incur the costs associated with maintaining records while others may be also subject to some emission monitoring depending on the other activities at the facility. Facilities that require emission caps will have the costs of preparing permit applications and emissions monitoring, recordkeeping and reporting. Facilities that are subject to NSR in its entirety will have costs associated with preparing permit applications, including control technology and environmental impact assessments, emission offsets for nonattainment areas, and emissions monitoring, recordkeeping, and reporting. The proposed amendments to Part 231, in general, add provisions for increased regulatory flexibility and provide for a coordinated review process for LAER affected projects. The technology assessment requirements of LAER, for facilities subject to the Department's existing Part 231, remain unchanged in the Department's proposed amendments to Part 231. While some aspects of the regulatory applicability determination will be more restrictive for nonattainment NSR than current Part 231, i.e. the baseline actual emissions to projected actual emissions methodology will replace the maximum annual potential (MAP) methodology calculation, other aspects of the proposed regulation will be more flexible than the current regulation. For example, for baseline determinations facilities will have the option to choose any 24 consecutive month period in the past five years while the current Part 231 requires facilities to use the most recent 24 consecutive month period unless they can demonstrate that another period is more representative. It is possible that the proposed revisions to Part 231 will result in more facilities being subject to nonattainment NSR review than under current Part 231 since the Department is eliminating the maximum annual potential (MAP) applicability concept. It is also possible that more facilities will be subject to NSR under revised Part 231 than under the Federal regulations since the Department is proposing to determine baseline actual emissions based on a five-year look back period rather than a 10-year look back as in the Federal NSR rule. Although the Department anticipates that more facilities will be subject than under the federal NSR rule since there will be less opportunity for an emission look back, the Department does not have definitive data to determine for certain that this will be the case. As far as the costs of compliance are concerned the Department does not envision significant increased costs. Since the proposed amendments to Part 231 apply to proposed major facilities and major modifications, annual compliance and administrative costs would remain consistent with those currently incurred to comply with the Department's 6 NYCRR Part 201 Title V requirements.

The proposed regulation requires that for any facility seeking the establishment of a PAL, that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The capital, operation and maintenance, and monitoring costs associated with the acceptance of a PAL, if any, will vary on a case-by-case basis. The requirement to reduce the PAL may cause an increase in cost to the facility that chooses to use a PAL, if a facility chooses a capital-intensive means of achieving the emission reductions. However, some facilities may meet the 25 percent reduction without incurring any additional costs, such as when a facility already plans to reduce the usage of a less efficient source within the facility, or implements efficiency improvements that reduce emissions and the cost of operation. Since PALs are a new compliance option, no specific cost estimates are

available to determine if the PAL provisions will cause a monetary burden on any facility that chooses to use a PAL.

The proposed amendments to Part 231 set forth PM 2.5 applicability requirements for new major facilities and NSR major modifications consistent with new federal PM 2.5 requirements. The Department must include PM 2.5 in its proposed amendments to Part 231 to receive SIP approval. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 nonattainment area, the proposed rule requires the application of LAER and emission offsets of PM 2.5 at a ratio of one to one. For new major facilities and NSR major modifications for PM 2.5, located in a PM 2.5 attainment area, the proposed rule requires the application of BACT and preparation of an ambient air quality impact analysis. Facilities which meet the PM 2.5 applicability criteria will incur additional costs above those in existing Part 231 since PM 2.5 is not a regulated contaminant under existing Part 231 and was not previously a regulated contaminant under federal 40 CFR 52.21 (PSD). The most significant cost increase will be for new facilities and modifications that need to obtain PM 2.5 emission offsets. These costs will, however, vary greatly being dependent on the amount (tons per year) of emission offsets needed and the availability of approved reductions to be used as PM 2.5 offsets.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on rural areas. The proposed revisions to Part 231 involve a major restructuring of the rule which will make it less burdensome for the Department to implement and easier for the regulated community to comprehend. The Department has provided a more flexible approach for determining the baseline period (any 24 consecutive month period in the previous five years) than under the current Part 231 (immediate 24 consecutive month period in the previous five years). NNSR and PSD review requirements will now be included in one regulation rather than in separate State and Federal rules. The rule also includes PAL provisions which allow a facility to accept a 10 year facility-wide emission cap for a particular pollutant and then make changes at the facility avoiding NSR applicability provided the facility remains in compliance with its PAL.

RURAL AREA PARTICIPATION:

In May 2004, the Department convened a workgroup to discuss the development and adoption of a State NSR regulation (revised Part 231). Participants included members of the regulated community, State and Federal agencies, and environmental organizations: American Lung Association; the Business Council of New York State, Inc. (BCNYS); the Chemical Alliance; the National Federation of Independent Businesses; Consolidated Edison Company of New York; the Energy Association of New York State; EPA Region II; Independent Power Producers of New York; the Natural Resources Defense Council (NRDC); the New York Public Interest Research Group (NYPIRG); New York Department of Public Service (NYSDPS); New York State Office of the Attorney General (NYSOAG); and the Governor's Office of Regulatory Reform (GORR).

The Department held four meetings in the summer and fall of 2004 to discuss the major reform provisions included in EPA's 2002 Federal NSR Rule and Equipment Replacement Provision (ERP). The following issues were discussed: the Clean Unit and Pollution Control Project exemptions; whether the 2002 Federal NSR Rule adequately addressed compliance monitoring, reporting and recordkeeping; the methodology for determining baseline actual emissions, including the appropriate look-back period (five years versus 10 years); the "reasonable possibility" test; the method for determining whether a significant emission increase occurred - the baseline actual emission to projected actual emissions test; whether "demand growth" should be excluded from the projection of post-modification actual emissions; routine maintenance, repair, and replacement, including the ERP rule, and the practice of conducting case-by-case determinations; and the PAL provision.

The workgroup reconvened on February 16, 2006 to discuss proposed amendments to Part 231. The Department presented an overview of the proposed amendments to Part 231 and discussed the differences between the proposed amendments to Part 231, EPA's 2002 Federal NSR Rule and the Department's existing NNSR Regulation (6 NYCRR Subpart 231-2). The workgroup commented on provisions which might be too broadly (*e.g.*, permit modification triggers) or too narrowly construed (*e.g.*, definition for routine maintenance repair and replacement). The attendees were also interested in the timing of the regulation and other pending and anticipated EPA regulations which might impact NSR review. The Department requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received. On September 6, 2006, the Department publicly noticed for hearings and

comment proposed amendments to Part 231. Following this proposal and receipt of comments, the workgroup reconvened once again on March 28, 2007 to discuss further changes that the Department planned to make to its proposed amendments to Part 231. The workgroup attendees were interested in the Department's proposed changes to baseline emissions, exemptions, PALs, and monitoring/reporting/recordkeeping requirements particularly as they relate to minor modifications and demand growth emissions. The Department once again requested written comments and revised the proposed amendments to Part 231, as appropriate, taking into account comments that were received.

The Department has also provided outreach through Part 231 rule making presentations at the New York State Business Council's 2005 Annual Industry-Environmental Conference held on October 13 & 14, 2005 in Saratoga Springs, New York, and at the Air & Waste Management's Ninth Annual Environmental, Health & Safety Seminar held in Rochester, New York on February 15, 2006. Comments from these presentations were also considered during development of the proposed amendments to Part 231. Furthermore, public notice and hearings will be held to obtain additional comments on the Department's proposed revisions to Parts 200, 201 and 231. Participation by every affected party will be actively sought through these hearings.

Job Impact Statement

NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rule making will apply statewide.

The Department is undertaking this rule making to comply with the 2002 Federal New Source Review (NSR) Rule EPA promulgated and correct deficiencies that EPA identified in regards to New York's existing Nonattainment New Source Review (NNSR) regulation. The 2002 Federal NSR Rule modified both the NNSR and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively, and requires states with State Implementation Plan (SIP) approved NSR programs to revise their regulations in accordance with the 2002 Federal NSR Rule and submit the revisions to EPA for approval into the SIP. The Department's existing NNSR program at Part 231 is subject to this requirement. Another purpose of the rule making is to adopt a State PSD program for proposed new major facilities and major modifications to existing facilities located in attainment areas. The proposed Part 231 rule incorporates provisions from the federal PSD regulations in significant part with additional provisions to ensure enforceability of the rule and effective monitoring, recordkeeping and reporting.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 52.21. The proposed revisions will provide clarification of existing NSR requirements and require more comprehensive monitoring, recordkeeping, and reporting in a manner consistent with New York's Title V operating permit program. Specific recordkeeping and monitoring requirements have been included in the proposed amendments to address minor modifications. The revisions leave in-tact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. New York is also requiring facilities which obtain Plant-wide Applicability Limits (PAL) to reduce emissions or make a demonstration that they operate with current pollution control technology. This additional PAL requirement, however, is only applicable to facilities which choose to obtain a PAL, not all facilities. The Department has added under Part 200 a regulatory definition for routine maintenance, repair, or replacement (RMRR), which codifies the current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed Reg 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area. Collectively, these additional requirements will not affect all major facilities, only new facilities or those which undertake major modifications. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in

appropriate cases submit permit applications and undertake control technology reviews. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:

Due to the nature of the proposed amendments to Part 231, as discussed above, no measurable effect on the categories or numbers of jobs, or employment opportunities in any specific category is anticipated. There may be some job opportunities for persons providing consulting services and/or manufacturers of pollution control technology in relation to the new requirements.

REGIONS OF ADVERSE IMPACT:

There are no regions of the State where the proposed revisions would have a disproportionate adverse impact on jobs or employment opportunities. The existing NSR requirements are not being substantially changed from those that currently exist.

MINIMIZING ADVERSE IMPACT:

The proposed rule making revisions as described above are not expected to create significant adverse impacts on existing jobs or promote the development of any significant new employment opportunities. The proposed revisions to Part 231 involve a major restructuring of the rule which will make it less burdensome for the Department to implement and easier for the regulated community to comprehend. The Department has provided a more flexible approach for determining the baseline period (any 24 consecutive month period in the previous five years) than under the current Part 231 (immediate 24 consecutive month period in the previous five years). NNSR and PSD review requirements will now be included in one regulation rather than in separate State and Federal rules. The rule also includes PAL provisions which allow a facility to accept a 10 year facility-wide emission cap for a particular pollutant and then make changes at the facility avoiding NSR applicability provided the facility remains in compliance with its PAL.

SELF-EMPLOYMENT OPPORTUNITIES:

The types of facilities affected by these regulatory changes are larger operations than what would typically be found in a self-employment situation. There may be an opportunity for self-employed consultants to advise facilities on how best to comply with the revised requirements. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

Department of Health

EMERGENCY RULE MAKING

Payment for FQHC Psychotherapy and Offsite Services

I.D. No. HLT-39-07-00007-E

Filing No. 979

Filing date: Sept. 10, 2007

Effective date: Sept. 10, 2007

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

Action taken: Amendment of section 86-4.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 201.1(v)

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

Specific reasons underlying the finding of necessity: The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community

health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

Subject: Payment for FQHC psychotherapy and offsite services.

Purpose: To permit psychotherapy by certified social workers as a billable service under certain circumstances.

Text of emergency rule: Section 86-4.9 is amended to read as follows:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in subdivision (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services with the exception of clinical social services in FQHC clinics as defined in subdivision (g) of this section, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g) For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(h) Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in subdivision (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.

(i) Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.

(1) FQHC offsite services must:

(i) consist of services normally rendered at the FQHC site.

(ii) be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.

(iii) be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.

(iv) be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.

(v) not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.

(vi) not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.

(2) Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.

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 8, 2007.

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act (42 USC 1396a(a)(10)) and 1905(a)(2) of the Social Security Act (42 USC 1396d(a)(2)) require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act (42 USC 1395x(aa)) defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

- Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.
- Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.
 - Payment will be made on the basis of a FQHC group rate.
 - Payment will only be made for services that occur in FQHCs.
- Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.
- Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.
- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

Costs:

Costs for the Implementation of, and Continuing Compliance with this Regulation to Regulated Entity:

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services. These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Downstate			Upstate	Statewide	Cost Estimates
	Average					
Offsite Visits						Offsite Visits
Subsequent Hospital Care	\$62.73	\$55.19	\$58.96			\$1,117,212
Psychotherapy Services						Group Therapy
Group Psychotherapy	\$34.86	\$30.81	\$32.84			\$6,222,733
2004 FQHC Visit Volume	1,894,864					
						Total
						\$7,339,945
Volume Increase Assumptions						
Group Therapy Increase = 10% Increase						
2004 FQHC Volume.						
Off-site Visit Increase = 1% Increase						
Over 2004 FQHC Volume						

Cost to the Department of Health:

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment will become effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

No impact on small businesses or local governments is expected.

Compliance Requirements:

This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

Professional Services:

No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department's (SED) new standards for social worker licensure.

Compliance Costs:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Economic and Technological Feasibility:

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Small Business Participation:

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

Compliance Costs:

There are no direct costs associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and associations represent social workers and clinic providers from across the State, including rural areas.

Job Impact Statement

Nature of Impact:

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

Categories and Numbers Affected:

There are almost 1000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

Regions of Adverse Impact:

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

Minimizing Adverse Impact:

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

Self-Employment Opportunities:

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

Department of Law

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Investigations, Civil Enforcement Actions and Qui Tam Actions Related to Fraud

I.D. No. LAW-39-07-00008-EP

Filing No. 980

Filing date: Sept. 10, 2007

Effective date: Sept. 10, 2007

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

Action taken: Addition of Part 400 to Title 13 NYCRR.

Statutory authority: State Finance Law, section 194

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

Specific reasons underlying the finding of necessity: Frauds perpetrated against the government harm the public by depriving the state and local governments of much-needed funds. Certain frauds, such as those involving complicit or participating government officials, threaten the very integrity of the administration of the state and local governments, and are likely to be repeated unless discovered. Many frauds also directly threaten the health, public safety, and welfare of members of the public who rely on government-funded service providers for housing, health care and other essential services.

On April 9, 2007, New York enacted Article XIII of the State Finance Law. See N.Y. State Finance Law, sections 187-194 (hereinafter referred to as "Article XIII"). The purposes of Article XIII include the prevention and deterrence of frauds against the state and local governments, and the recovery of funds or property fraudulently obtained. Article XIII empowers the Attorney General of the State of New York to investigate and initiate civil enforcement actions against parties who, among other things, knowingly present false or fraudulent demands for payments or property to the state or a local government. Additionally, Article XIII empowers local governments to investigate and initiate civil enforcement actions on their own behalf. It also allows private individuals to file qui tam enforcement actions on behalf of the state or a local government, and then prosecute these actions on their own if the state or local government declines to intervene in the action.

The Attorney General adopts the emergency rule to enforce the newly enacted Article XIII, as a matter of necessity, because time is of the essence for the Office of the Attorney General to begin and continue investigations to prevent and deter frauds against the state and local governments and to recover funds and property fraudulently obtained. The rule will also allow for the orderly processing and handling of civil enforcement actions and qui tam enforcement actions that have been and that may be filed pursuant to Article XIII. The need for the emergency rule will exist until such rule is adopted on a permanent basis.

Indeed, in the absence of the rule, a procedural vacuum exists that is contrary to the public interest. Guidelines or procedures currently do not exist that specify the manner in which the Office of the Attorney General can investigate violations of Article XIII. Additionally, government plaintiffs and qui tam plaintiffs currently empowered to investigate and prosecute violations of Article XIII cannot effectively and efficiently exercise that power without the attached rule. This jeopardizes the public interest in the immediate prevention and deterrence of frauds against the state and local governments, and the recovery of funds or property fraudulently obtained. This also jeopardizes the health and general welfare of the public in connection with fraud related to public health and welfare programs.

Furthermore, in the absence of the rule, there are no procedures to ensure that the Attorney General is made aware of civil enforcement actions filed by local governments, even though such actions may affect an interest of the state or interfere with or duplicate ongoing investigations or enforcement actions being undertaken by the Attorney General or other state agencies. Without such consultation these actions may likewise interfere with or duplicate ongoing investigations being conducted by the Attorney General or other state agencies.

Finally, in the absence of the rule, insufficient procedures exist for processing qui tam actions, including, but not limited to, critical procedures regarding how qui tam plaintiffs shall proceed when the government declines to intervene or supersede in a qui tam action.

Thus, compliance with the normal procedural requirements for notice and public comment would be contrary to the public interest.

Subject: Investigations, civil enforcement actions, and qui tam actions related to fraud perpetrated against the State and local governments.

Purpose: To establish procedures for (1) investigating persons who defrauded the State or a local government; and (2) the handling and processing of civil enforcement actions and qui tam actions under Article XIII of State Finance Law.

Text of emergency/proposed rule: CHAPTER IX. FALSE OR FRAUDULENT CLAIMS INVOLVING GOVERNMENT FUNDS OR PROPERTY
PART 400. PROCEDURAL REGULATIONS OF THE FALSE CLAIMS ACT

Section 400.1 General Provisions

(a) The State Finance Law, sections 187-194, shall be referred to herein as the "False Claims Act".

(b) Definition of Person: The term "person" as used herein shall mean any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.

(c) Definition of Attorney General: The term "Attorney General" as used herein shall mean the Attorney General or his or her deputies, designees, assistants or special assistants.

(d) Severability: If any provision herein or the application of such provision to any persons or circumstances shall be held invalid, the validity of the remainder of the provisions and/or the applicability of such provisions to other persons or circumstances shall not be affected thereby.

Section 400.2 Civil Enforcement by the Attorney General

Whenever it shall appear to the Attorney General that any person has engaged or is engaging in conduct that would amount to a violation of the False Claims Act, the Attorney General may investigate any such person or any such conduct with the investigative powers, procedures and devices that are described in section 352 of the General Business Law. The provisions of section 352 of the General Business Law relating to investigative powers, procedures and devices shall be fully applicable to an investigation under the False Claims Act, with the following qualifications:

(a) The powers, procedures and devices to investigate granted under this section shall not abate or terminate by reason of any action or proceeding brought under the False Claims Act by the Attorney General, a local government, or any person, including a qui tam plaintiff; and

(b) If a person subpoenaed to attend an inquiry related to a violation of the False Claims Act fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper when ordered so to do by the officer conducting such inquiry, or if a person fails to perform any act required to be performed, the Attorney General may institute civil contempt proceedings under section 2308(b) of the civil practice law and rules or make a motion to compel pursuant to that section or take any other action authorized by law.

Section 400.3 Civil Enforcement by Local Governments

(a) A local government shall consult with the Attorney General prior to filing any action under section 190(1) of the False Claims Act related to the Medicaid program.

(b) A local government filing an action under section 190(1) of the False Claims Act shall provide the Attorney General with a copy of the complaint on or about the date such complaint is filed.

(c) Under no circumstances shall the state be bound by the act of a local government that files an action involving damages to the state.

Section 400.4 Qui Tam Actions

(a) All qui tam actions shall be served on the Attorney General by the personal delivery of the qui tam complaint and accompanying evidence to a person designated to receive service at the Managing Clerk's Office on the 24th Floor at the Office of the Attorney General at 120 Broadway, New York, New York 10271, unless otherwise authorized by the Attorney General.

(b) A local government, having been authorized by the Attorney General to supersede or intervene in a qui tam action on its own behalf pursuant to section 190(2) of the False Claims Act, shall cooperate with the Attorney General in any subsequent investigation related to the action.

(c) If the state or a local government does not intervene or supersede after the 60 day time period or any extensions obtained under section 190(2)(b) of the False Claims Act, then the qui tam plaintiff has 30 days

after such time period or extensions expire to decide whether to proceed with the action.

(1) If the qui tam plaintiff elects to proceed with the action, the qui tam plaintiff shall so advise the court, the state, and applicable local governments, and cause the complaint to be unsealed. After the complaint is unsealed, the qui tam plaintiff shall serve the complaint on any defendant pursuant to the provisions of the civil practice law and rules and other applicable law.

(2) If the qui tam plaintiff elects not to proceed with the action, the qui tam plaintiff shall either: (i) voluntarily discontinue the action, without an order and without unsealing the action, by filing with the court a notice of discontinuance and serving a copy of this notice on the Attorney General, who may in the Attorney General's discretion make an in camera motion to unseal the complaint; or (ii) seek to voluntarily discontinue the action by order of court by making an in camera motion to unseal the complaint and dismiss the action.

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 8, 2007.

Text of rule and any required statements and analyses may be obtained from: Henry M. Greenberg, Department of Law, The Capitol, Albany, NY 12224, (518) 474-7330, e-mail: henry.greenberg@oag.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: Section 194 of the State Finance Law gives the Attorney General of the State of New York power to adopt such rules and regulations as is necessary to effectuate the purposes of Article XIII of the State Finance Law. See N.Y. State Finance Law, sections 187-194 (hereinafter referred to as "Article XIII").

2. Legislative objectives: These rules and regulations are in accordance with the public policy objectives the Legislature sought to advance by passing Article XIII, which include the prevention and deterrence of fraud against the state and local governments, and the recovery of funds or property fraudulently obtained. The investigative procedures authorized by the rules and regulations (hereinafter referred to as "the rule") will empower the Attorney General to investigate frauds that constitute a violation of Article XIII, and thereby facilitate his or her ability to bring civil enforcement actions and other actions against parties that commit such violations. Also, the rule provides for the orderly process and handling of civil enforcement actions and qui tam actions.

3. Needs and benefits: The rule is needed to effect the purposes of Article XIII: the prevention and deterrence of frauds against the state and local governments, and the recovery of funds or property obtained through false or fraudulent conduct. It will establish how the Attorney General can begin and continue investigations of potential violations of Article XIII. It will also allow for the orderly processing and handling of civil enforcement actions and qui tam enforcement actions that have been and that may be filed.

In the absence of the rule, a procedural vacuum exists that is contrary to the public interest. Guidelines or procedures currently do not exist that specify the manner in which the Attorney General can investigate violations of Article XIII. Government plaintiffs and qui tam plaintiffs currently empowered to investigate and prosecute violations of Article XIII cannot effectively and efficiently exercise that power without the rules promulgated herein. This jeopardizes the public interest in the immediate prevention and deterrence of frauds against the state and local governments, and the recovery of funds or property fraudulently obtained. This also jeopardizes the health and general welfare of the public in connection with fraud related to public health and welfare programs. In fact, qui tam cases have already been served on the Attorney General alleging Medicaid fraud that may have harmed patients.

Furthermore, there are no procedures to ensure that the Attorney General is made aware of civil enforcement actions filed by local governments, even though such actions may affect an interest of the state or interfere with or duplicate ongoing investigations or enforcement actions being undertaken by the Attorney General or other state agencies. Without such consultation these actions may likewise interfere with or duplicate ongoing investigations being conducted by the Attorney General or other state agencies.

Finally, there presently does not exist sufficient procedures for processing qui tam actions, including but not limited to critical procedures for how qui tam plaintiffs shall proceed when the government declines to intervene

or supersede in a qui tam action. Such procedures are absent even though qui tam actions have already been filed, and more qui tam actions may be filed at any time.

The benefits derived from the rule are that:

(A) The Attorney General can investigate any person for having engaged in conduct amounting to a violation of Article XIII with the same or similar long-standing, familiar and effective powers, procedures and devices that the Attorney General may use to investigate fraud under section 352 of the General Business Law. Furthermore, the rule modifies those powers, procedures and devices set forth in section 352(2) and (4) to address the specific circumstances of an investigation of a violation of Article XIII. Specifically, it ensures that the Attorney General's powers to investigate granted therein do not terminate by reason of a local government, or any person, including a qui tam plaintiff, filing a complaint. Likewise, the rule specifies that the Attorney General may use section 2308(b) of the civil practice law and rules, or other applicable law, to compel compliance with an investigation. The rule thus enhances the Attorney General's ability to investigate and bring enforcement actions under Article XIII.

(B) The Attorney General will be notified of local government enforcement actions, and consulted with prior to a local government filing an action related to the Medicaid program, so that he or she can protect the state's interest in local enforcement actions and notify other state agencies if necessary. This will protect the state's interest in litigation initiated by local governments, avoid duplicative actions and investigations, and allow for the cooperation and the sharing of resources by the state and local governments.

(C) Qui tam actions will be orderly handled and processed. If the government decides not to intervene in a qui tam action, the rule establishes a time period and procedures for the qui tam plaintiff to either proceed or discontinue the action.

Together, these benefits will enhance the ability of the state and local governments and qui tam plaintiffs to bring enforcement actions, recover funds and property fraudulently obtained, and prevent and deter other frauds.

4. Costs: There are de minimis costs to the rule.

5. Local government mandates: A local government filing an action under section 190(1) of the State Finance Law shall provide the Attorney General with a copy of the complaint on or about the date such complaint is filed. A local government shall consult with the Attorney General prior to filing any action related to the Medicaid program.

6. Paperwork: There are no additional reporting requirements or paperwork requirements as a result of this rule.

7. Duplication: The rule will not duplicate any existing state or federal law.

8. Alternatives: There were alternative proposals considered, including, but not limited to, requiring local governments to notify the Attorney General prior to filing any civil enforcement action, and requiring qui tam actions to be filed in specific venues. Those were rejected as unnecessary and overly burdensome on both local governments and qui tam plaintiffs. Consideration was also given to issuing no regulations, but this would have been contrary to the public interest.

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

10. Compliance schedule: Compliance with this rule could be achieved immediately upon effect of the adoption of this rule.

Regulatory Flexibility Analysis

1. Effect of rule: By virtue of its subject matter, the rule will have no impact on small businesses. The rule applies to every local government, as defined in section 188(4) of the State Finance Law, which chooses to file a civil enforcement action pursuant to section 190(1) of the State Finance Law. Accordingly, the rule may apply to every county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state.

2. Compliance requirements: A local government filing an action under section 190(1) of the State Finance Law is required to provide the Attorney General with a copy of the complaint on or about the date such complaint is filed. Additionally, a local government is required to consult with the Attorney General prior to filing any action under section 190(1) that is related to the Medicaid program. Local governments will not need to employ any professional services in order to comply with the rule.

3. Compliance costs: The rule imposes de minimis costs on local governments.

4. Feasibility of compliance: Due to the de minimis impact of the rule, all local governments should easily be able to comply.

5. Minimizing adverse impact: By virtue of its subject matter, the rule will not have a significant adverse impact on local governments. There were alternative proposals considered, including, but not limited to, requiring local governments to notify the Attorney General prior to filing any civil enforcement action. Such proposals were rejected as unnecessary and overly burdensome on local governments.

6. Economic and technological feasibility: Due to the de minimis impact of the rule, local governments will have no difficulty meeting technological requirements, if any.

7. Local government participation: In order to ensure that local governments have an opportunity to participate in the rule making process, a copy of the proposed rules has been sent to the Executive Director of the New York Association of Counties. A copy of the proposed rules will also be posted on the web site of the Attorney General of the State of New York.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The rule applies uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 counties that would constitute rural areas. The rule applies to such counties as well as other local governments within them.

2. Compliance requirements: A local government filing an action under section 190(1) of the False Claims Act is required to provide the Attorney General with a copy of a complaint on or about the date of filing a cause of action under section 190(1) of the State Finance Law. Additionally, a local government is required to consult with the Attorney General prior to filing any action under section 190(1) that is related to the Medicaid program. Local governments will not need to employ any professional services in order to comply with the rule.

3. Compliance costs: The rule imposes de minimis costs on local governments.

4. Minimizing adverse impact: The rule will not have an adverse impact on local governments in rural areas, since it only imposes de minimis costs on local governments. There were alternative proposals considered, including, but not limited to, requiring local governments to notify the Attorney General prior to filing any civil enforcement action. Such proposals were rejected as unnecessary and overly burdensome on local governments.

5. Rural area participation: In order to ensure that local governments in rural areas have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to the Executive Director of the New York Association of Counties. A copy of the proposed rules will also be posted on the web site of the Attorney General of the State of New York.

ately would result in recipients losing access to services necessary to their health, safety and the general welfare.

Subject: Comprehensive outpatient programs.

Purpose: To equalize Comprehensive Outpatient Program (COPS) and non-COPS funding.

Text of emergency rule: 1. Subdivision (g) of Section 588.13 of Title 14 NYCRR is amended to read as follows:

(g) Clinic, continuing day treatment, and/or day treatment programs for which an operating certificate has been issued and which are not designated as *Level I* comprehensive outpatient programs pursuant to Part 592 of this Title may qualify to become *Level II* comprehensive outpatient programs under such Part, and shall comply with the applicable provisions of such Part. [, may be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;

(2) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;

(3) be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(4) have received a current operating certificate that is of at least a total of six months duration; and

(5) be a current enrollee in good standing in the medical assistance program.]

2. Section 592.4 of Title 14 NYCRR is amended to read as follows:

§ 592.4 Definitions

(a) *Level I* Comprehensive Outpatient Program means a provider of services which has been licensed to operate an outpatient mental health program in accordance with Part 587 of Title 14 and has been annually designated by a local governmental unit to be eligible to receive supplemental medical assistance reimbursement for a specific program or specific programs under its auspice which agrees to provide the services required of a *Level I* Comprehensive Outpatient Program as set forth in this Part.

(b) *Level II* Comprehensive Outpatient Program means a provider of services, other than a *Level I* Comprehensive Outpatient Program, which has been licensed to operate a mental health clinic, day treatment or continuing day treatment program in accordance with Part 587 of this Title, which is not also licensed under Article 28 of the Public Health Law, and which agrees to provide the services required of a *Level II* Comprehensive Outpatient Program as set forth in this Part.

(c) Grant means the funds received by the provider pursuant to section 41.18, 41.23 or 41.47 of the mental hygiene law including State aid and any mandatory local contribution provided by a local government or a voluntary agency.

[c] (d) Provider, for the purpose of this Part, means the specific location of the licensed mental health outpatient program which received the mental health grant utilized in the initial calculation of the supplemental rate under the medical assistance program.

[d] (e) Eligible deficit means those funds received by the provider as a grant which are used as the basis for the supplemental Medicaid rate calculation in subdivision 592.8(c). The original grants may have been adjusted in accordance with this Part, where necessary.

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

3. The heading, and subdivision (a), of Section 592.5 of Title 14 NYCRR are amended to read as follows:

§ 592.5 Designation as a *Level I* comprehensive outpatient program.

(a) A *Level I* comprehensive outpatient program shall be designated by the local governmental unit in accordance with the criteria provided in section 592.7 of this Part. In order to receive supplemental medical assistance reimbursement, a program shall:

(1) be determined by the commissioner or his or her designee to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(2) have received a current operating certificate that is of at least a total of six months in duration; and

(3) be a current enrollee in good standing in the medical assistance program.

Office of Mental Health

EMERGENCY RULE MAKING

Comprehensive Outpatient Programs

I.D. No. OMH-39-07-00002-E

Filing No. 955

Filing date: Sept. 6, 2007

Effective date: Sept. 6, 2007

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

Action taken: Amendment of Parts 588 and 592 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b) and 31.04(a); and Social Services Law, sections 364(3) and 364-a

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

Specific reasons underlying the finding of necessity: These amendments provide authority to simplify and make equitable Comprehensive Outpatient Program (COPS) funding and non-COPS funding as authorized by the 2006-2007 enacted budget. Failure to initiate this program immedi-

4. Subdivision (a) of Section 592.6 of Title 14 NYCRR is amended to read as follows:

(a) The local governmental unit shall designate and enter into written agreements with appropriate providers of services as *Level I* comprehensive outpatient programs. Such agreements shall, at a minimum reflect the requirements established in sections 592.6 and 592.7 of this Part;

5. The heading, subdivision (a), and paragraph (a)(2) of Section 592.7 of Title 14 NYCRR are amended to read as follows:

§ 592.7 *Level I* comprehensive outpatient program – criteria for designation and responsibilities

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

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

6. Subdivisions (a), (c) (d), (h), (i), and (k) of Section 592.8 of Title 14 NYCRR are amended to read as follows:

(a) In addition to the medical assistance reimbursement rates available pursuant to Part[s 579 and] 588 of this Title, providers with at least one *Level I* comprehensive outpatient program are eligible to receive supplemental medical assistance reimbursement in accordance with the rules of this Part.

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

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

(2) The sum of grants received by the provider, as recalculated under paragraph (1) of this subdivision, shall be divided by the projected number of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

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

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

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

(d) In order to recoup supplemental payments for those visits in excess of 110% of the number of visits used to calculate the supplemental rate for a *Level I* provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

(h) The Office of Mental Health may amend the supplemental rate and/or the comprehensive outpatient program allocation to account for program changes required by the Office of Mental Health, local governmental

unit, or other administrative agency, or approved by the commissioner pursuant to Part 551 of this Title.

(1) When a *Level I* provider receives reimbursement under this part which is less than its comprehensive outpatient program allocation in a local fiscal year (beginning with Calendar Year 2001 for upstate or Long Island based providers or Local Fiscal Year 2000-01 for New York City based providers), the local governmental unit may, subject to the approval of the Commissioner of Mental Health and the Director of the Division of Budget, allocate any amount of the provider's comprehensive outpatient program reimbursement which is less than its comprehensive outpatient program allocation to [one or more designated comprehensive outpatient program allocation to] one or more designated *Level I* comprehensive outpatient programs within the same county beginning in the following fiscal year. In making such adjusted allocations, the local governmental unit shall consider the extent to which a provider receiving an additional allocation is in compliance with the program requirements set forth in Section 592.7 of this Part. This adjusted allocation process shall be accomplished through the revision of each affected provider's comprehensive outpatient program allocations for the previous fiscal year. In no case shall such adjusted allocation be less than the amount of comprehensive outpatient program reimbursement received by a provider consistent with its applicable comprehensive outpatient program allocation received in either the 2000 local fiscal year or the local fiscal year before the year in which such reimbursement is received, whichever amount is less.

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

(i) When a designated *Level I* program has ceased or will cease to provide services or the local governmental unit has not designated an eligible or previously designated *Level I* program and discontinued all grants to that program, visits reimbursed under the medical assistance program to that program may be added to the visits of one or more other outpatient programs of the same outpatient category in the same county to be included in the supplemental rate adjustments pursuant to subdivisions (e)-(g) of this section subject to the following:

(1) the local governmental unit must recommend such consideration to the commissioner prior to June 1, 1991 for the initial year and the commencement of the local fiscal year in all succeeding years;

(2) the recommendation must specify the volume of visits to be allowed to each alternative provider;

(3) each alternative provider must be licensed in the same program category as the eligible provider;

(4) each alternative provider must be eligible to be designated prior to the local governmental unit's recommendation under this subdivision;

(5) the local governmental unit recommendation may be less than, but may not exceed, the volume of visits reimbursed, in the base year under the medical assistance program, to the provider not designated as a *Level I* comprehensive outpatient program;

(6) the allowance of additional visit volume approved by the commissioner under this subdivision may be less than the volume recommended by the local governmental unit where the calculated supplemental rate of payment for the alternative provider is greater than that for the provider not designated. In no instance will the supplemental revenue to all designated providers in the county exceed the estimated supplemental revenue to all eligible providers in the county; and

(7) if a program ceases to provide services in all program locations it shall not be eligible for designation as a *Level I* comprehensive outpatient program or for any additional local assistance grants for the period of at least one local fiscal year following the year during which the program ceased to provide services.

(j) When a [designated] *comprehensive outpatient* program has ceased or will cease to provide services and the local governmental unit determines that no existing, [designated] *comprehensive outpatient* program of the same outpatient category within the same county is capable of providing services to the clients of the program ceasing operation, the local governmental unit, with the approval of the commissioner, may designate any not-for-profit or municipally operated agency operating an outpatient mental health program of the same category as a comprehensive outpatient program. When no agency operating an outpatient program in the same

category is available, the local governmental unit may, with the approval of the commissioner, designate an agency already designated in another outpatient program category which has not previously been licensed in the category of the closing program. The designation of such program shall not be effective until the designated program commences operation within the designating county. Supplemental rates or supplemental rate adjustments for successor programs designated pursuant to this subdivision shall be calculated as follows:

(1) Supplemental rates shall be based upon the lesser of the successor program's budgeted eligible grant amount recommended by the local governmental unit and approved by the Office of Mental Health pursuant to Part 551 of this Title, or the supplemental revenue and Medicaid visit volume used to establish the supplemental rate for the closing provider for the year of closure.

(2) The rate established in paragraph (1) of this subdivision shall be approved on an interim basis until receipt of a consolidated fiscal report including one complete local fiscal year of operation as a comprehensive outpatient program, after which the Office of Mental Health shall recalculate the final supplemental rate or supplemental rate adjustments subject to the limitations in paragraph (1) of this subdivision.

(3) Such rates shall not be otherwise limited by the provisions of paragraphs (i)(3) and (4) of this section.

(k) Each general hospital, as defined by Article 28 of the Public Health Law, which is operated by the New York City Health and Hospitals Corporation, which received a grant pursuant to Section 41.47 of the Mental Hygiene Law for the local fiscal year ending in 1989 shall be designated as a *Level I* comprehensive outpatient program for all outpatient programs licensed pursuant to [Parts 585 and] Part 587 of this Title. For purposes of calculating supplemental Medicaid rates pursuant to this Part, all such programs in the New York City Health and Hospitals Corporation are combined for a uniform supplemental Medical Assistance program rate.

7. Subdivisions (c) and (d) of Section 592.9 of Title 14 NYCRR are amended to read as follows:

(c) A program which the Commissioner determines has failed to substantially comply with the requirements of this section or any other requirements established by the local governmental unit shall be referred to the local governmental unit with a recommendation that it not be designated as a *Level I* comprehensive outpatient program for the subsequent local fiscal year.

(1) The local governmental unit may designate such provider of services as a *Level I* comprehensive outpatient program for the following local fiscal year, but shall notify the Commissioner of such designation and the reason(s) therefore.

(2) The Commissioner shall review such program prior to the end of the following local fiscal year. If the program is found to have continued to have failed to substantially comply with the requirements of this Part, or any other requirements established by the local governmental unit, the Commissioner shall instruct the local governmental unit that such provider of services shall not be designated as a *Level I* comprehensive outpatient program for the next local fiscal year.

(3) A determination that a provider of services shall not be designated as a *Level I* comprehensive outpatient program does not affect the status of such provider of services as a licensed provider of outpatient services.

(d) A provider of services that has been discontinued as a *Level I* comprehensive outpatient program pursuant to Paragraph (c)(2) of this section, may be designated by the local governmental unit as a *Level I* comprehensive outpatient program in the local fiscal year subsequent to the local fiscal year for which such designation was discontinued, providing that the local governmental unit shall provide assurances to the Commissioner that such program has taken such steps as are necessary to substantially comply with the requirements of this Part and all other requirements established by the local governmental unit.

8. A new Section 592.10 is added to Title 14 NYCRR to read as follows:

§ 592.10 Level II Comprehensive Outpatient Program

(a) A clinic, continuing day treatment, and/or day treatment provider, other than a provider licensed under Article 28 of the Public Health Law, that has not been designated as a *Level I* Comprehensive Outpatient Program pursuant to this Section shall be eligible to be a *Level II* Comprehensive Outpatient Program, and shall be eligible to receive supplemental medical assistance reimbursement for services rendered. In order to be a *Level II* Comprehensive Outpatient Program and receive supplemental medical assistance reimbursement, a program shall:

(1) agree to provide initial assessment services to all patients referred from inpatient or emergency settings within five business days of referral from such setting;

(2) directly provide or arrange for the provision of case management, home visiting services and other clinically necessary mental health services to maintain patients in programs and minimize patients' absence from treatment;

(3) be determined to be in substantial compliance with all applicable regulations of the Commissioner of Mental Health;

(4) have received a current operating certificate that is of at least a total of six months duration; and

(5) be a current enrollee in good standing in the medical assistance program.

(b) In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.

9. A new Section 592.11 is added to Title 14 NYCRR to read as follows:

§ 592.11 Comparability of fees

The sum of the base fee, as established in Section 588.13(a)(1) of this Part, and the supplement, calculated in accordance with Section 592.8 of this Part, received by a clinic treatment program that is not licensed under Article 28 of the Public Health Law and which has been designated as a *Level I* comprehensive outpatient program, shall not be less than the base fee and the supplement received by any *Level II* comprehensive outpatient provider in the region.

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 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Sue Watson, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: swatson@omh.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

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

Chapter 54 of the Laws of 2006 provides funding appropriations in support of programs not formerly designated as Comprehensive Outpatient Programs. (Section 1, State Agencies, Office of Mental Health, line 44, page 277.)

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 43 of the Mental Hygiene Law gives the Commissioner authority to set certain rates. Under Section 364(3) and 364-a of the Social Services Law, OMH is granted responsibility for standards of care for certain Medicaid funded programs under its jurisdiction.

3. Needs and Benefits: The intent and impact of this regulatory change is to simplify and make more equitable the Medicaid reimbursement which outpatient mental health providers receive. Every provider, and the clients they serve, will either be unaffected by or will benefit from these amendments.

Generally, outpatient Medicaid rates are separated into two components: a base fee and either a COPs supplement or a Non-COPs supplement. COPs providers generally receive a higher base rate than Non-COPs providers. Some providers received neither a COPs nor a Non-COPs component.

COPs providers are required to meet both higher standards than Non-COPs providers. They also must have received State deficit financing when the program was established in 1993. Many Non-COPs providers

currently meet many of the standards applicable to COPs providers, but still cannot qualify for COPs reimbursement. These amendments attempt to mitigate this by combining all of the above providers into COPs, leveling up the base fees they receive, and allowing providers previously categorized as Non-COPs to bill for COPs-only visits on behalf of managed care recipients. Providers who were neither COPs nor Non-COPs will now be included as well.

In order to accomplish this, two levels, of COPs have been established by this rulemaking. The first level, Level I, contains the current nine special programmatic standards and deficit funding requirement of COPs. The second level, Level II, contains the five special programmatic standards for Non-COPs. Both tiers will receive the same base fees and operate under the same set of billing rules.

4. Costs:

(a) Costs to private regulated parties: There will be no mandated unreimbursed costs to the regulated parties.

(b) Costs to state and local government: The annual state cost for the program is estimated to be \$2,122,500.00. These additional funds are included in an appropriation for the State share of Medicaid. There is no local Medicaid share or other costs for this program.

(c) The cost projection was calculated by adding the \$2,000,000 available in the appropriation for leveling up to the \$122,500 available in the appropriation to address the non-COPS only adjustment, for a total of \$2,122,500.00.

5. Local Government Mandates: These regulatory amendments will not involve or result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative would be inaction. As this initiative has been established and funded in statute, this alternative was rejected, since it is contrary to the intent of the legislation.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The authority to establish and fund this initiative deemed effective on April 1, 2006, consistent with the enacted budget.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose a significant negative economic impact on small businesses, or local governments. The establishment of this initiative, which equalizes Article 31 outpatient fees and non-COPS programs, is required by the enacted 2006-2007 state budget.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will have no negative impact on services and programs serving residents of rural counties. Recipients of services in the 44 counties designated as rural counties by the New York State Legislature, as well as non-rural counties will benefit from the establishment of this new statewide program.

Job Impact Statement

The proposed amendments to 14 NYCRR will not adversely impact jobs or employment opportunities in New York, nor should these amendments impact existing employees of Comprehensive Outpatient Programs for adults (COPs), non-COPs programs, or other programs under the jurisdiction of OMH. The purpose of this rulemaking is to equalize funding for Article 31 outpatient fees and non-COPS programs, as required by the enacted 2006-2007 state budget.

NOTICE OF ADOPTION

Operation of Residential Treatment Facilities for Children and Youth

I.D. No. OMH-29-07-00013-A

Filing No. 956

Filing date: Sept. 6, 2007

Effective date: Sept. 26, 2007

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

Action taken: Amendment of section 584.5(e) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b), 31.04(a)(2) and 31.26(b)

Subject: Operation of residential treatment facilities for children and youth.

Purpose: To continue the temporary increase in the capacity of certain RTFs to serve the needs of emotionally disturbed children and youth.

Text or summary was published in the notice of proposed rule making, I.D. No. OMH-29-07-00013-P, Issue of July 18, 2007.

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

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

Assessment of Public Comment

The agency received no public comment.

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

Comprehensive Outpatient Programs

I.D. No. OMH-39-07-00003-P

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

Proposed action: This is a consensus rule making to amend Part 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b) and 31.04(a); and Social Services Law, sections 364(3) and 364-a

Subject: Comprehensive outpatient programs.

Purpose: To increase certain Medicaid rate schedules consistent with the 2007-08 enacted State Budget.

Text of proposed rule: Paragraph (4) of subdivision (a) of Section 588.13 is amended to read as follows:

(4) Reimbursement under the medical assistance program for day treatment programs serving children shall be in accordance with the following fee schedule.

(i) For programs operated in Bronx, Kings, New York, Queens and Richmond counties:

Full day at least 5 hours \$[72.89] 76.25

Half day at least 3 hours [36.45] 38.13

Brief day at least 1 hour [24.30] 25.42

Collateral at least 30 minutes [24.30] 25.42

Home at least 30 minutes [72.89] 76.25

Crisis at least 30 minutes [72.89] 76.25

Preadmission - full day at least 5 hours [72.89] 76.25

Preadmission - half day at least 3 hours [36.45] 38.13

(ii) For programs operated in other than Bronx, Kings, New York, Queens and Richmond counties:

Full day at least 5 hours \$[70.46] 73.71

Half day at least 3 hours [35.23] 36.85

Brief day at least 1 hour [23.45] 24.53

Collateral at least 30 minutes [23.45] 24.53

Home at least 30 minutes [70.46] 73.71

Crisis at least 30 minutes [70.46] 73.71

Preadmission - full day at least 5 hours [70.46] 73.71

Preadmission - half day at least 3 hours [35.23] 36.85

Subdivision (b) of Section 588.13 is amended to read as follows:

(b) Reimbursement under the medical assistance program for regular, collateral, and crisis visits to all non-State operated partial hospitalization programs licensed pursuant to Article 31 of the Mental Hygiene Law and Part 587 of this Title shall be in accordance with the following fee schedule.

(1) For programs located in Nassau and Suffolk counties, the fee shall be [\$22.15]\$22.66 for each service hour.

(2) For programs located in New York City, the fee shall be [\$29.09] \$29.76 for each service hour.

(3) For programs located in the counties included in the region of New York State designated by the Office of Mental Health as the Hudson River Region, the fee shall be [\$24.45] \$25.01 for each service hour.

(4) For programs located in the counties in the region of New York State designated by the Office of Mental Health as the Central Region, the fee shall be [\$16.76] \$17.15 for each service hour.

(5) For programs located in the counties included in the region of New York State designated by the Office of Mental Health as the Western Region, the fee shall be [\$20.78] \$21.26 for each service hour.

Subdivision (c) of Section 588.13 is amended to read as follows:

(c) Reimbursement under the medical assistance program for on-site and off-site visits for all non-state operated intensive psychiatric rehabilitation treatment programs, licensed pursuant to Article 31 of the Mental Hygiene Law and Part 587 of this Title shall be at [\$23.87] \$24.42 for each service hour.

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

Data, views or arguments may be submitted to: Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: regs@omh.state.ny.us

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

Consensus Rule Making Determination

No person is likely to object to these amendments since they merely increase the Medicaid reimbursement associated with Day Treatment Programs, Partial Hospitalization Programs and Intensive Psychiatric Rehabilitation (IPRT) Programs, consistent with the 2007-08 Enacted State Budget.

In accordance with the provisions of Section B of Chapter 54 of the Laws of 2007, amounts were made available, effective April 1, 2007 for cost of living adjustments (COLA) for Partial Hospitalization and IPRT Programs. In accordance with the provisions of Section B of Chapter 54 of the Laws of 2007, amounts were made available for fee increases for Children's Day Treatment Programs.

Additional State funding in the amount of \$150,112 is available on an annual basis to provide for the State share of Medicaid associated with the COLA for IPRT. Additional State funding in the amount of \$81,227 is available on an annual basis to provide for the State share of Medicaid associated with the COLA for Partial Hospitalization Programs. Additional State funding in the amount of \$349,330 is available on annual basis to provide for the State share of revised Medicaid fees for Day Treatment Programs. There is no local share of Medicaid associated with these adjustments.

A. Partial Hospitalization Fee Increase

Region	Service Hour Rate Effective 10/1/06	Service Hour Rate Effective 4/1/07
Long Island	\$22.15	\$22.66
New York City	29.09	29.76
Hudson River	24.45	25.01
Central	16.76	17.15
Western	20.78	21.26

B. The IPRT fee increase for all non-state IPRT Programs will increase from \$23.87 to \$24.42 for each service hour.

C. Day Treatment Fee Increase

For programs operated in Bronx, Kings, New York, Queens and Richmond counties:

		New Fee Effective 4/1/2006	Fee Effective 4/1/2007
Full day	at least 5 hours	\$ 72.89	\$ 76.25
Half day	at least 3 hours	\$ 36.45	\$ 38.13
Brief day	at least 1 hour	\$ 24.30	\$ 25.42
Collateral	at least 30 minutes	\$ 24.30	\$ 25.42
Home	at least 30 minutes	\$ 72.89	\$ 76.25
Crisis	at least 30 minutes	\$ 72.89	\$ 76.25
Preadmission-full day	at least 5 hours	\$ 72.89	\$ 76.25
Preadmission-half day	at least 3 hours	\$ 36.45	\$ 38.13

For programs operated in other than Bronx, Kings, New York, Queens and Richmond counties:

		New Fee Effective 4/1/2006	Fee Effective 4/1/2007
Full day	at least 5 hours	\$ 70.46	\$ 73.71
Half day	at least 3 hours	\$ 35.23	\$ 36.85
Brief day	at least 1 hour	\$ 23.45	\$ 24.53

Collateral	at least 30 minutes	\$ 23.45	\$ 24.53
Home	at least 30 minutes	\$ 70.46	\$ 73.71
Crisis	at least 30 minutes	\$ 70.46	\$ 73.71
Preadmission-full day	at least 5 hours	\$ 70.46	\$ 73.71
Preadmission-half day	at least 3 hours	\$ 35.23	\$ 36.85

Note: This change in Day Treatment fees shall not apply to programs licensed by both the Office of Mental Health and the Department of Health.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves rate increases as required by the enacted State budget for Fiscal Year 2007-08 for Day Treatment Programs, Partial Hospitalization Programs and Intensive Psychiatric Rehabilitation Programs, and will not have a substantial adverse impact on jobs and employment activities.

Department of Motor Vehicles

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

Chemical Test Refusal Hearings

I.D. No. MTV-39-07-00009-P

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

Proposed action: Amendment of Parts 127 and 139 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 1194(2)(c) and (e)

Subject: Chemical test refusal hearings.

Purpose: To establish criteria for the suspension of drivers' licenses for motorists who have refused to submit to a chemical test.

Text of proposed rule: Subdivision (e) of section 127.7 is amended to read as follows:

(e)(1) [In] *Except as provided for in paragraphs (2) and (3) of this subdivision, in any case where an adjournment is granted, any suspension or revocation of a license, permit or privilege already in effect may be continued pending the adjourned hearing. In addition, in the event no such action is in effect, a temporary suspension of such license, permit or privilege may be imposed at the time the adjournment is granted provided that the records of the department or the evidence already admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard.*

(2) *Adjournment of a chemical test refusal hearings held pursuant to Vehicle and Traffic Law section 1194. Where an adjournment of a chemical test refusal hearing is granted at the request of the respondent, any suspension of a respondent's license, permit or privilege already in effect shall be continued pending the adjourned hearing. In addition, in the event no such suspension is in effect when the adjournment is granted, a temporary suspension of such license, permit or privilege shall be imposed and shall take effect on the date of the originally scheduled hearing. Such suspension shall not be continued or imposed if the hearing officer affirmatively finds, on the record, that there is no reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record.*

(3) *Continuance of a chemical test refusal hearing held pursuant to Vehicle and Traffic Law section 1194. If a chemical test refusal hearing is continued at the discretion of the hearing officer, in order to complete testimony, to subpoena witnesses or for any other reason, and if the respondent's license, permit or privilege was suspended pending such hearing, such suspension shall remain in effect pending the continued hearing unless the hearing officer affirmatively finds, on the record, that there is no reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record. If respondent's license, permit or privilege was not suspended pending the hearing, the hearing officer may suspend such license, permit or privilege, based upon the testimony provided and evidence submitted at such hearing, if the hearing officer affirmatively finds, on the record, that there is*

reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record.

(4) In addition to any grounds for suspension authorized pursuant to paragraphs (2) and (3) of this subdivision, a hearing officer must impose a suspension or continue a suspension of a respondent's driver's license, pursuant to paragraphs (2) and (3) of this subdivision, if the respondent's record indicates that:

(i) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of the operation of a motor vehicle.

(ii) The person has two or more revocations and/or suspensions of his driver's license within the last three years, other than a suspension that may be terminated by performance of an act by the person.

(iii) The person has been convicted more than once of reckless driving within the last three years.

(iv) The person has three or more alcohol-related incidents within the last ten years, including any conviction of Vehicle and Traffic Law section 1192, any finding of a violation of section 1192-a of such law, and a refusal to submit to a chemical test. If a refusal that arises out of the same incident as a section 1192 conviction, this shall count as one incident.

Subdivision (b) of section 127.9 is amended to read as follows:

(b) If no adjournment has been granted, and the respondent fails to appear for a scheduled hearing, the [hearing officer may take the testimony of the arresting officer and any other witnesses present and consider all relevant evidence in the record. If such testimony and evidence is sufficient to find that respondent refused to submit to a chemical test, the hearing officer shall revoke the respondent's driver's license, permit or privilege of operating a vehicle] *respondent's failure to appear shall be deemed to be a waiver of hearing.* [If, following such a determination, respondent petitions] *Respondent may petition for a rehearing, pursuant to section 127.8 of this Part and section 1194-2(c) of the Vehicle and Traffic Law. If such a rehearing is granted, it shall be the responsibility of the respondent to insure the presence of any witness he or she wishes to question or cross-examine.*

Subdivisions (b) and (c) of section 139.4 are amended to read as follows:

(b) Time of hearing. The refusal hearing shall commence at the place provided in the notice of hearing form and as close as practicable to the designated time. If the hearing cannot be commenced due to the absence of a hearing officer or unavailability of the planned hearing site, it will be rescheduled by the department, with notice to the police officer and person accused of the refusal. Adjournment requests for *hearings held pursuant to section 1194 of the Vehicle and Traffic Law shall be considered in accordance with Parts 127.7 and 127.9 of this Title. All other requests for adjournments shall be addressed to the hearing officer, who may order a temporary suspension of the license, permit, nonresident operating privilege, or privilege of operating a vessel or snowmobile pursuant to law and Part 127 of this Title.*

(c) Waiver of hearing. A person may waive, in writing, the right to a chemical test refusal hearing. Any such waiver shall constitute an admission that a chemical test refusal occurred as contemplated by section 1194 of the Vehicle and Traffic Law, section 25.24 of the Parks, Recreation and Historic Preservation Law, or section 49-a of the Navigation Law, as the case may be, and such waiver shall result in administrative sanctions provided by law for the chemical test refusal. Failure to appear at a scheduled hearing shall also constitute a waiver; however, the person who failed to appear may make a written request to the commissioner for a rescheduled hearing to be held as soon as practicable *in accordance with Part 127.8 of this Title.*

Text of proposed 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

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

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

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law ("VTL") Section 215(a) authorizes the Commissioner to enact and amend regulations to control and regulate the exercise of the powers of the Department of Motor Vehicles (DMV) and the performance of the duties of officers, agents and other employees thereof. VTL Section 510(3-a) authorizes a hearing of-

ficer to suspend a license pending a hearing. VTL Section 1194(2)(c) provides that the Commissioner is authorized to establish a hearing schedule for the adjudication of chemical test refusals. VTL Section 1194(2)(e) provides that the Commissioner shall promulgate rules and regulations as may be necessary to effectuate the provisions of such section in relation to chemical test refusal hearings.

2. Legislative objectives: The Legislature enacted Vehicle and Traffic Law ("VTL") Section 1194 to provide for the fair and efficient adjudication of chemical test refusals by DMV's hearing officers. This section authorizes the Commissioner to establish a schedule of hearings and to promulgate regulations related thereto, including provisions for the adjournment and continuance of such hearings. In addition, pursuant to VTL Section 510(3-a), a hearing officer is authorized to suspend a driver's license pending a hearing, which is typically done when the licensee poses a highway safety risk to the general public.

This proposal accords with the legislative objectives of permitting the adjournment and continuation of chemical test refusal hearings while requiring hearing officers to suspend driver's licenses pending such adjournments and continuances in order to preserve the public safety. The proposal strikes a balance between the need to accommodate motorists and their attorneys, while insuring that adjournments and continuances are not used as a tool to delay justice or to allow a potentially high risk motorist to operate on our highways.

3. Needs and benefits: This regulation will benefit the general motoring public by prohibiting licensees with poor driving records from operating on our State's highways, under certain circumstances, when a chemical test refusal hearing is adjourned or continued. A person who has refused a chemical test has not only shown a disregard for the law by refusing to submit to the test, but has also been charged with, and sometimes convicted of, a criminal offense related to driving while intoxicated. Often, such individuals have prior alcohol convictions and/or other convictions on their driving record that indicate that they pose a risk to the general motoring public. This proposed regulation sets forth reasonable standards that require a DMV hearing officer to suspend a driver's license pending an adjourned or continued hearing in order to keep dangerous drivers off our highways.

This proposal is also beneficial to attorneys and their clients (the hearing respondent), because they are put on notice as to when a driver's license will be suspended when a hearing is adjourned or continued. Currently, the hearing officer has broad discretion about when to suspend a license and there is a presumption that the license will not be suspended unless the hearing officer finds that the suspension is "necessary to prevent continuing violations or a substantial traffic safety hazard." This proposal reverses the presumption and provides that a suspension shall be imposed unless the hearing officer affirmatively finds, on the record, that the respondent does not pose a traffic safety hazard. In addition, the proposal provides that a suspension must be imposed if the respondent's driving record contains certain incidents or convictions, such as a conviction for assault or homicide, more than one reckless driving conviction within a three year period, or three or more alcohol-related incidents within a ten year period. Using this criteria, a hearing officer's determination about whether to suspend will be more predictable and consistent.

The amendments to Part 139 are merely technical cross-references to the amendments set forth in Part 127.

In sum, this regulation is necessary to establish reasonable, fair and consistent guidelines for the suspension of driver's license pending the adjournment or continuance of a chemical test refusal hearing.

4. Costs: There would be no additional costs to the public, the State, DMV or to local governments. DMV already has a system in place for scheduling chemical test refusal hearings.

Source: DMV's Safety Hearing Bureau

5. Local government mandates: This proposal imposes no local government mandates.

6. Paperwork: This proposal will require no revision to forms or other paperwork.

7. Duplication: This proposal does not duplicate any federal or state laws or rules.

8. Alternatives: A no action alternative was not considered. No other alternatives were considered.

9. Federal standards: The rule does not exceed any minimum standards of the federal government.

10. Compliance schedule: Compliance will be immediate.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with these proposed amendments because they have

no adverse or disproportionate impact on small businesses or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposed rule because it has no adverse or disproportionate impact on rural areas of the State.

Job Impact Statement

A Job Impact Statement is not submitted with this proposed rule because it has no adverse impact on job development or creation in the State.

Public Service Commission

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Rate Filing by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-39-07-00015-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject or modify, 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 schedules for electric service—P.S.C. No. 9—Electricity, P.S.C. No. 2—Retail Access, PASNY No. 4 and Economic Development Delivery Service No. 2.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Major rate filing.

Purpose: To consider a proposal to increase annual electric revenues by approximately \$1.225 billion or 36.8 percent.

Public hearing(s) will be held at: 10:30 a.m. on Oct. 17, 2007 at Department of Public Service, 90 Church St., New York, NY *We are commencing the hearings on Oct. 17, 2007 at 10:30 a.m. and continuing as needed, weekday to weekday thereafter, but expected to conclude Oct. 31, 2007. On occasion there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case 07-E-0523.

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

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

Substance of proposed rule: On May 4, 2007, Consolidated Edison Company of New York, Inc. (Con Edison) made a tariff filing to increase its annual electric revenues by approximately \$1.225 billion or 36.8%. The effective date of the filing is currently suspended through March 30, 2008. The Commission may approve, reject or modify, in whole or in part, Con Edison's proposal.

Text of proposed rule may be obtained from: Central Operations, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or argument 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-0523SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Frontier Communications of Sylvan Lake, Inc., et al.

I.D. No. PSC-39-07-00011-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Frontier Communications of Sylvan Lake Inc., Frontier Communications of New York and Comcast Phone of New York, LLC for approval of an interconnection agreement executed on May 1, 2007.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York and Comcast Phone of New York, LLC have reached a negotiated agreement whereby Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York and Comcast Phone of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until May 1, 2008, or as extended.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/F96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(07-C-1021SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Communications, et al.

I.D. No. PSC-39-07-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Communications and Comcast Phone of New York, LLC for approval of an interconnection agreement executed on May 1, 2007.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Communications and Comcast Phone of New York, LLC have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Communications and Comcast Phone of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions

under which the parties will interconnect their networks lasting until May 1, 2008, or as extended.

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

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

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

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

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

(07-C-1022SA1)

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

Interconnection Agreement between Verizon New York Inc. and Public Interest Network Services, Inc.

I.D. No. PSC-39-07-00013-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Public Interest Network Services, Inc. for approval of an interconnection agreement executed on July 24, 2007.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Verizon New York Inc. and Public Interest Network Services, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Public Interest Network Services, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until July 23, 2009, or as extended.

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

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

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

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

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

(07-C-1028SA1)

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

Interconnection Agreement between Frontier Communications of AuSable Valley, Inc., et al.

I.D. No. PSC-39-07-00014-P

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

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

Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York, Inc., Frontier Communications of Seneca-Gorham, Inc., Ogden Telephone Co. (Frontier) and Level #3 Communications, LLC for approval of an interconnection agreement executed on April 1, 2007.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York, Inc., Frontier Communications of Seneca-Gorham, Inc., Ogden Telephone Co. (Frontier) and Level #3 Communications, LLC have reached a negotiated agreement whereby Frontier and Level #3 Communications, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until April 1, 2008, or as extended.

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

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

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

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

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

(07-C-1029SA1)

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

Submetering of Electricity by The Sheldrake Organization on behalf of Site 16/17 Development LLC

I.D. No. PSC-39-07-00016-P

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

Proposed action: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by The Sheldrake Organization, on behalf of Site 16/17 Development LLC, to submeter electricity at One and Two River Terrace, Battery Park City, New York, NY.

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

Subject: Submetering of electricity.

Purpose: To submeter electricity at One and Two River Terrace, Battery Park City, New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by The Sheldrake Organization, on behalf of Site 16/17 Development LLC, to submeter electricity at One and Two River Terrace, Battery Park City, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-E-1047SA1)

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

Gas Bill Issuance Charge by New York State Electric & Gas Corporation

I.D. No. PSC-39-07-00017-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its schedules for gas service, P.S.C. Nos. 87 and 88—Gas, to become effective April 1, 2008.

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

Subject: Gas bill issuance charge.

Purpose: To create a gas bill issuance charge unbundled from delivery rates and to show the unbundled amount of \$.70 on the customer's bill.

Substance of proposed rule: The Commission is considering New York State Electric & Gas Corporation's (NYSEG) request to create a gas bill issuance charge unbundled from delivery rates and to show the unbundled amount of \$.70 on the customer's bill. The filing is being made pursuant to Commission's Order Denying Tariff Amendments issued and effective December 22, 2006 in Case 06-G-1386. The Commission may approve, reject or modify, in whole or in part, NYSEG's request.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-1386SA1)

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

Property Lease Renewal by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York, et al.

I.D. No. PSC-39-07-00018-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) and Consolidated Edison Company of New York, Inc.'s petition for authorization of a lease renewal and other related matters.

Statutory authority: Public Service Law, section 70

Subject: Joint petition for the authorization of a property lease renewal.

Purpose: To authorize the renewal of the property lease associated with KEDNY's Jamaica Customer office located in Jamaica, NY.

Substance of proposed rule: The Public Service Commission is considering whether to approve, reject or modify, in whole or in part, The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) and Consolidated Edison Company of New York, Inc.'s (Con Edison) Joint Petition for KEDNY to re-lease a portion of its Jamaica Customer Office, located at 89-67 162nd Street, Jamaica, New York to

Con Edison. Currently, Con Edison leases a portion of that property for its customer Walk-In Center.

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-M-0957SA1)

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

Estimating Customer Gas and/or Electric Usage by New York State Electric and Gas Corporation

I.D. No. PSC-39-07-00019-P

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

Proposed action: The Public Service Commission is considering whether to accept, reject or to modify, in whole or in part, a proposal by New York State Electric and Gas Corporation (NYSEG) to revise the procedures the utility uses to estimate customer gas and/or electric usage for the purpose of rendering bills to nonresidential electric or gas heating customers when an actual reading of metered usage data for the customers is not available.

Statutory authority: Public Service Law, section 39

Subject: NYSEG's procedures for estimating customer usage for the purpose of rendering billed charges.

Purpose: To modify the procedure for estimating customer usage in instances when metered usage data is not available.

Substance of proposed rule: The New York State Public Service Commission is considering whether to accept, reject or to modify, in whole or in part, a proposal of New York State Gas and Electric Corporation to revise the method the utility uses to estimate customer gas and/or electric usage for the purpose of rendering bills to nonresidential electric or gas heating customers when actual metered usage data is not available.

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-M-1052SA1)

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

Estimating Customer Usage for the Purpose of Rendering Billed Charges by Rochester Gas and Electric Corporation

I.D. No. PSC-39-07-00020-P

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

Proposed action: The Public Service Commission is considering whether to accept, reject or to modify, in whole or in part, a proposal by Rochester

Gas and Electric Corporation (RG&E) to revise the procedures the utility uses to estimate customer gas and/or electric usage for the purpose of rendering bills to nonresidential electric or gas heating customers when an actual reading of metered usage data for the customers is not available.

Statutory authority: Public Service Law, section 39

Subject: RG&E's procedures for estimating customer usage for the purpose of rendering billed charges.

Purpose: To modify the procedure for estimating customer usage in instances when metered usage data is not available.

Substance of proposed rule: The New York State Public Service Commission is considering whether to accept, reject or to modify, in whole or in part, a proposal of Rochester Gas and Electric Corporation to revise the method the utility uses to estimate customer gas and/or electric usage for the purpose of rendering bills to nonresidential electric or gas heating customers when actual metered usage data is not available.

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-M-1053SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

Disqualification of a Horse for Intentional or Careless Interference

I.D. No. RWB-39-07-00001-E

Filing No. 954

Filing date: Sept. 6, 2007

Effective date: Sept. 6, 2007

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

Action taken: Amendment of section 4035.2(d) of Title 9 NYCRR.

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

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

Specific reasons underlying the finding of necessity: This rule is necessary to preserve the integrity of pari-mutuel racing and wagering in New York State, and thereby insure that the State can receive reasonable revenue in support of government arising from such wagering. This rule is designed to protect the betting public from intentional or negligent misconduct committed during the course of a horse race, and ensure that a jockey's conduct during the course of a race is both professional and beyond reproach. It is urgent that this rule be adopted to assure the public confidence and integrity of pari-mutuel racing on both a daily basis. This rule is necessary to ensure public confidence in such events, as well as provide for the continuing safety of the participating horses and jockeys.

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

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

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

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

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 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, e-mail: info@racing.state.ny.us

Regulatory Impact Statement

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

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

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

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

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

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

4. Costs:

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

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

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

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

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

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

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

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

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

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

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

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

Albany, NY 12231, (518) 474-6740, e-mail: dos.sm.InetLegl@dos.state.ny.us

**EMERGENCY
RULE MAKING**

Cremation Certification Course

I.D. No. DOS-37-07-00001-E

Filing No. 958

Filing date: Sept. 6, 2007

Effective date: Sept. 6, 2007

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

Action taken: Addition of Part 204 to Title 19 NYCRR.

Statutory authority: Not-for-Profit Corporation Law, section 1517(j)

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

Specific reasons underlying the finding of necessity: Division of Cemeteries must certify those organizations seeking to be approved providers of the cremation certification course before September 18, 2007.

Subject: Approval of cremation certification course.

Purpose: To establish the training and course requirements for the maintenance and operation of crematories within the State.

Text of emergency rule: A new Part 204 is added to Title 19 NYCRR to read as follows:

Section 204.1. Purpose. Paragraph (j) of section 1517 of the Not-for-Profit Corporation Law, as enacted by Chapter 579 of the Laws of 2006, empowers the Division of Cemeteries to certify an organization seeking to make application for approval to conduct a cremation certification course of study. In furtherance of its statutory mandate, the Division of Cemeteries has adopted these rules and regulations to establish the training and course requirements for the maintenance and operation of crematories within the State, including but not limited to subjects for study, attendance, examinations and certificate of completion.

Section 204.2. General requirements. (a) A crematory shall ensure that, on or after October 15, 2007, all employees operating crematory equipment have attended cremation classes and obtained the certificate required by this Part. No employee shall be allowed to operate any cremation equipment until he or she has met the requirements of this Part. Proof of such employee certification must be posted in the crematory and available for inspection at any time.

(b) No certificate or renewal certificate to operate a crematory shall be issued to any crematory employee on or after October 15, 2007 unless such employee completes a minimum of 8 hours of cremation certification classes and passes a written examination.

(c) No offering of a course of study in the field of cremation operation for purposes of compliance with this Part shall be acceptable for credit unless such course of study has been approved by the Division of Cemeteries.

(d) All new crematory employees whose function is to conduct the daily operations of the cremation process must be certified within 1 year of employment or any reclassification as a crematory operator. No employee shall be allowed to conduct the daily operations of the cremation process until they have completed the certification course, passed the written take home examination and possess a certificate of completion. Any employee of a crematory required to be certified under this Part and retained prior to October 15, 2007 shall be certified within 1 year of such date. Renewal of such certification shall be completed every five years from the date of certification.

Section 204.3. Approved entities. Cremation certification courses may be given by an organization approved by the Division of Cemeteries. No organization seeking approval as a cremation certification course provider shall be affiliated or associated with, owned, operated or controlled by a funeral entity.

Section 204.4. Request for approval of course of study. (a) Applications for approval to conduct a cremation certification course of study satisfying the requirements of this Part shall be made at least 60 days before the proposed course is to be conducted. The application shall be prescribed by the Division to include the following:

(1) name and business address of the organization that will present the course;

(2) if the organization is a partnership, the names and home addresses of all the partners of the entity;

Department of State

NOTICE

A Notice of Proposed Rule Making, I.D. No. DOS-37-07-00001-P, pertaining to Cremation Certification Course, published in the September 12, 2007 issue of the *State Register* has been amended to change the contact person.

Text of proposed rule and any required statements and analyses may be obtained from: Nathan Hamm, Department of State, 41 State St.,

(3) if the organization is a corporation, the names and home addresses of persons who own five percent or more of the stock of the entity;

(4) the name, business address, telephone number, resume and qualifications of each educational provider who will be teaching and grading the course for the organization;

(5) regional or geographic locations where classes will be conducted;

(6) description of materials that will be distributed;

(7) final examination to be presented for the certification course, including the answer key;

(8) procedure for taking attendance; and

(9) an outline of the course content and the number of hours devoted to each subject.

(b) Educational provider qualification.

Each educational provider must be qualified as follows:

(1) Is eighteen years of age or over and of good moral character;

(2) Holds an associates degree in mortuary science or holds a high school diploma or its equivalent and possesses over five years experience in crematory operation;

(3) Possesses instructional experience, academic achievement, and specialty or technical experience in the field of cremation;

(4) Is capable of administering and grading written examinations following the crematory certification course.

Section 204.5. Subjects of study for crematory operator certification course. The certification course shall be divided into two subject matter areas. One subject matter area will address the New York statutes and regulations. Such statutes shall include all applicable sections of Article 15 of the Not-for-Profit Corporation Law (N-PCL) relating to cremations with an emphasis on N-PCL section 1517 and the New York State Public Health Law sections 3441, 4145, 4200, 4201, 4202, 4210(a), 4216, and 4218. Such regulations shall include Part 203 of the New York Code, Rules and Regulations (NYCRR) and Part 219-4 of the New York State Department of Environmental Conservation Air Quality Regulations. The approved organization shall devote 20% of the total time allotted for the course to the New York statutes and regulations.

The other subject matter area of the course shall address the general and technical aspects of crematory operations. The subject matter area shall include but not be limited to the cremation process, cremation equipment, operation of cremation chamber, cremation terminology, crematory operator safety, and the identification of cremated human remains. The approved organization shall devote 80% of the total time allotted for the course to the general and technical aspects of crematory operations.

Section 204.6. Computation of instruction time. The certification course for crematory employees shall be a 1 day course for a total of a minimum of 8 hours of instruction to be provided by the approved organization.

Section 204.7. Attendance and examinations. (a) No applicant to receive certification as a crematory employee shall receive certification if he or she is absent from the class room for a period totaling more than 10% of the time during any instructional period. No crematory employee shall be absent from the class room except for a reasonable and unavoidable cause.

(b) Any crematory employee who fails to attend the required scheduled class hours may, at the discretion of the approved organization, make up the missed subject matter during subsequent courses presented by an approved organization.

(c) Final examinations may only be taken by a crematory employee who has satisfied the attendance requirement.

(d) The final examination shall be a take home examination in which each employee must attain a score of 70% in order to obtain certification as a crematory operator. A failing grade on the final exam shall constitute failure of the course. All final exams are to be reviewed and graded by the approved organization and a copy of all tests with scores shall be provided to the Division of Cemeteries.

(e) Individuals who complete a course of study offered outside of the State of New York, which course has not been approved by the Division, may file a request to the Division for review and evaluation. Evidence of satisfactory course completion must be submitted by the applicant.

Section 204.8. Facilities. Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course. Such facilities shall be pre-approved by the Division.

Section 204.9. Examination requirement and record retention. (a) All approved organizations shall retain the attendance records, the final examinations and a list of crematory employees who successfully complete each certification course for a period of five years after completion of each

course. All such documents shall during normal business hours be available for inspection by authorized representatives of the Division of Cemeteries.

(b) All examinations required for certification shall be in the form of a written take home examination and shall be returned to the educational provider within two weeks after distribution.

Section 204.10. Change in approved course of study. There shall be no change or alteration in any approved course of study of any subject or in any instruction staff or provider without prior written notice and approval by the Division of Cemeteries.

Section 204.11. Auditing. A duly authorized representative of the Division of Cemeteries may audit any course offered, and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

Section 204.12. Suspensions and denials of course approval. Within 30 days after the receipt of the application for approval of an offering, the Division of Cemeteries shall inform the organization as to whether the offering has been approved, denied, or whether additional information is needed to determine the acceptability of the offering. The Division may deny, suspend, or revoke the approval of a certification course of an organization, if it is determined that they are not in compliance with the law and rules, or if the offering does not adequately reflect and present current cremation knowledge as a basis for a level of cremation practice.

Section 204.13. Certificate of completion. Evidence of successful completion of the course must be furnished to each crematory employee in certificate form. The certificate must indicate the following: name of the cemetery corporation; Crematory Operator Certification Course; a statement that the employee, who shall be named, has satisfactorily completed a course of study in the cremation subjects approved by the Division of Cemeteries in accordance with the provisions of Chapter 579 of the Laws of 2006, and that his or her attendance record was satisfactory and in conformity with the law, and that such course was completed on a stated date. The certificate must be signed by the approved organization and dated, and must have affixed thereto the official seal of the approved organization. Copies of such certification shall be filed with the Division of Cemeteries at 41 State Street, Albany, New York.

Section 204.14. Fees. Each approved organization shall establish the registration fee for the certification course offered.

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. DOS-37-07-00001-P, Issue of September 12, 2007. The emergency rule will expire December 4, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Nathan Hamm, Department of State, Office of Counsel, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: dos.sm.InetLegl@dos.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Section 1504(c) of the Not-for-Profit Corporation Law authorizes the Cemetery Board to adopt reasonable rules and regulations for the proper administration of the Public Cemetery Corporations Law. N-PCL section 1517(j) as added by Chapter 579 of the Laws of 2006 authorizes the Division of cemeteries to certify an organization seeking to make application for approval to conduct a cremation certification course of study.

2. Legislative Objectives: The legislative intent of Chapter 579 of the Laws of 2006 pertaining to the regulation of crematories, is to protect the well-being of our citizens, to promote the public welfare and to prevent crematories from falling into disrepair and dilapidation and becoming a burden upon the community, and in furtherance of the public policy of this State that crematories shall be conducted on a non-profit basis for the mutual benefit of the public therein.

3. Needs and Benefits: This regulation is needed to provide crematory employees with a standardized course of instruction in the operation and maintenance of crematories throughout the State. The Division of Cemeteries must approve the organization or entity seeking to be a cremation certification course provider. Upon completion of the course and after passing a written examination each crematory employee will receive a cremation certification allowing such employees to conduct the daily operations of the cremation process. The regulation also sets forth the criteria to be used when an organization or entity seeks to make application to be a course provider. No organization seeking approval as a cremation certification course provider shall be affiliated or associated with, owned, operated or controlled by a funeral entity. Under the Not-for-Profit Corporation Law § 1506-a, also known as the anti-combination statute, was enacted to

prevent funeral entities from having any involvement in the operation, maintenance, or the cross marketing of goods and services with a cemetery corporation. This regulation would prevent a funeral entity from making an application to the Division of Cemeteries to be a course provider to conduct a cremation certification course of study.

The regulation further provides for the subjects of study, attendance, examinations and certification of completion requirements. The estimated cost to attend the certification course per crematory employee may range from \$150.00 to \$450.00. The Division of Cemeteries shall not approve the fees to be charged by the approved course provider. As a matter of policy the Division believes that it would be inappropriate to regulate the fee charged for the certification course since it does not want to be held accountable by the crematory industry for setting a fee that may be cost prohibitive from the perspective of the crematory operators. Based upon that policy decision, the Division feels that it is appropriate for the course provider to set their own fee based upon the current market price for the certification course being offered.

4. Costs: There are no costs to state agencies.

In terms of cemetery corporations that own and operate crematories in the State there will be a cost to certify their employees whose function is to conduct the daily operations of the cremation process. Any crematory employee retained prior to the effective date of the enactment of Chapter 579 of the Laws of 2006 must be certified by October 15, 2007. Any new employees of a crematory hired after October 15, 2007 must be certified within one year of their employment. Renewal of such certification must be completed every five years from the date of certification. The approved organization or entity shall establish the registration fee for the certification course offered. Each cemetery corporation will have to pay the approved fee to certify those crematory employees who will conduct cremations. The estimated cost to attend the certification course per crematory employee may range from \$150.00 to \$450.00.

5. Local Government Mandates: The proposal does not require any local government mandates.

6. Paperwork: The proposal does require the approved organization or entity to provide the Division of Cemeteries with a copy of all tests and scores upon completion of the course. Copies of all certifications shall be filed by the approved organization or entity with the Division of Cemeteries. Entities interested in providing the course must submit, at least 60 days prior to the start of the course, an application and specified course documentation to the Division of Cemeteries for approval. The Division will provide approval or disapproval within 30 days of such submission. The course provider must present each successful participant with a certificate form that includes an official signature and seal of such organization, and file copies of those forms with the Division of Cemeteries. In addition, the course provider shall retain attendance records, final examinations and a list of certified employees for a period of five years after course completion. The proposal does not require any new paperwork or reporting requirements for the cemetery corporations that own and operate crematories. Proof of all certifications must be posted in the crematory and available for inspection by the Division at anytime.

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

8. Alternatives: The certification course will be presented as a one day course. Discussions were held to provide the course in a day and a half format but due to cost concerns the one day format was implemented. The regulation also provides that the final examination will be a take home examination as opposed to an on site examination after completing the course. The take home examination was implemented primarily for cost concerns because an on site examination would have required an additional half day to the structure of the course. In addition, the regulation allows for any entity to make application to the Division of Cemeteries to provide the certification course provided that such entity meets the criteria for approval of a course of study. It is anticipated that those approved entities will provide the course on multiple days in different regions of the state to accommodate those crematories with multiple employees and smaller crematories with only one or two employees thus avoiding a situation wherein a crematory may have to close its operation for a day or two to meet the certification requirements.

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

10. Compliance Schedule: The regulations will apply to all crematory employees employed on or after October 15, 2007. The certification course will involve both the NYS Department of State (DOS) and the NYS Department of Environmental Conservation (DEC). The DOS will provide a certification course related to the statutory provisions that were enacted

in Chapter 579 of the Laws of 2006. The DEC will provide a separate certification course related to air pollution control requirements for crematories. The DEC through the Environmental Facilities Corporation has conducted a survey to determine the location and the number of courses needed to comply with the law. The projected plan is to offer three separate regional testing sites on multiple days in order to meet the needs of the crematory operators and their employees. In addition, DOS and DEC held an informational meeting on April 12, 2007 by inviting all the crematory owners within the state and the New York State Association of Cemeteries (NYSAC) to discuss the proposed regulation. The meeting proved to be successful in that it was well attended and many questions that were raised regarding the proposed regulation were clarified at the meeting. After the April meeting the proposed regulation was presented to NYSAC for their comments. The regulation was presented to the NYSAC cremation committee for review. The committee recommended that several changes to the proposed regulation be made and those changes have been incorporated into the proposed regulation as currently submitted. NYSAC does not oppose the proposed regulation as submitted since all their changes to the regulation have been incorporated. The Department of State intends to begin accepting applications from interested organizations that have an interest in teaching the certification course once the regulation has been approved.

Regulatory Flexibility Analysis

1. Effect on small businesses: There are approximately 50 crematories throughout the State that are under the jurisdiction of the Division of Cemeteries. There are an estimated 200 crematory employees who are presently employed as crematory operators in the State and who must be certified on or before October 15, 2007.

2. Compliance requirements: All cemetery corporations that own and operate crematories in the State must insure that all their current crematory employees must be certified on or before October 15, 2007. Any new employees hired after October 15, 2007 must be certified within one year from their date of employment. Renewal of such certification must be completed every five years from the date of certification. Entities interested in providing the course must submit, at least 60 days prior to the start of the course, an application and specified course documentation to the Division of Cemeteries for approval. The Division will provide approval or disapproval within 30 days of such submission. The course provider must present each successful participant with a certificate form that includes an official signature and seal of such organization, and file copies of those forms with the Division of Cemeteries. In addition, the course provider shall retain attendance records, final examinations and a list of certified employees for a period of five years after course completion.

3. Professional services: The regulation shall not require cemetery corporations to utilize professional services to comply with the regulation.

4. Compliance costs: The estimated cost to attend the certification course per crematory employee may range from \$150.00 to \$450.00. The Division of Cemeteries shall not approve the fees to be charged by the approved course provider. As a matter of policy the Division believes that it would be inappropriate to regulate the fee charged for the certification course since it does not want to be held accountable by the crematory industry for setting a fee that may be cost prohibitive from the perspective of the crematory operators. Based upon that policy decision, the Division feels that it is appropriate for the course provider to set their own fee based upon the current market price for the certification course being offered.

5. Economic and technological feasibility: It is economically and technologically feasible for cemetery corporations to comply with the regulation.

6. Minimizing adverse impact: This regulation will provide a degree or level of attainment for the training and certification requirements of all crematory employees whose function is to conduct the daily operations of the cremation process throughout the State. The regulation will apply uniformly to all crematories across the State and should not impose any adverse or disparate impact.

7. Small business and local government participation: The certification course will involve both the NYS Department of State (DOS) and the NYS Department of Environmental Conservation (DEC). The DOS will provide a certification course related to the statutory provisions that were enacted in Chapter 579 of the Laws of 2006. The DEC will provide a separate certification course related to air pollution control requirements for crematories. The DEC through the Environmental Facilities Corporation has conducted a survey to determine the location and the number of courses needed to comply with the law. The projected plan is to offer three separate regional testing sites on multiple days in order to meet the needs of the crematory operators and their employees. In addition, DOS and DEC held

an informational meeting on April 12, 2007 by inviting all the crematory owners within the state and the New York State Association of Cemeteries (NYSAC) to discuss the proposed regulation. The meeting proved to be successful in that it was well attended and many questions that were raised regarding the proposed regulation were clarified at the meeting. After the April meeting the proposed regulation was presented to NYSAC for their comments. The regulation was presented to the NYSAC cremation committee for review. The committee recommended that several changes to the proposed regulation be made and those changes have been incorporated into the proposed regulation as currently submitted. NYSAC does not oppose the proposed regulation as submitted since all their changes to the regulation have been incorporated. The Department of State intends to begin accepting applications from interested organizations that have an interest in teaching the certification course once the regulation has been approved.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Approximately one half of the 50 crematories located in the State are located in rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Cemeteries and crematories that conduct cremations and all their employees whose function is to conduct the daily operations of the cremation process will be required to be certified through an organization approved by the Division of Cemeteries for the operation of a crematory facility. No crematory employee that conducts the daily operations of a crematory can operate a crematory facility unless they are certified. Proof of all certifications must be posted in the crematory and available for inspection by the Division at any time. Entities interested in providing the course must submit, at least 60 days prior to the start of the course, an application and specified course documentation to the Division of Cemeteries for approval. The Division will provide approval or disapproval within 30 days of such submission. The course provider must present each successful participant with a certificate form that includes an official signature and seal of such organization, and file copies of those forms with the Division of Cemeteries. In addition, the course provider shall retain attendance records, final examinations and a list of certified employees for a period of five years after course completion. There would be no new reporting or record keeping requirements for the cemetery corporations that own and operate crematories.

3. Costs: The estimated cost to attend the certification course per crematory employee may range from \$150.00 to \$450.00. As a matter of policy the Division believes that it would be inappropriate to regulate the fee charged for the certification course since it does not want to be held accountable by the crematory industry for setting a fee that may be cost prohibitive from the perspective of the crematory operators. Based upon that policy decision, the Division feels that it is appropriate for the course provider to set their own fee based upon the current market price for the certification course being offered.

4. Minimizing adverse impact: This regulation will provide a degree or level of attainment for the training and certification requirements of all crematory employees whose function is to conduct the daily operations of the cremation process throughout the State. The regulation will apply uniformly to all crematories across the State and should not impose any adverse or disparate impact.

5. Rural area participation: The certification course will involve both the NYS Department of State (DOS) and the NYS Department of Environmental Conservation (DEC). The DOS will provide a certification course related to the statutory provisions that were enacted in Chapter 579 of the Laws of 2006. The DEC will provide a separate certification course related to air pollution control requirements for crematories. The DEC through the Environmental Facilities Corporation has conducted a survey to determine the location and the number of courses needed to comply with the law. The projected plan is to offer three separate regional testing sites on multiple days in order to meet the needs of the crematory operators and their employees. In addition, DOS and DEC held an informational meeting on April 12, 2007 by inviting all the crematory owners within the state and the New York State Association of Cemeteries (NYSAC) to discuss the proposed regulation. The meeting proved to be successful in that it was well attended and many questions that were raised regarding the proposed regulation were clarified at the meeting. After the April meeting the proposed regulation was presented to NYSAC for their comments. The regulation was presented to the NYSAC cremation committee for review. The committee recommended that several changes be made to the proposed regulation and those changes have been incorporated into the proposed regulation as currently submitted. NYSAC does not oppose the proposed regulation as submitted since all their changes to the regulation have been

incorporated. The Department of State intends to begin accepting applications from interested organizations that have an interest in teaching the certification course once the regulation has been approved.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. As a result of the enactment of section 1517(j) of the Not-for-Profit Corporation Law, which became effective October 15, 2006, any employee of a crematory whose function is to conduct the daily operations of the cremation process shall be certified by an organization approved by the Division of Cemeteries. Certifications are valid for five years, and may be renewed only upon successful completion of an approved cremation certification course of study. Inasmuch as this rule affects only those certified crematory operators who seek renewal of certification, it promotes employment by ensuring that only those qualified to provide this service, will be certified.

EMERGENCY RULE MAKING

Notice of Hearing for a Disciplinary Action Against a Registered Security Guard

I.D. No. DOS-39-07-00005-E

Filing No. 959

Filing date: Sept. 7, 2007

Effective date: Sept. 7, 2007

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

Action taken: Amendment of section 400.4(a) of Title 19 NYCRR.

Statutory authority: General Business Law, section 89-o

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

Specific reasons underlying the finding of necessity: This rule was adopted on an emergency basis to preserve the public safety and welfare. Security guards are employed for the protection of individuals and property, as well as the prevention and reporting of unlawful or unauthorized activity. Adoption of this rule permits the Department of State to serve the notice of hearing and complaint in administrative proceedings on security guards by certified mail, rather than pursuant to the CPLR as currently provided by 19 NYCRR Part 400. Especially in cases where the department is seeking to revoke or suspend a guard registration where a security guard has been charged with, or convicted of, a serious crime, this expedited service, which is similar to that required by other regulatory statutes, provides a greater measure of safety to the general public.

Subject: Authorization of a method of service of a notice of hearing for disciplinary action against a registered security guard.

Purpose: To expedite hearings involving disciplinary action against registered security guards.

Text of emergency rule: An Amendment to 19 NYCRR Section 400.4(a) is adopted to read as follows:

Section 400.4 Commencement of disciplinary proceedings.

(a) Every adjudicatory proceeding which may result in a determination to revoke or suspend a license or to fine or reprimand a licensee will be commenced by the service of a notice of hearing together with a statement of charges (also known as a complaint), which shall consist of plain and concise statement which shall sufficiently give the administrative law judge and the respondent notice of the alleged misconduct of incompetence. Notice of hearing and statement of charges (or complaint) shall be communicated in any manner permitted by the applicable regulatory statute, or if no specific manner is designated by the applicable statute, by certified mail, or by any manner authorized by the Civil Practice Law and Rules. Respondent may, at his option, serve an answer denying such charges and interposing affirmative defenses, if any. Absent an answer, all charges are deemed denied and all rights are reserved.

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 5, 2007.

Text of emergency rule and any required statements and analyses may be obtained from: Kenneth L. Golden, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740

Regulatory Impact Statement

1. Statutory authority:

Article 7-A (Security Guard Act) of the General Business Law was enacted as Chapter 336 of the Laws of 1992. Section 89-g(1)(a) of Article 7-A prohibits employment of security guards unless it is established that they have obtained a valid registration card issued by the Department of State. Registration cards are issued only after the applicant has undergone an investigation and background check by the Division of Criminal Justice Services. Applicants charged or convicted of crimes are disqualified from being issued a registration card where the crime “bears a direct relationship to their employment” as a security guard. Applicants are notified of the proposed denial of their application by regular mail, and may request a hearing challenging the Department’s determination. Notice of the hearing is served by registered mail or in any manner authorized by the Civil Practice Law and Rules in accordance with General Business Law §§ 89-k and 79(2).

General Business Law § 89-1 provides that current holders of a registration card who are charged or convicted of a crime are subject to disciplinary action, such as revocation, suspension, or the imposition of a fine, but only after being afforded a hearing held pursuant to the State Administrative Procedure Act. In accordance with rules adopted by the Secretary of State for the adjudication of disciplinary hearings, notice of the hearing may be served “in any manner permitted by the applicable statute or the Civil Practice Law and Rules.” Since no specific method of service is provided by § 89-1 of the General Business Law, service must be made pursuant to the methods provided by the Civil Practice Law and Rules, resulting in delay and/or additional costs. General Business Law § 89-o authorizes the Secretary of State in consultation with the security guard advisory council to adopt rules and regulations implementing the provisions of Article 7-A. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

In enacting Article 7-A of the General Business Law, the legislature described the increasing role of security guards in protecting individuals and property from “harm, theft and/or unlawful activity,” and found that the “proper screening, hiring and training of security guards is a matter of state concern and compelling state interest . . . ,”¹ and in the aftermath of the events of September 11, 2001, reinstated a federal fingerprint check on registered security guards to provide an additional measure of protection against potential harm from registrants who may have committed federal crimes or crimes in other jurisdictions that did not appear on the New York State records.² As a result, background checks have revealed an even greater number of holders of security guard registration cards who may be subject to disciplinary action for crimes committed in other jurisdictions, and who are entitled to hearings to determine whether they should continue to perform security guard functions. This rule re-enforces the stated objectives of the Legislature when it enacted Article 7-A.

3. Needs and benefits:

General Business Law § 89-1 provides that current holders of a registration card who are charged or convicted of a crime which “bears a direct relationship to their employment” are subject to disciplinary action, such as revocation, suspension, or the imposition of a fine, but only after being afforded a hearing held pursuant to the State Administrative Procedure Act. Notice of the hearing may be served “in any manner permitted by the applicable statute or the Civil Practice Law and Rules.” Since no specific method of service is provided by § 89-1 of the General Business Law, service must be made pursuant to the requirements of the Civil Practice Law and Rules, resulting in delay and/or additional costs. The public benefits from a timely and expedited determination of whether registered security guards charged or convicted of crimes pose an additional risk of harm to their safety or property.

4. Costs:

a. Costs to regulated parties:

The Department of State does not anticipate any additional costs to holders of registration cards by enactment of this rule.

b. Costs to the Department of State:

The Department of State anticipates that the cost and implementation and continued administration of this rule will be accomplished using existing resources.

c. Costs to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The rule does not require the securing, preparation, filing or maintenance of any additional papers or documents.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The current alternative to this rule requires that a holder of a registration card receive notice of a hearing seeking disciplinary action in any manner authorized by the Civil Practice Law and Rules. Those requirements necessitate either personal service or delivery and mailing of duplicate notices, which involves additional delays and costs in reaching a determination concerning the registrant’s fitness to continue performing the functions of a security guard. This rule expedites the procedure for reaching that determination while affording the registrant notice and an opportunity to be heard on any proposed disciplinary measures.

9. Federal standards:

This rule meets all federal and constitutional standards for due process.

10. Compliance schedule:

The Department of State anticipates that the Division of Licensing Services will be able to comply immediately with this rule.

¹McKinney’s 1992 Session Laws of New York, Chapter 366, p. 1073

²McKinney’s 2004 Sessions Law of New York, Chapter 699, p. 2147.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule affects security guard companies, and those persons wishing to become registered as security guards, to the extent that they are subject to the enforcement provisions contained in Article 7-A of the General Business Law. However, it does not place any financial or additional burdens on such businesses who are already required to exercise “due diligence” in determining whether employees have been convicted of any offense that “bears such a relationship to the performance of the duties of a security guard, as to constitute a bar to employment”

The rule does not apply to local governments.

2. Compliance requirements:

The reporting and recordkeeping requirements are currently mandated by General Business Law § 89-g, and are not altered by this rule.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule. The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

It is not anticipated that small businesses will incur any additional costs of compliance as a result of this rule.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

It is not anticipated that small businesses will incur any additional costs or require technical expertise as a result of implementation of this rule.

The rule does not affect local governments.

6. Minimizing adverse economic impact:

It is not anticipated that small businesses will incur any additional costs as a result of implementation of this rule, requiring the adoption of alternative practices.

The rule does not affect local governments.

7. Small business and local government participation:

Since the impact on small businesses will be minimal, and the rule would not affect local governments, the Department did not solicit comment prior to the adoption of this rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies equally to holders of security guard registration cards in all areas of the state-urban, suburban and rural.

2. Reporting, recordkeeping and other compliance requirements:

Reporting and recordkeeping requirements are set forth fully in Section 2 of the Regulatory Flexibility Analysis for Small Business and Local Governments.

Holders of security guard registration cards in rural areas will not need to employ any additional professional services in order to comply with this rule.

3. Costs:

It is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance as a result of this rule.

4. Minimizing adverse impact:

It is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance requiring the adoption of alternative practices, as a result of this rule.

5. Rural area participation:

Since the impact on small businesses will be minimal and will apply equally throughout all areas of the state, whether urban, suburban or rural, the Department did not solicit comment prior to adoption of this rule.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. Under existing law, applicants and current holders of a registration card charged or convicted of crimes are disqualified from being employed as security guards, where the crime "bears a direct relationship to their employment" as a security guard, and continued employment constitutes a danger to the health, safety or well-being of the public. Inasmuch as this rule affects only the method of notification of persons disqualified from employment as a security guard, or subject to disciplinary action, it promotes employment opportunities by ensuring that only those qualified for registration are employed in the protection of persons and their property.

**EMERGENCY/PROPOSED
RULE MAKING
HEARING(S) SCHEDULED**

New York State Uniform Fire Prevention and Building Code

I.D. No. DOS-39-07-00010-EP

Filing No. 981

Filing date: Sept. 11, 2007

Effective date: Sept. 11, 2007

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

Action taken: Amendment of sections 1201.2(d) and 1204.1; addition of section 1204.3(f)(4) and (h)(3); renumbering of section 1204.3(i) to section 1204.3(l); and addition of section 1204.3(i), (j) and (k) to Title 19 NYCRR.

Statutory authority: Executive Law, section 381

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

Specific reasons underlying the finding of necessity: This rule is adopted as an emergency measure to preserve the public safety and general welfare. This rule clarifies an existing rule, which provides that the State is accountable for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority, by expressly providing that the State will be responsible for administration and enforcement of the Uniform Code with respect to facilities to be included in the Statewide Wireless Network to be established and implemented by the Office for Technology. Adoption of this rule on an emergency basis preserves the public safety and general welfare by clarifying the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network, and thereby permitting the immediate commencement of the review and permitting process incidental to the construction and implementation of the Statewide Wireless Network.

Subject: Accountability for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Purpose: To clarify that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code with respect to facilities to be included in the Statewide Wireless Network.

Public hearing(s) will be held at: 10:00 a.m., Nov. 19, 2007 at Department of State, 41 State St., 11th Fl. Conference Rm. (Rm. 1120), Albany, NY.

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

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

Text of emergency/proposed rule: Subdivision (d) of section 1201.2 of Title 19 NYCRR is amended to read as follows:

(d) (1) The State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority.

(2) Without limiting the generality of the provisions of paragraph (1) of this subdivision, the State shall be accountable for administration and enforcement of the Uniform Code with respect to all statewide wireless network facilities (as that term is defined in subdivision (j) of section 1204.3 of Part 1204 of this Title) and all activities related thereto undertaken by the Office for Technology; provided, however, that nothing in this paragraph shall be construed as subjecting to the provisions of the Uniform Code any statewide wireless network facility that would not otherwise be subject to the provisions of the Uniform Code.

(3) In the case of a statewide wireless network facility (as that term is defined in subdivision (j) of section 1204.3 of Part 1204 of this Title) which is constructed or installed on or in a statewide wireless network supporting building (as that term is defined in subdivision (k) of section 1204.3 of Part 1204 of this Title):

(i) the State shall be accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network facility and all activities related thereto undertaken by the Office for Technology, but the State shall not be accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building;

(ii) the governmental entity that would have been accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building if such statewide wireless network facility had not been constructed or installed thereon or therein shall remain accountable for administration and enforcement of the Uniform Code with respect to such statewide wireless network supporting building, but such governmental entity shall not be responsible for administration and enforcement of the Uniform Code with respect to such statewide wireless network facility; and

(iii) the State and such governmental entity shall consult with each other and fully cooperate with each other in connection with the performance of their respective administrative and enforcement obligations, and in particular, but not by way of limitation, the State shall make all records in its possession pertaining to such statewide wireless network facility available to such governmental entity upon request by such governmental entity, and such governmental entity shall make all records in its possession pertaining to such statewide wireless network supporting building available to the State upon request by the State. Nothing in this paragraph shall require the State to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency (as that term is defined in subdivision (h) of section 1204.3 of Part 1204 of this Part) to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.

Section 1204.1 Title 19 NYCRR is amended to read as follows:

Section 1204.1 Introduction. Section 381 of the Executive Law directs the Secretary of State to promulgate rules and regulations prescribing minimum standards for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (Uniform Code). Section 1201.2(d) of this Title provides that the State shall be accountable for administration and enforcement of the Uniform Code with respect to:

(a) buildings, premises, and equipment in the custody of, or activities related thereto undertaken by, a State agency, and

(b) all statewide wireless network facilities and all activities related thereto undertaken by the Office for Technology.

This Part establishes procedures for the administration and enforcement of the Uniform Code by state agencies. Buildings and structures exempted from the Uniform Code by other preclusive statutes or regulations are not subject to the requirements of this Part.

New paragraph (4) of subdivision (f) of section 1204.3 of Title 19 NYCRR is added to read as follows:

(4) Notwithstanding any other provision of this subdivision to the contrary and without regard to the criteria mentioned in paragraph (3) of this subdivision, for the purposes of this Part the Office for Technology shall be considered to have custody and effective control of all statewide wireless network facilities; provided, however, that nothing in this subdivision shall be construed as subjecting to the provisions of the Code any statewide wireless network facility that would not otherwise be subject to

the provisions of the Code; and provided further that for the purposes of this Part, the Office for Technology shall not be considered to have custody or effective control of any statewide wireless network supporting building merely by reason of the construction or installation of any statewide wireless network facility thereon or therein.

New paragraph (3) of subdivision (h) of section 1204.3 of Title 19 of the NYCRR is added to read as follows:

(3) Without limiting the generality of paragraphs (1) and (2) of this subdivision, for the purposes of this Part and for the purposes of Part 1201 of this Title, the term "State agency" shall include the Office for Technology.

Subdivision (i) of section 1204.3 of Title 19 NYCRR is renumbered subdivision (l) and new subdivisions (i), (j), and (k) are added to read as follows:

(i) *Statewide wireless network. An integrated statewide communications system intended to link state and local first responders to each other and to allow state and local first responders to communicate reliably during emergency situations, as contemplated by section 402(1)(a) of the State Technology Law. The term "statewide wireless network" shall include such communications system as originally developed and constructed and as thereafter extended, improved, upgraded, or otherwise modified from time to time.*

(j) *Statewide wireless network facility. Any tower, antenna, or equipment which is used or intended to be used in the operation of the statewide wireless network, and any building or structure which is constructed specifically for the purpose of supporting or containing any such tower, antenna, or equipment.*

(k) *Statewide wireless network supporting building. A building or structure which is not a statewide wireless network facility (i.e., which was not constructed specifically for the purpose of supporting or containing a tower, antenna, or equipment which is used or intended to be used in the operation of the statewide wireless network), but which has a statewide wireless network facility constructed or installed thereon or therein. For example, if a tower, antenna, and equipment used or intended to be used in the operation of the statewide wireless network, and a building or structure which will contain such equipment or support such tower, are constructed on the top of an existing office building, then:*

(1) *such office building would be a statewide wireless network supporting building;*

(2) *such office building would not be a statewide wireless network facility; and*

(3) *the tower, antenna, equipment, and building or structure constructed on the top of such office building would be a statewide wireless network facility.*

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 6, 2007.

Text of 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

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

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

1. STATUTORY AUTHORITY.

The statutory authority for this rule is section Executive Law section 381(1), which provides that the Secretary of State shall promulgate rules and regulations prescribing minimum standards for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code"), and Executive Law section 381(2), which provides that every local government shall administer and enforce the Uniform Code "(e)xcpt as may be provided in regulations of the secretary"

2. LEGISLATIVE OBJECTIVES.

"In general, section 381 of the Executive Law directs that the State's cities, towns and villages administer and enforce the New York State Uniform Fire Prevention and Building Code (Uniform Code). However, the statute contemplates the need for alternative procedures for certain classes of buildings based upon their design, construction, ownership, occupancy or use, and authorizes the Secretary of State to establish those procedures. . . ." 19 NYCRR section 1201.1.

Rules and regulations previously adopted by the Secretary of State pursuant to Executive Law section 381(2) provide that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities

related thereto undertaken by, a State department, bureau, commission, board or authority.

This rule will clarify that the State is accountable for administration and enforcement of the Uniform Code with respect to facilities in the Statewide Wireless Network to be constructed and implemented by the Office for Technology.

3. NEEDS AND BENEFITS.

The existing policy of this State, as reflected in the existing rules and regulations, is that the State shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority. This rule will clarify that this policy shall apply to facilities in the Statewide Wireless Network to be constructed and implemented by the Office for Technology.

This rule will also address the situation that will arise when a governmental agency other than the State (a local government, in most cases) is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure, and a Statewide Wireless Network facility is to be constructed or installed in or on such building or structure. This rule will provide that in such a case: (1) the local government will continue to have responsibility for administration and enforcement of the Uniform Code with respect to the building or structure; (2) the State will be responsible for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facility to be constructed on installed in or on the building or structure; and (3) the local government and the State must consult and cooperate with each other with respect to their respective administrative and enforcement responsibilities, and must make their records available to each other on request. The rule would provide that the State would not be required to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.

It is appropriate that the State have the responsibility for administration and enforcement of the Uniform Code with respect to the facilities that will be part of the Statewide Wireless Network. This will simplify and streamline the permitting process for all Statewide Wireless Network facilities to be constructed throughout the State. However, it may not be clear that the Office for Technology is a "department, bureau, commission, board or authority," as that phrase is currently used in 19 NYCRR section 1201.2(d), and it may not be clear that all facilities in the Statewide Wireless Network will be in the "custody" of the Office for Technology, as that term is currently used in 19 NYCRR section 1201.2(d). Since Statewide Wireless Network facilities will be constructed in numerous communities throughout the State, it is appropriate to provide those communities, as well as the Office for Technology, with a clear indication of the responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facilities.

4. COSTS.

a. Cost to regulated parties for the implementation of and continuing compliance with this rule: This rule imposes no obligation on any private party.

b. Costs to the Department of State: The Department of State anticipates that it will incur no costs as a result of this rule.

c. Costs to other State agencies: This rule will clarify that the State will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State anticipates that the Office of General Services ("OGS") will be the construction-permitting agency for Statewide Wireless Network facilities. The Department of State views this aspect of this rule more as a clarification of existing rules and regulations, rather than the creation of a new obligation that OGS would not otherwise have.

The Office for Technology will be required to comply with the Uniform Code in constructing any Statewide Wireless Network facility that is subject to the Uniform Code. However, this obligation exists under existing law and regulation, and not by reason of this rule.

d. Cost to local governments: This rule will require local governments having the responsibility for administration and enforcement of the Uniform Code with respect to buildings and structures to consult and cooperate with the State, and to make their records available to the State, when a Statewide Wireless Network facility is constructed or installed in or on any such building or structure. However, the Department of State anticipates that existing staff in the code enforcement offices of the affected local governments will be able to provide the required consultation and coopera-

tion, and the Department of State anticipates that this part of this rule will impose little or no new costs on local governments.

5. PAPERWORK.

This rule will clarify that the State, rather than local governments, will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State anticipates that the amount of paperwork that will be required if the State is responsible for administration and enforcement of the Uniform Code will be no greater than the paperwork that would be required if local governments were given that responsibility.

6. LOCAL GOVERNMENT MANDATES.

As stated in subparagraph 4 (d) (Costs to local governments) of this Regulatory Impact Statement, this rule will require local governments having the responsibility for administration and enforcement of the Uniform Code with respect to buildings and structures to consult and cooperate with the State, and to make their records available to the State, when a Statewide Wireless Network facility is constructed or installed in or on any such building or structure. However, the Department of State anticipates that existing staff in the code enforcement offices of the affected local governments will be able to provide the required consultation and cooperation.

7. DUPLICATION.

The Department of State 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.

Making local governments, and not the State, responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities was considered but rejected for the reasons set forth in the Regulatory Impact Statement. The Department of State has not considered any other alternative to this rule.

9. FEDERAL STANDARDS.

The Department of State 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. The Office of General Services has the ability to act as the construction-permitting agency, and should be able to begin the required permitting process with little or no delay.

Regulatory Flexibility Analysis

1. EFFECT OF RULE.

This rule does not apply directly to any business. However, to the extent that any business becomes involved in the Uniform Code permitting process incidental to construction of any Statewide Wireless Network facility, such business will be indirectly affected by this rule, since this rule will provide that the State will be responsible for such permitting.

This rule will affect local governments in municipalities in which Statewide Wireless Network facilities are to be constructed, since this rule will clarify that the State, and not the local government, will be responsible for administration and enforcement of the Uniform Code with respect to such Statewide Wireless Network facilities.

This rule will provide that when a local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and a Statewide Wireless Network facility is constructed or installed in or on such building or structure, (1) the local government will retain the responsibility for administration and enforcement of the Uniform Code with respect to the building or structure, (2) the State will have responsibility for administration and enforcement of the Uniform Code with respect to the Statewide Wireless Network facility constructed on installed in or on such building or structure, and (3) the local government and the State will be required to consult and cooperate with each other in connection with the performance of their respective administrative and enforcement obligations, and to make records available to each other upon request. (The rule will provide that the State would not be required to make available any record which, if disclosed, would jeopardize the capacity of the State, the Office for Technology, or any other State agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures, or if access to such record could otherwise be denied under section 87 of the Public Officers Law.)

2. COMPLIANCE REQUIREMENTS.

Any business involved in the construction of any Statewide Wireless Network facility will be required to comply with the Uniform Code (to the extent that the Uniform Code applies to such facility). However, that

requirement exists under current law, not by reason of this rule. This rule will clarify that the State will be responsible for administration and enforcement of the Uniform Code with respect to such facility; this rule will not impose any new compliance requirement on any business.

This rule will clarify that the State, and not local governments, will be responsible for administration and enforcement of the Uniform Code with respect to Statewide Wireless Network facilities. This part of the rule imposes no compliance requirements on local governments.

This rule will provide that a local government that is responsible for administration and enforcement of the Uniform Code with respect to a building or structure shall retain such responsibility even if a Statewide Wireless Network facility is constructed or installed in or on such building or structure. This part of the rule imposes no new compliance requirements on local governments.

This rule will require a local government to consult and cooperate with the State, and to make its records available to the State, when the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and a Statewide Wireless Network facility is constructed or installed in or on such building or structure.

3. PROFESSIONAL SERVICES.

This rule imposes no new compliance requirements on businesses. Therefore this rule creates no new reporting, record keeping, or other requirements for business which would require professional services.

A local government will be required to consult and cooperate with the State, and to make its records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that existing staff in the code enforcement office of the local government will be able to provide the necessary consultation and cooperation. Therefore, except for such professional services as may be provided by existing staff, the Department of State anticipates that local governments will not require professional services to comply with this rule.

4. COMPLIANCE COSTS.

This rule imposes no new compliance requirements on businesses. Therefore this rule creates no new compliance costs for businesses.

This rule requires a local government to consult and cooperate with the State, and to make records available to the State, when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that existing staff in the code enforcement office of the local government will be able to provide the necessary consultation and cooperation. Therefore, the Department of State anticipates that local governments will incur little or no additional costs in complying with this consultation and cooperation requirement.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

The Department of State anticipates that the Office of General Services will serve as the construction-permitting agency in connection with the State's obligation to administer and enforce the Uniform Code with respect to Statewide Wireless Network facilities. The Department of State believes that the permitting process incidental to the construction of a Statewide Wireless Network will be facilitated and simplified if that process is centralized in a single State agency. Therefore, to the extent that any small business becomes involved in the permitting process, this rule should enhance the economic and technological feasibility of compliance with the permitting requirements by such business.

The Department of State anticipates that existing staff in the code enforcement offices of local governments will be able to provide the consultation and cooperation that this rule will require when (1) the local government is responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. The Department of State anticipates that it will be economically and technologically feasible for local governments to comply with this rule.

6. MINIMIZING ADVERSE IMPACT.

This rule imposes no new obligation on businesses of any size. Accordingly, this rule makes no special provisions for small businesses.

This rule requires a local government to consult and cooperate with the State, and to make records available to the State, when (1) the local government is responsible for administration and enforcement of the Uni-

form Code with respect to a particular building or structure and (2) a Statewide Wireless Network facility is constructed or installed in or on such building or structure. Since such consultation and cooperation is essential to proper administration and enforcement of the Uniform Code and, accordingly, essential to public safety, it is not feasible to exempt local governments from this rule. However, the Department of State anticipates that existing staff in the code enforcement offices of local governments will be able to provide the necessary consultation and cooperation, and the Department of State anticipates that local governments will incur little or no additional costs in complying with this consultation and cooperation requirement.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

The Department of State has solicited comments from the Office for Technology and the Office of General Services.

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.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule clarifies that the State will be responsible for the administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to facilities to be included in the Statewide Wireless Network to be established by the Office for Technology. This rule will apply uniformly throughout the State, including all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

This rule creates no new reporting, record keeping, or compliance requirement for any business. In particular, this rule creates no new reporting, record keeping, or compliance requirement for businesses located in rural areas.

Local governments that are responsible for administration and enforcement of the Uniform Code with respect to a particular building or structure will be required to consult and cooperate with the State, and to make its records available to the State, when a Statewide Wireless Network facility is constructed in or on such building or structure. This requirement will apply to all local governments, including local governments located in rural areas.

3. COSTS.

The Department of State anticipates that this rule will impose no new cost on any business. In particular, the Department of State anticipates that this rule will impose no new cost on businesses located in rural areas.

The Department of State anticipates that local governments, including local governments located in rural areas, will be able to use existing staff in their code enforcement offices to fulfill the consulting and cooperation requirements described in Section 2 (Reporting, recordkeeping and other compliance requirements) of this Rural Area Flexibility Analysis. Therefore, the Department of State anticipates that local governments, including local governments located in rural areas, will incur little or no additional costs in complying with this rule.

4. MINIMIZING ADVERSE IMPACT.

For the reasons discussed in Section 3 (Costs) of this Rural Area Flexibility Analysis, the Department of State anticipates that this rule will have little or no adverse impact on any business or local government. In particular, the Department of State anticipates that this rule will have little or no adverse impact on businesses or local governments located in rural areas. Accordingly, this rule makes no special provisions for regulated parties located in rural areas.

5. RURAL AREA PARTICIPATION.

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.

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 amends the existing regulation that provides that the State shall be accountable for administration and enforcement of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code") with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, a State department, bureau, commission, board or authority, and adds definitions of new terms. The purpose of this rule is to clarify that the State shall have responsibility for administration and enforcement of the Uniform Code with respect to facilities to be included in the statewide wireless network to be established by the Office for Technology.

This rule will simply clarify the responsibility for administration and enforcement of the Uniform Code with respect to the statewide wireless network. It is anticipated that rule will have no adverse impact on jobs or employment opportunities related to the construction of the statewide wireless network. Rather, by providing that all review and permitting responsibilities will be vested in a single permitting agency, this rule should streamline the construction process, which may have a beneficial impact on jobs and employment opportunities related to the construction of the statewide wireless network.