

# RULE MAKING ACTIVITIES

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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.

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## Banking Department

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### EMERGENCY RULE MAKING

#### Authorization and Education Requirements for Mortgage Loan Originators

**I.D. No.** BNK-14-08-00001-E

**Filing No.** 247

**Filing date:** March 12, 2008

**Effective date:** March 17, 2008

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

**Action taken:** Addition of Part 420 and Supervisory Procedure MB 107 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-E

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

**Specific reasons underlying the finding of necessity:** The Banking Department finds that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with the requirements of subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest.

The Legislature, in adopting article 12-E of the Banking Law, has determined that regulation of persons who originate mortgage loans on

residential real property by the Superintendent of Banks (“superintendent”) is necessary to ensure the public welfare.

Article 12-E becomes effective January 1, 2008. The legislation requires the Superintendent to adopt implementing regulations prior to that date. Such adoption is necessary in order for mortgage bankers, mortgage brokers and mortgage loan originators (“MLOs”) to understand their obligations under the new legislation, to file the necessary applications and to plan compliance.

The process of working with other regulatory and self-regulatory organizations involved in the process of developing the nationwide MLO information system, devising and drafting the regulations necessary to implement the new legislation and consulting with other government agencies and industry groups on the new regulatory framework has taken significant time. Consequently, it will not be possible to complete the process for proposing and adopting permanent rules set forth in section 202 of SAPA by January 1, 2008.

Immediate adoption of the regulation is necessary to enable the Banking Department to begin the MLO registration process as soon as possible. It is also necessary to establish the form and manner of application, and the amount of the application fee, so as to enable individuals who seek to originate mortgages after January 1, 2008 to file their applications with the Banking Department. Under new section 599(c)(6) of the Banking Law, if such individuals were not employed as MLOs prior to that date, they may not engage in mortgage loan origination until the Department has received their application.

**Subject:** Authorization and education requirements for mortgage loan originators.

**Purpose:** To require persons who originate mortgage loans on residential real property to regulation on or after January 1, 2008 to be authorized by the Superintendent of Banks. Proposed Part 420 sets forth application, exemption and approval procedures for authorization as a mortgage loan originator (MLO). It also sets forth education requirements for MLOs, describes prohibited conduct and sets forth penalties. Proposed Supervisory Procedure MB 107 sets forth the details of the application procedure.

**Substance of emergency rule:** PART 420

Section 420.1 summarizes Section 599-c of the Banking Law, which describes the authorization and application process to become a Mortgage Loan Originator (MLO), and Section 599-g of the Banking Law, which describes the grounds for suspension or revocation of an MLO authorization.

Section 420.2 summarizes the exemptions from the requirement to register as an MLO that are contained in Section 599-e of the Banking Law.

Section 420.3 contains a number of definitions of terms that are used in Part 420, including the crucial terms “Mortgage Loan Originator, Mortgage Loan Originating, and Originating Entity”.

Section 420.4 sets forth the application procedure for initial authorization as an MLO. It includes two grace periods that are contained in the Banking Law, and one that is being adopted by the Superintendent of Banks under authority granted in Section 599-h of the Banking Law and Section 5 of chapter 749 of the laws of 2006. Specifically, a person who was employed by or affiliated with an Originating Entity as an MLO prior to January 1, 2008 may continue to engage in Mortgage Loan Originating until the earlier of January 1, 2010 or the date such person receives notice from the Superintendent that his or her application has been denied. Such a person must file an application to become authorized by July 1, 2008, or such later date as the Superintendent may agree with such MLO’s Originating Entity. A person who is initially employed by or affiliated with

an Originating Entity as an MLO on or after January 1, 2008 may engage in Mortgage Loan Originating after April 1, 2008 only if he or she has submitted an application, fingerprints and required fees in accordance with Part 420 and either such person or his or her Originating Entity has received notice from the Superintendent that his or her application has been accepted for processing and has not received notice that such application has been denied.

This Section also sets forth information as to the elements of an application for authorization.

Section 420.5 allows Originating Entities to employ certain persons after the January 1, 2008 effective date of the MLO provisions of the Banking Law, even though they have not yet become authorized.

Section 420.6 sets forth the method in which the Superintendent will notify applicants of the approval or denial of an application to become an authorized MLO. It summarizes the statutory grounds on which the Superintendent may deny an application. It also repeats the statutory requirement that the Superintendent maintain on the Department's website a list of authorized MLOs.

Section 420.7 describes the "inactive status" that occurs during any period when an MLO is not employed by or affiliated with a mortgage banker or mortgage banker licensed under Article 12-D of the Banking Law, and the requirements placed on Originating Entities to notify the Superintendent when that occurs.

Section 420.8 describes the grounds for suspension and expiration of authorization as an MLO, including failure to timely pay the annual authorization fee and failure to timely complete the education requirements. It also makes clear that the suspension or expiration of an authorization does not affect the MLO's civil or criminal liability for acts committed prior to the suspension or expiration.

Section 420.9 describes the procedures for annual renewal of an authorization as an MLO.

Section 420.10 contains the requirements for surrender of an authorization as an MLO. It also makes clear that the surrender of an authorization does not affect the MLO's civil or criminal liability for acts committed prior to the surrender.

Section 420.11 first sets forth the education requirements that apply as a condition to initial authorization and as a condition to annual renewal of authorization. Second, it requires each Originating Entity to obtain proof, in the form of certificates of course completion in the form required by the Superintendent, that each MLO employed by or affiliated with it has completed the required Education Courses. Third, the rule sets out the education requirements (*i.e.*, required number of hours of Education Courses) that must be completed by MLOs, as well as the requirements with respect to course content. Fourth, the Section describes the consequences of failure to comply with the education requirements and the procedure for requesting variances and extensions. Finally, the Section defines, for purposes of Section 599-e, an educational program that is substantially equivalent to the requirements for non-exempt MLOs. This is important to MLOs employed by or affiliated with certain Originating Entities that are subsidiaries or affiliates of certain banking organizations, which are required by the Banking Law, as a condition to their exemption from the authorization provisions of the statute, to provide Education Courses that are the substantial equivalent of those provided by non-exempt entities.

Section 420.12 summarizes the provisions of Article 12-E of the Banking Law with respect to persons or entities authorized to provide Education Courses. Some such entities are authorized in the statute to give Education Courses (referred to in Section 420 as "Authorized Providers"). Others must be approved by the Superintendent (referred to in Section 420 as "Approved Providers"). Second, the Section describes the application process for those providers that must be approved by the Superintendent. Third, it also requires Authorized Providers nevertheless to give notice to the Superintendent that they plan to provide Education Courses to MLOs in this state and provide the Superintendent with information about such courses. Fourth, the Section sets forth the procedure whereby Approved Providers must obtain approval for particular Education Courses. Fifth, the section contains rules with respect to advertising that a course has been approved by the Superintendent. Sixth, it describes information about Approved Providers, approved Education Courses, and Authorized Providers that will be listed on the Department's website. Seventh, the section notes that the Superintendent may approve Education Courses that meet the requirements of another jurisdiction that the Superintendent determines meet the standards of Article 12-E and provides for a list of such jurisdictions to be posted on the Department's website. Eighth, the Section requires Authorized Providers and Approved Providers to file an annual

report with the Superintendent that provides certain information with respect to the Education Courses given by it for which it has granted a certificate of course completion to a New York MLO. Finally, it provides for the examination of providers of Education Courses and for revocation of the authorization to act as such provider.

Section 420.13 provides for certain fees for an initial authorization application and an annual re-authorization application.

Section 420.14 contains certain duties of Originating Entities.

Section 420.15 contains certain duties of MLOs.

Section 420.16 contains conduct that is prohibited to an MLO (including conduct that is prohibited under Part 38.7 of the General Regulations of the Banking Board) and conduct that is prohibited to an Originating Entity.

Section 420.17 summarizes the circumstances in which the Superintendent may revoke a person's authorization as an MLO or suspend such authorization. It also states that an order of suspension may include, as a condition of reinstatement, that restitution be made to consumers with respect to fees or other charges that the MLO has improperly charged or collected, as determined by the Superintendent. Furthermore, it reminds MLOs that, under Section 44 of the Banking Law, the Superintendent may impose fines against MLOs. The section sets forth a number of grounds for disciplinary action, and states that administrative hearings will be conducted under Supervisory Procedure G111.

Section 420.18 provides that Section 420 will be effective immediately upon adoption.

#### SUPERVISORY PROCEDURE 107

Section 107.1 contains definitions of defined terms used in the Supervisory Procedure. Importantly, it defines the National Mortgage Licensing System (NMLS), the web-based system with which the Superintendent has entered into a written contract to process applications for authorization and applications for annual re-authorization of MLOs.

Section 107.2 contains general information about applications for authorization and annual re-authorization as an MLO, including the address where certain parts of the application for authorization must be mailed.

Section 107.3 describes the parts of an application for initial authorization and states that a sample of the application form (which must be completed online) may be found on the Department's website. The application includes (1) the application form, (2) fingerprint cards, (3) the fees, (4) applicant's credit report, (5) an affidavit subscribed under penalty of perjury in the form prescribed by the Superintendent, and (6) any other information that may be required by the Superintendent. It also describes the procedure when the Superintendent determines that the information provided by the application is not complete.

Section 107.4 describes the required submissions for annual re-authorization of an MLO.

Section 107.5 covers inactive status.

Section 107.6 provides information on places where applicants may obtain additional instructions and assistance on the Department's website, by email, by mail, and by telephone.

**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 June 9, 2008.

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

#### Regulatory Impact Statement

1. Statutory authority. Article 12-E of the Banking Law, as amended by the Legislature in 2007, creates a framework for the regulation of mortgage loan originators. Mortgage loan originators (MLO) are individuals employed by or affiliated with an originating entity who engage in mortgage loan originating. An originating entity means a person or entity licensed or registered pursuant to Article 12-D of the Banking Law. Article 12-E authorizes the Superintendent to make such rules and regulations as may in his or her judgment be necessary or appropriate for the effective administration or enforcement of this article.

Section 599-c of 12-E prohibits a person from engaging in mortgage loan originating without first being authorized by the Superintendent. In addition, it authorizes the Superintendent, in determining whether to grant authorization to an applicant, to assess the applicant's general character, fitness and education qualifications warrant a belief that the applicant will engage in mortgage loan originating honestly, fairly and efficiently. This section also requires the Superintendent to apply the same character and fitness standards to MLOs that apply to originating entities (*i.e.*, mortgage bankers and mortgage brokers) pursuant to Sections 592 and 592-a, respec-

tively, of Article 12-D of the Banking Law. As part of the authorization process, MLOs are also required to pay a fee under 599-c. This fee can be adjusted annually by the Superintendent.

Section 599-d requires authorized MLOs to take continuing education courses relating to the current business of mortgage loan originating. These courses must include education in the statutory and regulatory requirements and judicial interpretations governing the mortgage industry and mortgage practices in New York, as well as courses in the ethics of mortgage loan originating and mortgage lending.

Section 599-f requires the originating entity to retain course credit documentation for each MLO and also requires the Superintendent to maintain an internet listing of all authorized MLOs.

Section 599-g gives the Superintendent grounds to revoke or suspend any mortgage loan originator's authorization where the MLO has violated Article 12-E or a rule or regulation promulgated by the Banking Board or the Superintendent under the Banking Law, or a federal law or regulation pertaining to mortgage banking, mortgage brokerage or loan originating, or if there is a substantial risk of public harm. Also, it allows the Superintendent to determine what measures should be taken to penalize an MLO who has engaged in dishonest or inequitable practices that may cause substantial harm to persons afforded protections under 12-D. This authority is specifically granted under Section 44 of Article 2 of the Banking Law, which authorizes the Superintendent to impose a fine against an MLO for any violation of the Banking Law, any regulation promulgated thereunder or any final or temporary order issued by the Superintendent.

2. Legislative objectives. The legislature deems it necessary, in order to ensure the public welfare, that mortgage loan originators be subject to regulation by the Superintendent. The problems related to sub-prime lending require immediate attention, and enhanced supervision of the mortgage industry will address many of the concerns that have been identified in the sub-prime mortgage market. The legislation seeks to improve the integrity and professionalism of individuals in the mortgage lending industry. The bill has two main components: it requires the authorization (*i.e.*, registration) of individual mortgage loan originators by the Banking Department, and it sets continuing educational standards for such individuals.

The legislative intent of the authorized mortgage loan originators (MLO) law was to create a level of consistency between the authorization process of mortgage entities found in Article 12-D of the Banking Law and Article 12-E; and 12-D is referenced throughout the statute. The Legislature deemed it necessary to regulate MLOs and originating entities on the same level. Thus, many of the regulatory requirements made pursuant to Article 12-D were referenced and borrowed to maintain consistency between Articles 12-E and 12-D.

The continuing education requirements, similar to those imposed on insurance brokers and real estate brokers, ensure that individuals engaging in the business of mortgage loan origination have a solid understanding of the mortgage business as well as an understanding of ethical business practices and relevant federal and state laws and regulations. In addition, the continuing education component of the law recognizes that laws, regulations and practices governing the mortgage industry are subject to continuing change and requires those individuals involved in mortgage origination to maintain an understanding of these changes.

3. Needs and benefits. This regulation is needed to implement the statute and is necessary to address problems that have surfaced over the past year in the mortgage industry. Increased oversight of mortgage loan originators is necessary to curb disreputable and deceptive businesses practices by MLOs. Individuals engaging in abusive practices have avoided detection by moving from company to company and in some instances, from state to state. The registration of MLOs will greatly assist the department in its efforts to oversee the mortgage industry and protect consumers. The regulation will enable the Department to identify, track and hold accountable those individuals who engage in abusive practices, and ensure continuing education for all MLOs that are authorized by the Department. The Department estimates as many as 40,000 originators may register in 2008.

In addition to including statutory requirements, the regulation requires MLO applications to be submitted electronically, specifies particular conduct which is prohibited, imposes requirements upon originating entities that employ MLOs and upon providers of continuing education.

These regulatory requirements will improve accountability among mortgage industry professionals, protect and promote the integrity of the mortgage industry, and improve the quality of service, thereby helping to restore consumer confidence.

4. Costs. The mortgage business will experience increased costs associated with the continuing education requirements and the fees associated

with MLO authorization and annual re-authorization. The regulation sets forth an investigatory background check fee of \$125, an initial authorization processing fee of \$50 and an annual authorization fee of \$50. There will also be a fee for the processing of fingerprints and fees to cover the cost of third party processing of the application. The latter two fees will be posted on the Department's website. The cost of continuing education is estimated to be approximately \$500 every two years. Education providers will not be charged fees for submission of applications for provider and course approval. Providers may incur administrative costs associated with preparing applications for provider and curriculum approval. Providers will, however, charge MLOs fees for attending the continuing education courses. The Department's increased effectiveness in fighting mortgage fraud and predatory lending is expected to lower costs related to litigation and to decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

The regulation will not result in any fiscal implications to the State. The Banking Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

5. Local government mandates. None

6. Paperwork. An application process will be established for an MLO to apply for authorization electronically and to submit additional background information to the Mortgage Banking Division of the Banking Department. The electronic application form requests information about the applicant's educational and employment background, as well as certain information about legal proceedings involving the applicant. The additional information will consist of fingerprints, a recent credit report, and an attestation as to the truthfulness of the applicant's statements. Mortgage brokers and bankers are required to retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. Persons or entities seeking to be approved by the Superintendent as education providers must submit an application for provider approval and separate applications for course approval. Originating entities must also submit to the Department four reports per year documenting currently employed or affiliated MLOs, and dismissals of MLOs for alleged or actual violations.

7. Duplication. The regulation does not duplicate, overlap or conflict with any other regulations.

8. Alternatives. The industry has supported passage of Article 12-E and has had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, the industry has been involved in an on-going policy dialogue with the Department during rule development. Meetings have been held with representatives of the mortgage industry to ensure regulation that will impose an adequate level of supervisory oversight where none previously existed. The purpose of the regulation is to address problems that have arisen in the mortgage market while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. For example, the Department considered an examination requirement for mortgage loan originators, as is currently the practice with real estate brokers and sales persons. The Department, however, believes that the education and continuing education requirements will be sufficient to raise the knowledge of originators to acceptable levels. Similarly, the Department discussed whether it was desirable to require that MLO's with less than four years' experience to obtain continuing education only in a traditional live classroom setting, to facilitate the answering of questions and to ensure a high level of attention. Although the Department believes this may be the most desirable educational setting for inexperienced MLOs, the Department, concluded that alternative settings for continuing education would adequately address the intent of the statute, without imposing undue burdens upon regulated parties. Such alternative settings may include online programs, web casts, video conferences, teleconferences, and computer-based training programs. The Department also considered specifying a number of obligations of MLOs in avoiding predatory lending practices. However, discussions with representatives of the industry raised a number of inconsistencies between such duties and the duties already placed on mortgage bankers and mortgage brokers. Accordingly, the Department determined that the standards for MLOs with respect to subprime mortgages should be the same as those that apply to mortgage bankers and mortgage brokers under Part 38.7 of the General Regulations of the Banking Board. The ongoing discussion with the industry helped the Department achieve a workable, efficient and effective regulation to implement the statute.

9. Federal standards. While federal regulators have issued guidance on the origination of mortgage products, the responsibility for regulating non-bank entities such as mortgage bankers and mortgage brokers is largely

assumed by the states. Moreover, as the mortgage industry has fragmented in recent years, a significant share of the residential mortgage business, particularly the non-prime sector, has been served by these entities, which are typically licensed through state agencies. The New York State Banking Department currently licenses over 2,700 such entities. State regulators, through the Conference of State Bank Supervisors (CSBS), are developing a nationwide registry of mortgage lenders, mortgage brokers and mortgage loan originators to assist regulators in identifying and tracking individuals who have engaged in predatory origination practices. New York has participated in the development of this system and will be using it as part of its MLO authorization program.

10. Compliance schedule. The emergency regulation will become effective upon filing; and the Department expects to begin receiving applications through the web-based National Mortgage Licensing System on or about January 2, 2008. By January 15, 2008, mortgage originating entities must provide the Superintendent with a report of MLOs employed by or affiliated with them on December 31, 2008. Each Mortgage Loan Originator who was employed by or affiliated with an originating entity before January 1, 2008, must file an application to be authorized by July 1, 2008 (or such later date as the Superintendent may agree with such MLO's originating entity). To make this process minimally disruptive to the industry, the regulation allows these "grandfathered" mortgage loan originators to continue to engage in origination on while the Department conducts the necessary background checks. An individual who became employed by or affiliated with an originating entity for the first time on or after January 1, 2008 may not originate mortgages after April 1, 2008 until he or she has filed an application (along with the necessary fees and fingerprint cards) and received notice from the Department that the application has been received. These MLOs may then continue to originate mortgages unless they are given notice that their application has been denied. In instances in which applications are incomplete, the MLO will be given thirty days to remedy the deficiency.

Individuals who engaged in mortgage loan origination before January 2008 will have until January 1, 2010 to comply with the initial education requirements. Those who became employed on or after January 1, 2008 must complete the initial education requirements by the end of the year in which the first anniversary of their authorization occurs.

#### **Regulatory Flexibility Analysis**

1. Effect of the Rule: The regulation will not have any impact on local governments. However, the majority of originating entities (*i.e.*, licensed and registered mortgage bankers and mortgage brokers who employ or are affiliated with mortgage loan originators are considered small businesses. In excess of 2,700 of these businesses are licensed or registered by the Department.

2. Compliance Requirements: The bill has two main components: it requires the authorization (*i.e.*, registration) of individual mortgage loan originators by the Banking Department, and it sets continuing educational standards for such individuals. The small businesses that MLOs are employed by or affiliated with will be required to ensure that all MLOs employed by them have been duly authorized, report four times a year on the MLOs newly employed by them or dismissed for actual or alleged violations, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. Some education providers seeking to participate in the MLO continuing education program may also be small businesses. Those providers must submit an application for provider approval and separate applications for course approval and maintain records of course programs and attendance.

3. Professional Services: None

4. Compliance Costs: Some mortgage entities may choose to pay for costs associated with authorization and annual re-authorization for their MLOs and continuing education requirements, but are not required to do so. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education are expected to be minimal. Education providers will not be charged fees for submission of applications for provider and course approval. Providers may incur administrative costs associated with preparing applications for provider and curriculum approval. Providers may, however, recover these expenses by charging fees for attending the continuing education courses.

5. Economic and Technological Feasibility: The rule-making should impose no adverse economic or technological burden on mortgage bankers and brokers who are small businesses.

6. Minimizing Adverse Impacts: The industry, and specifically small businesses who are licensed and registered mortgage businesses, supported passage of Article 12-E and has had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, these businesses were involved in an on-going policy dialogue with the Department during rule development. Meetings have been held with representatives of the mortgage industry to ensure regulation that will impose an adequate level of supervisory oversight where none previously existed without having an adverse impact on small business. The Department worked with mortgage businesses during rule development to minimize adverse impacts in many instances. For example, we considered an examination requirement for mortgage loan originators, as is currently the practice with real estate brokers and sales persons. The Department, however, believes that the education and continuing education requirements will be sufficient to raise the knowledge of originators to acceptable levels. Similarly, the Department discussed whether it was desirable to require that MLO's with less than four years' experience to obtain continuing education only in a traditional live classroom setting, to facilitate the answering of questions and to ensure a high level of attention. Although the Department believes this may be the most desirable educational setting for inexperienced MLOs, the Department, concluded that alternative settings for continuing education would adequately address the intent of the statute, without imposing undue burdens upon regulated parties. Such alternative settings may include online programs, web casts, video conferences, teleconferences, and computer-based training programs. The Department also considered specifying a number of obligations of MLOs in avoiding predatory lending practices. However, discussions with representatives of the industry raised a number of inconsistencies between such duties and the duties already placed on mortgage bankers and mortgage brokers. Accordingly, the Department determined that the standards for MLOs with respect to subprime mortgages should be the same as those that apply to mortgage bankers and mortgage brokers under Part 38.7 of the General Regulations of the Banking Board. The ongoing discussion with the industry helped the Department achieve a workable, efficient and effective regulation to implement the statute.

7. Small Business and Local Government Participation: Representatives of the following entities have been invited to participate in a number of outreach meetings that were conducted during both the statutory and regulatory drafting process: New York Association of Mortgage Brokers; New York Bankers Association; Empire State Mortgage Bankers Association; Citigroup; HSBC; Mortgage Bankers Association; and representatives from GORR.

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

Types and Estimated Numbers: The New York State Banking Department currently licenses over 2,700 mortgage bankers and brokers throughout the state and anticipates that up to 40,000 mortgage loan originators may register in 2008. Many of these entities and MLOs will be operating in rural areas of New York State and would be impacted by the proposal.

Compliance Requirements: Mortgage loan originators in rural areas must be authorized by the Superintendent to engage in the business of mortgage loan origination. An application process will be established requiring an MLO to apply for authorization electronically and to submit additional background information to the Mortgage Banking Division of the Banking Department. This additional information will consist of fingerprints, a recent credit report, supplementary background information and an attestation as to the truthfulness of the applicant's statements. Mortgage brokers and bankers are required to ensure that all MLOs employed by them have been duly authorized, report four times a year on the MLOs newly employed by them or dismissed for cause, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. Education providers seeking to participate in the MLO continuing education program must submit an application for provider approval and separate applications for course approval. Originating entities must also submit to the Department four reports per year documenting currently employed or affiliated MLOs, and dismissals of MLOs for alleged or actual violations. The Department believes that this rule will not impose a burdensome set of requirements on entities operating in rural areas.

Costs: Some mortgage businesses in rural areas may choose to pay the increased costs associated with the continuing education requirements and the fees associated with authorization and re-authorization of their MLOs, but are not required to do so. The regulation sets forth a background investigation fee of \$125.00, an initial authorization processing fee of \$50.00 and an annual authorization fee of \$50.00. There will also be a fee for the processing of fingerprints and fees to cover the cost of third party processing of the application. The latter two fees will be posted on the Department's website. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education courses are expected to be minimal. The cost of continuing education is estimated to be approximately \$500 every two years. Education providers will not be charged fees for submission of applications for provider and course approval. Providers may incur administrative costs associated with preparing applications for provider and curriculum approval. Providers will, however, charge MLOs fees for attending the continuing education courses. The Department's increased effectiveness in fighting mortgage fraud and predatory lending will lower costs related to litigation and will decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

**Minimizing Adverse Impacts:** The industry has supported passage of Article 12-E and has had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, the industry has been involved in an on-going policy dialogue with the Department during rule development. Meetings have been held with representatives of the mortgage industry to ensure regulation that will impose an adequate level of supervisory oversight while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on mortgage companies in rural areas. In addition, the Department considered an examination requirement for mortgage loan originators, as is currently the practice with real estate brokers and sales persons. The Department, however, believes that the education and continuing education requirements will be sufficient to raise the knowledge of originators to acceptable levels. The Department noted opposition related to requiring MLOs with less than four years experience to obtain continuing education only in a traditional face-to-face setting. Although this may be the most desirable educational setting for inexperienced MLOs, alternative forums for continued education would adequately address the intent of the statute, without imposing undue burdens upon regulated parties in rural areas. Discussions with representatives of the industry also revealed objections to certain provisions of the regulation which related to duties of mortgage loan originators and prohibited conduct. In their view these standards were not consistent with those previously set forth for brokers and mortgage bankers. As requested by the industry, the Department modified the proposal, bringing it into conformity with the mortgage industry standards established in Part 38.7 of the General Regulations of the Banking Board. The ongoing discussion with the industry helped the Department achieve a workable, efficient and effective regulation to implement the statute and minimize adverse impacts wherever possible.

**Rural Area Participation:** Representatives of the following entities have been invited to participate in a number of outreach meetings that were conducted during both the statutory and regulatory drafting process: New York Association of Mortgage Brokers; New York Bankers Association; Empire State Mortgage Bankers Association; Citigroup; HSBC; Mortgage Bankers Association. These entities include mortgage bankers and brokers conducting business in rural areas and entities that conduct mortgage originating in rural areas.

#### **Job Impact Statement**

Article 12-E of the Banking Law sets forth conditions under which certain individuals may be authorized by the Superintendent to engage in the business of mortgage loan origination. This regulation requires Mortgage Loan Originator applicants to meet those statutorily set qualifications for authorization as a Mortgage Loan Originator (MLO) and fulfill the statutory continuing education requirements. The Department acknowledges that applicants who fail to qualify for authorization will be barred from employment as MLOs. However, it is apparent that any impact on jobs and employment opportunities is due to the nature and purpose of the statute rather than the provisions of this proposal.

## Education Department

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

#### **Teacher Tenure Determinations**

**I.D. No.** EDU-14-08-00009-P

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

**Proposed action:** Amendment of Part 30 and section 100.2 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 and 3012-b as added by L. 2007, ch. 57, part A, sec. 9

**Subject:** Teacher tenure determinations.

**Purpose:** To establish minimum standards and procedures for teacher tenure determinations in order to implement the requirements of section 3012-b of the Education Law.

**Text of proposed rule:** 1. The title of Part 30 is amended, effective July 17, 2008, to read as follows:

Part 30

Tenure [Areas]

2. Each respective section of Part 30 of the Rules of the Board of Regents is renumbered to be a respective section of a new Subpart 30-1 of the Rules of the Board of Regents, effective July 17, 2008.

3. The title of new Subpart 30-1 is added, effective July 17, 2008, to read as follows:

*Subpart 30-1*

*Tenure Areas*

4. Subdivision (h) of renumbered section 30-1.1 is amended, effective July 17, 2008, to read as follows:

(h) Tenure area means the administrative subdivision within the organizational structure of a school district in which a professional educator is deemed to serve in accordance with the provisions of this [Part] *Subpart*.

5. Renumbered section 30-1.2 is amended, effective July 17, 2008, to read as follows:

30-1.2 Applicability.

(a) The provisions of this [Part] *Subpart* shall apply to all probationary appointments to professional education positions made by a board of education or a board of cooperative educational services by resolution on or after August 1, 1975 and to appointments on tenure based upon such probationary appointments.

(b) Each board of education or board of cooperative educational services shall on and after the effective date of this [Part] *Subpart* make probationary appointments and appointments on tenure in accordance with the provisions of this [Part] *Subpart*.

(c) This [Part] *Subpart* shall not be applicable to city school districts located within cities having a population in excess of 400,000 inhabitants or to school districts employing fewer than eight teachers.

6. Subdivisions (a), (c) and (d) of renumbered section 30-1.9 are amended, effective July 17, 2008, to read as follows:

(a) A board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time throughout the probationary period in at least one designated tenure area except that a professional educator who teaches in an experimental program as defined in subdivision (i) of section [30.1] *30-1.1* of this [Part] *Subpart* and who does not devote 40 percent or more of his time to service in any one tenure area may be appointed to a tenure area for which he holds the proper certification.

(c) If a professional educator possesses certification appropriate to more than a single tenure area and the board of education or board of cooperative educational services proposes at the time of initial appointment to assign such individual in such a manner that he will devote a substantial portion of his time during each of the school years constituting the probationary period in more than one of the tenure areas established by this [Part] *Subpart*, the board shall in its resolution of appointment designate each such tenure area and shall thereafter separately confer or deny tenure to such individual in the manner prescribed by statute in each designated tenure area.

(d) Where a board of education or board of cooperative educational services proposes to assign a professional educator having tenure or in

probationary status in a tenure area created by this [Part] *Subpart* in such a manner that he will devote a substantial portion of his time in a tenure area to which he has not previously been appointed, the board shall prior to such assignment confer a probationary appointment in accordance with section [30.3] 30-1.3 of this [Part] *Subpart*, designating such additional tenure area. Thereafter, the board shall separately confer or deny tenure to such individual in the designated tenure area in the manner prescribed by statute.

7. Renumbered section 30-1.10 is amended, effective July 17, 2008, to read as follows:

Where a professional educator acquires tenure in a tenure area created by this [Part] *Subpart*, he shall retain such tenure while he remains continuously employed by the board of education or board of cooperative educational services as a full-time member of the professional staff of the district, notwithstanding subsequent appointments to tenure or to probation in other tenure areas.

8. Renumbered section 30-1.12 is amended, effective July 17, 2008, to read as follows:

Subject to the provisions of sections 2510 and 2585 of the Education Law, where a board of education, on or after the effective date of this [Part] *Subpart*, modifies the organizational structure of a school in such a manner that instruction in the core academic subjects is departmentalized in a grade or grades previously taught by professional educators deemed to serve in the middle grades tenure area, each tenured professional educator or probationer serving in such grade or grades at the time of such departmentalization shall retain such status and shall be eligible to teach any core academic subject or special subject for which such professional educator possesses appropriate certification; provided that such tenure shall pertain only to grade levels not higher than those formerly associated with the middle grades tenure area in such school district.

9. Subdivision (c) of renumbered section 30.13 is amended, effective July 17, 2008, to read as follows:

(c) Should the individual so identified have tenure or be in a probationary status in additional tenure areas created by this [Part] *Subpart*, he shall be transferred to such other tenure area in which he has greatest seniority and shall be retained in such area if there is a professional educator having less seniority than he in such other tenure area.

10. A new Subpart 30-2 is added, effective July 17, 2008, to read as follows:

#### *Subpart 30-2*

##### *Teacher Tenure Determinations*

###### *§ 30-2.1 Definitions.*

*As used in this Subpart:*

(a) *Teacher means a teacher in the classroom teaching service, as that term is defined in section 80-1.1 of the Regulations of the Commissioner.*

###### *§ 30-2.2 Applicability.*

(a) *The provisions of this Subpart shall apply to tenure determinations for teachers made by school districts and boards of cooperative educational services on or after July 1, 2008.*

(b) *Nothing herein shall be construed to make the requirements of this Subpart applicable to teaching assistants, administrative or supervisory staff or pupil personnel service providers.*

(c) *Each school district and board of cooperative educational services shall on and after the effective date of this Subpart make determinations for teacher tenure in accordance with the provisions of this Subpart.*

###### *§ 30-2.3 Standards and Procedures for Tenure Determinations for Teachers.*

(a) *A superintendent of schools or district superintendent of schools, prior to recommending tenure for a teacher, shall evaluate all relevant factors, including the teacher's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students. When evaluating a teacher for tenure, each school district and board of cooperative educational services shall utilize a process that complies with subdivision (b) of this section.*

(b) *The process for evaluation of a teacher for tenure shall be consistent with article 14 of the Civil Service Law and shall include, but need not be limited to, a combination of:*

(1) *evaluation of the extent to which the teacher successfully utilized analysis of available student performance data (such as State test results, student work, school-developed assessments, teacher-developed assessments, etc.) and other relevant information (such as documented health or nutrition concerns, or other student characteristics affecting learning) when providing instruction;*

(2) *peer review by other teachers, as far as practicable; and*

(3) *an assessment of the teacher's performance by the teacher's building principal or other building administrator in charge of the school or program, which shall consider all the annual performance review criteria set forth in section 100.2(o)(2)(iii)(b)(1) of the Regulations of the Commissioner.*

(c) *Nothing herein shall be construed to impose a mandatory collective bargaining obligation, over any locally developed standards, that is not required by article 14 of the Civil Service Law.*

(d) *The trustees and board of education of every school district and every board of cooperative educational services, and the chancellor of a city school district of a city with a population of one million or more shall, consistent with existing contractual provisions, make any changes in local rules, regulations, policies and procedures that are necessary to ensure that tenure determinations made on or after July 1, 2008 shall be made in compliance with section 3012-b of the Education Law and this section.*

11. Item (vi) of subclause (1) of clause (b) of subparagraph (iii) of paragraph (2) of subdivision (o) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 17, 2008, as follows:

(vi) student assessment, the teacher shall demonstrate that he or she implements assessment techniques based on appropriate learning standards designed to measure students' progress in learning *and that he or she successfully utilizes analysis of available student performance data (such as State test results, student work, school-developed assessments, teacher-developed assessments, etc.) and other relevant information (such as documented health or nutrition needs, or other student characteristics affecting learning) when providing instruction;*

**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:**

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

Section 3012-b of the Education Law, as added by Section 9 of Part A of Chapter 57 of the Laws of 2007, establishes the minimum standards and procedures for teacher tenure determinations for all school districts and boards of cooperative education services made on or after July 1, 2008.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment carries out the legislative objectives of the above-referenced statutes by establishing minimum standards and procedures for teacher tenure determinations made after July 1, 2008.

##### **3. NEEDS AND BENEFITS:**

The purpose of the proposed amendment is to implement the requirements of Section 3012-b of the Education Law, as added by Chapter 57 of the Laws of 2007, by establishing minimum standards and procedures for teacher tenure determinations made after July 1, 2008.

##### **4. COSTS:**

(a) **Costs to State government:** The proposed amendment will not impose any additional costs on State government, including the State Education Department.

(b) **Costs to local governments:** Section 3012-b of the Education Law, as added by Chapter 57 of the Laws of 2007, may impose costs on local governments, over and above the current costs for making tenure determinations, depending on the current practices followed by school districts and BOCES. However, the proposed amendment will not impose any additional costs, beyond those imposed by the statute.

(c) **Costs to private regulated parties:** The proposed amendment will not impose any additional costs on private regulated parties, beyond those imposed by the statute.

(d) **Costs to regulating agency for implementing and continued administration of the rule:** As stated above in "Costs to State Government," the amendment will not impose any additional costs on the State Education Department beyond those imposed by statute.

##### **5. LOCAL GOVERNMENT MANDATES:**

Section 9 of Part A of Chapter 57 of the Laws of 2007 requires a superintendent of schools or district superintendent of schools, to evaluate

all relevant factors prior to recommending a teacher for tenure, including an evaluation of the candidate's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students.

Section 3012-b of the Education Law, as added by Chapter 57 of the Laws of 2007, requires all school districts and boards of cooperative educational services, when evaluating a teacher for tenure to: (1) evaluate the extent to which the teacher successfully utilized analysis of available student performance data and other relevant information when providing instruction; (2) consider peer review by other teachers, as far as practicable; and (3) provide an assessment of the teacher's performance by the teacher's building principal or other building administrator. The proposed amendment aligns the Regents Rules with the statutory requirements and requires the use of the Annual Professional Performance Review criteria set forth in Section 100.2 of the Regulations of the Commissioner of Education in tenure determinations, which has been a regulatory requirement since 2000.

Consistent with the statute, the proposed amendment also permits the consideration of locally developed standards. However, this approach does not prescribe the types of locally developed standards designed to measure a teacher's effectiveness in contributing to the successful academic performance of his or her students. Such standards may or may not be mandatory subjects of collective bargaining.

The proposed amendment further clarifies that school districts and BOCES shall, when making a tenure determination, consider available student data, including State test results, student work, school-developed assessments, etc. and other relevant information including, documented health or nutrition concerns, or other student characteristics affecting learning.

To be consistent with the new statute, an amendment was also made to Section 100.2 of the Regulations of the Commissioner of Education, to the "student assessment" factor of the Annual Professional Performance Review regulations to explicitly mention the teacher's use of student performance data to inform future instruction.

**6. PAPERWORK:**

The amendment does not impose additional paperwork requirements upon school districts or boards of cooperative education.

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

There are no viable alternatives to the proposed amendment, and none were considered. The amendment implements statutory requirements.

**9. FEDERAL STANDARDS:**

There are no Federal standards that establish minimum standards and procedures for tenure determinations for teachers.

**10. COMPLIANCE SCHEDULE:**

School districts and boards of cooperative educational services will be required to comply with the proposed amendment on its stated effective date in order to comply with section 3012-b of the Education Law, as added by Chapter 57 of the Laws of 2007.

**Regulatory Flexibility Analysis**

**(a) Small businesses:**

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and relates to standards and procedures for teacher tenure determinations in order to implement the requirements of section 3012-b of the Education Law, as added by Section 9 of Part A of Chapter 57 of the Laws of 2007. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**(b) Local governments:**

**1. EFFECT OF RULE:**

The proposed amendment applies to the 698 school districts and seven BOCES located in New York State and relates to standards and procedures for teacher tenure determinations in order to implement the requirements of section 3012-b of the Education Law, as added by Section 9 of Part A of Chapter 57 of the Laws of 2007.

**2. COMPLIANCE REQUIREMENTS:**

Section 9 of Part A of Chapter 57 of the Laws of 2007 requires a superintendent of schools or district superintendent of schools, to evaluate

all relevant factors prior to recommending a teacher for tenure, including an evaluation of the candidate's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students.

Section 3012-b of the Education Law requires all school districts and BOCES, when evaluating a teacher for tenure to: (1) evaluate the extent to which the teacher successfully utilized analysis of available student performance data and other relevant information when providing instruction; (2) conduct peer review by other teachers, as far as practicable; and (3) provide an assessment of the teacher's performance by the teacher's building principal or other building administrator. The proposed amendment aligns the Regents Rules with the statutory requirements and requires the use of the Annual Professional Performance Review criteria set forth in Section 100.2 of the Regulations of the Commissioner of Education when making tenure determinations, which has been a regulatory requirement since 2000.

The proposed amendment also clarifies that school districts and BOCES shall consider available student data meaning State test results, student work, school-developed assessments, etc., and any other relevant information including, but not limited to, documented health or nutrition concerns, or other student characteristics affecting learning.

To be consistent with the new statute, an amendment was also made to Section 100.2 of the Regulations of the Commissioner of Education, to the "student assessment" factor of the Annual Professional Performance Review regulations, to explicitly mention the teacher's use of student performance data to inform future instruction.

**3. PROFESSIONAL SERVICES:**

The proposed amendment does not mandate that school districts or BOCES contract for additional professional services to comply.

**4. COMPLIANCE COSTS:**

The proposed amendment does not impose any additional compliance costs on school districts or BOCES, beyond those imposed by the statute.

**5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

**6. MINIMIZING ADVERSE IMPACT:**

The proposed amendment establishes minimum standards and procedures for teacher tenure determinations in New York State. Because these statutory requirements specifically apply to school districts and BOCES, it is not possible to exempt them from the proposed amendment or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on school districts and BOCES. Moreover, the State Education Department has determined that uniform requirements for teacher tenure determinations are necessary to ensure the quality of the State's teaching workforce.

**7. LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES. Comments were also solicited from school districts across the State, and the City School District of the City of New York.

**Rural Area Flexibility Analysis**

**1. TYPES AND ESTIMATE OF THE NUMBER OF RURAL AREAS:**

The proposed amendment will affect candidates seeking tenure as a teacher in the 698 school districts and seven boards of cooperative services in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Section 9 of Part A of Chapter 57 of the Laws of 2007 requires a superintendent of schools or district superintendent of schools, to evaluate all relevant factors prior to recommending a teacher for tenure, including an evaluation of the candidate's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students.

Section 3012-b of the Education Law requires all school districts and BOCES, when evaluating a teacher for tenure to: (1) evaluate the extent to which the teacher successfully utilized analysis of available student per-

formance data and other relevant information when providing instruction; (2) conduct peer review by other teachers, as far as practicable; and (3) provide an assessment of the teacher's performance by the teacher's building principal or other building administrator. The proposed amendment aligns the Regents Rules with the statutory requirements and requires the use of the Annual Professional Performance Review criteria set forth in Section 100.2 of the Regulations of the Commissioner of Education when making tenure determinations, which has been a regulatory requirement since 2000.

The proposed amendment also clarifies that school districts and BOCES shall consider available student data meaning State test results, student work, school-developed assessments, etc., and any other relevant information including, but not limited to, documented health or nutrition concerns, or other student characteristics affecting learning.

To be consistent with the new statute, an amendment was also made to Section 100.2 of the Regulations of the Commissioner of Education, to the "student assessment" factor of the Annual Professional Performance Review regulations, to explicitly mention the teacher's use of student performance data to inform future instruction.

The amendment does not impose recordkeeping requirements or require candidates seeking certification to retain professional services in order to comply.

### 3. COSTS:

Section 3012-b of the Education Law, as added by Chapter 57 of the Laws of 2007, may impose costs on private regulated parties, over and above the current costs for making tenure determinations, depending on the current practices followed by school districts and BOCES. However, the proposed amendment will not impose any additional costs, beyond those imposed by the statute.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes minimum standards and procedures for teacher tenure determinations in New York State. Because these statutory requirements specifically apply to teachers, school districts and BOCES located in all areas of the State, it is not possible to exempt them from the proposed amendment or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on teachers, school districts and BOCES. Moreover, the State Education Department has determined that uniform requirements for teacher tenure determinations are necessary to ensure the quality of the State's teaching workforce.

### 5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES located in rural areas of New York State.

### Job Impact Statement

The purpose of the proposed amendment is to establish minimum standards and procedures for teacher tenure determinations made by all school districts and boards of cooperative educational services in New York State after July 1, 2008.

Because it is evident from the nature of this regulation that it will have no impact on the number of jobs or employment opportunities in New York State, 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

### Reasonable and Necessary Expenses

**I.D. No.** EDU-14-08-00010-P

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

**Proposed action:** Addition of section 100.15 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 211-b(2)(a), (b) and 211-c(7); and L. 2007, ch. 57

**Subject:** Reasonable and necessary expenses of distinguished educators, and members of school quality review teams and joint intervention teams.

**Purpose:** To establish criteria for determining the reasonable and necessary expenses to be paid by school districts to distinguished educators and members of school quality review teams and joint intervention teams appointed pursuant to Education Law sections 211-b and 211-c.

**Text of proposed rule:** Section 100.15 of the Regulations of the Commissioner of Education is added, effective July 17, 2008, as follows:

*100.15 Reasonable and necessary expenses of members of school quality review teams and joint intervention teams, and distinguished educators, appointed pursuant to Education Law sections 211-b and 211-c.*

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

(1) *"Consulting fees" shall mean reasonable and necessary wage compensation paid to individuals in accordance with paragraph (1) of subdivision (c) of this section for the hours worked in the performance of their official duties as members of school quality review teams and joint intervention teams, and as distinguished educators.*

(2) *"Replacement costs" shall mean those costs including, but not limited to, salary and benefits of an individual employed by a school district or charter school to replace a teacher and/or administrator who takes a leave of absence to serve as a distinguished educator pursuant to Education Law section 211-c(8).*

(b) *Payment and reimbursement.*

(1) *A school district or charter school, for which a school quality review team, a joint intervention team and/or a distinguished educator is appointed, shall pay consulting fees to members of such teams and/or to such distinguished educator and reimbursement for their meals, lodging and travel expenses, in accordance with subdivision (c) of this section and no later than 60 days after receipt of each invoice for such expenses and fees.*

(2) *Notwithstanding the provisions of paragraph (1) of this subdivision, nothing in this section shall be deemed to require a school district or charter school to pay such consulting fees to:*

(i) *State Education Department staff who are appointed as members of such school quality review teams or joint intervention teams, or as distinguished educators; or*

(ii) *staff contracted by the State Education Department to provide support and assistance to schools and districts who are appointed as members of such school quality review teams or joint intervention teams, or as distinguished educators, except where such contract provides that the school district or charter school shall be responsible for the payment of such consulting fees to contracted staff.*

(c) *Criteria for payment and reimbursement.*

(1) *Consulting fees. Consulting fees shall be paid in accordance with an annual schedule of hourly consulting fees established by the commissioner and based upon the following factors:*

(i) *the regional costs of labor in related occupations;*

(ii) *the current market salaries paid New York State teachers and educational administrators, based on available wage data from the New York State and/or federal departments of labor; and*

(iii) *the expected duration of the intervention or school improvement consulting, as determined by the length of time that the school or school district has been in accountability status and the severity of the accountability status of such school or district.*

(2) *Meal Expenses.*

(i) *A team member or distinguished educator shall be reimbursed for receipted expenses for the dinner and breakfast meals which precede and follow, respectively, an evening during which they are lodging in the performance of their official duties.*

(ii) *Team members or distinguished educators shall be reimbursed for receipted expenses for breakfast and/or dinner meals in cases where their departure from their permanent residence for purposes of performing their official duties or their arrival at their permanent residence after completion of their official duties for that day, shall take place before 7:00 AM or after 7:00 PM, respectively.*

(iii) *Reimbursement for meals shall be paid at a rate not to exceed the applicable rates paid to State employees.*

(3) *Lodging Expenses.*

(i) *Team members or distinguished educators shall be reimbursed for receipted lodging expenses, provided that the travel distance from their permanent residence to the school or school district in which they perform their official duties exceeds 50 miles.*

(ii) *Reimbursement for lodging shall be paid at a rate not to exceed the applicable rates paid to New York State employees.*

(4) *Travel Expenses.*

(i) *Reimbursement to team members or distinguished educators for the use of a personal vehicle in the performance of their official duties shall be paid at a rate not to exceed the applicable rates paid to State employees.*

(ii) *Reimbursement to team members or distinguished educators for travel by bus, subway, train or rental car, in performance of their*

official duties, shall be paid if travel by personal vehicle is not economical, possible or feasible.

(iii) *The mode of travel selected should be the most economical available; provided that the determination of the appropriate mode of travel shall balance the needs of team members and distinguished educators, including but not limited to flexibility to perform their official duties, with the needs of the schools and school districts, including but not limited to economy, predictability and cost efficiency.*

(d) *Employment Status. Members of school quality review teams and joint intervention teams, and distinguished educators, in performance of their official duties, shall be deemed to be consultants to the school district or schools, including charter schools, to which they are appointed, and not employees of such school district or charter school.*

(e) *Replacement Costs. Replacement costs shall not be included in the calculation of reasonable and necessary expenses.*

**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

#### STATUTORY AUTHORITY:

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

Education Law section 211-b, as added by section 1 of Part A of Chapter 57 of the Laws of 2007, provides for the appointment of: (1) school quality review teams to assist schools in school improvement, corrective action, restructuring status or schools under registration review (SURR) status; and (2) joint intervention teams for schools in restructuring status or SURR status that have failed to demonstrate progress as specified in their corrective action plan or comprehensive education plan.

Education Law section 211-c, as added by section 1 of Part A of Chapter 57 of the Laws of 2007, provides for the appointment of distinguished educators to assist low performing districts in improving their academic performance.

Education Law sections 211-b(2)(a) and (b) and 211-c(7) provide that the reasonable and necessary expenses of teams and distinguished educators in performing their official duties shall be a charge upon the school district, or charter school, operating the school.

#### LEGISLATIVE OBJECTIVES:

The rule is necessary to implement Chapter 57 of the Laws of 2007, by establishing criteria for determination of reasonable and necessary expenses of members of school quality review teams and joint intervention teams, and distinguished educators.

#### NEEDS AND BENEFITS:

The rule establishes criteria for determining reasonable and necessary expenses of members of school quality review teams and joint intervention teams, and distinguished educators.

Four statistical and scientific studies were used as bases for the rule:

(1) The federal Department of Labor's Bureau of Labor Statistics (BLS) operates a nationwide survey of employers, the Occupational Employment Statistics (OES) survey. This statistical study data source was one of three used to estimate the consulting fees. The wage estimates are generated from a sample of 1.2 million business establishments nationwide and the sample is large enough to generate reliable state and industry-specific estimates. The wage estimates of the occupations of educational managers and teachers, at both the elementary and post-secondary levels, employed in the State in May 2006, at the 75th and 90th percentiles were downloaded from the BLS website (<http://www.bls.gov/oes/current/oesrcst.htm>). The same data at the 95th percentile of the wage distribution were obtained by a customized analytical report provided by the BLS' economists in the New York City regional office.

(2) In order to trend forward - to reflect inflation from 2006 to January of 2008, the nationwide CPI-U (consumer price index, all urban consumers) was downloaded from the BLS website (<http://www.bls.gov/cpi/home.htm>) and applied to the data yielded by source (1); and

(3) To generate regional specific consulting fees to reflect the geographic distribution of professional titles similar to teachers and administrators, we applied the Regents Regional Cost Index (RCI), based on

research by the Department ([http://www.oms.nysed.gov/faru/Articles/RCI\\_2006update.htm](http://www.oms.nysed.gov/faru/Articles/RCI_2006update.htm)) to the values generated by data source/stage (2).

(4) Federal Census Data on the average commute time in the State was used to generate the commute distance at which the right to receive lodging reimbursements will be granted. The American Community Survey of the Census Bureau (<http://www.census.gov/acs/www/>) reports that the mean travel time to work in the State is 28 minutes, while 1 standard deviation is equal to 21 minutes. Statistical theory based on the normal or bell-shaped distribution would predict that 84% of commuters would have commute times of less than 49 minutes. Because of a lack of population density outside the NYC metropolitan area, commuters can expect to travel 60 miles in an hour. Therefore, in setting this standard of only reimbursing lodging for commutes of distances greater than 49 miles, payment is authorized only for those for whom the commute would be unreasonably long.

#### COSTS:

The rule implements Chapter 57 of the Laws of 2007, and will not impose any costs beyond those inherent in the statute.

(a) Costs to State government: None.

(b) Costs to local government: The statute imposes a cost on certain school districts, charging them for the reasonable and necessary expenses of distinguished educators and members of school quality review and joint intervention teams assigned to them. The costs will vary by the extent of the involvement and number of schools engaged by these teams and individuals.

The Southern Tier and the North Country have the lowest labor prices for consulting fees. Assuming a school district there has a single school in accountability status (such as a school in its first year in need of improvement), and further assuming that a supply of school quality review staff is available within a 49-mile radius of the school district (such that there would be no meal or lodging expenses incurred by the district but only the travel expenses for the use of one's personal vehicle), the amount of involvement would be very minimal: there might be just two reviewers for one week in this school, driving their own cars each day for a round trip distance of 30 miles from their homes. The annual cost to the district for this hypothetical scenario would be \$4,705: (\$57 per hour x 8 hours worked a day x 5 days x 2 school quality reviewers) + (15 miles x 2 school quality reviewers x 2 trips per day x 5 days x \$.485 [current GSA mileage rate]).

At the other extreme, a district that has academic performance problems that are more widespread, of greater severity and which have persisted for a longer period may have a distinguished educator assigned by the Commissioner. If we assume this district is located in Westchester County (a higher priced labor market area) and that a distinguished educator was not available within the 35-mile area of the school (such that the district would be responsible for paying for the travel, meal and lodging expenses of the distinguished educator), the cost to the district for just a single school assigned a distinguished educator, could exceed \$135,000 annually ( \$112 per hour x 40 hours per week x 25 weeks = \$112,000) + (travel expenses for the use of one's personal vehicle at \$.485 per mile x 150 miles per week x 25 weeks = \$1,825) + meals (2 days at \$44.50 per day and 3 days at \$59 per day = \$266 per week x 25 weeks = \$6,650); + lodging ( \$154 per night x 4 nights a week x 25 weeks = \$15,400).

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None. It is anticipated that any costs associated with the preparation of annual schedules of hourly consulting fees will be absorbed using existing staff and resources.

#### LOCAL GOVERNMENT MANDATES:

The rule imposes no mandates on school districts beyond that required by the statute - that the reasonable and necessary expenses of distinguished educators and members of school quality review and joint intervention teams be borne by the school districts to which they are assigned.

#### PAPERWORK:

The rule imposes no paperwork or other reporting requirements beyond those inherent in the statute. Some additional paperwork by school districts will be needed in order to account for, record, and pay the expenses of distinguished educators and members of school quality review and joint intervention teams assigned to them.

#### DUPLICATION:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and does not duplicate, overlap or conflict with State and federal legal requirements.

#### ALTERNATIVES:

One alternative related to allowing a school district that might temporarily lose the services of an employee who is assigned as a distinguished educator to another school district, to be compensated for the employee's 'replacement costs', *i.e.*, the expenses associated with backfilling and paying for a replacement for this employee. However, it was determined that this would be an undue burden on school districts that are assigned distinguished educators, and that there is nothing in the statute that requires payment of such replacement costs by school districts that are assigned distinguished educators, or that requires a school district to continue to pay the salaries and benefits of an employee who takes a leave of absence to serve as a distinguished educator.

There was discussion as to whether the consulting fees proposed were generous enough to obtain the desired competence and expertise that would be necessary to effect positive change in struggling schools. Concern was expressed that the fees would not be competitive with many of the salaries of superintendents of schools, particularly those located in Downstate. However, the countervailing arguments which ultimately were persuasive are several-fold. The authorizing statute explicitly mentions both teachers and school administrators as those occupations that would be eligible to serve as distinguished educators and members of school improvement and joint intervention teams. For this reason, teachers as well as administrators are included in the labor classes in the Bureau of Labor Statistics (BLS) dataset that were used to estimate appropriate consulting fees, which has the practical effect of deflating the salaries that would have been generated had education administrators only been included.

Because of the relationship between years of tenure - and by extension, competence - and salary 'steps' in teacher contracts, the Statewide BLS wages used to generate the consulting fees were staggered or tiered based on the assumed expertise and corresponding level of intervention. Since the school quality review process is the least intensive of the three, we chose wages at the 75th percentile. Insofar as schools and districts requiring the assistance of a joint intervention team would probably present with more intractable achievement problems, and would thus require greater competence to solve them, the consulting fees were generated by using the wage at the 90th percentile. Distinguished educators' consulting fees, requiring the greatest intervention, were estimated using the 95th percentile wage - the highest level available in this data series.

Moreover, economic incentives are generally most effective when the relationship of 'sticks and carrots' or rather, penalties and incentives, respectively, is proportional. In this particular case, the penalties or by extension, costs could be seen as the totality of administrative burdens, which are not insignificant, imposed on contract for excellence schools and districts, including the requirement this rule effectuates - that districts pay for their own school improvement responsibilities. In light of these costs, the Department felt that an even more generous consulting reimbursement would create an imbalance, when compared to the incentive side of the equation - *i.e.*, the new, enhanced foundation aid amounts, which although reflect historic gains in State education aid, and particularly for high need districts, are only a small share of the total cost of the K-12 educational enterprise Statewide.

Finally, in the absence of a useful precedent elsewhere in New York State law for a definition of 'reasonable and necessary' expenses which could guide the Department in the task of promulgating this rule, a federal treatment was available, which was useful and persuasive if not compelling. The Federal Office of Management and Budget (OMB), in its Circular A-87: Cost Principles for State, Local and Indian Tribal Governments, states that "in determining reasonableness of a given cost, consideration shall be given to: market prices for comparable goods or services" among other factors.

#### FEDERAL STANDARDS:

The rule is necessary to implement Chapter 57 of the Laws of 2007 by establishing criteria for the determination of reasonable and necessary expenses of members of school quality review teams and joint intervention teams, and distinguished educators. There are no applicable federal standards for the same or similar subject areas.

#### COMPLIANCE SCHEDULE:

The rule imposes no compliance requirements on local governments beyond those required by the statute - that the reasonable and necessary expenses of distinguished educators and school quality review and joint intervention teams be borne by the school districts to which they are assigned. The proposed rule merely establishes criteria for the determination of such expenses. It is anticipated that regulated parties may achieve compliance with the proposed rule by its effective date.

#### Regulatory Flexibility Analysis

Small Businesses:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007, by establishing criteria for determining the reasonable and necessary expenses to be paid by school districts to distinguished educators and members of joint intervention and school quality review teams who will assist schools and districts in improving their academic performance. The proposed rule does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

#### EFFECT OF RULE:

The proposed rule applies to each public school district and charter school in the State for which a school quality review team, a joint school intervention team or a distinguished educator has been appointed pursuant to Education Law sections 211-b and 211-c. Currently, 31 community districts and one charter school, all located in the New York City School District, have been assigned a school quality review team. No joint school intervention teams or distinguished educators have been assigned.

#### COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007 imposes no compliance requirements on school districts beyond those required by the statute: *i.e.*, that the reasonable and necessary expenses of distinguished educators and school quality review and joint intervention teams be borne by the school districts to which they are assigned. The proposed rule merely establishes criteria for the determination of such expenses. Some additional paperwork by school districts will be needed in order to account for, record, and pay the expenses of distinguished educators and school quality review and joint intervention teams assigned to them. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

#### PROFESSIONAL SERVICES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007, by establishing criteria for determining the reasonable and necessary expenses to be paid by school districts to distinguished educators and members of joint intervention and school quality review teams who will assist schools and districts in improving their academic performance. The proposed rule imposes no additional professional services requirements on school districts beyond those inherent in the statute.

#### COMPLIANCE COSTS:

The statute imposes a cost on certain school districts, charging them for the reasonable and necessary expenses of distinguished educators and members of school quality review and joint intervention teams assigned to them. The costs will vary by the extent of the involvement and number of schools engaged by these teams and individuals.

The Southern Tier and the North Country have the lowest labor prices for consulting fees. Assuming a school district there has a single school in accountability status (such as a school in its first year in need of improvement), and further assuming that a supply of school quality review staff is available within a 49-mile radius of the school district (such that there would be no meal or lodging expenses incurred by the district but only the travel expenses for the use of one's personal vehicle), the amount of involvement would be very minimal: there might be just two reviewers for one week in this school, driving their own cars each day for a round trip distance of 30 miles from their homes. The annual cost to the district for this hypothetical scenario would be \$4,705: (\$57 per hour x 8 hours worked a day x 5 days x 2 school quality reviewers) + (15 miles x 2 school quality reviewers x 2 trips per day x 5 days x \$.485 [current GSA mileage rate]).

At the other extreme, a district that has academic performance problems that are more widespread, of greater severity and which have persisted for a longer period may have a distinguished educator assigned by the Commissioner. If we assume this district is located in Westchester County (a higher priced labor market area) and that a distinguished educator was not available within the 35-mile area of the school (such that the district would be responsible for paying for the travel, meal and lodging expenses of the distinguished educator), the cost to the district for just a single school assigned a distinguished educator, could exceed \$135,000 annually ( \$112 per hour x 40 hours per week x 25 weeks = \$112,000) + (travel expenses for the use of one's personal vehicle at \$.485 per mile x

150 miles per week x 25 weeks = \$1,825) + meals (2 days at \$44.50 per day and 3 days at \$59 per day = \$ 266 per week x 25 weeks = \$6,650); + lodging ( \$154 per night x 4 nights a week x 25 weeks = \$15,400).

#### PROFESSIONAL SERVICES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007, by establishing criteria for determining the reasonable and necessary expenses to be paid by school districts to distinguished educators and members of joint intervention and school quality review teams who will assist schools and districts in improving their academic performance. The proposed rule imposes no additional professional services requirements on school districts beyond those inherent in the statute. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts. Economic feasibility is discussed in the Compliance Costs section above. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007, and imposes no compliance requirements on school districts beyond those required by the statute: *i.e.*, that the reasonable and necessary expenses of distinguished educators and school quality review and joint intervention teams be borne by the school districts to which they are assigned. The proposed rule merely establishes criteria for the determination of such expenses. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

The proposed has been carefully drafted to meet statutory requirements, while minimizing the impact on school districts and small businesses. Where possible, the regulations have incorporated existing State standards.

There were alternatives considered in the creation of the rule. One alternative related to allowing a school district that might temporarily lose the services of an employee who is assigned as a distinguished educator to another school district, to be compensated for the employee's 'replacement costs', *i.e.*, the expenses associated with backfilling and paying for a replacement for this employee. However, it was determined that this would be an undue burden on school districts that are assigned distinguished educators, and that there is nothing in the statute that requires payment of such replacement costs by school districts that are assigned distinguished educators, or that requires a school district to continue to pay the salaries and benefits of an employee who takes a leave of absence to serve as a distinguished educator.

There was discussion as to whether the consulting fees proposed were generous enough to obtain the desired competence and expertise that would be necessary to effect positive change in struggling schools. Concern was expressed that the fees would not be competitive with many of the salaries of superintendents of schools, particularly those located in Downstate. However, the countervailing arguments which ultimately were persuasive are several-fold. The authorizing statute explicitly mentions both teachers and school administrators as those occupations that would be eligible to serve as distinguished educators and members of school improvement and joint intervention teams. For this reason, teachers as well as administrators are included in the labor classes in the Bureau of Labor Statistics (BLS) dataset that were used to estimate appropriate consulting fees, which has the practical effect of deflating the salaries that would have been generated had education administrators only been included.

Because of the relationship between years of tenure - and by extension, competence - and salary 'steps' in teacher contracts, the Statewide BLS wages used to generate the consulting fees were staggered or tiered based on the assumed expertise and corresponding level of intervention. Since the school quality review process is the least intensive of the three, we chose wages at the 75th percentile. Insofar as schools and districts requiring the assistance of a joint intervention team would probably present with more intractable achievement problems, and would thus require greater competence to solve them, the consulting fees were generated by using the

wage at the 90th percentile. Distinguished educators' consulting fees, requiring the greatest intervention, were estimated using the 95th percentile wage - the highest level available in this data series.

Moreover, economic incentives are generally most effective when the relationship of 'sticks and carrots' or rather, penalties and incentives, respectively, is proportional. In this particular case, the penalties or by extension, costs could be seen as the totality of administrative burdens, which are not insignificant, imposed on contract for excellence schools and districts, including the requirement this rule effectuates - that districts pay for their own school improvement responsibilities. In light of these costs, the Department felt that an even more generous consulting reimbursement would create an imbalance, when compared to the incentive side of the equation - *i.e.*, the new, enhanced foundation aid amounts, which although reflect historic gains in State education aid, and particularly for high need districts, are only a small share of the total cost of the K-12 educational enterprise Statewide.

Finally, in the absence of a useful precedent elsewhere in New York State law for a definition of reasonable and necessary' expenses which could guide the Department in the task of promulgating this rule, a federal treatment was available, which was useful and persuasive if not compelling. The Federal Office of Management and Budget (OMB), in its Circular A-87: Cost Principles for State, Local and Indian Tribal Governments, states that "in determining reasonableness of a given cost, consideration shall be given to: market prices for comparable goods or services" among other factors.

#### LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

#### Rural Area Flexibility Analysis

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

The proposed rule applies to each public school district and charter school in the State for which a school quality review team, a joint school intervention team or a distinguished educator has been appointed pursuant to Education Law sections 211-b and 211-c. These districts include are those who have schools in need of improvement or otherwise in accountability status and include those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Currently, no school quality review teams, joint intervention teams or distinguished educators have been assigned to school districts located in rural areas.

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

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007 imposes no compliance requirements on school districts beyond those required by the statute: *i.e.*, that the reasonable and necessary expenses of distinguished educators and school quality review and joint intervention teams be borne by the school districts to which they are assigned. The proposed rule merely establishes criteria for the determination of such expenses. Some additional paperwork by school districts will be needed in order to account for, record, and pay the expenses of distinguished educators and school quality review and joint intervention teams assigned to them. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources. The proposed rule imposes no additional professional services requirements on school districts beyond those inherent in the statute. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

#### COSTS:

The statute imposes a cost on certain school districts, charging them for the reasonable and necessary expenses of distinguished educators and members of school quality review and joint intervention teams assigned to them. The costs will vary by the extent of the involvement and number of schools engaged by these teams and individuals.

The Southern Tier and the North Country have the lowest labor prices for consulting fees. Assuming a school district there has a single school in accountability status (such as a school in its first year in need of improvement), and further assuming that a supply of school quality review staff is available within a 49-mile radius of the school district (such that there

would be no meal or lodging expenses incurred by the district but only the travel expenses for the use of one's personal vehicle), the amount of involvement would be very minimal: there might be just two reviewers for one week in this school, driving their own cars each day for a round trip distance of 30 miles from their homes. The annual cost to the district for this hypothetical scenario would be \$4,705: (\$57 per hour x 8 hours worked a day x 5 days x 2 school quality reviewers) + (15 miles x 2 school quality reviewers x 2 trips per day x 5 days x \$.485 [current GSA mileage rate]).

At the other extreme, a district that has academic performance problems that are more widespread, of greater severity and which have persisted for a longer period may have a distinguished educator assigned by the Commissioner. If we assume this district is located in Westchester County (a higher priced labor market area) and that a distinguished educator was not available within the 35-mile area of the school (such that the district would be responsible for paying for the travel, meal and lodging expenses of the distinguished educator), the cost to the district for just a single school assigned a distinguished educator, could exceed \$135,000 annually ( \$112 per hour x 40 hours per week x 25 weeks = \$112,000) + (travel expenses for the use of one's personal vehicle at \$.485 per mile x 150 miles per week x 25 weeks = \$1,825) + meals (2 days at \$44.50 per day and 3 days at \$59 per day = \$ 266 per week x 25 weeks = \$6,650); + lodging ( \$154 per night x 4 nights a week x 25 weeks = \$15,400).

#### PROFESSIONAL SERVICES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007, by establishing criteria for determining the reasonable and necessary expenses to be paid by school districts to distinguished educators and members of joint intervention and school quality review teams who will assist schools and districts in improving their academic performance. The proposed rule imposes no additional professional services requirements on school districts beyond those inherent in the statute. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts in rural areas from coverage by the rule. Nevertheless, there are ways in which the differing needs or problems of, rural areas were accommodated in the creation of the proposed rule. For example, it is expected that the vast majority of teachers and administrators who would be willing to and/or wish to serve as distinguished educators, joint intervention and school quality review team members will reside not in rural, but rather metropolitan New York, insofar as these are the State's population and economic centers. However, the creation of the proposed rule anticipates that there will be several regional 'hubs' from which teams can be developed and recruited, so that travel time and therefore, administrative costs and burdens can be minimized for rural areas. Moreover, the consulting fees and travel and meal expenses have been created to reflect the regional costs of living in rural areas, so as to create an incentive to teachers and administrators to serve as distinguished educators and team members there.

The proposed rule merely establishes criteria for the determination of such reasonable and necessary expenses of distinguished educators and members of school quality review and joint intervention teams. It is anticipated that similar tasks and functions to track, record and pay expenses are already in place in school districts and charter schools and that the additional tasks and functions engendered by the statute and proposed rule will be carried out using existing staff and resources.

The proposed has been carefully drafted to meet statutory requirements, while minimizing the impact on school districts and small businesses. Where possible, the regulations have incorporated existing State standards.

There were alternatives considered in the creation of the rule. One alternative related to allowing a school district that might temporarily lose the services of an employee who is assigned as a distinguished educator to another school district, to be compensated for the employee's 'replacement costs', *i.e.*, the expenses associated with backfilling and paying for a replacement for this employee. However, it was determined that this would be an undue burden on school districts that are assigned distinguished educators, and that there is nothing in the statute that requires payment of

such replacement costs by school districts that are assigned distinguished educators, or that requires a school district to continue to pay the salaries and benefits of an employee who takes a leave of absence to serve as a distinguished educator.

There was discussion as to whether the consulting fees proposed were generous enough to obtain the desired competence and expertise that would be necessary to effect positive change in struggling schools. Concern was expressed that the fees would not be competitive with many of the salaries of superintendents of schools, particularly those located in Downstate. However, the countervailing arguments which ultimately were persuasive are several-fold. The authorizing statute explicitly mentions both teachers and school administrators as those occupations that would be eligible to serve as distinguished educators and members of school improvement and joint intervention teams. For this reason, teachers as well as administrators are included in the labor classes in the Bureau of Labor Statistics (BLS) dataset that were used to estimate appropriate consulting fees, which has the practical effect of deflating the salaries that would have been generated had education administrators only been included.

Because of the relationship between years of tenure - and by extension, competence - and salary 'steps' in teacher contracts, the Statewide BLS wages used to generate the consulting fees were staggered or tiered based on the assumed expertise and corresponding level of intervention. Since the school quality review process is the least intensive of the three, we chose wages at the 75th percentile. Insofar as schools and districts requiring the assistance of a joint intervention team would probably present with more intractable achievement problems, and would thus require greater competence to solve them, the consulting fees were generated by using the wage at the 90th percentile. Distinguished educators' consulting fees, requiring the greatest intervention, were estimated using the 95th percentile wage - the highest level available in this data series.

Moreover, economic incentives are generally most effective when the relationship of 'sticks and carrots' or rather, penalties and incentives, respectively, is proportional. In this particular case, the penalties or by extension, costs could be seen as the totality of administrative burdens, which are not insignificant, imposed on contract for excellence schools and districts, including the requirement this rule effectuates - that districts pay for their own school improvement responsibilities. In light of these costs, the Department felt that an even more generous consulting reimbursement would create an imbalance, when compared to the incentive side of the equation - *i.e.*, the new, enhanced foundation aid amounts, which although reflect historic gains in State education aid, and particularly for high need districts, are only a small share of the total cost of the K-12 educational enterprise Statewide.

Finally, in the absence of a useful precedent elsewhere in New York State law for a definition of reasonable and necessary' expenses which could guide the Department in the task of promulgating this rule, a federal treatment was available, which was useful and persuasive if not compelling. The Federal Office of Management and Budget (OMB), in its Circular A-87: Cost Principles for State, Local and Indian Tribal Governments, states that "in determining reasonableness of a given cost, consideration shall be given to: market prices for comparable goods or services" among other factors.

#### RURAL AREA PARTICIPATION:

The proposed rule was shared with the members of the Rural Education Advisory Committee for their input as to the feasibility of its provisions and its impact on rural schools and their operations.

#### Job Impact Statement

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, as added by Chapter 57 of the Laws of 2007, by establishing criteria for determining the reasonable and necessary expenses to be paid by school districts to distinguished educators and members of joint intervention and school quality review teams who will assist schools and districts in improving their academic performance. The proposed rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed repeal 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.

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

#### State Aid

I.D. No. EDU-14-08-00011-P

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

**Proposed action:** Repeal of sections 100.1(q) and (r), 100.2(u) and (v), 110.6, 144.1, 144.2, 144.3, 144.4, 144.5, 144.6, 144.9, 144.10, 144.11, 175.7, 175.18, 175.20, 175.22, 175.26, 175.29, 175.32, 175.33, 175.34, 175.36, 175.38 and 175.44; and amendment of sections 110.3, 175.4, 175.10(a)(1), 175.11, 175.12, 175.13, 175.15(a), 175.16, 175.17, 175.21, 175.24, 175.37, 175.39(a)(1) and 175.40 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20) and 3602, and L. 2007, ch. 57

**Subject:** State aid.

**Purpose:** To implement the foundation aid provisions enacted by chapter 57 of the Laws of 2007 and to otherwise bring the commissioner's regulations into compliance with other statutory changes to the law, and eliminate obsolete provisions.

**Substance of proposed rule (Full text is posted at the following State website: [www.emsc.nysed.gov/mgtserv/regulations](http://www.emsc.nysed.gov/mgtserv/regulations)):** The State Education Department proposes to amend and repeal various sections of the Commissioner's Regulations, effective July 17, 2008, relating to State aid. The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law, and to eliminate obsolete provisions. The following is a summary of the provisions of the proposed rule.

Subdivisions (q) and (r) of section 100.1, relating to the definitions of "declassification support services" and "educationally related support services", respectively, are repealed.

Subdivisions (u) and (v) of section 100.2, relating to declassification of support services and educationally related support services, respectively, are repealed.

Section 110.3 is amended to provide for average daily membership in elementary and secondary summer schools.

Section 110.6, relating to summer school programs aidable pursuant to Education Law section 3602(39), is repealed.

Sections 144.1, 144.2, 144.3, 144.4, 144.5, 144.6, 144.9, 144.10 and 144.11, relating to certain grant programs for public school districts, are repealed.

Section 175.4 is amended to provide that a school may exclude from its average daily attendance those days during the existence of a manmade or natural disaster, or act of terrorism, and otherwise conform with the law and remove reference to Operating Aid.

Section 175.7, relating to allocation of State aid from lottery revenue, is repealed.

Section 175.10 is amended to eliminate reference to Growth Aid.

Section 175.11 is amended to correct references to certain subdivisions of Education Law section 3602, including pupils with disabilities.

Section 175.12 is amended to correct references to certain subdivisions of Education Law section 3602.

Section 175.13 is amended to provide for average daily membership.

Section 175.15 is amended to update current practice of computation of state aid.

Section 175.16 is amended to correct references to certain subdivisions of Education Law section 3602.

Section 175.17 is amended to conform with current law and eliminate obsolete references.

Section 175.18, relating to computation of 1981-1982 operating aid base by borough for the New York City School District, is repealed.

Section 175.20, relating to equipment aid for occupational and vocational education, is repealed.

Section 175.21 is amended to reflect current law with regards to services provided by a tutor for purposes of determining average daily membership pursuant to paragraph 1 of subdivision 1 of section 3602 of Education Law.

Section 175.22, relating to additional aid for school districts receiving pupils as a result of the dissolution of another school district, is repealed.

Section 175.24, relating to voluntary interdistrict urban-suburban transfer program, is amended to conform with current law and eliminate obsolete references.

Section 175.26, relating to computation of equivalent attendance for the 1982-1983 and 1983-1984 school years, is repealed.

Section 175.29, relating to the teacher summer business training and employment program, is repealed.

Section 175.32, relating to efficiency study grants, is repealed.

Section 175.33, relating to approval of expenditures related to technologies network ties program, is repealed.

Section 175.34, relating to calculations of aid for small city school districts, is repealed.

Section 175.36, relating to apportionment of State aid to school districts experiencing an increase in student enrollment as a result of the expansion of Fort Drum, is repealed.

Section 175.37 is amended to correct references to certain subdivisions of Education Law section 3602.

Section 175.38, relating to computation of maximum wealth adjusted tax rate and maximum unadjusted tax rate, is repealed.

Section 175.39(a)(1) is amended, to update a reference to Education Law sections 3602.

Section 175.40 is amended to correct references to certain subdivisions of Education Law section 3602.

Section 175.44, relating to full day kindergarten conversion aid, is repealed.

**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](mailto: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](mailto:p16education@mail.nysed.gov)

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

#### Regulatory Impact Statement

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

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties charged by the Regents.

Education Law section 3602 provides for the apportionment of State monies to school districts, and the process therefore. Chapter 57 of the Laws of 2007 amended section 3602 to change the school funding system by replacing approximately 30 State aid items with a single Foundation Aid.

##### LEGISLATIVE OBJECTIVES:

The proposed amendments and repeals are consistent with the authority conferred by the above statutes and are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions.

##### NEEDS AND BENEFITS:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law, and to eliminate obsolete provisions. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since Operating Aid and other aids replaced by Foundation Aid are referenced throughout the Commissioner's Regulations, this created the need for extensive amendments and some repeals of certain sections. In other instances, certain provisions have become obsolete and need to be repealed.

##### COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the

rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

#### LOCAL GOVERNMENT MANDATES:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

#### PAPERWORK:

The proposed amendments and repeals conform the Commissioner's Regulations to existing statutes and practices, and do not impose any additional reporting or other paperwork requirements on school districts or boards of cooperative educational services (BOCES).

#### DUPLICATION:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions, and do not duplicate, overlap or conflict with State and federal legal requirements.

#### ALTERNATIVES:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. There are no significant alternatives and none were considered.

#### FEDERAL STANDARDS:

The proposed amendments and repeals relate to the payment of State aid to school districts and boards of cooperative educational services (BOCES), and are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law, and to eliminate obsolete provisions. There are no related federal standards.

#### COMPLIANCE SCHEDULE:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts or BOCES beyond those inherent in Chapter 57 and other applicable statutes. It is anticipated that regulated parties can achieve compliance with the proposed rule making upon its effective date.

#### **Regulatory Flexibility Analysis**

##### Small Businesses:

The proposed amendments and repeals relate to the payment of State aid to school districts and boards of cooperative educational services (BOCES), and are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule making that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Government:

#### EFFECT OF RULE:

The proposed rule making applies to each of the 698 public school districts and the 37 boards of cooperative educational services (BOCES) in the State.

#### COMPLIANCE REQUIREMENTS:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance require-

ments or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since Operating Aid and other aids replaced by Foundation Aid are referenced throughout the Commissioner's Regulations, this created the need for extensive amendments and some repeals of certain sections. In other instances, certain provisions have become obsolete and need to be repealed.

#### PROFESSIONAL SERVICES:

The proposed amendment and repeals do not impose any additional professional services requirements.

#### COMPLIANCE COSTS:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 and other applicable statutes.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendments and repeals do not impose any additional costs or new technological requirements on school districts or BOCES.

#### MINIMIZING ADVERSE IMPACT:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since Operating Aid and other aids replaced by Foundation Aid are referenced throughout the Commissioner's Regulations, this created the need for extensive amendments and some repeals of certain sections. In other instances, certain provisions have become obsolete and need to be repealed. The proposed amendments and repeals have been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts and BOCES. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting the regulatory requirements.

#### LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

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

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

The proposed amendments and repeals apply to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts or BOCES in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since Operating Aid and other aids replaced by Foundation Aid are referenced throughout the Commissioner's Regulations, this created the need for extensive amendments and some repeals of certain sections. In other instances, certain provisions have become obsolete and need to be repealed. The proposed amendments and repeals will impose no additional professional services requirements on rural school districts.

#### COMPLIANCE COSTS:

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the

rule making conforms the Commissioner’s Regulations to existing statutes and practices, and does not impose any costs on rural school districts beyond those inherent in Chapter 57 and other applicable statutes.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendments and repeals are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner’s Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner’s Regulations to existing statutes and practices, and does not impose any additional compliance requirements, local government mandates or costs on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since Operating Aid and other aids replaced by Foundation Aid are referenced throughout the Commissioner’s Regulations, this created the need for extensive amendments and some repeals of certain sections. In other instances, certain provisions have become obsolete and need to be repealed. Since these requirements apply to school districts across the State, it was not possible to exempt, or provide a lesser standard for, school districts in rural areas. The proposed amendments and repeals have been carefully drafted to meet statutory requirements while minimizing the adverse impact on school districts in rural areas. The regulations have incorporated existing requirements and eliminated redundant requirements.

**RURAL AREA PARTICIPATION:**

Comments on the proposed rule making were solicited from the Department’s Rural Advisory Committee, whose membership includes school districts located in rural areas.

**Job Impact Statement**

The proposed amendments and repeals relate to the payment of State aid to school districts and boards of cooperative educational services (BOCES), and are necessary to implement the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner’s Regulations into compliance with other statutory changes to the law, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner’s Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts or BOCES, and will not have an adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed amendments and repeals that they 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.

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

**School Bus and Vehicle Engine Idling**

**I.D. No.** EDU-14-08-00012-P

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

**Proposed action:** Addition of section 156.3(h) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 3624 (not subdivided) and 3627(1), (2) and (3); and L. 2007, ch. 670

**Subject:** School bus and vehicle engine idling.

**Purpose:** To prescribe requirements for minimizing the idling of school buses and other vehicles.

**Text of proposed rule:** Subdivision (h) of section 156.3 of the Regulations of the Commissioner of Education is added, effective July 17, 2008, as follows:

(h) *Idling school buses on school grounds.*

(1) *Except as provided in paragraph (2) of this subdivision, each school district shall ensure that each driver of a school bus, as defined in Vehicle and Traffic Law section 142, or other vehicle owned, leased or contracted for by such school district, shall turn off the engine of such school bus or vehicle while waiting for passengers to load or off load on school grounds, or while such vehicle is parked or standing on school grounds or in front of or adjacent to any school.*

(2) *Notwithstanding the provisions of paragraph (1) of this subdivision and unless otherwise required by State or local law, the idling of a school bus or vehicle engine may be permitted to the extent necessary to achieve the following purposes: (i) for mechanical work; or (ii) to maintain an appropriate temperature for passenger comfort; or (iii) in emergency evacuations where necessary to operate wheelchair lifts.*

(3) *Each school district shall ensure that each driver of a school bus shall:*

(i) *instruct pupils on the necessity to board the school bus promptly in the afternoon in order to reduce loading time;*

(ii) *whenever possible, park diagonally in school loading areas to minimize the exhaust that may enter the school bus from adjacent buses; and*

(iii) *turn off the bus engine during sporting or other events.*

(4) *Each school district shall annually provide their school personnel, no later than five school days after the start of school, with notice of the provisions of Education Law section 3637 and of this section, in a format prescribed and provided by the Commissioner to such school districts for dissemination.*

(5) *Each school district shall monitor compliance with the provisions of this subdivision by school bus drivers and drivers of vehicles owned, leased or contracted for by such school district, by performing two annual monitoring reviews, the first to be administered between November 1st and December 31st, inclusive, and the second to be administered between April 1st and May 31st, inclusive. Each school district shall prepare a written report of such review, which shall include the name of each driver checked, the date, and degree of adherence to the provisions of this subdivision. Copies of the report shall be retained in the school district’s files for a period of six years and shall be provided to the Commissioner upon request.*

(6) *All contracts for pupil transportation services between a school district and a private vendor that are entered into on or after July 17, 2008, shall include a provision requiring such vendor’s compliance with the provisions of this subdivision.*

**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**

**STATUTORY AUTHORITY:**

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

Education Law section 3624 authorizes the Commissioner of Education to establish and define qualifications of school bus drivers and to make rules and regulations governing the operation of transportation facilities used by pupils. Such rules and regulations shall include acts or conduct which would affect the safe operation of such transportation facilities.

Education Law section 3637, as added by Chapter 670 of the Laws of 2007, directs the Commissioner to promulgate regulations requiring school districts to minimize, to the extent practicable, the idling of the engine of any school bus and other vehicles owned or leased by the school district while such bus or vehicle is parked or standing on school grounds, or in front of any school.

**LEGISLATIVE OBJECTIVES:**

The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles.

**NEEDS AND BENEFITS:**

New York State has the largest fleet of school buses and vehicles in the nation. Over 50,000 vehicles are used in the State each day to transport over 2.5 million school children to and from school. Simply stated, New York State transports ten percent of all the nation’s pupils. In a year, our school buses travel over 225 million miles.

With such a large student population and amount of miles transported, our children are being exposed to sizeable hazards from school bus emissions. The diesel exhaust from a school bus can be harmful to adults but even more so for our children. This is because children are more susceptible to air pollution than adults because their respiratory systems are still developing and they have a faster breathing rate. Diesel exhaust contains billions of small particles that are so small that several thousand of them could fit on the period at the end of this sentence. When children breath in the exhaust from school buses, these particles can cause lung damage and aggravate asthma, bronchitis and other health problems.

Furthermore, the exhaust from an idling school bus does not just target children, but also pollutes the air in the entire community. The United States Environmental Protection Agency (EPA) has reported that exhaust fumes pollute the air in our communities and can enter school buildings through fresh air intakes, doors and open windows (See There are 25 Million Reasons Why it is Important to Reduce Idling, April 2006 - <http://www.epa.gov/cleanschoolbus/documents/42of06018.pdf>). One-third of our student population resides in areas of the State where the air quality is compromised. By minimizing the amount of time school buses and other vehicles idle on or near school grounds, we will improve the health of students, parents, area residents and employees of school districts across the State.

The United States Environmental Protection Agency Region 2 performed a study on school bus idling in New York State using the Katonah-Lewisboro School District located in Cross River, New York. The study was specifically designed to determine which of several different methods of running a school bus engine during the winter months was the most effective in reducing emissions while providing cost efficient and safe pupil transportation services. The study results clearly showed that "turning off the bus engine is the preferred operating choice." The study also showed that the short burst of emissions that occurs when restarting an engine that was turned off, is still less than keeping an engine idling. (The study has been posted at the following website: <http://www.epa.gov/region02/cleanschoolbus/r2schoolbusstudy.pdf>)

The United States Environmental Protection Agency has identified 21 chemicals in truck and bus exhaust that are known or suspected to cause cancer or other serious health conditions. Some of these chemicals include formaldehyde, acetaldehyde and benzene. Emissions also contain other pollutants linked to respiratory diseases including particulate matter, nitrogen oxides and carbon monoxide. Particulate matter consists of both black soot that you can see and tiny, invisible particles that are a fraction of the width of a human hair which can lodge deep in your lungs. Pollutants in bus exhaust can cause or trigger lung cancer, cardiovascular disease, asthma attacks, chronic bronchitis, impaired immune system function, decreased lung function and shortness of breathe. These adverse health effects can hurt the entire population not just school children. This can lead to increased hospital admissions, emergency room use, school absences, and work loss, which all increase our health care costs. Idling from diesel engines damages our environment by adding to smog. It reduces crop yields and acid rain means fewer fish in our lakes and streams in the Adirondacks and Finger Lakes. It increases the growth of algae and harms the coastal waters in Long Island Sound. For these reasons it is important that we not limit the protection afforded our children to those whose respiratory health is already compromised, but take firm steps to insure that all of our children and citizenry are protected from the harmful effects of pollutants from idling school buses.

Furthermore, limiting the idling time of a school bus is also cost efficient. Unnecessary idling of school bus engines taxes the mechanical health of the engine and uses more fuel than turning the bus engine off and on. Running an engine at low speed causes twice the wear on internal parts compared to driving at regular speed. While some may suggest that idling for lengthy periods is important to warm up the engine for in cold weather, engine manufacturers routinely suggest a warm up time of less than five minutes. In especially severe winter weather bus heaters or engine block heaters are more effective than unnecessary idling.

For these reasons, and consistent with the statute's directive to minimize the idling of school buses and other vehicles, the proposed rule has been drafted to apply to all school districts.

#### COSTS:

(a) Costs to the state: The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. The effect on State aid will be minimal. The additional time necessary for staff to semi-annually check school bus driver compliance should be minimal as the monitoring may be part of other school bus driver and contract monitoring functions performed by district supervisory staff.

(b) Costs to local government: The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. School districts are responsible for annually providing employees with copies of materials on minimizing idling. The cost of such activity is expected to be minimal since the content of the materials will be supplied by the Commissioner and is estimated to be four pages in length. Notice to employees may be by handouts, group meetings or postings. Districts will monitor school bus driver compliance twice annually and record the re-

sults. The cost of this activity should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

(c) Costs to private regulated parties: None.

(d) Costs to the regulation agency for implementation and central administration: The proposed rule implements the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. The materials concerning minimizing idling of school buses and vehicles have previously been developed as part the State Education Department "Anti-Idling Campaign" for the 2004 School Bus Driver Safety Training Program. A copy of those materials will be supplied to all school districts.

#### LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional program, service, duty or responsibility on school districts beyond those intrinsic to the statute. The proposed rule generally requires that all school districts work to minimize idling of school buses and vehicles on school grounds or adjacent to the school. It requires school districts to annually provide school bus drivers and employees with information concerning the dangers of idling of vehicles. The materials may be supplied as paper copy, or the information may be covered in an employee staff meeting. In addition, to insure compliance, school districts must monitor driver adherence to the policy semi-annually and record the results, but are not required to submit written reports to the Commissioner. Such reports shall be retained in the school district's files for a period of seven years and shall be provided to the Commissioner upon request.

#### PAPERWORK:

The proposed rule requires school districts to complete a semi-annual monitoring check of driver compliance and record the results. It does not specify any particular forms or require the filing of paperwork with the Department. School districts are responsible for annually providing employees with copies of materials on minimizing idling. However, the content of the materials will be supplied by the Commissioner and is currently estimated to be four pages in length.

#### DUPLICATION:

The proposed rule is necessary to implement Education Law section 3637, as added by Chapter 670 of the Laws of 2007, and will not duplicate any other State or Federal statute or regulation. Section 217 (3.2b) of the Regulations of the Commissioner of Environmental Conservation applies a 5 minute maximum time for idling of diesel buses while the bus is not in traffic. There may be local codes that apply a more stringent requirement such as New York City Administrative Code 24-163, which restricts idling of diesel engines to three minutes within New York City. Consistent with the statute, the rule allows idling to the extent necessary for mechanical work, or to maintain an appropriate temperature for passenger comfort, or in emergency evacuations where necessary to operate wheelchair lifts, unless otherwise prohibited by State or local law.

#### ALTERNATIVES:

Consideration was given to limiting the provisions of the proposed rule to those school districts identified as having a significant number of children with asthma or other similar health conditions. However, as discussed in more detail in the Needs and Benefits section of this Regulatory Impact Statement, exhaust from idling school buses and other vehicles is harmful not only to children with these health conditions, but is harmful to all children, as well as to adults and the environment. Limiting the idling time of a school bus is a win-win situation. It improves the air quality for all the State's citizenry, is environmentally sound, and cost efficient. For these reasons, and consistent with the statute's directive to minimize the idling of school buses and other vehicles, the proposed rule has been drafted to apply to all school districts.

#### FEDERAL STANDARDS:

The proposed rule relates to State standards for school districts. There are no Federal standards for school districts concerning idling of school buses and vehicles.

#### COMPLIANCE SCHEDULE:

The proposed rule requires the Commissioner to provide school districts with a copy of Education Law section 3637, information concerning minimizing idling and a copy of this regulation. School districts are annually required to provide those materials to all school bus drivers and other drivers of school vehicles. Districts are then required to monitor compliance with the anti-idling provisions in two checks scheduled for between November 1st and December 31st and between April 1st and May 31st. We do not anticipate any difficulty for school districts to comply with the proposed rule by its effective date.

**Regulatory Flexibility Analysis****Small Businesses:**

The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles. It does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local Government:****EFFECT OF RULE:**

The proposed rule applies to all public school districts in the State. It requires all school districts to implement a program to reduce idling of school buses and vehicles on school grounds.

**COMPLIANCE REQUIREMENTS:**

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007, and generally requires that all school districts work to minimize idling of school buses and vehicles on school grounds or adjacent to the school. It requires school districts to annually provide school bus drivers and employees with information concerning the dangers of idling vehicles. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department. School districts may provide paper copies of the materials to all drivers and school employees or they may provide annual notice of the requirements through staff meetings. They may provide notice of the anti-idling program requirements via staff meetings, school handbooks, calendar and web-sites. Districts are responsible for monitoring compliance semi-annually but are not required to submit written reports to the Commissioner. Such reports shall be retained in the school district's files for a period of seven years and shall be provided to the Commissioner upon request.

**PROFESSIONAL SERVICES:**

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

**COMPLIANCE COSTS:**

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. School districts are responsible for annually providing employees with copies or notice of Education Law section 3637, of this regulation and training materials in ways to minimize the idling of vehicles on school grounds. The cost of such activity is expected to be minimal since the content of the materials will be supplied by the Commissioner. Notice to employees may be by handouts, group meetings or postings. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed rule implements the requirements of Chapter 670 of the Laws of 2007 and does not impose any costs beyond those intrinsic to the statute or impose requirements for which there are technological feasibility barriers. The materials concerning minimizing idling of school buses and vehicles have previously been developed and piloted as part of the State Education Department "Anti-Idling Campaign" for the 2004 - 2005 school year as part of the School Bus Driver Safety Training Program. A copy of those materials will be supplied to all school districts.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to implement Education Law section 3637, as added by Chapter 670 of the Laws of 2007. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department to school districts. The proposed rule lessens adverse impact upon school districts by permitting school districts to either provide paper copy of the materials to all drivers, or provide annual notice of the requirements through staff meetings, employee handbook or district website. The proposed rule, while requiring compliance monitoring, does not require submission of written compliance reports to the Department, except upon request of the Commissioner. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

**LOCAL GOVERNMENT PARTICIPATION:**

Department staff met with public interest groups, including the American Lung Association of New York State, concerning the importance of reducing harmful emissions for school buses and other vehicles on and around school grounds in order to reduce the hazard to pupils and the general population.

Staff also requested comments and advice from statewide pupil transportation associations such as the New York Association for Pupil Transportation, and the New York School Bus Contractors Association. Copies of draft language have been shared with these groups, as well as, the New York State School Boards Association and the Department's Rural Education Advisory Committee.

The Anti-Idling campaign that was developed and implemented in the 2004-2005 school year was part of the School Bus Driver Safety Training Program. The campaign was developed by a non-profit pupil transportation training agency with suggestions from Master Instructors and School Bus Driver Instructors from across the State.

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

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

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

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007, and generally requires that all school districts work to minimize idling of school buses and vehicles on school grounds or adjacent to the school. It requires school districts to annually provide school bus drivers and employees with information concerning the dangers of idling vehicles. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department. School districts may provide paper copies of the materials to all drivers or they may provide annual notice of the requirements through staff meetings. They may provide notice of the anti-idling program requirements to student, parent and business delivery agent drivers via student assemblies, school handbook, calendar and web-site. Districts are responsible for monitoring compliance semi-annually but are not required to submit written reports to the Commissioner. Such reports shall be retained in the school district's files for a period of seven years and shall be provided to the Commissioner upon request.

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

**COSTS:**

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. School districts are responsible for annually providing employees with copies or notice of Education Law section 3637, of this regulation and training materials in ways to minimize the idling of vehicles on school grounds. The cost of such activity is expected to be minimal since the content of the materials will be supplied by the Commissioner. Notice to employees may be by handouts, group meetings or postings. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

**MINIMIZING ADVERSE IMPACT:**

The proposed rule is necessary to implement Education Law section 3637, as added by Chapter 670 of the Laws of 2007. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department to school districts. The proposed rule lessens adverse impact upon school districts by permitting school districts to either provide paper copy of the materials to all drivers, or provide annual notice of the requirements through staff meetings, employee handbook or district website. The proposed rule, while requiring compliance monitoring, does not require submission of written compliance reports to the Department, except upon request of the Commissioner. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

**RURAL AREA PARTICIPATION:**

The proposed rule has been provided for review, discussion and comment to the State Education Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

Department staff met with public interest groups, including the American Lung Association of New York State, concerning the importance of reducing harmful emissions for school buses and other vehicles on and around school grounds in order to reduce the hazard to pupils and the general population.

Staff have also requested comments and advice from statewide pupil transportation associations such as the New York Association for Pupil

Transportation, and the New York School Bus Contractors Association. Copies of draft language have been shared with these groups, as well as, the New York State School Boards Association.

The Anti-Idling campaign that was developed and implemented in the 2004-2005 school year was part of the School Bus Driver Safety Training Program. The campaign was developed by a non-profit pupil transportation training agency with suggestions from Master Instructors and School Bus Driver Instructors from across the State.

**Job Impact Statement**

The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles. The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

## Department of Environmental Conservation

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

**Recreational and Commercial Harvest of Hudson River American Shad**

**I.D. No.** ENV-14-08-00002-EP  
**Filing No.** 265  
**Filing date:** March 13, 2008  
**Effective date:** March 13, 2008

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

**Action taken:** Amendment of Parts 10, 35 and 36 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0306, 11-0315, 11-0317, 11-0319, 11-1301, 11-1303, 11-1305, 11-1501, 11-1503, 11-1505 and 13-0105

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

**Specific reasons underlying the finding of necessity:** The Department is adopting amendments to 6 NYCRR Parts 10, 35 and 36 which will implement a catch and release recreational fishery for American shad in the Hudson River; and gear limit and fishing restrictions for the Hudson River commercial fishery. These regulations are necessary in order for New York to comply with the Department’s mandate of stewardship of the state’s natural resource.

American shad of the Hudson River are anadromous. They spawn in the river, but spend most of their life in the near shore Atlantic Ocean from Virginia to Maine. They are caught by recreational and commercial fishermen while they are in the Hudson and by commercial fishermen while they are in the ocean.

Recently, DEC staff completed a stock assessment of the Hudson River American shad as part of a coast-wide assessment of American shad stocks under the coordination of the Atlantic States Marine Fisheries Commission (ASMFC). Abundance of Hudson River American shad has declined since the early 1990’s and it is now at a historic low. Moreover, fish in the spawning stock (adult fish) became smaller and younger, mortality increased to excessive and unacceptable levels, and production of young dropped more than 70 percent to an all time low in 2002. The primary cause of these changes was over-fishing. Through the ASMFC, New York worked toward, and achieved closure of ocean harvest of Hudson shad in commercial fisheries that targeted shad in 2005. This closure substantially reduced losses of Hudson River American shad, but it did not solve the problem in the face of continued low production of juveniles and continued excessive mortality. The few fish produced in 2002 to 2007 are now returning as adults and are what remains to recover the stock. These fish need substantial protection if the shad stock is to recover. Our analysis

indicates that if river harvest could be maintained at 2004-2006 levels mortality would be a bit above that required to maintain the stock at low levels. However, mortality and harvest would still be more than twice the levels needed to allow the stock to begin recovery. The DEC recognizes that this is a serious problem which needs immediate attention.

Under ECL 11-0303, it is the DEC’s responsibility to act in behalf of the natural resources of the state. New York will implement measures which will achieve a reduction in adult mortality and will also account for the recent recruitment failure (lack of young fish) in the stock. To allow for stock recovery, it is necessary to reduce recent levels of harvest by approximately 50 percent. In order to accomplish this reduction, the Department will implement actions to: 1) create a catch and release recreational fishery to eliminate recreational harvest 2) implement seasonal restrictions, from March 15th to June 15th, on the commercial fishery to include an increased escapement period (a period of no fishing each week), gear limits, and closed and restricted areas.

The promulgation of this regulation is necessary in order for the Department to protect and restore the Hudson River American shad stock. Failure by New York to adopt these amendments would jeopardize recovery of the Hudson River American shad stock.

**Subject:** Recreational and commercial harvest of Hudson River American shad.

**Purpose:** To reduce harvest of Hudson River American shad consistent with protecting the resource.

**Text of emergency/proposed rule:** Part 10 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled “Sportfishing Regulations” is amended as follows:

- (Section 10.1(a) through paragraph 10.1(b)(12) remains unchanged)
- Subdivision 10.1.(b)(13) is amended to read as follows:
- (b) “Table A. Sportfishing regulations”

	Species	Open Season	Minimum Length	Daily limit
(13)	<i>American shad-in the Hudson River and tributaries north of the George Washington Bridge</i>	All year	Any size	6
	<i>American shad - all other inland waters</i>	<i>Catch and release only</i>		

- (Section 10.2 through Section 10.9 remain unchanged)
- Part 35 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled “Licenses” is amended as follows:
- Paragraph 35.1(a) is amended to read as follows:

	Gear or operation	Residents	Nonresidents of the State
	Scoop, Dip and Scap Nets 10 feet square or under	\$1.00	\$3.00
	Scoop, Dip and Scap Nets Over 10 feet square	2.00	6.00
	Fyke Nets In Lakes Erie and Ontario	15.00	30.00
	Fyke Nets In Hudson River 1- to 3-foot hoop 1.00 3.00		
	Fyke Nets In Hudson River Over 3-foot hoop	2.00	6.00
	Fyke Nets Elsewhere 1- to 3-foot hoop	2.00	3.00
	Fyke Nets Elsewhere Over 3-foot hoop	3.00	6.00
	Seines Per lineal foot	0.05	0.15
	Seines 100 lineal feet of stake net or part thereof	3.00	9.00
	Gill Nets Per lineal foot	0.05	0.15
	Gill Nets In Hudson and Delaware Rivers from March 15 to June 15, [2,000] 600 feet or under	10.00	100.00
	Gill Nets In Chaumont Bay and waters of Jefferson County within one-half mile of the shore between Horse Island and Tibbet’s Light, 2,500 feet or under	15.00	45.00
	Trap Nets In Lakes Erie and Ontario	20.00	45.00
	Trap Nets Elsewhere 4 feet or under	3.00	12.00
	Trap Nets Elsewhere Over 4 feet and up to 6 feet	5.00	15.00

Trap Nets Elsewhere Over 6 feet and up to 8 feet	7.00	21.00
Trap Nets Elsewhere Over 8 feet	10.00	30.00
Sturgeon Line	5.00	15.00
Tide Line	3.00	9.00
Eel Pot	0.50	1.50
Eel Weir	20.00	60.00
Rowboat or sailboat in Lakes Erie and Ontario	20.00	60.00
10 h.p. or under outboard motor in Lakes Erie and Ontario	20.00	60.00
Over 10 h.p. outboard motor in Lakes Erie and Ontario	40.00	120.00
Inboard motor boat under 10 tons in Lakes Erie and Ontario	40.00	120.00
Inboard motor boat 10 to 15 tons in Lakes Erie and Ontario	50.00	150.00
Inboard motor boat over 15 tons in Lakes Erie and Ontario	60.00	180.00

Part 36 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled "Gear and operation of gear" is amended as follows:

Subdivision 36.1(a), paragraphs (1) through (3) remain unchanged.

Addition of paragraph 36.1(4) reads as follows:

(4) *It is unlawful for any person to take American shad for commercial purposes without having in possession either a valid gill net or shad and herring gill net Marine permit. Only one valid licensed gill net per fisher may be used to take American shad.*

Section 36.2 remains unchanged.

Subdivision 36.3(a) remains unchanged.

Subdivision 36.3(b) is amended to read as follows:

(b) No net shall be staked, anchored or otherwise fixed in position in the waters of the Hudson River within 1,500 feet upriver or down river of any other licensee's net. No net shall exceed [1,200] 600 feet in length.

Paragraph 36.3(c)1 through 36.3(c)7 are amended to read as follows:

(1) Seasonal restrictions. During the period December 1st-March 14th, both dates inclusive, no person shall set, place, possess or draw a [gill] net of any kind in or on that section of the Hudson River between the Troy Dam and the George Washington Bridge.

(2) Restricted [area] areas. From March 15th to June 15th, both dates inclusive:

i) [no] No nets of any kind shall be set, placed, drawn or in any way used on the shoals or flats in the Hudson River known as "The Flats" beginning at the red buoy north of Kingston point and continuing in a northerly direction to the red buoy opposite the Village of Barrytown.

ii) No gill nets shall be possessed in or on that section of the Hudson River between the Federal dam at Troy and the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges.

iii) Gill nets having a stretched mesh of a maximum of 3½ inches stretched mesh, inside measure, through the net, may be possessed and used in or on that section of the Hudson River between the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges and the George Washington Bridge.

iv) Gill nets having a stretched mesh equal to 5½ inches stretched mesh, inside measure, through the net, may be possessed and used in or on that section of the Hudson River between the Rip VanWinkle Bridge and the George Washington Bridge.

v) No person shall set a gill net other than a drift gill net in the waters of the Hudson River lying between the Bear Mountain Bridge and the Beacon-Newburgh Bridge nor possess any gill net other than a drift gill net while on the shores or waters of that portion of the Hudson River. For the purposes of this subdivision a drift gill net is defined as a gill net that is not anchored or staked and is free to move with water currents.

(3) Mesh restrictions. From March 15th through June 15th [gill nets with bar mesh size greater than 1¾ inches and less than 2½ inches must not be set in the Hudson River from George Washington Bridge north to the Federal Dam at Troy, nor possessed while on those waters. Gill nets of less than 1 1/8 inch bar mesh must not be used at any time except that gill nets for taking Atlantic tomcod not less than 7/8 inch bar mesh may be used.] :

(i) gill nets having a maximum of 3½ inches stretched mesh, inside measure, through the net, may be used to take river herring (alewife or blueback herring). Any American shad taken must be immediately returned to the water.

(ii) gill nets equal to 5½ inches stretched mesh, inside measure, through the net, may be used to take American shad.

(4) Escapement period. During the shad and herring season, from March 15th to June 15th, both dates inclusive, no nets shall be set, placed or drawn or allowed to remain in, or possessed on the waters of the Hudson River below the dam at Troy between 6 a.m. prevailing time on Friday and 6 p.m. prevailing time on the following Saturday; provided, however, that:

- (i) fyke nets and scap nets may be set and operated at any time;
- (ii) minnow nets may be set and operated to take bait fish at any time;

[(iii) seines and stake stop nets may be set and operated at any time from the Troy dam to the lighthouse at Esopus Meadows south of Kingston, except in the channel of the river.]

(iii) Shad closure. Gill nets equal to 5½ inches stretched mesh, inside measure, through the net, may not be set in or possessed on the waters of the Hudson River below the Rip VanWinkle Bridge to the George Washington Bridge between 6 a.m. prevailing time on Wednesday and 6 p.m. prevailing time on the following Saturday.

Paragraph 36.3.c.5 is rescinded.

(5) Closed area. From March 15th through June 15th, no person shall set a gill net other than a drift gill net in the waters of the Hudson River lying between the Bear Mountain Bridge and the Beacon-Newburgh Bridge nor possess any gill net other than a drift gill net while on the shores or waters of that portion of the Hudson River. For the purposes of this subdivision a drift gill net is defined as a gill net that is not anchored or staked and is free to move with water currents.]

Paragraph 36.3.c.5 is adopted to read as follows:

(5) Gear limits. In the Hudson River from the Bear Mountain Bridge north to the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges, the permittee shall be in immediate attendance while fishing any gill net.

Paragraph 36.3.c.6 remains unchanged.

(7) Operation of licensed nets at night. Nets that have been duly licensed may be operated between [sunset and] ½ hour before sunrise and sunset in the Hudson River south of the barrier dam at Troy to the Bear Mountain Bridge, except as restricted by paragraphs (1) and (5) of this subdivision.

**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 June 10, 2008.

**Text of rule and any required statements and analyses may be obtained from:** Kathryn A. Hattala, Department of Environmental Conservation, 21 S. Putt Corners Rd., New Paltz, NY 12561, (845) 256-3071, e-mail: kahattal@gw.dec.state.ny.us

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

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

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

**Regulatory Impact Statement**

1. Statutory authority:

Environmental Conservation Law (ECL) sections 3-0301, 11-0303, 11-0305, 11-0306, 11-0315, 11-0317, 11-0319, 11-1301, 11-1303, 11-1305, 11-1501, 11-1503, 11-1505 and 13-0105 authorize the Department of Environmental Conservation (DEC or Department) to establish, by regulation, the open season, size and catch limits, possession and sale restrictions and manner of taking for American shad.

2. Legislative objectives:

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

3. Needs and benefits:

The Department is adopting amendments to 6 NYCRR Parts 10, 35 and 36 which will implement a catch and release recreational fishery for American shad in the Hudson River and implement gear limit and fishing restrictions for the Hudson River commercial fishery. These regulations are necessary to protect American shad and therefore are a part of DEC's stewardship responsibilities over the state's natural resources.

American shad of the Hudson River are anadromous. They spawn in the river, but spend most of their life in the near shore Atlantic Ocean from Virginia to Maine. They are caught by recreational and commercial fishermen while they are in the Hudson and by commercial fishermen while they are in the ocean.

Recently, DEC staff completed a stock assessment of the Hudson River American shad as part of a coast wide assessment of American shad stocks

under the coordination of the Atlantic States Marine Fisheries Commission (ASMFC). Abundance of Hudson River American shad has declined since the early 1990's and is now at a historic low. Moreover, fish in the spawning stock (adult fish) became smaller and younger, mortality increased to excessive and unacceptable levels, and production of young dropped more than 70 percent to an all time low in 2002. The primary cause of these changes was over fishing. Through the ASMFC, New York worked toward, and achieved closure of ocean harvest of Hudson shad in commercial fisheries that targeted shad in 2005. This closure substantially reduced losses of Hudson River American shad, but it did not solve the problem in the face of continued low production of juveniles and continued excessive mortality. The few fish produced from 2002 to 2007 are now returning as adults and are what remains to recover the stock. These fish need substantial protection if the shad stock is to recover. Our analysis indicates that if river harvest were maintained at 2004-2006 levels mortality would be above that required to maintain the stock at low levels. However, mortality and harvest would still be more than twice the levels needed to allow the stock to begin recovery. The DEC recognizes that this is a serious problem which needs immediate attention.

Under ECL 11-0303, it is the DEC's responsibility to act in behalf of the natural resources of the state. New York will implement measures which will achieve a reduction in adult mortality and will also account for the recent recruitment failure (lack of young fish) in the stock. To allow for stock recovery, it is necessary to reduce recent levels of harvest by approximately 50 percent. In order to accomplish this reduction, the Department will implement actions to: 1) create a catch and release recreational fishery to eliminate recreational harvest and 2) implement seasonal restrictions, from March 15th to June 15th, on the commercial fishery to include an increased escapement period (a period of no fishing each week), gear limits, and closed and restricted areas. Failure by New York to adopt these amendments would jeopardize recovery of the Hudson River American shad stock.

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

Confirming New York's actions, the ASMFC has initiated preparation of Amendment III to the Fishery Management Plan (FMP) for Shad and River Herring. This amendment will require reductions in mortality for shad stocks currently in decline such as the Hudson River stock. The new amendment will not be in place until May, 2009 meaning that any response would not be implemented until the 2010 fishery. It would be irresponsible for the DEC to wait until then to implement measures to stop the stock's decline.

#### 4. Costs:

##### (a) Cost to state government:

Minor costs will be incurred by the regulating agency. See below.

##### (b) Cost to Local government:

There will be no costs to local governments.

##### (c) Cost to private regulated parties:

Certain regulated parties may experience some adverse economic effects due to the increase in the Escapement period (e.g., loss of several days per week in the fishing season). The targeted party is the commercial shad fishers who will be limited to three days per week to harvest shad. There will be some economic loss to these businesses. Over the last five years, an average of 25 commercial shad fishermen on the Hudson River targeted (intentionally fished for) American shad. Most of the fishermen work alone. Only a few hire assistants. Furthermore, American shad are now only in the river in harvestable numbers for up to eight weeks each spring. Therefore, commercial shad fishing constitutes by nature a short part-time job that provides supplemental income to fishermen and a few helpers.

Over the last 30 years, the number of weeks of fishing activity and the number of participants in the commercial fishery in the Hudson River has dwindled as the stock abundance has declined. This industry has probably reached a level where the costs associated with fishing are high in relation to profit, or even meeting costs, for most fishers. The proposed rule lessens the ability of licensed fishers to harvest American shad and because of this some individuals may stop fishing.

Over the long term, however, the maintenance of sustainable shad fisheries will have a positive effect on small businesses in the Hudson River shad fishery. Any short-term losses will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to prevent overharvest of stocks so stocks can rebuild for future utilization.

Another possible affected party is a co-occurring (during the same time period shad are present in the river) commercial bait fishery for river herring. However, proposed regulations were designed to allow this activity to continue without change. Thus, herring netters will retain the ability to harvest fish and bait shops to purchase bait as they have in the past. There should be little economic impact to these businesses.

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

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

#### 5. Local government mandates:

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

#### 6. Paperwork:

None.

#### 7. Duplication:

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

#### 8. Alternatives:

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

(1) Complete closure of the commercial and recreational fisheries in the Hudson River.

Closure of the commercial fishery was rejected because commercial shad fishing holds a place as one of the longest and most enduring historic fisheries in the Hudson Valley. Archeological sites indicate shad have been fished in the valley for several thousand years. The "modern" fishery began in the 1600's as colonists shared their fishing skills with the Native Americans in the valley. Department staff believe that the social and historical value of the commercial fishery is worth preserving. The selected option seeks to preserve the commercial fishery while providing needed protection to the Hudson River shad stock.

Closure of the recreational fishery was rejected because little added protection would be gained from such an action. DEC performed a catch and release study that examined the release mortality of shad caught by recreational hook and line fishers. The study found that if shad were minimally handled, that the release mortality was low (approximately 1.6 percent). Recent creel surveys indicate that most (approximately 93 percent) recreational shad fishers release their catch. Complete closure (stopping the act of recreational fishing for American shad) would not appreciably lower harvest, but would deny New Yorkers the ability to enjoy the use of this resource. Moreover, recreational shad fishing occurs at times and locations of recreational fishing for other fish species. Thus closure of the shad recreational shad fishery would be difficult to enforce.

(2) Reduce harvest from the recreational and commercial fishery to levels that might maintain the stock at current historic lows. This option was rejected because it puts the stock at unacceptable risk of survival. The current record low stock level and record low and persistent production of young would make it impossible for the spawning stock to compensate for any unfavorable environmental conditions during spawning. This would lead to loss of production and certain stock decline. Department staff believe that maintaining the stock at current low levels would be inconsistent with a sustainable fishery.

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

The "no action" alternative would leave current regulations in place and further jeopardize the American shad stock status. This would put New York in a position of allowing continued excessive mortality as defined in the ASMFC shad management plan and allowing the potential demise of the Hudson River American shad. This result would be contrary to the objectives of ECL 11-0303 to effectively manage the fish resources of New York State. For this reason, this alternative was rejected.

#### 9. Federal standards:

The amendments to Parts 10, 35 and 36 are in compliance with the ASMFC Fishery Management Plan for American shad.

#### 10. Compliance schedule:

The emergency regulations will take effect immediately upon filing with the Department of State. Regulated parties will be notified of the

changes to the regulations by mail, through appropriate news releases and via the Department's website.

**Regulatory Flexibility Analysis**

1. Effect of the regulations:

These amendments to 6 NYCRR Parts 10, 35 and 36 create a catch and release recreational fishery for American shad in the Hudson River and significantly restrict commercial harvest of this species in the river. Because this rule making addresses recreational and commercial fishing, the businesses that will be directly affected are commercial shad fishers. These regulations do not apply directly to local governments, and will not have any direct effects on local governments.

In the last five years, an average of 25 Hudson River commercial fishermen targeted American shad. Although the season March 15th to June 15th spans 13 weeks, shad are only harvested for approximately eight weeks prior to fish spawning, as the market is for female shad roe (eggs). Because shad are only in the river for a limited time in harvestable quantities, all commercial shad operations are part-time operations of short duration. New York will implement measures which will achieve a reduction in the harvest of 50 percent in total landings, relative to the base years of 2004 through 2006. In order to accomplish this reduction, the Department is: 1) increasing the escapement (non-fishing) period for shad to 84 hours, allowing commercial shad fishing to occur three days per week instead of five; 2) allowing fishing to occur only during daylight hours only for drift fishers; 3) implementing gear restrictions of a maximum of 600 feet with mesh restricted to 5.5 inch stretched mesh; and 4) closed areas to fishing in certain spawning reaches. The reduction in the number of fishing days is designed to reduce harvest by about 40 percent. The additional gear limits and area closures will make up the needed additional 10 percent and restrain fishing effort so that fishers may not compensate by fishing more within the limited time allowed.

The American shad commercial fishery has provided only part-time employment for fishers since the 1970's. The number of weeks of fishing activity and the number of participants in the commercial fishery in the Hudson River has dwindled as the stock abundance has declined. Over the last five years, an average of 25 commercial fishermen targeted American shad. This industry has probably reached a level where the costs associated with fishing are high in relation to profit, or even meeting costs, for most fishers. The proposed rule lessens the ability of licensed fishers to harvest American shad and because of this, some individuals may stop fishing.

It is unknown how many fishing charter vessels operate in the Hudson River, New York for American shad. While the proposed catch and release recreational fishery eliminates harvest, it allows continued use of the resource for recreational purposes. Creel surveys indicate that few fishers retain their catch; 93 percent of all shad caught are released. Thus little change is expected in charter boat activities. No reduction in fishing days is planned for the recreational fishery.

In the long-term, the maintenance of sustainable shad fisheries will have a positive effect on small businesses in the fisheries in question. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild them for future utilization.

2. Compliance requirements:

None.

3. Professional services:

None

4. Compliance costs:

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

5. Economic and technological feasibility:

The proposed regulations do not require any expenditures on the part of affected businesses in order to comply with the changes. The restriction will reduce harvest and may reduce income from commercial fishing activities. However, shad are in short supply coast-wide and reduced harvest may lead to higher prices and some recoupment of income.

There is no additional technology required for small businesses, and this action does not apply to local governments.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the Department to protect and restore the Hudson River American shad stock. The regulations are intended to protect the resource and avoid the adverse impacts that would be associated with closure of the fishery.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well

as wholesale and retail outlets and other support industries. Failure to take actions to protect the fishery could cause the collapse of the stock and have a more severe adverse impact on the commercial and recreational fisheries, as well as the supporting industries for those fisheries. These regulations are being adopted in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

The Department consulted the Hudson River Estuary Management Advisory Committee regarding the proposed action. The Committee is comprised of representatives from recreational and commercial fishing interests, local government, educational and research institutions. The Committee supported the need to reduce or eliminate fishing mortality on the Hudson shad stock, but has not commented on specifics of proposed rules. The Department has also met with several potentially affected commercial fishermen to explain the need for harvest reduction and to discuss potential fishing restrictions. The Department has maintained a regular dialogue with several of these fishermen by phone and e-mail regarding the issue. The Department has and will provide a notice of the emergency rulemaking to affected fishers through mailings, newspapers and other media outlets. Local governments were not contacted because the rule does not affect them.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

Five of the nine Hudson Valley counties fall into the rural area category: Columbia, Greene, Putnam, Rensselaer and Ulster counties. The proposed regulations will affect individuals who are licensed to operate fishing gear to catch American shad in the Hudson River. Some of these individuals are residents of other areas in New York, generally downstate.

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

All licensed fishers, as part of their mandatory report to the Department, are required to maintain daily fishing records of catch and effort expended.

3. Costs:

There will be no initial capital or annual costs to comply with the new regulations.

4. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the Department to protect and restore the Hudson River American shad stock. The regulations are intended to protect the resource and avoid the adverse economic and social impacts that would be associated with closure of the fishery. Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to take actions to protect the fishery could cause the collapse of the stock and have a more severe adverse impact on the commercial and recreational fisheries, as well as the supporting industries for those fisheries. These regulations are being adopted in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

5. Rural area participation:

The Department met with affected parties at two public meetings to inform them of the American shad stock status and initiate discussions of potential fishing restrictions necessary to protect the stock and to maintain acceptable fishing mortality. The Department has maintained a regular dialogue with several of these fishermen by phone and e-mail regarding the issue. Moreover, the Department has and will continue to provide notice to affected fishers through mailings, newspapers and other media outlets, including those in rural counties and towns.

**Job Impact Statement**

1. Nature of impact:

The American shad commercial fishery has only provided part time employment for fishers since the 1970's. These commercial fishing operations are very small businesses that operate for a short-time (up to eight weeks) each year. Most fishermen work alone. Only a few hire short-term assistants. The number of weeks of fishing activity and the number of participants in the commercial fishery in the Hudson River has dwindled as the stock abundance has declined. This industry has probably reached a level where the costs associated with fishing are high in relation to profit, or even meeting costs, for most fishers. The proposed rule lessens the ability of licensed fishers to harvest American shad and because of this some individuals may stop fishing.

2. Categories and numbers affected:

For the past five years, approximately 25 individuals, from Hudson Valley counties, targeted (intentionally fished for) shad for harvest. An additional 10 to 15 individuals harvested shad as a bycatch while seeking river herring.

3. Regions of adverse impact:

The fishery has always been unique to the state and only occurs in the Hudson River Valley south of Catskill.

4. Minimizing adverse impact:

The Department's intent of the proposed rule is to provide protection to the long term health of the stock so that restoration efforts will provide for a sustainable fishery for future years. In the long-term, the maintenance of a sustainable fishery will have a positive effect on employment for the American shad fishery. Any short term losses in participation will be offset by the restoration of fishery stocks and an increase in yield from well managed resources.

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## Long Island Power Authority

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### NOTICE OF ADOPTION

#### Tariff for Electric Services

**I.D. No.** LPA-52-07-00004-A

**Filing date:** March 12, 2008

**Effective date:** March 12, 2008

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

**Action taken:** The authority adopted revisions to its tariff for electric services to amend and repeal certain parts and sections of the tariff.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Tariff for electric services.

**Purpose:** To adopt miscellaneous revisions to the authority's tariff for electric services.

**Text or summary was published** in the notice of proposed rule making, I.D. No. LPA-52-07-00004-P, Issue of December 26, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Kevin S. Law, President and Chief Executive Officer, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700

**Assessment of Public Comment:**

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

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## Public Service Commission

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### NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-34-06-00011-W	August 23, 2006
PSC-34-06-00012-W	August 23, 2006
PSC-09-07-00016-W	February 28, 2007
PSC-21-07-00008-W	May 23, 2007
PSC-24-07-00013-W	June 13, 2007
PSC-33-07-00006-W	August 15, 2007
PSC-37-07-00007-W	September 12, 2007
PSC-39-07-00016-W	September 26, 2007
PSC-40-07-00008-W	October 3, 2007

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

#### Rural Telephone Bank Proceeds

**I.D. No.** PSC-14-08-00003-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 the disposition of rural telephone bank proceeds as they relate to the incumbent local exchange companies as a result of the order issued March 4, 2008 in Case 07-C-0349.

**Statutory authority:** Public Service Law, sections 91, 92 and 97

**Subject:** Granting incumbent local exchange companies rural telephone bank proceeds.

**Purpose:** To consider the disposition of rural telephone bank proceeds as related to competitive presence.

**Substance of proposed rule:** The Commission is considering the disposition of Rural Telephone Bank proceeds as they relate to the incumbent local exchange companies as a result of the Order issued March 4, 2008 in Case 07-C-0349.

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

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

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

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

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

(06-C-0314SA2)

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

#### Disposition of Tax Refund by Verizon New York Inc.

**I.D. No.** PSC-14-08-00004-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Verizon New York Inc. to retain \$3.6 million, the regulated, intrastate New York portion of an approximately \$5.7 million property tax refund it received from the City of New York on Jan. 9, 2008, and to retain tax credits of an equal amount to be applied to Verizon's second half 2007-2008 tax liability.

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** Disposition of tax refund.

**Purpose:** To determine how much of a tax refund should be retained by Verizon New York Inc.

**Substance of proposed rule:** On February 21, 2008, Verizon New York Inc. (Verizon) filed a petition proposing the disposition of that portion of a tax refund and tax credits allocable to its regulated, intrastate New York operations. The tax refund of approximately \$5,718,000, and a tax credit of the same amount, was the result of the settlement of claims related to Verizon's real property assessments in New York City. Verizon requests permission to retain that portion of the tax refund allocable to its regulated, intrastate New York operations, approximately \$3,600,000, and to retain a similar amount in tax credits. The Commission may approve or reject, in whole or in part, Verizon'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. (08-C-0193SA1)

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

**Interconnection Agreement between Verizon New York Inc. and Brandwidth.com CLEC, LLC**

**I.D. No.** PSC-14-08-00005-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 Brandwidth.com CLEC, LLC for approval of an interconnection agreement executed on March 1, 2008.

**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 Brandwidth.com CLEC, LLC have reached a negotiated agreement whereby Verizon New York Inc. and Brandwidth.com CLEC, 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 February 28, 2010, 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. (08-C-0229SA1)

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

**Definition of “Major Outage” by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-14-08-00006-P

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

**Proposed action:** The commission is considering revision of the definition of “major outage” on a network under Consolidated Edison Company of New York, Inc.’s (Con Edison or the company) reliability performance mechanism (RPM), as recommended in the recommended decision (RD) issued in Case 07-E-0523. The commission may adopt, modify, or reject, in whole or in part, any proposed definition.

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

**Subject:** Definition of “major outage.”

**Purpose:** To consider revision of the definition of “major outage” under Con Edison’s RPM.

**Substance of proposed rule:** The Commission is considering revision of the definition of “major outage” on a network under Consolidated Edison Company of New York, Inc.’s (Con Edison or the Company) Reliability Performance Mechanism (RPM), as recommended in the Recommended Decision (RD) issued in Case 07-E-0523. Currently, the threshold for a major outage event on a network system is a network shutdown, defined as the loss of all supply feeders to any of the 57 secondary networks in Manhattan, Brooklyn, Queens and the Bronx for three hours or more in duration. Staff recommends modifying the threshold for a major outage event on a network system to be the interruption of service to 10% or more of the customers in any network for a period of three hours or more. The Commission may adopt, modify, or reject, in whole or in part, this or any proposed definition.

**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-0523SA2)

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

**Requirements for Natural Gas Pipeline Capacity by St. Lawrence Gas Corporation**

**I.D. No.** PSC-14-08-00007-P

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

**Proposed action:** The Public Service Commission is considering a petition from St. Lawrence Gas Corporation (the company) to exclude the company from the requirement to amend its tariff in accordance with the requirements of the commission order on capacity release for local distribution companies, issued on Aug. 22, 2007, in Case 07-G-0299.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** Requirements for natural gas pipeline capacity intended to serve the customers of marketers and energy service companies.

**Purpose:** To determine whether to waive the requirement for St. Lawrence Gas Corporation to comply with the commission rule that determines the requirements for natural gas pipeline capacity intended to serve customers of marketers and energy service companies.

**Substance of proposed rule:** The Public Service Commission is considering a petition from St. Lawrence Gas Corporation (the Company) to exclude the Company from the requirement to amend its tariff in accordance with the requirements of the Commission order on capacity release for local distribution companies, issued on August 22, 2007, in Case 07-G-0299. By letter dated September 27, 2007, the Company states that, rather than assigning capacity, the tariff contains provisions requiring it to contract with transportation customers to use the transmission rights to move customers’ gas on the upstream transmission system. Thus, it is unable to make the ordered changes to its tariffs, due to existing contractual obligations with TransCanada Pipeline (TCPL). TCPL is a Canadian regulated pipeline and the Company relies on it for 100% of its reliability requirements.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-G-0299SA2)

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

**Electronic Tariff Filing and Waiver of Rate Setting Authority by Cale Farms Homeowners Association, Inc.**

**I.D. No.** PSC-14-08-00008-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by Cale Farms Homeowners Association, Inc. for approval of its electronic tariff schedule, P.S.C. No. 1—Water, and a waiver of the Public Service Commission's rate setting authority.

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

**Subject:** Electronic tariff filing and waiver of rate setting authority.

**Purpose:** To approve an electronic tariff schedule, P.S.C. No. 1—Water, for the Cale Farms Homeowners Association, Inc., and the waiver of rate setting authority.

**Substance of proposed rule:** On March 14, 2008, Cale Farms Homeowners Association, Inc. (Cale Farms or Association) filed a request for approval of its electronic tariff, P.S.C. No. 1—Water, which sets forth the rates, charges, rules and regulations under which the Association will provide water service effective June 1, 2008, and a waiver of the Public Service Commission's rate setting authority pursuant to Public Service Law (PSL) § 5(4). The Association proposes that metered rates will be established by the Association members from time to time to cover the expenses associated with the operation and maintenance of the water system. Each member of the Association will have the right at any time to ask the Public Service Commission to investigate the rates and charges. Also, the restoration of service charge will be a rate agreed upon by the members of the Association and will appear on all written notices of discontinuance of service. The Association's tariff, along with its proposed changes, will be available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under File Room—Tariffs.

Cale Farms provides metered water service to 45 residential customers in the Town of Somers, Westchester County. The Commission may approve or reject, in whole or in part, or modify, the company's request.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-W-0230SA1)

## Department of State

### NOTICE OF ADOPTION

#### Manufactured Homes

**I.D. No.** DOS-47-07-00018-A

**Filing No.** 266

**Filing date:** March 14, 2008

**Effective date:** April 2, 2008

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

**Action taken:** Addition of Part 1210 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 604

**Subject:** Obtaining and attaching manufacturer's warranty seals and installer's warranty seals to manufactured homes; certification of manufacturers, retailers, installers, and mechanics of manufactured homes; and administrative procedures for resolution of disputes relating to the construction, installation, or servicing of manufactured homes.

**Purpose:** To implement art. 21-B of the Executive Law, as added by chapter 729 of the Laws of 2005.

**Text or summary was published** in the notice of proposed rule making, I.D. No. DOS-47-07-00018-P, Issue of November 21, 2007.

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

**Text of rule and any required statements and analyses may be obtained from:** Joseph Ball, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, e-mail: [Joseph.Ball@dos.state.ny.us](mailto:Joseph.Ball@dos.state.ny.us)

**Assessment of Public Comment**

The agency received no public comment.

## Department of Taxation and Finance

### NOTICE OF WITHDRAWAL

#### Filing Requirements for Certain Distributors of Wine

**I.D. No.** TAF-43-07-00002-W

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

**Action taken:** Notice of proposed rule making, I.D. No. TAF-43-07-00002-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on October 24, 2007.

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

**Reason(s) for withdrawal of the proposed rule:** An objection was received from Southern Wine and Spirits.