

# RULE MAKING ACTIVITIES

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

- AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice.
- E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; 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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## Department of Agriculture and Markets

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### NOTICE OF ADOPTION

**Incorporation by Reference in 1 NYCRR of the 2008 Edition of National Institute of Standards and Technology (NIST) Handbook 44**

**I.D. No.** AAM-18-08-00005-A

**Filing No.** 784

**Filing Date:** 2008-08-04

**Effective Date:** 2008-08-20

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

**Action taken:** Amendment of section 220.2 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18, and 179

**Subject:** Incorporation by reference in 1 NYCRR of the 2008 edition of National Institute of Standards and Technology (“NIST”) Handbook 44.

**Purpose:** To incorporate by reference in 1 NYCRR the 2008 edition of NIST Handbook 44.

**Text of final rule:** Subdivision (a) of section 220.2 of 1 NYCRR is amended to read as follows:

(a) Except as otherwise provided in this Part, the specifications, tolerances and regulations for commercial weighing and measuring devices shall be those adopted by the [91st] 92nd National Conference on Weights and Measures [2006] 2007 as published in the National Institute of Standards and Technology Handbook 44, [2007] 2008 edition. This document is available from the National Conference on

Weights and Measures, 15245 Shady Grove Road, Rockville, MD 20850, or the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is available for public inspection and copying in the office of the Director of Weights and Measures, Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, or in the office of the Department of State, [41 State Street, Albany, NY 12231.] *One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, New York 12231.*

**Final rule as compared with last published rule:** Nonsubstantial changes were made in 220.2(a).

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

#### **Revised Job Impact Statement**

With regard to Handbook 44 (2008 version), what was previously published has not changed due to the nonsubstantive change in the text of the rule (updating of address from 41 State Street to One Commerce Plaza).

#### **Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Agriculture and Markets publishes a new notice of proposed rule making in the *NYS Register*.

#### **Dairy Assistance Program**

I.D. No.	Proposed	Expiration Date
AAM-31-07-00002-EP	August 1, 2007	July 31, 2008

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## Department of Correctional Services

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### NOTICE OF ADOPTION

#### **Procedure for Stay of Good Behavior Allowance**

**I.D. No.** COR-24-08-00001-A

**Filing No.** 771

**Filing Date:** 2008-07-30

**Effective Date:** 2008-08-20

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

**Action taken:** Amendment of section 263.2(a)(3) of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112, 137 and 803

**Subject:** Procedure for stay of good behavior allowance.

**Purpose:** To discontinue an unnecessary automatic review by the commissioner or his designee for a class of inmates who are not affected.

**Text or summary was published** in the June 11, 2008 issue of the Register, I.D. No. COR-24-08-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Executive Deputy Commissioner, Department of Correctional Services, 1220 Washington Ave., Bldg. #2, State Campus,

Albany, NY 12226-2050, (518) 457-4951, e-mail: AJAnnucci@DOCS.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

## Delaware River Basin Commission

### INFORMATION NOTICE

#### INFORMATION NOTICE

#### NOTICE OF PROPOSED RULEMAKING AND HEARING

The Delaware River Basin Commission ("Commission" or "DRBC") is a federal-state regional agency charged with managing the water resources of the Delaware River Basin without regard to political boundaries. Its members are the governors of the four Basin states – New Jersey, New York, Pennsylvania and Delaware – and a federal representative, the North Atlantic Division Commander of the United States Army Corps of Engineers. The Commission is not subject to the requirements of the New York Administrative Procedures Act. This notice is published by the Commission for informational purposes.

Proposed Amendments to the Water Code and Comprehensive Plan to Implement a Revised Water Audit Approach to Identify and Control Water Loss

**Summary:** The Commission will hold a public hearing to receive comments on proposed amendments to the Commission's Water Code and Comprehensive Plan to phase in a requirement for water purveyors to follow a revised water audit approach for identifying and controlling water loss.

**Background:** An estimated 150 million gallons of treated and pressurized water is physically lost from public water supply distribution systems in the Delaware River Basin per day and current methods to account for, track and reduce this loss are inadequate.

The purpose of the proposed amendments is to phase in a program requiring water purveyors to perform a water audit and report their findings in accordance with a new audit structure established by the American Water Works Association (AWWA) and the International Water Association (IWA). These new methods are widely regarded as superior to the existing approach, which entails tracking "unaccounted for water," which is no longer considered best practice.

The new water audit methodology provides a rational approach that will facilitate more consistent tracking and reporting than the existing approach allows. It will help water managers and regulators, including the Commission, state agencies, and utility managers, target their efforts to improve water supply efficiency, thereby reducing water withdrawals. Improving water accountability will contribute to achieving objective 1.3.C of the *Water Resources Plan for the Delaware River Basin*, which calls for ensuring maximum feasible efficiency of water use across all sectors.

The Commission's Water Management Advisory Committee (WMAC), which has taken primary responsibility for reviewing the proposed audit methodology and developing these amendments, is composed of representatives from a wide range of public and private sector organizations. WMAC membership includes: Mr. Ferdows Ali, Environmental Scientist with the New Jersey Department of Agriculture; Ms. Janet L. Bowers, Executive Director of the Chester County Water Resources Authority; Mr. Gerald Esposito, President of Tidewater Utilities; Mr. David Froehlich, of the Wissahickon Valley Watershed Association; Mr. David Jostenski, Chief of the Water Use Assessment Section of the Pennsylvania Department of Environmental Protection; Mr. Mark Hartle, of the Pennsylvania Fish & Boat Commission, Division of Environmental Services; Mr. Stewart Lovell, Supervisor of Water Allocations of the Delaware Department of Natural Resources and Environmental Control; Mr. John Mello, of Region II of the U.S. Environmental Protection Agency; Mr. Bruno M. Mercuri, of Mercuri and Associates, Inc.; Dr. Joseph A. Miri, of the New Jersey Department of Environmental Protection, Water Supply Element; Mr. Robert Molzahn, of the Water Resources Association of the Delaware River Basin; Mr. Howard Neukrug, of the Philadelphia Water Department; Ms. Mary Ellen Noble, of the Delaware Riverkeeper Network; Ms. Senobar Safar, of the New York City Department of Environmental Protection, Strategic Services Division, Bureau of Water Supply; Mr. Tom Simms, Director of the Institute of Soil and Environmental Quality of the University of Delaware DGS Annex; Mr. Ronald A. Sloto, of the U.S. Geological Survey, Water Resources Division; Ms. Edith Stevens, of the

League of Women Voters; and Mr. Glen Stevens, of the U.S. Army Corps of Engineers.

On May 25, 2004 the WMAC established a subcommittee to investigate the issue of water loss and water accountability in light of new methods proposed by the American Water Works Association (AWWA) and the International Water Association (IWA). The subcommittee met on four occasions to review the Commission's current policies concerning water loss and water accountability and to discuss the new methods. The DRBC's current policies are based on the concept of "unaccounted for water," which is no longer considered best practice. The new methods are based upon more precise definitions and more rational accounting procedures that will result in a clearer understanding on the part of utility managers and regulators of the causes of water loss. The new methods will thus facilitate targeted improvements that reduce system water demands, with region-wide benefits. DRBC staff participated in the development of water audit software based on the new accounting methods, in an effort led by the AWWA Water Loss Control Committee (WLCC).

On March 16, 2005, after listening to a presentation outlining the benefits of the new water accountability methods, the DRBC Commissioners asked DRBC staff and the WMAC to develop a position statement and policy recommendations for the Commission and to engage water purveyors in the Basin in a pilot study of the newly developed water audit software in order to test the software and solicit feedback.

Six water purveyors from the Delaware River Basin were identified to participate in the nationwide pilot study. The comments and feedback provided to AWWA led to improvements in the software. In March 2006, the software was approved by the AWWA WLCC and was posted on the AWWA website, where it is available at no charge to all users. Links to the software are posted on the water conservation page of the DRBC website: <http://www.state.nj.us/drbc/policy.htm>

The WMAC and its subcommittee determined that the IWA/AWWA water audit methodology represents an improvement to the Commission's current practices and can lead to multiple benefits for water utilities and other stakeholders. It is anticipated that adoption of the IWA/AWWA approach will:

- Improve upon the traditional approach for identifying "unaccounted for water," which lacks standardized terminology and a clearly defined water audit structure.
- Provide a rational water audit structure to help identify water losses and improve water supply system efficiency.
- Provide meaningful performance indicators to help identify systems with the greatest losses. These indicators allow water utility managers to make reliable comparisons of performance and to identify best practices to control water loss in an economical way.
- Identify ways to improve water supply efficiency and thereby reduce water withdrawals that have no beneficial end use.
- Help to target efforts to reduce the estimated 150 million gallons per day that is physically lost from public water supply distribution systems in the Basin.
- Enhance utility revenues by enabling utility managers to recover the significant revenue that is otherwise lost due to *apparent losses* such as theft of service, unbilled connections, meter discrepancies and data errors.
- Help utility managers and regulators identify real losses (such as leakage) that waste treated and pressurized water and increase operating costs. Significant real losses indicate opportunities for improved asset management that can reduce the vulnerability of utilities to disruptive water main breaks, other service disruptions and water quality upsets.

Because the water audit approach is relatively new in a regulatory context, the proposed amendments call for phased implementation. Until 2011, the DRBC will promote the voluntary use of the IWA/AWWA water audit program. During this period, information will be gathered from within the Basin and nationwide to assist in the establishment of performance indicators for water loss, which ultimately will replace the "unaccounted for water" targets. If approved, the proposed amendments will require water purveyors to perform an annual water audit conforming to the IWA/AWWA methodology, beginning in calendar year 2012.

The proposed amendments also require changes in the way data pertaining to water loss are collected by the state agencies and shared with DRBC.

**Dates:** The public hearing will be held on Thursday, September 25, 2008 at the Commission's office building, located at 25 State Police Drive, West Trenton, New Jersey. The hearing will begin at 1:30 P.M. and will continue until all those who wish to testify are afforded an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance by phoning Ms. Paula Schmitt at 609-883-9500, ext. 224. Written comments must be received by 5:00 P.M. on Friday,

October 3, 2008. Written comments may be submitted as follows: if by email, to paula.schmitt@drbc.state.nj.us; if by fax, to Commission Secretary at 609-883-9522; if by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360; or if by overnight mail, to Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360. In all cases, please include the commenter's name, address and affiliation, if any, in the comment document and include "Water Audit" in the subject line.

*Further Information, Contacts:* The current rule and the full text of the proposed amendments are posted on the Commission's website, www.drbc.net. Hard copies may be obtained by contacting Ms. Paula Schmitt at 609-883-9500, ext. 224. The Commission will hold an informational meeting on Wednesday, September 10, 2008 from 4:00 P.M. to 6:00 P.M. at the Commission's office building, located at 25 State Police Drive, West Trenton, New Jersey. Driving directions are available on the Commission's website - www.drbc.net. Please do not rely on Internet mapping services as they may not provide accurate directions to the DRBC. Please contact Commission Secretary Pamela Bush, 609-883-9500 ext. 203 with questions about the proposed rule or the rulemaking process.

Pamela M. Bush, Esq.  
Commission Secretary  
July 29, 2008

**Text of Proposed Amendments**

It is proposed to amend Comprehensive Plan and Article 2 of the Delaware River Basin Water Code as set forth below. Deleted text is denoted by brackets and inserted text is italics.

§ 2.1.2 C.1. . . . .

*e. An ongoing water auditing program in accordance with section 2.1.8*

§ 2.1.6 A. . . . .

Such a program shall at a minimum include: periodic surveys to monitor leakage, [enumerate unaccounted for water], and determine the current status of system infrastructure; recommendations to [monitor and] control leakage; and a schedule for the implementation of such recommendations. Each purveyor's program shall be subject to review and approval by the designated agency in the state where the system is located.

["Unaccounted-for water" is defined as the difference between the "metered ratio" and 100 percent. The metered ratio is the amount of water delivered through service meters divided by the amount of water entering the distribution system.]

The designated state agencies are: Delaware Department of Natural Resources and Environmental Control; New Jersey Department of Environmental Protection; New York Department of Health, and Pennsylvania Department of Environmental Protection.

*B. Each purveyor shall strive to minimize system leakage to levels as guided by IWA/AWWA Water Audit Methodology (AWWA Water Loss Control Committee (WLCC) Water Audit Software) and corresponding AWWA guidance. [Each purveyor that distributes in excess of one million gallons per day (mgd) shall submit its initial program to monitor and control leakage to the appropriate designated agency within two years and each purveyor that distributes between 100,000 gpd and 1 mgd shall submit its initial program to monitor and control leakage to the appropriate designated agency within five years of the effective date of this regulation or at such earlier date as shall be fixed by the designated state agency. Each purveyor shall prepare and submit a revised and updated program to monitor and control leakage every three years thereafter or at such earlier date as shall be required by the designated state agency. The designated state agency may require more frequent program submission from purveyors with unaccounted-for water that is in excess of 15 percent.]*

C. Any project approvals hereafter granted pursuant. . . . .

§ 2.1.8 Water Auditing (Resolution No. 2008 - xx).

*A. It shall be the policy of the commission to encourage owners of water supply systems serving the public to implement a standardized water audit methodology to ensure accountability in the management of water resources.*

*B. For the period beginning [EFFECTIVE DATE] and ending December 31, 2011, owners of water supply systems serving the public, with sources or service area located in the Delaware River Basin, are encouraged to implement an annual calendar year water audit program conforming to IWA/AWWA Water Audit Methodology (AWWA Water Loss Control Committee (WLCC) Water Audit Software) and corresponding AWWA guidance.*

*C. Effective January 1, 2012, the owners of each water supply system serving the public, with sources or service area located in the Delaware River Basin, shall implement an annual calendar year water*

*audit program conforming to IWA/AWWA Water Audit Methodology (AWWA Water Loss Control Committee (WLCC) Water Audit Software) and corresponding AWWA guidance.*

*D. Effective January 1, 2013, non-revenue water reported under section 2.50.3.B.1.b.ii. shall be computed in accordance with IWA/AWWA Water Audit Methodology (AWWA Water Loss Control Committee (WLCC) Water Audit Software) and corresponding AWWA guidance.*

§ 2.50.3 B.1.b.ii. . . . . - Other metered (Specify)

- Non-revenue water, including unbilled authorized consumption, apparent losses, and real losses computed in accordance with section 2.1.8.D

[- Unaccounted for (defined as the amount of water entering the distribution system minus the amount of water delivered through service meters)] \*\*

- Total. . . . .

[\*\*Further breakdown of unaccounted for water can be provided. For example, estimated fire hydrant use, other unmetered public uses, and leakage losses.]

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## Education Department

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### NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

**Employment of Retired Persons**

**I.D. No.** EDU-29-08-00004-ERP

**Filing No.** 774

**Filing Date:** 2008-08-01

**Effective Date:** 2008-08-01

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

**Action Taken:** Repeal of section 80-5.5, and addition of new section 80-5.5 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 3003(1), 3004(1); Retirement and Social Security Law, sections 210 (not subdivided), 211(2) and (8)

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

**Specific reasons underlying the finding of necessity:** The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. In order to address recent concerns over the approval process, on May 22, 2008, the Commissioner of Education suspended the approval process for 60 days to conduct a thorough review of the process and make any necessary improvements, with a particular focus on transparency, effectiveness and legislative intent. The proposed amendment incorporates several actions that the Commissioner believes will improve the approval process.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare in order to strengthen the current regulatory standards relating to the approval process prescribed under Section 211 of the Retirement and Social Security Law and to ensure that such standards are in place immediately in order to conform with the provisions of S.8669, which has passed both the Senate and Assembly and we anticipate being signed by the Governor.

**Subject:** Employment of retired persons.

**Purpose:** To strengthen the standards for approval by the Commissioner of Education for the employment of retired persons.

**Text of emergency/revised rule:** 1. The emergency action taken at the June 24, 2008 meeting of the Board of Regents, which repealed Section 80-5.5 of the Regulations of the Commissioner of Education and added a new Section 80-5.5, is repealed, effective July 31, 2008.

2. Section 80-5.5 of the Regulations of the Commissioner of Education is repealed and a new section 80-5.5 of the Regulations of the Commissioner of Education is added, effective August 1, 2008 as follows:

§ 80-5.5 *Employment of retired public employees.*

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

(1) "High need school" means a school designated by the commissioner of education as a high need school. Such term shall include, but not be limited to, schools under registration review, low performing schools, and other high need schools, in which there was a shortage of certified teachers in the previous school year and there is a projected shortage in the current school year.

(2) "Teacher shortage area" means a subject area designated by the commissioner of education as having a shortage of certified teachers in the previous school year and a projected shortage in the current school year.

(3) "Retired person" means a retired person as defined in section 210 of the Retirement and Social Security Law.

(b) *Applicability.*

(1) The approval of the commissioner to the employment of a retired person by any school district (other than the city school district of the city of New York), or by any board of cooperative educational services ("BOCES") or any county vocational education and extension board, in the unclassified service pursuant to section 211 of the Retirement and Social Security Law, shall be obtained in accordance with the requirements prescribed in this section.

(2) The approval of the commissioner shall not be granted for the employment of a retired person in any school district, BOCES or county vocational education and extension board if the retired person is seeking to return to work in the same or similar position that the retired person retired from for a period of one year following the date of his/her retirement.

(c) *Written request for approval.*

(1) The prospective employer shall file with the commissioner a written request for approval, which shall certify to the commissioner the following:

(i) That the retired person is duly qualified and competent.

(ii) That the retired person is physically fit to perform the duties to be assigned.

(iii) That the retired person is properly certified as a teacher where such certification is required.

(iv) Specific reasons why there is a need for the services of the particular retired person.

(v) Specific reasons why the employment of the particular retired person is in the best educational interests of the district, or the board.

(vi) That there are not readily available other persons who are not retired persons qualified to perform the duties to be assigned, in accordance with section 211 of the Retirement and Social Security Law.

(2) The written request shall also include satisfactory documentation to establish either of the following:

(i) That the district or board has undertaken an extensive and good faith recruitment search for a certified and qualified candidate and determined that there are no available non retired persons qualified to perform the duties of such position. Satisfactory documentation of an extensive and good faith recruitment search shall include, but not be limited to, evidence that the district or board:

(a) considered all certified and qualified non retired candidates before requesting approval from the commissioner under this section; and

(b) advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or

(ii) That there is an urgent need for the retired person's services in such position as a result of an unplanned, unpredictable and unexpected vacancy requiring an immediate temporary interim appointment, precluding the district or board from conducting an extensive recruitment search. In the case of an emergency interim appointment, the district or board shall describe the selection process employed for the interim appointment.

(3) Each written request for approval of employment of a retired person shall be accompanied by:

(i) a copy of the resolution of the board authorizing such employment, subject to the approval of the commissioner;

(ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period. The recruitment plan shall specify the selection criteria, the media outlets the district or board will utilize to recruit a candidate and contingency plans for expanded recruitment if the initial recruitment procedures do not yield sufficient, certified non retired candidates; and

(iii) if a school district is seeking the commissioner's approval of employment of a retired person to the position of superintendent of schools, a certification that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

(4) The written request shall be signed by the prospective employer

and the retired person and filed with the commissioner prior to employment, but in no event more than 30 days after employment commences.

(e) *Duration of Approval.*

(1) Approval of the commissioner shall be for a period of up to one school year; and may be renewed once for up to an additional school year, but only in instances of demonstrated extreme hardship or other unexpected and unforeseen circumstances beyond the control of the district or board.

(2) Upon expiration of any renewal of the commissioner's approval for the employment of a retired person, a district or board shall not apply to the commissioner for additional approval under this section for a retired person seeking employment in the same position, in the same district unless the retired person is employed in a position as a certified teacher in a teacher shortage area or in a high need school, or in extreme circumstances where a district, BOCES or county vocational education and extension board is prohibited by law or otherwise from hiring a permanent replacement for a position, and such employment has been approved pursuant to this section.

(f) *Notification to Taxpayers.* Upon employment of a retired person under this section, the district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the commissioner for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

**Emergency rule compared with proposed rule:** Substantial revisions were made in section 80-5.5(b)(2), (c)(2)(i), (c)(2)(ii), (e)(2) and (3).

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Education Department, Office of Counsel, 89 Washington Ave., Rm. 148, Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner, Education Department, 89 Washington Ave., 2M West Wing, Albany, NY 12234, (518) 474-3862, email: P16education@mail.nysed.gov

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

#### **Revised Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Section 101 of the Education Law charges the Department with the general management and supervision of all the educational work of the State and establishes the Regents as the head of the Department.

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 305 (1) of the Education Law authorizes the Commissioner of Education to enforce all laws relating to the educational system of the State and execute all educational policies determined by the Board of Regents.

Section 305 (2) of the Education Law provides that the Commissioner shall have general supervision over all schools and shall advise and guide the school officers of all school districts in relation to their duties and the general management of schools under their control.

Section 3003(1) of the Education Law authorizes the Commissioner of Education to certify school superintendents employed in the public schools of the State.

Section 3004(1) of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools of the State.

Section 211 (2) of the Retirement and Social Security Law permits a retired person to be employed in the unclassified service of a school district other than the city of New York, a board of cooperative education services or a county vocational education and extension board upon approval of the Commissioner of Education.

Section 211 (8) of the Retirement and Social Security Law authorizes the Commissioner of Education to promulgate regulations governing the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards.

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

The proposed amendment carries out the intent of the aforementioned statutes by strengthening the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law.

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

The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. In order to address recent concerns over the approval process, on May 22, 2008, the Commissioner of Education suspended the approval process for 60 days to conduct a thorough review of the process and make any necessary improvements, with a particular focus on transparency, effectiveness and legislative intent. The proposed amendment incorporates several actions that the Commissioner believes will improve the approval process.

#### 4. COSTS:

(a) Costs to State Government: The amendment will not impose any additional costs on State government.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Cost to the regulatory agency: As stated above in Costs to State Government, the proposed amendment does not impose additional costs on the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted an extensive and good faith recruitment search for a certified and qualified candidate and determined that there are no available non retired persons qualified to perform the duties of such position, including satisfactory documentation that the district or board considered all certified and qualified non retired candidates before requesting approval from the commissioner and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that there is an urgent need for the retired person's services in such position as a result of an unplanned, unpredictable and unexpected vacancy requiring an immediate temporary interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

#### 6. PAPERWORK:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted an extensive and good faith recruitment search for a certified and qualified candidate and determined that there are no available non retired persons qualified to perform the duties of such position, including satisfactory documentation that the district or board considered all certified and qualified non retired candidates before requesting approval from the commissioner and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that there is an urgent need for the retired person's services in such position as a result of an unplanned, unpredictable and unexpected vacancy requiring an immediate temporary interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the

prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

#### 7. DUPLICATION:

There are no other State or Federal requirements on the subject matter of this amendment. Therefore, the amendment does not duplicate other existing State or Federal requirements.

#### 8. ALTERNATIVES:

An earnings limitation on retiree's salaries was considered and was rejected due to the need to attract qualified candidates, particularly in emergency circumstances when an immediate interim appointment may be necessary.

Consideration was also given to the alternative of requiring a district or board to provide the Commissioner with their rationale for not selecting a qualified, non-retired candidate. This alternative was rejected because the Department believes that such a provision would be duplicative of existing provisions in the regulation, i.e., the requirement that a district or board provide satisfactory evidence that it conducted a thorough and good faith search for a certified and qualified candidate and that the district or board considered all certified non retired candidates before requesting approval from the commissioner.

The Department also considered prohibiting superintendents from participating in the selection process of an interim superintendent. This prohibition was clarified to permit superintendents to participate in the selection process, but prohibit superintendents from leading the review process.

Another alternative considered was to prohibit a retired person from seeking employment in any district/board from which the retired person was employed in the two-year period preceding retirement. This requirement was adjusted to prohibit a retired person from seeking employment in the district/board from which he/she retired from for a year following retirement.

#### 9. FEDERAL STANDARDS:

There are no Federal standards concerning the subject matter of this amendment.

#### 10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its effective date. No additional period of time is necessary to enable regulated parties to comply.

#### *Revised Regulatory Flexibility Analysis*

##### (a) Small Businesses:

The proposed amendment establishes the regulatory standards relating to the process for approval by the Commissioner of Education for the employment of retired persons in school districts, boards of cooperative educational services and county vocational education and extension boards, as required by section 211 of the Retirement and Social Security Law. 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 establishes the regulatory standards relating to the process for approval by the Commissioner of Education for the employment of retired persons in school districts, boards of cooperative educational services and county vocational education and extension boards, as required by section 211 of the Retirement and Social Security Law.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted an extensive

and good faith recruitment search for a certified and qualified candidate and determined that there are no available non retired persons qualified to perform the duties of such position, including satisfactory documentation that the district or board considered all certified and qualified non retired candidates before requesting approval from the commissioner and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that there is an urgent need for the retired person's services in such position as a result of an unplanned, unpredictable and unexpected vacancy requiring an immediate temporary interim appointment, precluding the district or board from conducting an extensive recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

### 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 Retirement and Social Security Law.

### 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 strengthens current regulatory standards relating to the approval process for the employment of retired persons in school districts, BOCES or county vocational education and extension boards, as prescribed in Retirement and Social Security Law § 211. Because the 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.

### 7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts across the State.

#### *Revised Rural Area Flexibility Analysis*

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

The Department estimates that it receives approximately 400 written requests for approval of employment under Section 211 of the Retirement and Social Security Law per year from school districts, boards of cooperative educational services (BOCES) and county vocational education and extension boards 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:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted an extensive and good faith recruitment search for a certified and qualified candidate and determined that there are no available non retired persons qualified to perform the duties of such position, including satisfactory documentation that the district or board considered all certified and qualified non retired candidates before requesting approval from the commissioner and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the

district or board; or (2) that there is an urgent need for the retired person's services in such position as a result of an unplanned, unpredictable and unexpected vacancy requiring an immediate temporary interim appointment, precluding the district or board from conducting an extensive recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

### 3. COSTS:

The proposed amendment will not any impose costs beyond those currently required to comply with statutory and regulatory requirements for the employment of retired persons in school districts, BOCES and county vocational education and extension boards.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment strengthens the approval process for a school district, BOCES or county vocational educational and extension board seeking approval by the Commissioner for the employment of retired persons in such districts or boards. These requirements are in place to insure that school districts have the best available leadership and to improve the approval process with a particular focus on transparency, effectiveness and legislative intent. Because these statutory requirements specifically apply to 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.

### 5. RURAL AREA PARTICIPATION:

The proposed rule was submitted for comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas.

#### *Revised Job Impact Statement*

The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. 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.

#### *Assessment of Public Comment*

The agency received no public comment.

## NOTICE OF ADOPTION

### Contracts for Excellence

**I.D. No.** EDU-20-07-00005-A

**Filing No.** 775

**Filing Date:** 2008-08-04

**Effective Date:** 2008-08-21

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

**Action taken:** Amendment of section 170.12 and addition of section 100.13 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), 211-d(1-9), and section 12 of Part A of Chapter 57 of the Laws of 2007, and section 2 of Part A of Chapter 57 of the Laws of 2008

**Subject:** Contracts for excellence.

**Purpose:** To establish allowable programs and activities, criteria for public reporting by school districts.

**Substance of final rule:** The rule is necessary to implement Education Law section 211-d to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts.

The proposed rule was adopted as an emergency measure at the April Regents 2007 meeting, revised and readopted as an emergency rule at the June and July 2007 Regents meetings, readopted as an emergency action at the September and October 2007 and January 2008 Regents meetings, and revised and readopted as an emergency action at the March, May and June 2008 Regents meetings.

At the July 2008 Regents meeting, the proposed rule was revised as described in the Statement Concerning the Regulatory Impact Statement filed herewith, and as so revised, adopted as a permanent rule.

The following is a summary of the permanent rule.

Section 100.13(a) defines: (1) total foundation aid; (2) supplemental educational improvement plan grant; (3) contract amount; (4) base year; (5) experimental programs; (6) highly qualified teacher; (7) response to intervention program and (8) students with low academic achievement.

Section 100.13(b) provides that each contract shall be prepared pursuant to the requirements of subdivision (d), shall be in a format, and submitted pursuant to a timeline, prescribed by the Commissioner and shall:

(1) describe how the contract amount shall be used to support new programs and new activities or expand use of programs and activities demonstrated to improve student achievement, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(c); and specify how the contract amount will be distributed in accordance with 100.13(b)(3);

(2) specify the new or expanded programs, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(c), for which each sub-allocation of the contract amount shall be used and affirm that such programs shall predominately benefit students with the greatest educational needs including, but not limited to: (a) limited English proficient (LEP) students and students who are English language learners (ELL), (b) students in poverty, (c) students with disabilities, and (d) students with low academic achievement;

(3) state, for all funding sources, whether federal, state or local, the instructional expenditures per pupil, the special education expenditures per pupil, and the total expenditures per pupil, projected for the current year and estimated for the base year; provided that no later than February 1 of the current school year, the district shall submit a revised contract stating such expenditures actually incurred in the base year;

(4) include any programmatic data projected for the current year and estimated for the base year, as the Commissioner may require; and

(5) in the NYC school district, include a plan that meets the requirements of section 100.13(d)(2)(i)(a), to reduce average class sizes within five years for the following grade ranges: (a) prekindergarten through grade three; (b) grades four through eight; and (c) grades nine through twelve. Such plan shall be aligned with the capital plan of the NYC school district and include continuous class size reduction for low performing and overcrowded schools beginning in the 2007-2008 school year and thereafter and include the methods to be used to achieve proposed class sizes, such as the creation or construction of more classrooms and school buildings, the placement of more than one teacher in a classroom or methods to otherwise reduce the student to teacher ratio. Beginning in the 2008-2009 school year, such plan shall provide for reductions in class size that, by the end of the 2011-2012 school year, will not exceed the prekindergarten through grade 12 class size targets prescribed by the Commissioner after consideration of the recommendation of an expert panel appointed to review class size research.

Paragraph (3) of section 100.13(b) prescribes requirements for the use of contract for excellence funds.

The Commissioner shall approve each contract meeting the provisions of section 100.13 and certify, for each contract, that the expenditure of additional aid or grant amounts is in accordance with Education Law section 211-d(2). Approval shall be given to contracts demonstrating to the Commissioner's satisfaction that the allowable programs selected:

(i) predominately benefit students with the greatest educational needs;

(ii) predominately benefit students in schools identified as requiring academic progress, or in need of improvement, or in corrective action, or restructuring and address the most serious academic problems in those schools; and

(iii) are based on practices supported by research or other comparable evidence in order to facilitate student attainment of State learning standards.

Section 100.13(c) establishes the allowable programs and activities, including experimental programs. Section 100.13(c)(1) establishes general requirements, including that such programs and activities: (1) predominately benefit students with the greatest educational needs including, but not limited to: LEP and ELL students, students in poverty, students

with disabilities, and students with low academic achievement; (2) predominately benefit students in schools identified as requiring academic progress, in need of improvement, in corrective action, or restructuring and address the most serious academic problems in those schools; (3) be consistent with federal and State statutes and regulations governing the education of such students; (4) be developed in reference to practices supported by research or other comparable evidence in order to facilitate student attainment of State learning standards; (5) where applicable, be accompanied by high quality, sustained professional development focused on content pedagogy, curriculum development, and/or instructional design in order to ensure successful implementation of each program and activity; (6) ensure that expenditures of the contract amount shall be used to supplement and not supplant funds expended by the district in the base year for such purposes; (7) ensure that all additional instruction is provided by appropriately certified teachers or highly qualified teachers where required by section 120.6 of this Title, emphasizing skills and knowledge needed to facilitate student attainment of State learning standards; and (8) be coordinated with all other allowable programs and activities included in the district's contract as part of the district's comprehensive educational plan.

Section 100.13(c)(2) establishes criteria for specific allowable programs and activities, which shall include: (1) class size reduction for (a) the NYC school district and (b) all other school districts; (2) student time on task; (3) teacher and principal quality initiatives; (4) middle school and high school restructuring; and (5) full-day kindergarten or prekindergarten programs.

Section 100.13(c)(2)(i) establishes requirements for class size reduction, including special provisions for NYC. NYC must allocate some of its total contract amount to class size reduction according to a plan, included in their contract and approved by the Commissioner pursuant to section 100.13(c), to reduce the average class size for the following grade ranges: prekindergarten to grade three, grades four through eight, and grades nine through twelve, commencing in the 2007-2008 school year and ending in the 2011-2012 school year, to target levels recommended by the expert panel appointed by the Commissioner. Districts outside of NYC shall establish class size reduction goals in the 2007-2008 school year and demonstrate measurable progress towards meeting such goals; and beginning with the 2008-2009 school year, shall demonstrate measurable progress towards meeting the target levels recommended by the expert panel. The rule also mandates NYC give priority to prekindergarten through grade 12 students in schools requiring academic progress, correction, improvement or in restructuring and to overcrowded schools. Furthermore, it requires that classrooms created shall provide adequate and appropriate physical space to students and staff, among others. Class size reduction may be accomplished through the creation of additional classrooms and buildings, through assignment of more than one teacher to a classroom or, in NYC, by other methods to reduce the student to teacher ratio, as approved by the Commissioner.

Section 100.13(c)(2)(ii) provides that allowable programs and activities related to student time on task may be accomplished by: (1) lengthened school days, (2) lengthened school years and (3) dedicated instructional time, including individual intervention, tutoring and student support services.

Section 100.13(c)(2)(iii) prescribes requirements for teacher and principal quality initiatives, including: (1) recruitment and retention of teachers, (2) mentoring for teachers and principals in their first or second year of a new assignment, (3) incentive programs for teacher placement, (4) instructional coaches, and (5) school leadership coaches. Districts shall ensure that an appropriately certified, or highly qualified teacher where required under section 120.6, is in every classroom and an appropriately certified principal is assigned to every school.

Section 100.13(c)(2)(iv) provides that allowable programs and activities for middle and high school restructuring include: (1) instructional program changes to improve student achievement and attainment of the State learning standards and (2) structural organization changes. The section further requires that districts choosing to make organization changes must also make instructional program changes.

Section 100.13(c)(2)(v) is added to provide that allowable programs and activities for model programs for student with limited English proficiency include: (1) programs serving limited English proficiency students to address their learning needs by providing education in their native language, provide targeted programs to student who have resided in the United States for 7 years or longer and who are below grade level in reading, writing and other targeted areas, and provide support services to students transitioning into mainstream educational settings; (2) native language support; (3) new immigrant programs; (4) recruitment and retention programs for bilingual teachers and personnel staff; and (5) parent involvement programs.

Section 100.13(c)(2)(vi) provides that allowable programs and activities for full-day kindergarten or prekindergarten programs include: (1) a

minimum full school day program, (2) a minimum full school day program with additional hours for children and families, (3) a minimum full school day program with additional hours in collaboration with community based agencies (prekindergarten only), and (4) classroom integration programs for students with disabilities (specifically for full-day prekindergarten).

Section 100.13(c)(3) lists the following requirements for experimental programs, not included in the allowable programs and activities described above: (1) a maximum percentage of the contract amount that may be used for experimental programs, (2) a plan must be submitted to the Commissioner, (3) the program must be based on an established theoretical base supported by research or other comparable evidence, (4) the implementation plan for an experimental program must be accompanied by a program evaluation plan based on empirical evidence to assess the impact on student achievement, and (5) the experimental program may be in partnership with an institution of higher education or other organization with extensive research experience and capacity.

Section 100.13(c)(3)(ii) states provides a maximum amount of up to \$30 million dollars or twenty-five percent of the contract amount, whichever is less, that districts may use in the 2007-2008 school year to maintain existing programs and activities listed in Education Law section 211-d(3)(a).

Section 100.13(d) establishes criteria for the development of the contract for excellence pursuant to a public process, in consultation with parents or persons in parental relation, teachers, administrators, and any distinguished educator appointed pursuant to Education Law section 211-c, which shall include at least one public hearing. Special provisions for NYC's development of the contracts are included.

Section 100.13(e) establishes requirements to assure procedures are in place by which parents may bring complaints concerning implementation of a district's contract for excellence, including special provisions for the NYC.

Section 100.13(f) establishes requirements for the public reporting by districts of their school-based expenditures of total foundation aid.

Section 170.12 (e)(1), relating to requirements of an annual audit of school district records, is amended to provide that, for schools required to prepare a contract for excellence pursuant to Education Law section 211-d, the annual audit for the year such contract is in effect shall also include a certification by the accountant or, where applicable, the NYC comptroller, in a form prescribed by the Commissioner, that the increases in total foundation aid and supplemental educational improvement plan grants have been used to supplement, and not supplant funds allocated by the district in the base year for such purposes.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in section 100.13 (b)(1)(vi), (c)(2)(i)(a)(2)(ii) and (b)(2)(ii).

**Revised rule making(s) were previously published in the State Register** on August 8, 2007, August 15, 2007, March 5, 2008, May 28, 2008 and June 18, 2008.

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

#### **Revised Regulatory Impact Statement**

Since publication of a Notice of Revised Rule Making in the State Register on June 18, 2007, the following nonsubstantial revisions were made to the proposed rule:

Section 100.13(b)(1)(vi), and section 100.13(c)(2)(i)(a)(2)(ii) and (b)(2)(ii), were revised to correct citation errors, by replacing references to 100.13(d) with references to 100.13(c). The revised rule published on June 18, 2008, among other changes, deleted subdivision (b) and relettered the succeeding subdivisions accordingly. However, certain citations within the regulation inadvertently included incorrect references to the previously lettered subdivisions, which have now been corrected.

These revisions do not require any further changes to the previously published Regulatory Impact Statement.

#### **Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Revised Rule Making in the State Register on June 18, 2008, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions to the proposed rule do not require any further changes to the previously published Regulatory Flexibility Analysis.

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

Since publication of a Notice of Revised Rule Making in the State Register on June 18, 2008, the proposed rule was revised as set forth in the Statement concerning the Regulatory Impact Statement filed herewith.

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

#### **Revised Job Impact Statement**

Since publication of a Notice of Revised Rule Making in the State Register on June 18, 2007, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The proposed amendment, as revised, is necessary to implement Education Law section 211-d, as added by Chapter 57 of the Laws of 2007 and amended by Chapter 57 of the Laws of 2008, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. The proposed revised amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

#### **Assessment of Public Comment**

The agency received no public comment.

### **NOTICE OF ADOPTION**

#### **Special Education Programs and Services**

**I.D. No.** EDU-08-08-00013-A

**Filing No.** 783

**Filing Date:** 2008-08-04

**Effective Date:** 2008-08-21

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

**Action taken:** Amendment of sections 177.1, 200.1, 200.3-200.7, 200.16 and 201.11 of Title 8 NYCRR.

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

**Subject:** Special education programs and services.

**Purpose:** To conform the Commissioner's Regulations to the Individuals with Disabilities Education Act.

**Text or summary was published** in the February 20, 2008 issue of the Register, I.D. No. EDU-08-08-00013-P.

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

**Revised rule making(s) were previously published in the State Register** on May 28, 2008.

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

#### **Assessment of Public Comment**

The agency received no public comment.

### **NOTICE OF ADOPTION**

#### **Teacher Tenure Determinations**

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

**Filing No.** 782

**Filing Date:** 2008-08-04

**Effective Date:** 2008-08-21

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

**Action taken:** Amendment of Part 30 and section 100.2 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 and 3012-b and chapter 57 of the Laws of 2008

**Subject:** Teacher tenure determinations.

**Purpose:** To establish minimum standards and procedures for teacher tenure determinations.

**Text or summary was published** in the April 2, 2008 issue of the Register, I.D. No. EDU-14-08-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, State Education Dept., State Education Bldg., Albany, NY 12234, (518) 474-8296, e-mail: legal@mail.nysed.gov

#### **Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**School Bus and Vehicle Engine Idling****I.D. No.** EDU-14-08-00012-A**Filing No.** 776**Filing Date:** 2008-08-04**Effective Date:** 2008-08-21

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

**Action taken:** 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 chapter 670 of the Laws of 2007

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

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

**Text or summary was published** in the April 2, 2008 issue of the Register, I.D. No. EDU-14-08-00012-P.

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

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

**Assessment of Public Comment**

Since publication of a Notice of Revised Rule Making in the State Register on June 11, 2008, the State Education Department received the following comments:

## 1. COMMENT:

The American Lung Association of New York State commended SED for its decision to require idling restrictions in all public school districts and to require that school buses park diagonally in school loading areas.

## DEPARTMENT RESPONSE:

We concur with this comment. The State Education Department, in consultation with the New York State Department of Health, has determined that the most effective method for reducing emissions and school bus idling in order to protect children with asthma and other respiratory conditions, is to apply the regulation to all school districts. The revision to the rule regarding diagonally parking was made in order to minimize exhaust that may enter school buildings as well as school buses.

## 2. COMMENT:

The rule exceeds the authority provided by the statute. Had the Legislature intended a statewide requirement, it would have imposed it.

## DEPARTMENT RESPONSE:

The proposed rule does not exceed the authority provided by the statute. Education Law section 3637(1), as added by Chapter 670 of the Laws of 2007 authorizes the Commissioner of Education to adopt regulations to implement the statute's provisions and provides the regulations "... shall apply to school districts identified by the commissioner, in consultation with the department of health, with a significant number of children with asthma and those other school districts deemed by the commissioner as appropriate [emphasis added]."

In developing the proposed rule, the State Education Department consulted with the Department of Health (DOH) and discussed the incidence of asthma in New York State schools. DOH indicated it had no objection to the rule. The statute did not specify a standard for what was to be considered a "significant number of children with asthma" and appropriate and current data was not available to determine which school districts were most affected by school bus diesel emissions. Based upon health, safety and other considerations discussed in Needs and Benefits section of the previously published Regulatory Impact Statement, and consistent with the statute's directive to minimize the idling of school buses and other vehicles, the rule has been drafted to apply to all public school districts in the State.

## 3. COMMENT:

School districts and private bus operators are already implementing aggressive anti-idling programs for environmental as well as fuel and economic reasons. They do not need a new and unnecessary regulation to initiate such efforts. More could be done by an aggressive anti-idling campaign to instruct school bus drivers on this issue than implementing new regulations.

## DEPARTMENT RESPONSE:

SED recognizes and appreciates the efforts of the school bus community to voluntarily implement anti-idling programs to protect the health of pupils and the environment. School districts and private bus operators are to be commended for their efforts to reduce harmful emissions from school

buses and to conserve fuel. SED had encouraged districts and operators to take such action by developing and implementing an Anti-Idling Campaign in 2004 to educate school bus drivers about the importance of reducing idling, and about common misconceptions regarding the necessity to continue idling school buses. However, such actions were not deemed to be sufficient and the Legislature passed a law specifically to reduce school bus idling. This statute further required the Commissioner to adopt regulations which minimize restrict the amount of idling by school buses. The proposed rule will enact uniform State-wide standards to ensure that all school districts and their contractors act to minimize school bus idling.

## 4. COMMENT:

The regulation imposes new mandates upon districts which go beyond the provisions of the statute such as requiring additional reporting and record-keeping, monitoring driver actions regarding idling, and urging school drivers to expedite the prompt loading of pupils.

## DEPARTMENT RESPONSE:

The rule does not impose any new mandates which are not consistent with a school district's responsibility to insure their compliance with the statutory requirement. Previous comments were received which requested that school bus drivers urge students to expedite loading the bus. The Council of School Superintendent's suggested language to modify the requirement to conduct monitoring and maintain records which show compliance. These requests and suggestions were incorporated in the revised regulation, published in the State Register on June 11, 2008. The revised regulation provides more flexibility to school districts to monitor and report compliance with the rule's provisions, including replacing a requirement for two monitoring reviews at specified months, with a requirement that districts periodically but at least semi-annually monitor compliance; and replacing a requirement that the monitoring report include the name of each driver, the date, and the degree of adherence found, with a requirement that the report describe the actions taken to review compliance and the degree of adherence found.

## NOTICE OF ADOPTION

**Honorary Associate Degrees****I.D. No.** EDU-19-08-00004-A**Filing No.** 781**Filing Date:** 2008-08-04**Effective Date:** 2008-08-21

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

**Action taken:** Amendment of section 3.50(c) of Title 8 NYCRR.

**Statutory authority:** Education Law sections 207 (not subdivided), 214 (not subdivided), 215 (not subdivided), 305 (1) and (2) and 6306 (5-b)

**Subject:** Honorary associate degrees.

**Purpose:** The purpose of the rule is to establish the list of honorary associates degrees that community colleges and other New York degree-granting institutions may award.

**Text or summary was published** in the May 7, 2008 issue of the Register, I.D. No. EDU-19-08-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Department, State Education Department, Office of Counsel, State Education Building, Room 148, Albany, New York 12234, (518) 473-8296, email: legal@mail.nysed.gov

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Student Dental Health Certificates****I.D. No.** EDU-19-08-00005-A**Filing No.** 779**Filing Date:** 2008-08-04**Effective Date:** 2008-09-01

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

**Action taken:** Amendment of section 136.3(k) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 305(1), (2), 903(2)(a), (b), 3(b) and (4)

**Subject:** Student dental health certificates.

**Purpose:** To prescribe requirements for school districts to request a dental health certificate from each student in the public schools.

**Text or summary was published** in the May 7, 2008 issue of the Register, I.D. No. EDU-19-08-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, State Education Dept., State Education Bldg., Rm. 148, Albany, NY 12234, (518) 474-8296, e-mail: legal@mail.nysed.gov

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Licensure as a Clinical Laboratory Technologist and Cytotechnologist and Certification as a Clinical Laboratory Technician**

**I.D. No.** EDU-20-08-00030-A

**Filing No.** 780

**Filing Date:** 2008-08-04

**Effective Date:** 2008-08-21

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

**Action taken:** Repeal of sections 79-13.1, 79-14.1 and 79-15.1; and addition of sections 52.38, 52.39, 52.40, 79-13.1, 79-14.1 and 79-15.1 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 210 (not subdivided), 6501 (not subdivided), 6504 (not subdivided), 6507(2)(a), (3)(a) and (4)(a), 6508(1), 8605(1)(b), (2)(b) and 8606(2)

**Subject:** Licensure as a clinical laboratory technologist and cytotechnologist and certification as a clinical laboratory technician.

**Purpose:** To establish educational requirements for licensure as a clinical laboratory technologist or cytotechnologist.

**Text or summary was published** in the May 14, 2008 issue of the Register, I.D. No. EDU-20-08-00030-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, State Education Dept., State Education Bldg., Albany, NY 12234, (518) 474-8296, e-mail: legal@mail.nysed.gov

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Certification in the Classroom Teaching Service Through Individual Evaluation**

**I.D. No.** EDU-20-08-00031-A

**Filing No.** 778

**Filing Date:** 2008-08-04

**Effective Date:** 2008-08-21

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

**Action taken:** Amendment of section 80-3.7 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 305, 3004 and 3006

**Subject:** Certification in the classroom teaching service through individual evaluation.

**Purpose:** To extend the expiration date for applicants seeking certification through the individual evaluation pathway.

**Text or summary was published** in the May 14, 2008 issue of the Register, I.D. No. EDU-20-08-00031-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, State Education, State Education Bldg. Rm. 1478, Albany, NY 12234, (518) 474-8296, e-mail: legal@mail.nysed.gov

**Assessment of Public Comment**

The agency received no public comment.

**State Board of Elections**

**NOTICE OF EXPIRATION**

The following notice has expired and cannot be reconsidered unless the State Board of Elections publishes a new notice of proposed rule making in the NYS Register.

**Minimum Number of Required Voting Machines**

I.D. No.	Proposed	Expiration Date
SBE-31-07-00004-P	August 1, 2007	July 31, 2008

**Department of Health**

**NOTICE OF ADOPTION**

**Qualifications of Local Health Department Personnel**

**I.D. No.** HLT-08-08-00012-A

**Filing No.** 777

**Filing Date:** 2008-08-05

**Effective Date:** 2008-08-20

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

**Action taken:** Amendment of Part 11 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 225(4), (5) and 206(1)(a)

**Subject:** Qualifications of Local Health Department Personnel.

**Purpose:** Modernize minimum qualifications for public health personnel to enable LHDs to recruit and retain competent appropriately trained public health professionals.

**Text of final rule:** The table of contents for Part 11 is amended to read as follows:

PART 11  
QUALIFICATIONS OF PUBLIC HEALTH PERSONNEL  
(Statutory authority: Public Health Law, Section 225)

Sec.  
GENERAL PROVISIONS  
11.0 Purpose, scope and construction

\* \* \*

PUBLIC HEALTH NURSE 1  
11.40 Definition  
11.41 Entry level qualifications  
[11.42 Supervisory level qualifications]

PUBLIC HEALTH NURSE 2  
11.42 Definition  
11.43 Qualifications  
11.44 Supervisory level definition  
11.45 Supervisory level qualifications

\* \* \*

ENVIRONMENTAL HEALTH DIRECTOR  
11.90 Definitions  
11.91 Qualifications

\* \* \*

PUBLIC HEALTH [OFFICIAL] SOCIAL WORKER  
\* \* \*

PUBLIC HEALTH EPIDEMIOLOGIST  
11.196 Definition  
11.197 Minimum qualifications  
11.198 Supervisory level qualifications

Subdivision (d) of Section 11.0 is amended to read as follows:  
(d) All public health professionals in the employ of local health [units] departments on June 2, [January 1, 1979] 2008, and [possessing current Health Department certification] in a title described in this part at the entry or supervisory level, shall be considered as meeting the qualifications prescribed by this Part for the title held in the entry or supervisory levels, respectively.

Subdivision (a) (2) (i) and (ii) of Section 11.2 are amended to read as follows:

(i) a baccalaureate degree from a regionally accredited or New York State registered [four-year] college or university and two years of [supervisory] experience in the administration, enforcement or management of a health or public health related program, including one year of supervisory experience; or

(ii) a master's degree in public health or a related field from a regionally accredited or New York State registered college or university and one year of supervisory experience in the administration, enforcement or management of a health or public health related program; or

Section 11.11 is amended to read as follows:

#### 11.11 Qualifications.

(a) A commissioner of health of a county, or a city having a population of 50,000 or more and having an established department of health, shall be a physician who is currently registered to practice medicine in New York State and possesses two [one] years of experience in administrative practice that demonstrates that the candidate possesses the knowledge and skills to administer public health programs including workforce and budget management, effective communications, effective establishment and implementation of policy or business goals, and compliance with legal requirements and:

(1) certification by the American Board of Preventive Medicine, or

(2) a master's degree in public health [or a related field] from a regionally accredited or New York State-registered college or university that demonstrates the core competencies of a masters in public health (Biostatistics, Environmental Health Sciences, Epidemiology, Health Policy and Management, and Social and Behavior Sciences) or a masters degree in a related field from a regionally accredited New York State-registered college or university. [; or]

(3) an appropriate combination of education and experience deemed equivalent by the State Commissioner of Health.]

(b) All appointments to the position of commissioner of health must be approved by the State Commissioner of Health.

(c) Candidates who do not meet the education or experience requirements of this section may be conditionally approved by the State Commissioner of Health for an appointment of two years, with an opportunity for two additional one year conditional renewals. Final approval of these candidates shall be contingent on satisfactory progress in meeting a public health education or experience plan developed in conjunction with and approved by the State Commissioner of Health.

Sections 11.40 and 11.41 are amended to read as follows:

#### PUBLIC HEALTH NURSE 1

##### 11.40 Definition.

The term public health nurse 1 shall mean a nurse who plans, provides, directs and evaluates nursing care in a variety of settings with the goal of improved health outcomes and [offers instruction and guidance in health practices for] is actively involved in the planning, development, provision and evaluation of public health programs designed to prevent disease and improve the health of individuals, [and] families, specific populations, high risk groups and/or communities.

##### 11.41 Entry level qualifications.

A public health nurse 1 must possess a baccalaureate degree in nursing from a regionally accredited or New York State-registered [four-year] college or university, as well as licensure and current registration[,] to practice as a registered professional nurse in New York State.

Section 11.42 is repealed and a new section 11.42 is added to read as follows:

#### PUBLIC HEALTH NURSE 2

##### 11.42 Definition.

The term public health nurse 2 shall mean a nurse who plans, provides, directs and evaluates nursing care in a variety of settings with the goal of improving health outcomes and is actively involved in the planning, development, provision and evaluation of public health programs designed to prevent disease and improve the health of individuals, families, specific populations, high-risk groups and/or communities. The public health nurse 2 is also involved in program administration and/or program budget development and monitoring and/or quality improvement initiatives, and/or acting as advocate and liaison for constituents.

New sections 11.43, 11.44 and 11.45 are added to read as follows:

##### 11.43 Qualifications.

A public health nurse 2 must meet the qualifications for public health nurse 1 and have one year of experience in public health nursing.

A public health nurse 2 must complete 15 hours of continuing education in public health related topics approved by the New York State Department of Health within the first year of employment in the title.

##### 11.44 Supervisory level definition.

The term supervising public health nurse shall mean a nurse who

supervises public health nurses 1 and 2 and other staff. A supervising public health nurse plans, provides, and evaluates nursing care in a variety of settings with the goal of improving health outcomes and is actively involved in the planning, development, provision and evaluation of public health programs designed to prevent disease and improve the health of individuals, families, specific populations, high-risk groups and/or communities. A supervising public health nurse may be involved in program administration and/or program budget development and monitoring and/or quality improvement initiatives, and/or acting as advocate and liaison for constituents and/or policy development.

##### 11.45 Supervisory level qualifications.

A supervising public health nurse must meet the qualifications for public health nurse 1 and have two year's experience in public health nursing; or a master's degree in nursing from a regionally accredited or New York State-registered college or university and one year of experience in public health nursing.

A supervising public health nurse must complete 15 hours of continuing education in public health and management related topics approved by the New York State Department of Health within the first year of employment in this title.

New sections 11.90 and 11.91 are added to read as follows:

#### ENVIRONMENTAL HEALTH DIRECTOR

##### 11.90 Definitions.

(a) The term environmental health director shall mean a person who administers and manages the environmental health programs of a county, or a city having a population of 50,000 or more.

(b) The term natural science shall mean a science such as biology, chemistry or physics that deals with the objects, phenomena, or laws of nature and the physical world. It shall include all physical and biological sciences.

(c) The term applied science shall mean science based courses in environmental technology, sanitation technology, medical technology, public health, infection control or food science.

##### 11.91 Qualifications.

An environmental health director must possess:

(a) a baccalaureate degree from a regionally accredited or New York State registered college or university in sanitary, environmental, chemical, civil or public health engineering or a related engineering field; or a bachelor's degree from a regionally accredited or New York State registered college or university with thirty (30) credit hours in the natural sciences, of which not more than twelve (12) credit hours may be in the applied sciences; and

(b) two years of administrative and supervisory experience as a supervising engineer or supervising sanitarian as defined in this Part; or five years of environmental health experience, including two years of supervisory responsibility that demonstrates that the candidate has the technical and administrative skills necessary to manage programs that can anticipate, recognize and respond to environmental health challenges. A master's degree in public or environmental health or a related field that demonstrates the five core competencies of a public health education (Biostatistics, Environmental Health Services, Epidemiology, Health Policy and Management and Social and Behavior Sciences) may be substituted for up to two (2) years of the required environmental health experience.

Sections 11.100 and 11.101 are amended to read as follows:

##### 11.100 Definition.

The term public health engineer shall mean a person who applies engineering principles for the detection, evaluation, control and management of those factors in the environment which influence the public's [man's] health.

##### 11.101 Entry level qualifications.

A public health engineer must possess a baccalaureate degree in engineering from a regionally accredited or New York State registered [four-year] college or university or a license to practice as a professional engineer in New York State.

Section 11.110 is amended to read as follows:

##### 11.110 [Definition.] Definitions.

(a) The term public health sanitarian shall mean a person who applies the principles of the [physical, biological] natural and social sciences for the detection, evaluation, control and management of those factors in the environment which influence the public's [man's] health.

(b) The term natural science shall mean a science such as biology, chemistry or physics that deals with the objects, phenomena, or laws of nature and the physical world. It shall include all physical and biological sciences.

(c) The term applied science shall mean science based courses in

*environmental technology, sanitation technology, medical technology, public health, infection control or food science.*

Section 11.111 is amended to read as follows:

11.111 Entry level qualifications.

A public health sanitarian:

(a) must possess a baccalaureate degree from a regionally accredited or New York State registered [four-year] college or university with 30 credit hours in the [physical and biological] *natural sciences, of which not more than twelve (12) credit hours may be in the applied sciences, and have satisfactorily completed a public health training course approved by the State Health Department within [one] two years of appointment; or*

(b) may be a public health technician who possesses five years of experience as a public health technician deemed satisfactory by the local commissioner of health or public health director and have satisfactorily completed a *public health* training course approved by the State Health Department.

Section 11.112 is amended to read as follows:

A supervising public health sanitarian must meet the qualifications for a public health sanitarian and have two years [,] of experience as a public health sanitarian.

Section 11.121 is amended to read as follows:

11.121 Entry level qualifications.

A public health technician must possess an associate degree from a regionally accredited or New York State registered [two-year] college or university or have completed 60 credit hours, with a minimum of [12] 15 credit hours in the [physical and biological] *natural sciences [in either case], of which not more than six (6) credit hours may be in the applied sciences, and have satisfactorily completed a public health training course approved by the State Health Department within two years of appointment.*

Section 11.130 is repealed and a new Section 11.130 is added to read as follows:

*11.130 Definition.*

*The term local public health nutritionist shall mean a person who plans, develops, implements and evaluates nutrition services within the community and is actively involved in the planning, development, provision and evaluation of nutritional programs and services designed to prevent disease and improve the health of individuals, families, and communities.*

Sections 11.131 and 11.132 are amended to read as follows:

11.131 Entry level qualifications.

A local public health nutritionist must possess a baccalaureate degree, with major studies in food and nutrition, from a regionally accredited or New York State-registered [four-year] college or university, and be registered as a *dietician* [or be eligible for registration] by the American Dietetic Association.

11.132 Supervisory level qualifications

A supervising public health nutritionist must meet the qualifications for a public health nutritionist and have two years' experience as a public health nutritionist from a *regionally accredited or New York State-registered college or university, and one year of experience as a public health nutritionist.*

Sections 11.150, 11.151 and 11.152 are amended to read as follows:

11.150 Definitions.

The term *local public health educator* shall mean a person who applies the principles of behavioral sciences in public health programs to foster the voluntary adaptation of behavior to improve or maintain health.

11.151 Entry level qualifications.

A local public health educator must possess:

(a) a baccalaureate degree in *health education, health science, public health, health promotion, community health, or health communications* from a regionally accredited or New York State-registered [four-year] college or university; or

(b) a baccalaureate degree in *education, nursing, epidemiology, wellness and fitness, or nutrition* from a regionally accredited or New York State-registered college or university and one year experience in *health education; or [a health-related field and two years experience in health education.]*

(c) a baccalaureate degree in *marketing, human services, social work or psychology* from a regionally accredited or New York State-registered college or university and two years experience in *health education; or*

(d) a master's degree in *public health or health education* from a regionally accredited or New York State-registered college or university.

A local public health educator must satisfactorily complete 15 hours of continuing education in health education related topics approved by the New York State Health Department within one year of appointment.

11.152 Supervisory level qualifications.

A supervising public health educator must meet the qualifications for

local public health educator and have two years['] of experience as a public health educator or have a master's degree in public health or health education from a regionally accredited or New York State registered college or university and one year['] of experience as a public health educator.

Section 11.171 is amended to read as follows:

11.171 Entry level qualifications.

A public health social worker must [possess certification in social work] *be licensed as a master social worker* by the New York State Education Department.

Section 11.182 is amended to read as follows:

11.182 Qualifications.

(a) A public health director shall possess:

(1) a master's degree in public health [or a related field] *from a regionally accredited or New York State-registered college or university [and] that demonstrates the core competencies of a public health education (Biostatistics, Environmental Health Sciences, Epidemiology, Health Policy and Management, and Social and Behavior Sciences) or a masters degree in a related field from a regionally accredited or New York State-registered college or university. Related fields include public health nursing, health administration, community health education or environmental health; and*

(2) two [three] years of [public health administration] *administrative experience in a health related organization or government agency that demonstrates that the candidate possesses the knowledge and skills necessary to administer public health programs including workforce and budget management, effective communication, effective establishment and implementation of policy or business goals, and compliance with legal requirements. [, or an appropriate combination of education and experience deemed equivalent by the State Commissioner of Health.]*

(b) All appointments to the position of public health director and the appointment and arrangements for the medical consultant are subject to the approval of the State Commissioner of Health.

(c) *Candidates who do not meet the education or experience requirements of this section may be conditionally approved for an appointment of two years by the State Commissioner of Health with an opportunity for two additional one year conditional renewals. Final approval of these candidates shall be contingent on satisfactory progress in meeting a public health education or experience plan developed in conjunction with and approved by the State Commissioner of Health.*

[(c) Persons occupying a similar position as of January 1, 1979 with current health department certification shall be considered as meeting the qualifications for this position.]

New sections 11.196, 11.197 and 11.198 are added to read as follows:

**PUBLIC HEALTH EPIDEMIOLOGIST**

*11.196 Definition.*

*The term local public health epidemiologist shall mean a person who investigates the occurrence of disease, injury or other health-related conditions or events in populations to describe the distribution of disease or risk factors for disease occurrence for the purpose of population-based prevention and control.*

*11.197 Minimum qualifications.*

A local public health epidemiologist must possess:

(a) a master's degree from a regionally accredited or New York State-registered college or university in epidemiology, or in public health with a concentration in epidemiology, or a health related field with a minimum of six credits in epidemiology and six additional credits in epidemiology or biostatistics; or

(b) a bachelor's degree or higher from a regionally accredited or New York State-registered college or university and two years experience conducting data collection, analysis and reporting in support of surveillance and epidemiologic investigations; or

(c) a bachelor's degree or higher from a regionally accredited or New York State-registered college or university and one year of experience conducting data collection, analysis and reporting in support of surveillance and epidemiologic investigations and successful completion of a principles of epidemiology course for health professionals given by the Centers for Disease Control, U.S. Public Health Service.

*11.198 Supervisory level qualifications.*

A supervising local public health epidemiologist must meet the qualifications for a public health epidemiologist and have two additional years of experience conducting data collection, analysis and reporting in support of surveillance and epidemiologic investigations.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in sections 11.0(d), 11.171 and 11.197(c).

*Text of rule and any required statements and analyses may be obtained from:* Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488.

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

The non-substantive changes made to the rule do not require changes to the impact statements.

**Assessment of Public Comment**

No comments were received during the public comment period for this regulation. The New York State Department of Health (NYSDOH) received one letter subsequent to the end of the comment period from the New York City Department of Health and Mental Hygiene (NYC DOHMH). This summary is intended to clarify various issues and minimize concerns expressed in that letter.

The NYC letter raised the following issues:

- “Commissioner of Health” title - NYC should be exempt from the State Sanitary Code provisions addressing the qualifications for local commissioners of health.
- “Environmental Health Director” title - The job qualifications put too much emphasis on health engineering.
- “Public Health Educator” title -The requirement for one year of experience in health education should be eliminated.
- Public health training and continuing education requirements - The requirement that training must be approved by NYSDOH should be removed.
- “Public Health Epidemiologist” title - Qualifications are unnecessarily burdensome and will reduce the pool of qualified applicants.
- The meaning of “regionally accredited school” should be clarified and the regulations should clearly authorize acceptance of degrees from foreign schools.
- NYC or all jurisdictions should be permitted to waive particular requirements set forth in these regulations on a case-by-case basis when the local health department determines that the waiver of particular requirement does not jeopardize the public health.

In response to the concern that the qualifications for a “Public Health Epidemiologist” were unnecessarily burdensome and would limit the pool of qualified applicants, the Department has revised the qualifications to include an option that candidates may have one year of experience and have completed a course in epidemiology. This new requirement matches the NYCDOHMH qualifications, and does not substantially revise the regulation.

With regard to the comments that the “New York City Commissioner of Health Mental Health should be exempt from the requirements of the State Sanitary Code, the request for a waiver from all of the requirements in the Code, and the request for elimination of the requirement that training and continuing education be approved by NYSDOH, the NYSDOH determined that these would create wide variations among the qualifications of public health practitioners in New York State, contrary to the statutory intent and would contradict the goal of high consistent statewide standards to better serve public health.

The NYSDOH disagrees with the comments made about the “Environmental Health” title because engineering and sanitarian experience are given equal weight. The NYSDOH believes that additional changes to the Public Health Educator title are not warranted. The amendments are meant to provide greater flexibility while still requiring some health education experience.

A “regionally accredited or New York State registered college or university” means a school that has been accredited by one of six accrediting bodies in the United States recognized by the United States Education Department, or the NYS Board of Regents. The NYSDOH will work through the NYS Department of Civil Service to ensure that local hiring agencies are aware of this meaning. Local agencies can address the equivalency of foreign degrees on a case by case basis.

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

**Approval of Nonclinical Projects**

**I.D. No.** HLT-34-08-00006-P

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

**Proposed Action:** This is a consensus rule making to amend section 710.1(c)(6) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2802

**Subject:** Approval of Nonclinical Projects.

**Purpose:** Substitute prior limited review for administrative CON review of construction projects with costs between \$3 million and \$10 million.

**Text of proposed rule:** Existing subparagraphs (iv), (v) and (vi) of Paragraph (6) of Subdivision (c) of Section 710.1 are renumbered as (v), (vi) and (vii) respectively and a new subparagraph (iv) is added to read as follows:

(6) Proposals requiring a prior review.

\* \* \*

(iv) Any proposal that does not relate to a change in clinical service or equipment and is not subject to paragraph (3) of this subdivision and whose cost does not exceed \$10 million, including but not limited to: information systems, exterior building envelope (e. g., windows, roof, and wall repairs), parking garages, dietary, and solid waste and/or sewage disposal.

(a) Requests for approval of proposals described in this subparagraph shall be made directly to the Deputy Director of the Division of Health Facility Planning with a copy sent to the local health systems agency having jurisdiction. The HSA will have 10 days to make a recommendation to the department. If construction is required, the request should include the cost of such construction and other information required by the Bureau of Architectural and Engineering Facility Planning under this Part. The applicant shall submit three copies of all such requests for approval described herein.

(b) If the proposal is acceptable to the commissioner, the applicant shall be notified in writing within 30 days. If the proposal is not acceptable, the applicant shall be notified in writing within 30 days of such determination and the basis therefor. If the applicant disagrees with the commissioner’s determination, the applicant may submit a certificate of need application to be processed for administrative or full review in accordance with Part 710 of this Chapter.

[iv] (v) Any proposal to convert beds from one category to another in the categories listed in clause (a) of this subparagraph and for which the acute care inpatient facility is already a certified provider, shall be subject to a prior limited review under Article 28 of the Public Health Law.

\* \* \*

[v] (vi) Any proposal to operate, change services offered or relocate a part-time clinic site shall be subject to a prior limited review under Article 28 of the Public Health Law.

\* \* \*

[vi] (vii) Notwithstanding anything in this Title to the contrary, any proposal for the reallocation, relocation or redistribution of acute care beds from one general hospital to another general hospital within the same established Article 28 network shall be subject to a prior limited review under Article 28 of the Public Health Law.

\* \* \*

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488.

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

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

**Consensus Rule Making Determination**

**Statutory Authority:**

The statutory authority for the promulgation of these regulations is contained in section 2803(2) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner.

**Basis:**

Because the proposed rule simplifies CON approval requirements and eliminates the \$1,250 application fee for affected projects, the Department does not expect to receive any comments in opposition to the proposed revision following its publication in the State Register. In developing the proposed rule, the Department worked with both the Greater New York Hospital Association (GNYHA) and the Healthcare Association of New York State (HANYS), who have had the opportunity to review the draft rule and support its approval.

**Job Impact Statement**

No Job Impact Statement is required pursuant to section 201 a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

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

**Amendment and Update of Life Safety and Architectural Standards for Neurobehavioral and Neurobehavioral Step Down Units**

**I.D. No.** HLT-34-08-00007-P

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

**Proposed Action:** Amendment of section 713-2.5 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2803(2)

**Subject:** Amendment and update of life safety and architectural standards for neurobehavioral and neurobehavioral step down units.

**Purpose:** Life safety & architectural standards for nursing facilities providing care for residents requiring neurobehavioral intervention.

**Text of proposed rule:** Section 713-2.5 is amended to read as follows:

713-2.5 Units for residents requiring neurobehavioral intervention.

(a) *These dedicated and discrete units shall be either Neurobehavioral Units, or Neurobehavioral Step Down Units.* When provided, each separate unit shall comply with the requirements of a nursing unit in accordance with section 713-2.2 of this Subpart, with the following variations and additional requirements:

(1) (i) [The] *Each Neurobehavioral Unit* shall be designed for a minimum of 15 residents, shall be limited to a maximum of 20 residents and shall be planned as a secure unit.

(ii) *Each Neurobehavioral Step Down Unit shall be limited to a maximum of 20 beds and shall not be a secure unit, except that the unit shall be monitored for elopement, with a delayed egress system on all unit doors.*

(2)(i) All resident bedrooms in *Neurobehavioral Units* shall be of single occupancy.

(ii) *Neurobehavioral Step Down Units shall provide single occupancy resident rooms for at least 10% of the unit capacity. For the balance of the unit, the maximum number of beds in a resident room shall be two.*

(3) Doors to resident bedrooms shall open outward.

(4) A private toilet room shall be provided for each resident bedroom.

(5) An exercise room shall be located on the unit and provide a minimum of 25 square feet per resident. Additional space shall be provided for storage. Adjacent dedicated resident toilet and showers shall be provided.

(6) An activity room shall be located on the unit and provide a minimum of 38 square feet per resident. Additional space shall be provided for equipment storage. Adjacent resident toilet and bathing facilities shall be provided.

(i) *Each Neurobehavioral Step Down Unit shall be provided at least one separate enclosed room providing a distraction-free treatment environment with visual and auditory separation from adjacent spaces and functions. This space shall accommodate a maximum of eight persons, for activities for functional living skills or cognitive skill development.*

(7) A room shall be provided for quieting down periods for over active and acting out residents. The room shall provide a minimum of 125 square feet of clear space, and shall be designed and furnished to protect the resident from self-injury. The door to the room shall be provided with a one-way panel with a view of the entire room.]

[8](7) Conference/counseling rooms sufficient for private family meetings with facility personnel and for meetings of facility staff shall be provided on the nursing unit. At least one room shall accommodate up to eight persons.

[9](8) Adequate on-unit offices shall be provided for staff use.

[10](9) Resident bathing facilities shall be provided at a ratio of one fixture per seven residents.

[11] (10) Details and finishes shall be designed to provide a high degree of safety and security for both residents and staff.

(i) Doors to all resident rooms shall be located so as to negate a possible resident hiding space behind the door.

(ii) Doors which separate the [unit] *Neurobehavioral Units* from adjacent functional areas of the facility shall be secure. *Delayed egress doors shall be sufficient for Neurobehavioral Step Down Units.*

(iii) The walls of resident use rooms shall be constructed so as to resist damage.

(iv) The ceilings of resident use rooms shall be constructed to resist damage. The ceiling surface shall be monolithic from wall to wall.

(v) Light switches and electric convenience outlets shall be tamper proof.

(vi) Major room furnishings such as desks, dressers, night tables, and shelving shall be designed and/or installed to minimize the danger of injury to residents and staff.

(vii) Shower heads in resident bathing rooms shall be of a recessed type.

(viii) Operable windows shall be provided with devices which will prevent the possibility of accidental falls. The operable sash opening shall be limited to six inches, however, alternate window opening protection may be acceptable, i.e., security screens. Window bars are not permitted.

(ix) An emergency call system for staff use shall be provided in all resident use spaces to permit staff communications in an emergency.

(x) Outside activity areas shall be provided. Resident access to the areas shall be directly from the unit.

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488

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

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

**Regulatory Impact Statement**

Statutory Authority:

Section 2803 of the Public Health Law requires the Commissioner of Health to ensure the fitness and adequacy of health care facilities established and operated in New York State and authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the commissioner for standards and procedures relating to hospital operating certificates. Public Health Law section 2801(1) includes the definition of "hospital", which term includes general hospitals, clinics, nursing facilities, and rehabilitation facilities and other medical facilities. This requirement extends not only to the services, personnel, administrative systems and governance of the facility but also to the safety and integrity of the facility structure. Pursuant to this requirement, 10 NYCRR section 713-2.5 sets forth architectural and life safety standards for nursing facilities providing care for residents requiring neurobehavioral intervention.

Legislative Objectives:

Article 28 of the Public Health Law seeks to protect and promote the health of the inhabitants of the State by assuring the efficient, accessible, and affordable provision of high quality health services. Consistent with this legislative intent, the proposed amendments will ensure that the initial construction of new units for residents requiring neurobehavioral intervention, as well as their subsequent repair, maintenance, refurbishing, and modernization, conforms to the latest architectural and engineering standards for the structure, dimensions and physical appointments of such units. They will also facilitate the development of less intensive "step down" units, allowing facilities to serve a wider range of residents in more appropriate settings.

Needs and Benefits:

Section 713-2.5 establishes the baseline architectural, engineering and construction standards for Neurobehavioral Units in nursing homes across New York State. The proposed amendments update these standards to reflect changes in life safety standards and architectural design, and changes in prevailing norms of treatment and care for Neurobehavioral Units that bear on how facilities and services are structured and configured. The proposed amendments are also intended to assist health care providers to compete in a continuously changing health care market.

The proposed amendments have been developed by an interdisciplinary team of Department of Health staff and consultants involved in the design and construction, programmatic oversight, surveillance and fiscal reimbursement of Neurobehavioral Units.

Section 713-2.5 sets forth the physical plant requirements for nursing units constructed specifically for individuals requiring both nursing home care and services associated with neurobehavioral intervention. Section 713-2.5 has been revised to more accurately reflect the needs of the type of patients presenting for neurobehavioral intervention. These revisions will ensure that nursing homes in New York State that provide neurobehavioral intervention services will be able to serve the spectrum of patients that have presented since the program was first defined in 1998. These regulations reflect the latest research in life safety, design, and all matters pertaining to the design and construction of nursing home units for behavioral intervention.

**Costs:**

**Costs to Private Regulated Parties:**

The proposed amendments are expected to have a favorable fiscal impact on health care facilities as follows:

- The general simplification of current regulations for step down units should result in cost savings for most providers. The ability to provide another level of program for neurobehavioral intervention will allow facilities to continue the care for these residents in nursing units that are less expensive to construct and operate.
- The elimination of the quiet room as a mandatory feature represents a savings in construction cost, albeit modest.

Department estimates for savings in the construction of step-down units are estimated at approximately 10% less than total project costs for the typical unit for neurobehavioral intervention.

**Costs to Local Government:**

There are no costs to local government, because the Department is solely responsible for enforcement of the subject regulations and any county or municipal agencies seeking to construct health care facilities would benefit from the savings projected above.

**Costs to State Agencies other than the Department of Health:**

There are no costs to state agencies other than the Department of Health.

**Costs to the Department of Health:**

The proposed amendments should impose no new costs on the Department of Health. Compliance with the amended regulations will continue to be monitored by existing staff in pre-construction and construction stages of each project, and by surveillance staff according to established surveillance practices.

**Local Government Mandates:**

The proposed amendments do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district, or other special district.

**Paperwork:**

The proposed amendments impose no new reporting requirements, forms, or other paperwork.

**Duplication:**

There are no relevant State or Federal rules which duplicate, overlap or conflict with the proposed amendments.

**Alternatives Considered:**

The only alternative available is to leave the regulations as is, which would require facilities to construct units to a higher, and thus more expensive, standard than necessary for many patients of nursing homes requiring neurobehavioral intervention. Therefore, this proposal is advanced to ensure a supportive physical plant environment allowing facilities to achieve the best possible clinical/programmatic outcomes.

**Compliance Schedule:**

The regulations would apply to all applications submitted to the Department of Health after the regulations are adopted. Regulated parties should be able to immediately comply with the regulations upon adoption.

**Regulatory Flexibility Analysis**

**Finding:**

The proposed amendments do not impose an adverse economic impact on small businesses or local governments, and they do not impose reporting, record keeping or other compliance requirements on such entities.

**Reasons for the Finding:**

The proposed amendments are intended to allow facilities to construct the most appropriate physical plant for this relatively new program. In the past, inappropriate settings for residents have increased costs for patient care. This definition of a new care setting should facilitate the development of more appropriate programs, resulting in less costly care and better outcomes.

Therefore, the proposed amendments do not impose new compliance requirements on those health care facilities that provide neurobehavioral intervention services.

**Measures taken to ascertain the Finding:**

Consistent with the previous revision effort in 1998 to define Neurobehavioral Units, the Department sought assistance from persons knowledgeable with these programs. In addition to the Department's own financial reimbursement, surveillance and program staff, a consultant who is expert in neurobehavioral, behavioral intervention and head injury

programs was involved. These physical plant amendments were developed in concert with similar amendments for program and reimbursement regulations. Among the factors which influenced the decision to proceed forward with this regulatory amendment was that this amendment would not increase the costs of design, construction or operation of health care facilities.

The interdisciplinary department team generally met on a weekly basis to coordinate all of the related amendments. Therefore, staff are keenly aware of the impact of code requirements on the industry and what elements of the code should be changed to promote flexibility and reduce costs for regulated parties. The proposed amendments reflect this knowledge and expertise.

**Rural Area Flexibility Analysis**

No Rural Area Flexibility Analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedures Act.

The proposed amendments do not impose an adverse impact on facilities in rural areas, and they do not impose reporting, record keeping or other compliance requirement on facilities in rural areas. The additional flexibility in design and program delivery afforded nursing homes should actually facilitate the approval of these projects in rural areas, where lower volume and less predictable levels of occupancy and utilization often make it advisable to design and operate services (e. g. nursing units) on a smaller scale than the minimal levels specified in regulation.

**Job Impact Statement**

**Nature of Impact:**

The proposed amendments will continue to offer health care providers the opportunity to be more innovative in the design and functioning of their facilities, and to tailor the physical plant and equipment more to their individual programs of care. The Department of Health expects that providers will continue to undertake projects to maintain and preserve their existing physical plants, which represent significant investments and capital assets. These circumstances will prompt most facilities to retain staff currently employed in facility planning and design or to continue to rely on design consulting firms for such services. As noted, the aforementioned cost savings of ten percent industry wide is expected to be made up in part by reductions in consulting fees for architectural and engineering services. However, these personal services costs are expected to constitute only a small portion of an already modest savings total; hence, no significant negative impact on employment as a result of the proposed regulations is anticipated. This projection is based on experience subsequent to the original adoption of the Guidelines and updated Life Safety Code 101 in 1998.

**Categories and Number Affected:**

The categories of jobs most affected by changes in the design and construction of health care facilities are those in the architecture and engineering professions. However, as discussed above, no significant negative effects on employment are anticipated with reference to these or any other occupations.

**Regions of Adverse Impact:**

The proposed amendments will not impose an adverse impact on any regions of the State.

**Minimization of Adverse Impact:**

There are no adverse impacts to this rule. Therefore, no measures to minimize adverse impact are necessary.

**Self-Employment Opportunities:**

The proposed amendments are not expected to have a negative effect on self-employment opportunities for architects and engineers who specialize in health care facility design. Department of Health staff have found that most such professionals in New York State are affiliated with design consulting firms and are not a significant component of the self-employed work force.

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

**Neurobehavioral Step Down Unit Program**

**I.D. No.** HLT-34-08-00008-P

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

**Proposed Action:** Amendment of sections 415.39 and 415.41 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2803(2), 2807(3) and 2808

**Subject:** Neurobehavioral Step Down Unit Program.

**Purpose:** New level of appropriate behavioral intervention care in NHs and to facilitate individual transition to least restrictive settings.

**Text of proposed rule:** The table of contents for Part 415 is amended as follows:

PART 415  
Nursing Homes - Minimum Standards  
GENERAL

Sec. 415.1 Basis and scope	*	*	*
415.39 <i>Neurobehavioral Units</i> [Specialized programs for residents requiring behavioral interventions]	*	*	*
415.41 <i>Neurobehavioral Step Down Unit Program</i>			

Paragraph (1) of subdivision (a) of Section 415.39 is hereby amended to read as follows:

415.39 *Neurobehavioral Units* [Specialized programs for residents requiring behavioral interventions.]  
(a) General.

(1) *Neurobehavioral Unit* [Specialized programs for residents requiring behavioral interventions] “the program” shall mean a discrete unit with a planned combination of services with staffing, equipment and physical facilities designed to serve individuals whose severe behavior cannot be managed in a less restrictive setting. The program shall provide goal-directed, comprehensive and interdisciplinary services directed at attaining or maintaining the individual at the highest practicable level of physical, affective, behavioral and cognitive functioning.

\* \* \*

A new Section 415.41 is hereby added to read as follows:

Section 415.41 *Neurobehavioral Step Down Unit Program*

(a) General.

(1) A specialized program identified as a neurobehavioral step down unit “the program”, shall mean a discrete unit with a planned combination of services with staffing, equipment and physical facilities designed to provide an intermediate level of services for nursing home eligible individuals whose behavior cannot be managed in a less restrictive setting, but who do not require the services provided in a neurobehavioral unit as described in Section 415.39 of this Title.

(2) The program shall serve residents who demonstrate serious co-occurring illness associated with brain disorders, or illness of the nervous system caused by genetic, metabolic, or other biological factors, who exhibit behaviors that are not dangerous to themselves or others, such as verbal disruption, physical aggression which is not assaultive or combative in nature, or occasional socially inappropriate behavior that does not cause harm.

(3) The program will not serve residents who exhibit behaviors requiring admission to a neurobehavioral unit as defined in Section 415.39 of this Title and/or those requiring acute psychiatric intervention such as dangerous behavior to self or others, including but not limited to sexual molestation, fire setting, suicidal or homicidal intent.

(4) The program shall provide medical, psychosocial, restorative, and other care services to meet resident needs. The program shall provide transitional skills to individuals that allow the individual to reside in a community or other less restrictive setting. Such services are goal-directed and comprehensive. The services will include support, assistance, and training in activities of daily living, community living, problem solving, planning, and other living skills. These services will be directed at attaining or maintaining the individual in the highest practicable level of physical, affective, behavioral and cognitive functioning.

(5) The program shall be located in a nursing home unit that is specifically designed for this purpose and physically separate from other facility residents. The unit shall be designated in accordance with provisions as set forth in Subpart 713.2 of this Title.

(6) The operator of the neurobehavioral step down unit is responsible for determinations of admission to the unit. All facilities with a neurobehavioral step down unit shall have a written agreement with a provider of more intensive services designed to care for individuals that exhibit behaviors that may present a danger to self or others, such as a nursing home with a designated neurobehavioral unit pursuant to Section 415.39 of this Title, or an inpatient psychiatric facility licensed or operated under the Mental Hygiene Law, to provide for possible admission and consultative services as necessary.

(7) In addition to the implementation of the quality assessment and assurance plan for this program as required by section 415.27 of this Part, the facility shall furnish records, reports and data in a format as requested by the commissioner or his or her designee and participate in a review of the program and resident outcomes.

(b) Admission.

(1) The facility shall develop written admission criteria that are applied to each referral. At a minimum, these criteria include, but are not limited to:

(i) the individual’s behavior is not dangerous to him or herself or others;

(ii) within the 30 days prior to the admission assessment, the individual has not displayed verbally or physically aggressive, or persistently regressive or socially inappropriate behaviors that cannot or have not been addressed, managed, or changed by therapeutic interventions;

(iii) the individual’s behavior cannot be currently managed in a less restrictive setting; and

(iv) the individual has the ability to benefit from the program.

(2) The facility shall maintain information in the individual’s admission record to support the admission, including the following:

(i) an interdisciplinary assessment of the individual’s current behavior, including severity, intensity, and frequency, and its contributing factors;

(ii) an interdisciplinary assessment of the individual’s need for the program, including the reasons why the individual’s current setting is not therapeutically appropriate and how admission to the neurobehavioral step down unit and its living skills training could benefit the individual;

(iii) an assessment regarding the individual’s eligibility for readmission to the referring entity if the individual’s behavior subsequently becomes appropriate for readmission; and

(iv) a description of the prospective resident’s clinical outcome goals, including his or her ability to be discharged to a less restrictive environment.

(c) Assessment and Care Planning

(1) An interdisciplinary team, as described in paragraph (2) of this subdivision, shall determine preliminary approaches and interventions to the presenting behavior and record them in the resident care plan prior to an individual’s admission to the unit.

(2) Each resident’s care plan shall include care, services, and interventions that are therapeutically beneficial for the resident and selected by the resident when able and as appropriate. The care plan shall be prepared by the interdisciplinary team, as described in Section 415.11 of this Title, which shall include physician, nursing, psychiatrist, psychologist, occupational therapist, speech/language therapist, or social worker participation as appropriate to the resident’s needs. Such services should be directed toward life skills, community orientation, and community living, as appropriate.

(3) Based on the resident’s response to therapeutic interventions, the care plan, including the discharge plan, shall be reviewed and modified as needed, but at least once per month.

(d) Discharge.

(1) A proposed discharge plan shall be developed within 30 days of admission for each resident as part of the overall care plan and shall include input from all professionals providing care for the resident, the resident, the resident’s family and/or natural supports, as well as any outside agency or resource that is targeted for involvement with the resident after discharge.

(2) Discharge planning efforts should seek to provide the least restrictive environment that is consistent with the needs of the resident and ensures the safety of the resident and others.

(3) When the interdisciplinary team determines that discharge of a resident to another facility or community-based program is appropriate, a discharge plan shall be implemented which is designed to assist and support the resident, family and caregiver in the transition to the new setting. To facilitate an appropriate discharge, program staff shall participate in discharge planning and implementation activities, including accompanying the resident on site visits to prospective discharge locations, development of the resident’s post-discharge care plan, and being available for post-discharge consultation with the receiving provider, resident, family and caregiver.

(4) The facility shall seek discharge of the resident when his or her care needs can no longer be met by the care and services in the neurobehavioral step down unit as required by this section.

(5) When a resident is determined to be appropriate for discharge, and availability in an appropriate discharge setting is not present, the provider shall continually seek such availability to ensure a discharge to a more appropriate setting. The provider shall document such ongoing efforts.

(6) When a resident is discharged from the program to an acute care facility for medical or psychiatric care and demonstrates a danger to self or others, a program staff member from the step down unit shall provide a

verbal report to the receiving facility before the resident arrives and also send a written summary with the resident to the receiving facility.

(7) There shall be a written transfer agreement with any referring entity that allows for priority readmission to the entity when the resident is capable of a safe discharge to the entity, consistent with bed availability and the entity's admission criteria.

(e) Resident Services and Staffing.

(1) The program shall consist of a variety of onsite medical, behavioral, occupational and speech/language therapy, counseling, recreational, exercise and/or other services to assist residents to improve behavioral control by learning new techniques or by redirection and diversionary activity, and to attain living skills that will assist individuals in residing in less restrictive settings, based on individual resident needs.

(2) There shall be dedicated staff in sufficient numbers to allow for the provision of direct services on the unit and to allow for small group activities and one to one care of each resident which is sufficiently flexible to meet the changing needs of the residents, as clinically appropriate.

(3) The unit shall be managed by a program coordinator who is a licensed or certified health care professional with previous formal education, training and experience in the administration of a program focused on behavior care and management and rehabilitation. The program coordinator shall be responsible for the operation and oversight of the program. Other responsibilities include:

- (i) planning and coordinating direct care and services;
- (ii) developing and implementing continuing education programs in collaboration with the interdisciplinary team directed to all staff in contact with the residents;
- (iii) participating in the facility's decisions regarding resident care and services that affect the operation of the unit; and
- (iv) ensuring the development and implementation of a program plan with policies and procedures specific to the neurobehavioral step down unit.

(4) A physician who has specialized training and experience in the care of individuals with neurobiological disorders, behavioral and/or neuropsychiatric conditions shall be responsible for the medical direction and medical oversight of this program. The physician shall work with the facility's Medical Director in the oversight and coordination of medical services for the program, consistent with the provisions of Section 415.15 of this Title. The physician's responsibilities for the program shall include, but not be limited to, the development and implementation of policies and procedures, and oversight and evaluation of the quality of care and effectiveness of medical services provided.

(5) A qualified specialist in psychiatry who has clinical experience in behavioral medicine and experience working with individuals who are neurologically impaired shall be available either on staff or on a consulting basis to the residents and to the program.

(6) A clinical psychologist with at least one year of training and experience in neuropsychology shall be available either on staff or a consulting basis to the residents and to the staff of the program as needed, based on the changing needs of the residents.

(7) A social worker or case manager with experience associated with severe behavioral conditions shall be available on staff to work with the residents, staff, family and natural supports on transitional discharge planning and care plan implementation.

(8) In addition to the program coordinator, there shall be at least one registered professional nurse on each shift dedicated to the neurobehavioral step down unit who has training and experience in the care of individuals with severe behavior.

(9) A full time therapeutic recreation specialist shall be responsible for the therapeutic recreation program.

(10) An occupational therapist with clinical experience in psychosocial behaviors shall be available and responsible for living skills training and therapy, and other occupational therapy as needed.

(11) The facility shall ensure that all staff assigned to the direct care of the residents have pertinent experience or have received training in the care and management of individuals with severe behaviors.

(12) The facility shall ensure that educational programs are conducted for staff not providing direct care but who come in contact with residents of the neurobehavioral unit on a regular basis such as house-keeping and dietary aides. The educational program will include orientation to the unit and its residents.

(13) In addition to the clinical psychologist with training in neuropsychology, there shall be at least one professional skilled and experienced in the retraining of functional living skills as well as cognitive retraining. Cognitive retraining is defined as a structured set of therapeutic activities designed to retrain an individual's ability to think, use judgment and make

decisions. This training should facilitate discharge to the least restrictive environment that is consistent with the resident's needs and with the safety of the resident and others.

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488.

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

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

#### Regulatory Impact Statement

Statutory Authority:

Public Health Law (PHL) section 2803 (2) authorizes the State Hospital Review and Planning Council subject to the approval of the State Commissioner of Health, to promulgate rules and regulations as shall be necessary to govern the operation of residential health care facilities. The Commissioner of Health has the overall responsibility for the health and well being of over 100,000 residents in New York's residential health care facilities. These residents range from infants with multiple impairments, to young adults suffering from the result of traumatic brain injury, to the frail elderly with chronic disabilities.

Legislative Objectives:

Article 28 of the Public Health Law seeks to protect and promote the health of those served by the State's health care system by assuring efficient, accessible, affordable, and high quality health services. The proposed regulation supports this objective. The proposed clinical treatment opportunity for individuals with traumatic brain injury and related neurobehavioral challenges is a critical expansion of service and provides a level of care that is currently unavailable throughout the State.

Current treatment settings as approved under 10 NYCRR 415.39 are directed primarily at residents who require significant behavior control. The clinical services and staff expertise support that clinical focus. The proposed step down unit is directed at individuals with less severe challenges, and focuses on transitional skills training that will allow the individual to move to a less restrictive environment. It can more effectively facilitate each resident to return to his or her highest practical level of behavioral health.

The regulatory requirements for the neurobehavioral step down unit ensure appropriate, timely assessment, appropriate service delivery, and a program objective to help individuals transition to community-based or other settings in which they can flourish.

This regulation will facilitate the opportunity for many individuals with neurobehavioral challenges to obtain and sustain behavioral stability and to live in a less restrictive environment for longer periods of time without exacerbation or interruption, ultimately facilitating more individuals greater access to less restrictive environments.

Needs and Benefits:

Currently, approximately 750 individuals located in New York State or in New York State contracted facilities currently require neurobehavioral step down residential care. Over 75% of them originate in NYC and Nassau/ Suffolk Counties.

The current standard for behavioral intervention units under 10 NYCRR 415.39 represents a high level of security for residents and staff. The proposed new unit establishes a less restrictive option that is generally unavailable to individuals with less severe challenges. It creates an added benefit by establishing a continuum of care that meets the needs of people requiring various levels of behavioral intervention. It provides a service level for individuals with specific needs for such services, and it provides a transitional service level for individuals whose severe behaviors have been successfully addressed in a traditional neurobehavioral unit, but who are not yet ready to move to a community-based environment.

The proposed regulation establishes a less restrictive environment that includes necessary clinical staffing and environmental program supports that seek to prevent behavioral regression and to ensure that the resident remains stable and can be discharged again to the community or a traditional nursing home setting. The proposed regulation has been developed by an interdisciplinary team of Department of Health staff and consultants involved in the design and construction, programmatic oversight, surveillance and fiscal reimbursement of current neurobehavioral units.

COSTS:

Costs to Regulated Parties:

Surveillance Costs

DOH will not experience any additional surveillance costs. The new service units will be reviewed as part of the existing surveillance processes and protocols.

Laboratory Costs Associated with Reporting:

There are no laboratory costs associated with reporting.

Physicians, Clinics and Hospitals:

The proposed regulation is expected to have a favorable fiscal impact on health care facilities. The addition of this level of neurobehavioral assistance program will allow nursing homes to continue the care for these residents in nursing units that are less expensive to construct and operate than a standard unit.

The prevalence rate has been anecdotally observed to be consistent with the number of individuals needing care in existing secure neurobehavioral units. With the overall incidence and prevalence rates for traumatic brain injury on a consistent decline, cost is not anticipated to increase in subsequent years. By providing a less restrictive setting for the discharge of residents on existing secure neurobehavioral units, the cost for care of these individuals will be substantially less annually.

Physicians, clinics and hospitals will make referrals to the neurobehavioral step down unit from other health care settings, including specialized neurobehavioral units and residential health care facilities, assisted living facilities and during routine visits to their offices or facilities. There are no anticipated additional costs for physicians, clinics or hospitals due to the proposed regulation.

#### Education, Training and Technical Assistance:

The NYSDOH will not incur additional costs for education, training and technical assistance. The Department's Office of Health Systems Management and Office of Medicaid Management currently contracts with a specialist in this clinical area for these functions. The contractor will facilitate initial placement of individuals, perform individual record reviews and make site visits to ensure appropriate care is provided and to monitor individual progress, and assist transfers to less restrictive levels of care.

The NYSDOH will coordinate collaborative educational activities with professional associations and providers as needed, including in-service training for providers with direct program responsibilities.

#### Other State Agencies:

Other State agencies will need to review their respective regulations and determine whether there will be a need to revise them in accordance with these proposed regulations. It is expected that these activities will be performed by existing staff, and costs absorbed within existing budgets.

#### Costs to the Department of Health:

The proposed amendments should impose no new costs to the Department of Health (see Surveillance Costs).

#### Local Government Mandates:

For the purposes of implementing these proposed regulations, the process will be overseen by NYSDOH, Office of Health Systems Management, Division of Quality and Surveillance for Nursing Homes and ICFs/MR. Local area office surveillance staff will participate as customary. There are no costs to local government specifically related to the programmatic requirements of these regulations and the enforcement thereof because the Department of Health will be solely responsible for the enforcement of the subject regulation and any county or municipal agencies seeking to implement the new program would benefit from the aforementioned cost savings.

#### Paperwork:

The proposed amendments impose no new reporting requirements that differ from 415.39 and require no new forms or other paperwork.

#### Duplication:

There are no relevant State or Federal Rules which duplicate, overall or conflict with the proposed regulation. Although the population served by Section 415.39 is similar, it is not the same. The proposed program serves as a step down unit and program regulations are intrinsically compatible to a continuum of care.

#### Alternatives:

The only alternative considered was to not promulgate Section 415.41 and program standards. However, this would continue to impede resident transition to a less restrictive environment, including home and community-based settings. This proposal is key to ensuring a continuum of care that is designed to advance the care of residents with neurobehavioral dysfunction in a less restrictive environment.

#### Federal Standards:

There are no federal laws specifically governing neurobehavioral step down units. The federal government establishes surveillance protocols for residential health facilities. States must comply with protocols to assure consistent oversight of residential health care facilities. The federal government has used these surveillance standards to certify States for the purposes of allocating federal funding.

#### Compliance Schedule:

The proposed regulation would apply to all applications submitted to the Department of Health after the regulation is adopted.

#### Regulatory Flexibility Analysis

##### Finding:

The proposed regulations do not impose an adverse economic impact on small businesses or local government and they do not impose reporting, record keeping or other compliance requirement on such entities different from 415.39 of the nursing home regulations.

#### Reason for the Finding:

The proposed regulations are intended to allow facilities to develop more appropriate programs for individuals with neurobehavioral challenges resulting in less costly care and better outcomes. There is no adverse economic impact on small businesses or local government.

#### Measures Taken to Ascertain the Finding:

Consistent with the previous revision effort in 1998 to define behavioral intervention units, the Department of Health sought assistance from Department staff knowledgeable with these programs. In addition to surveillance, program and financial reimbursement staff, a program consultant with expertise in neurobehavioral interventions and programs serving individuals with traumatic brain injury and related acquire brain disorders was involved. The measure taken reflects a well-balanced team with an interdisciplinary approach to construct the finding discussed.

#### Rural Area Flexibility Analysis

Pursuant to section 202-bb of the State Administrative Procedure Act, a Rural Area Flexibility Analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural business or governments in New York State and will not impose any additional recordkeeping, reporting or other compliance requirements.

#### Job Impact Statement

##### Nature of Impact:

The proposed rule will not have a substantial adverse impact on jobs and employment opportunities based upon its nature and purpose. The providers will retain staff currently employed and add a modest amount of clinical and program staff to the facility complement. There will be no negative impact on employment as a result of the proposed regulation.

The proposed rule may have a positive impact on jobs and employment opportunities. Some new positions, located in neurobehavioral step down units, will be required to address the increased workload, as well as program management staff to assume duties associated with overall program direction, information systems, administration and evaluation of the specialized program within the residential care facility.

##### Categories and Numbers Affected:

The categories of jobs most affected by changes in the program regulations to support neurobehavioral step down units are those in the behavioral health care professions. However, as discussed, no significant negative effect on employment is anticipated to these professionals.

##### Regions of Adverse Impact/Minimization of Adverse Impact:

The proposed amendments will not impose an adverse impact on any regions of the state.

##### Self-Employment Opportunities:

The proposed amendments are not expected to have a negative effect on self-employment opportunities for behavioral health professionals who specialize in neurobehavioral care. The regulations may provide additional consultation opportunities to professional to provide expertise to RHCF candidates to develop a competitive CON or actualize an approved neurobehavioral step down unit.

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## Office of Parks, Recreation and Historic Preservation

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

#### Repeal of an Outdated and Duplicative Rule that Addresses the Ticket and Simplified Information for Violations

I.D. No. PKR-34-08-00001-P

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

**Proposed Action:** This is a consensus rule making to repeal sections 446.0 through 446.17 of Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, sections 3.09(8), 27.03(1); Navigation Law, section 19(1)

**Subject:** Repeal of an outdated and duplicative rule that addresses the ticket and simplified information for violations.

**Purpose:** To allow the uniform ticket/simplified information issued by NYSDMV to be used for Parks and Rec and Navigation Law violations.

**Text of proposed rule:** Sections 446.0 through 446.17 of 9 NYCRR Part 446 are repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kathleen L. Martens, Office of Parks, Recreation and Historic Preservation, Agency Building 1, 19th Fl., Albany, NY 12238, (518) 486-2921, e-mail: rulemaking@oprhp.state.ny.us

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

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

**Consensus Rule Making Determination**

The Office of Parks, Recreation and Historic Preservation (“State Parks”) is repealing an outdated rule that addresses the ticket and simplified information required for violations of the Parks, Recreation and Historic Preservation Law, Navigation Law and implementing regulations. (9 NYCRR § § 446.0 - 446.17) Presently, law enforcement agencies are using an equivalent ticket/simplified information issued by the NYS Department of Motor Vehicles to cite these violations. State Parks, therefore, is proposing this consensus rule making to repeal a duplicative and outdated regulation. This consensus rule making is a non-controversial technical change and no objection is expected because the repeal, in part, reduces compliance costs on State and local entities.

**Job Impact Statement**

The existing rule does not affect jobs or employment opportunities and its repeal would not affect jobs or employment opportunities.

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

**Repeal of Outdated Environmental Assessment and Review Procedures**

**I.D. No.** PKR-34-08-00002-P

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

**Proposed Action:** Repeal of Part 464 and Appendices G-1 and I-3 through I-8 of Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, section 3.09(8); and Environmental Conservation Law, section 8-0113(3)

**Subject:** Repeal of outdated environmental assessment and review procedures.

**Purpose:** To streamline and update the Agency’s environmental assessment and review procedures.

**Text of proposed rule:** Part 464 and Appendixes G-1 and I-3 through I-8 of Title 9 NYCRR are repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kathleen L. Martens, Office of Parks, Recreation and Historic Preservation, Agency Building 1, 19th Floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

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

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

**Regulatory Impact Statement**

1. Statutory Authority

The statutes and regulation that apply to this repeal of 9 NYCRR Part 464 and its Appendixes G-1 and I-3 through I-8 (“Part 464”) are

- the Commissioner of the Office of Parks, Recreation and Historic Preservation’s (“State Parks” or “Agency”) general rule making authority at Parks, Recreation and Historic Preservation Law (“PRHPL”) § 3.09(8);
- Environmental Conservation Law (“ECL”) Article 8 and § 8-0113; and,
- 6 NYCRR Part 617, the State Environmental Quality Review (“SEQR”) regulation adopted by the Department of Environmental Conservation (“DEC”) that applies statewide to all agencies.

PRHPL Section 3.09(8) provides State Parks with general authority to repeal a regulation like this one that pertains to the commissioner’s functions, powers and duties.

2. Legislative Objectives

The State Legislature intended that “. . . to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth [in ECL Article 8].” (ECL § 8-0103[6]). State agency environmental review procedures must be “consistent with the rules and regulations adopted by the [DEC] commissioner.” (ECL § 8-0113[3]).

DEC’s statewide SEQR regulation, therefore, controls the basic

substance and procedures for agency environmental reviews. (6 NYCRR Part 617). It “provides[s] a statewide regulatory framework for the implementation of SEQR by all state and local agencies.” (§ 617[e]). DEC has continually amended and updated the statewide SEQR regulation. This repeal of Part 464 conforms to SEQR’s requirements. (§ 617.14[a]).

3. Needs and Benefits

Leaving Part 464 in the administrative code confuses staff, applicants and the public because Part 464 was last amended thirty two years ago. Therefore, many sections conflict with the updated SEQR regulation.

The purpose of this rule making is to clarify and streamline State Parks’ environmental review procedure for applicants, staff and the general public by repealing an outdated and invalid rule while not diminishing the substance of State Parks environmental reviews and allowing State Parks to continue protecting the environment. State Parks must comply with SEQR. Repeal of Part 464 would have no effect on State Parks’ existing substantive or procedural environmental review responsibilities.

This repeal of an obsolete regulation could be classified as a consensus rule but State Parks has chosen to explain its rationale and offer the public an opportunity to comment through a general rule making. However, no public comment is expected.

4. Costs

Repeal of Part 464 in deference to the controlling statewide SEQR regulation will save and reduce regulatory costs by making it easier for regulated parties and State and local agencies to understand and comply with State Parks’ environmental assessment procedures. Repeal also eliminates the confusion presented by leaving an obsolete regulation in the administrative code. Thus, State Parks and other State and local agency administrative costs will be saved.

5. Local Government Mandates

None.

6. Paperwork

Finally, repeal will clarify that regulated entities and State and local agencies should be using only the statewide SEQR forms and statewide SEQR procedures for State Parks actions.

7. Duplication

Provisions of Part 464 that are not obsolete or invalid are redundant and duplicate the statewide SEQR regulations, the State Administrative Procedure Act or the Freedom of Information Law. Repealing Part 464 would eliminate this duplication and confusion.

A brief summary of the problems with Part 464 follows below.

§ 464.1 Authority, purpose and policy

§ 464.1(a) acknowledges that DEC adopts a SEQR rule of “statewide applicability.”

§ 464.1(b) refers to and invalidly relies upon DEC’s now obsolete rule that was adopted in 1976. Does not acknowledge the ten subsequent amendments to that rule.

§ 464.1(c) acknowledges an agency’s additional procedures must be “consistent with” the statewide SEQR rule.

§ 464.1(d) quotes and makes an obsolete citation to 6 NYCRR § 617.10 (1976) that has been subsequently amended to address a different SEQR issue.

§ 464.2 Definitions

Includes obsolete, invalid or redundant definitions or Agency procedures.

§ 464.3 Applicability

Redundant with SEQR.

§ 464.4 General rule

Obsolete, invalid or redundant with SEQR. “Preliminary environmental documentation” is not defined, and “tentative approvals” are not authorized under SEQR.

§ 464.5 Responsibilities of applicants

Redundant.

§ 464.6 Preliminary agency environmental review procedures

Invalid or redundant with SEQR and includes obsolete agency procedures. For example, this section incorrectly requires an environmental assessment and negative declaration for a Type II action. In contrast, under SEQR Type II actions do not require any environmental review and require only a brief note to the file indicating why the action has been classified as Type II.

§ 464.7 Notices of completion of draft EIS’s and circulating, filing and availability thereof; circulation, filing and availability of draft EIS’s; public hearings and notices thereof.

Obsolete, invalid or redundant.

§ 464.8 Final EIS procedures

Invalid or redundant.

§ 464.9 Actions involving Federal participation

Invalid.

§ 464.10 Public hearings

Obsolete or redundant with SEQR and SAPA.

§ 464.11 Content of environmental impact statements

Invalid, redundant or includes obsolete agency procedures.  
 § 464.12 Agency decision making  
 Redundant or includes obsolete agency procedures.  
 § 464.13 Filing of SEQR documents  
 Redundant with SEQR and FOIL.  
 § 464.14 Fees and costs  
 Obsolete agency procedures.  
 § 464.15 Criteria for determining what actions may have a significant effect on the environment  
 Redundant or invalid.  
 § 464.16 Lists of actions  
 The Type I list refers to vague and undefined thresholds of “cost, dimension and location set by parks.” Those thresholds could be found arbitrary and capricious if applied. SEQR precludes an agency from designating “as Type I any action identified as Type II in section 617.5” (617.4[a][2]), however, activities described in this section could be Type II under SEQR. Also, there is no Type I list provided in Appendix G-1. Finally, Part 464 contains an undefined threshold for “particularly sensitive environmental setting.” This is an invalid restriction on the SEQR Type II list or potentially redundant with SEQR’s “critical environmental area” designations at 617.14(g).  
 § 464.17 Amendments  
 Redundant with SAPA.  
 § 464.18 Effective date  
 Obsolete.  
 8. Lack of Alternatives

There are no alternatives to a straightforward repeal of this rule. The “no-action alternative” would preclude State Parks from updating its environmental review procedures and complying with SEQR. A second alternative requiring State Parks to replicate the existing SEQR regulation in Title 9 would be duplicative. A third alternative to repeal and supplement SEQR with additional procedures would be redundant and unnecessary. None of these alternatives would meet the goal of streamlining the regulatory process for applicants, staff and the general public while at the same time not diminishing the substance of State Parks’ environmental reviews and allowing State Parks to continue protecting the environment.

9. Applicable Federal Standards  
 No federal standards apply. Actions involving Environmental Impact Statements (EISs) prepared under SEQR’s counterpart at the federal level known as the National Environmental Policy Act (“NEPA”) would continue to be addressed by the statewide SEQR provisions at 6 NYCRR § 671.15.

10. Compliance Schedule  
 The repeal would be effective immediately upon adoption.

#### **Regulatory Flexibility Analysis**

This rule making repeals an obsolete duplicative regulation at 9 NYCRR Part 464 that was enacted in 1976 and never amended. Its repeal will streamline the environmental assessment process for small businesses and local governments that deal with the Office of Parks, Recreation and Historic Preservation but will not affect substantive environmental decision making. Repeal clarifies the statewide SEQR procedures at 6 NYCRR Part 617 that have been updated at least ten times since 1976 apply to actions undertaken, approved or funded by the Office of Parks, Recreation and Historic Preservation. Therefore, repeal of Part 464 will have a positive economic impact on small businesses or local governments and will reduce recordkeeping requirements.

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

This rule making repeals an obsolete duplicative regulation at 9 NYCRR Part 464 that was enacted in 1976 and never amended. Its repeal will streamline the environmental assessment process for small businesses and local governments. Repeal clarifies that the statewide SEQR procedures at 6 NYCRR Part 617 that have been updated at least ten times since 1976 apply to actions undertaken, approved or funded by the Office of Parks, Recreation and Historic Preservation. Therefore, repeal will result in positive economic impacts for public and private entities in rural areas, and it will reduce their recordkeeping requirements.

#### **Job Impact Statement**

The existing rule does not affect jobs or employment opportunities and its repeal would not affect jobs or employment opportunities.

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## Public Service Commission

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### ERRATUM

A Notice of Proposed Rule Making, I.D. No. PSC-32-08-00011-P, pertaining to Waiver of P.S.C. No. 3 - Steam, P.S.C. No. 9 - Gas and 16

NYCRR Part 13, published in the August 6, 2008 issue of the State Register contained a typo in the Substance of proposed rule.

Following is the corrected Substance of proposed rule:

The Commission is considering whether or approve, modify or reject, in whole or in part, a petition filed by Consolidated Edison Company of New York, Inc. (Con Edison) for a waiver of any or all provisions of the rate schedules (P.S.C. No. 3 – Steam and P.S.C. No. 9 – Gas) and the Commission rules and regulations in 16 NYCRR Part 13, as may be necessary to permit Con Edison to provide credits to certain steam and gas customers who were unable to access their premises during the July 2007 steam pipe rupture incident.

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

#### **Transfer of Control of Time Warner ResCom, LLC**

**I.D. No.** PSC-34-08-00009-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 Time Warner ResCom, LLC (“TWRESCOM-NY”) requesting approval of a Transfer of Control from Time Warner, Inc. to Time Warner Cable, Inc.

**Statutory authority:** Public Service Law, section 222

**Subject:** Transfer of Control of Time Warner ResCom, LLC.

**Purpose:** To consider Time Warner, Inc.’s petition to distribute its equity interest in Time Warner Cable, Inc.

**Substance of proposed rule:** The Public Service Commission is considering whether to accept, reject or modify, in whole or in part, a petition from Time Warner ResCom, LLC (“TWRESCOM, LLC”) requesting approval of a transfer of control from Time Warner, Inc. to Time Warner Cable, Inc.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brilling@dps.state.ny.us

**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-V-0716SA1)

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## Racing and Wagering Board

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

#### **Bonus Ball Bingo**

**I.D. No.** RWB-34-08-00003-P

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

**Proposed Action:** Addition of sections 5800.1 (af) and 5820.57 to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 435(1)(a)

**Subject:** Bonus Ball Bingo.

**Purpose:** To create new rules for Bonus Ball Bingo.

**Text of proposed rule:** New subdivision (af) is added to section 5800.1 of 9NYCRR to read as follows:

(af) *Bonus ball is a special bingo game conducted in accordance with Section 5820.57 of this subtitle that is played in conjunction with one or more regular and/or special bingo games that have been designated by the licensed authorized organization on its application for bingo license and on the bingo program required by Section 5820.39 of this subtitle as "Bonus Ball Games" and in which a "Bonus Ball Prize" is awarded to the player acquiring the designated winning bingo pattern when the last number called and marked by that player is identical to the "Bonus Ball Number".*

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

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

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

#### Regulatory Impact Statement

1. Statutory authority: Section 435(1)a of the Executive Law and Section 476(11)b of the General Municipal Law as amended by chapter 162 of the laws of 2007, which outlines the rules for Bonus Ball Bingo, grants the Board the power and makes it a duty to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses for bingo, thereunder, and the conduct of games of bingo, to be fairly and properly conducted in the manner prescribed in the Bingo Licensing Law.

2. Legislative objectives: As recounted in the sponsor's memo, "Additional prizes for patrons of bingo ball will encourage business for licensed authorized bingo organizations. Many states' laws include provisions for bonus bingo ball, allowing for bonus prizes and costs to be monitored. By specifying that prizes cannot exceed seventy-five percent of sales or six thousand dollars in the bingo license, this law ensures that organizations will be subject to rational limits on these games."

3. Needs and benefits: This rule amendment is necessary to bring the Board's bingo rules and regulations into conformance with the Bingo Law, which was amended by Chapter 162 of the Laws of 2007 to allow a special Bonus Ball Bingo game to be played in conjunction with one or more regular games at licensed bingo occasions. Rules governing the conduct of bingo must provide explicit instruction written in easily understandable language and the new section 5820.57 provides clear and explicit rules for the conduct of Bonus Ball Bingo. The 2007 amendment to the Bingo Law requires that these amendments be made to the Board's bingo rules and regulations. Additional prizes for patrons of Bonus Ball Bingo will encourage business for the licensed authorized bingo organizations. Many states' laws include provisions for Bonus Ball Bingo, allowing for bonus prizes and costs to be monitored. By specifying that prizes cannot exceed 75% of sales or \$6,000 in the bingo license, this law ensures that organizations will be subject to rational limits on these games.

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: There are no added costs to regulated parties for the implementation and continuing compliance with the rule. Organizations that choose to add Bonus Ball Bingo games merely follow the prescribed rules and reporting, the same as they do for non-Bonus Ball Bingo games.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The New York State Racing and Wagering Board will have the same oversight responsibilities as it has for non-Bonus Ball Bingo games, and local governments will continue to have the same licensing and oversight responsibilities as they do for regular bingo games.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: Cost analysis is based upon a review by the Office of Counsel of the New York State Racing and Wagering Board. The methodology is based upon a review of Section 190-a of the General Municipal Law and the practical impact of the law on licensing and reporting.

5. Local government mandates: None.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: The Racing and Wagering Board considered a no action alternative, but chose to pursue this rule in order to conform the Board's bingo rules with amendments to the Bingo Law.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented immediately upon publication in the *State Register*.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as is apparent from the nature of the amendments, which define how a new bingo game, Bonus

Ball, is played and conducted by licensed authorized organizations. These proposed amendments do not impact upon State Administrative Procedure Act section 102(8), nor do they affect employment. It will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. These rules apply to charities and other not-for-profit organizations that conduct bingo. Bingo may only be conducted by volunteers and General Municipal Law sections 481(1)a and 479(8) prohibit any person from receiving remuneration for participating in the management or operations of bingo, therefore, there will be no significant impact on jobs.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Claiming Procedure of Horses in Harness Racing

I.D. No. RWB-34-08-00004-P

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

**Proposed Action:** Amendment of section 4109.3(a), (b), (d), (e) and (p) of Title 9 NYCRR.

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

**Subject:** Claiming procedure of horses in harness racing.

**Purpose:** To provide clarification and ensure consistent enforcement of the harness claiming rule by judges and horsemen.

**Text of proposed rule:** Subdivisions a, b, d, e and p of Section 4109.3 of Title 9 of the New York Codes, Rules and regulations are amended to read as follows:

(a) Claimant's credit. The claimant must have to his credit with the track an amount equivalent to the specified claiming price, the applicable sales tax, the cost of transferring the registration, and the fee for the test for equine infectious anemia. No claims shall be accepted unless such credit is certified in writing by an authorized track official and such written certification is included with the claim. *No track official of said association shall give any information as to the filing of any claim or claim information to the public and horsemen until after the race has been run.*

(b) [Owners] *Owner's* consent. No declaration to a claiming race shall be accepted unless both the registration certificate of the horse and written authorization by the owner to subject the horse so declared to claim is on file with the racing secretary of the track at which the horse is entered.

(d) Claim box. All claims shall be in *legible* writing, in a form satisfactory to the [commission] board, sealed in an envelope and presented to the presiding judge or his designee. *The presiding judge or his designee shall then write the date and time that the claim was submitted, the date and number of the race, and initial the claim envelope. The claimant must then deposit the claim in a locked claim box at least 30 minutes before the race in the board office of the track. [and deposited at least 30 minutes before the race in a locked box in the commission office at the track.]*

(e) Opening of the *locked claim box and sealed envelope*. No official or other person shall open the claim box and envelope or give any information on claims filed [until after the race] *except to check on the claimant's license and eligibility of the claim or at least 10 minutes before post time, to withdraw the claim.* Immediately after the race, the claim shall be opened in the presence of the judges and claims, if any, examined by such officials. *If the claimant is properly licensed and the claim form is accurate, signed and complete, the claim can be allowed by the judges. The claim information will then be given to the paddock judge, program director and announced. A claim should not be voided due to minor errors on the claim form. The claim should be voided only if, in the opinion of the presiding judge, it is impossible to determine what horse is being claimed or who submitted the claim.*

(p) *Withdrawal of claim.* A claimant may withdraw a claim up to 10 minutes before post time of the race in which the horse will compete. *The withdrawal must be submitted by the claimant in writing on a form prescribed by the board.*

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

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

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

#### Regulatory Impact Statement

1. Statutory Authority and Legislative Objectives of Such Authority: The Board is authorized to promulgate these rules pursuant to Racing

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

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

3. Needs and Benefits: The proposed amendments to NYCRR section 4109.3 (harness) are to clarify and simplify the Claiming procedure in harness racing. The existing rule as it pertains to claiming horses is subject to varying interpretations from the judges. The existing rule may also be somewhat confusing to the horsemen. To provide clarification and ensure consistent enforcement of the rule, these proposed amendments state that no track official shall give any information as to the filing of any claim or claim information to the public and horsemen until after the race has been run (NYCRR section 4109.3(a)). Additionally, the proposed amendment sets forth the manner in which a claim is to be presented to the presiding judge or his designee. The presiding judge or his designees shall then write the time, race and initial the claim envelope. The claimant must then deposit the claim in a locked claim box at least thirty (30) minutes before the race in the board office of the track. The presiding judge or his designee shall not remove the claim envelope from the locked box until the appropriate time to be opened (NYCRR section 4109.3(d)). Lastly, the proposed change to NYCRR section 4109.3(e) is that the claim box shall be locked and further specifies the procedure to the opening of the sealed envelope. The proposed amendment requires the claimant be properly licensed and the claim form accurate, signed and complete, before the claim can be allowed by the judges. The claim information will then be given to the paddock judge, program director and announced.

4. Costs:

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

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

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

See (d) below.

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

5. Local Government Mandates: None. See above.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: After considerable dialog with the stewards and judges, these amendments provide much needed clarity with respect to the claiming procedure. The only other alternative would be to continue to enforce a rule that is vague and confusing and thereby prone to inconsistent enforcement.

9. Federal Standards: None.

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

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

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

## Worker's Compensation Board

### EMERGENCY RULE MAKING

#### **Insolvency of Group Self-insured Trusts**

**I.D. No.** WCB-34-08-00005-E

**Filing No.** 773

**Filing Date:** 2008-08-01

**Effective Date:** 2008-08-01

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

**Action taken:** Amendment of section 317.20 of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 50 and 117

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

**Specific reasons underlying the finding of necessity:** The recent decision in *Held v. Workers' Compensation Board* found the first two quarterly assessments to pay claims of defaulted private group self-insured trusts were void. This rule defines the term insolvent so the third assessment is not void.

**Subject:** Insolvency of group self-insured trusts.

**Purpose:** Provide definition of insolvent for group self-insured trust and when the Chair will levy an assessment to pay claims.

**Text of emergency rule:** Section 317.20 of Part 317 of Title 12 NYCRR is amended to designate the current section as subdivision (c) and add new subdivisions (a) and (b) to read as follows:

Section 317.20 [T] *Insolvent; assessments; termination and dissolution of the group.*

(a) *Definition. "Insolvent", in the context of a determination by the Chair, or his or her designee, to levy an assessment pursuant to the provisions of Workers' Compensation Law section 50(5)(g), shall mean the inability of a private group self-insurer, to pay its outstanding lawful obligations under the Workers' Compensation Law as they mature in the regular course of business, as may be shown by: i) the self-insurer being underfunded as defined in Workers' Compensation Law section 50(3-a); and ii) the sum of the self-insurer's assets, as defined by section 317.2(n) of this Part, plus the available security deposit held by the Chair pursuant to Workers' Compensation Law section 50(3-a) and section 317.5 of this Part, being less than the total cost of all of the self-insurers anticipated workers' compensation liabilities, as defined by section 317.2(o) of this Part, that will accrue within the succeeding six months.*

(b) *The Chair shall levy an assessment against all private group self-insurers, pursuant to Workers' Compensation Law section 50(5)(g), whenever he or she, or his or her designee, determines that workers' compensation benefits may be unpaid by reason of the default of an insolvent private group self-insurer as defined in subdivision (a).*

(c) *Termination and dissolution of the group.* The group shall continue for such time as may be necessary to accomplish the purpose for which it was created, and so long as all requirements to maintain authorization as set forth in this Part continue to be met. Upon termination of the group's status as a group self-insurer, the group will continue to administer the workers' compensation liabilities incurred by the group. Upon failure on the part of the group to properly administer such liabilities, the [c]Chair shall assume the administration and final distribution of the group's assets and liabilities.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 29, 2008

**Text of rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Special Counsel to the Chair, NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory Authority: Workers' Compensation Law (WCL) § 117 authorizes the Chair of the Workers' Compensation Board (Board) to adopt reasonable rules consistent with the provisions of the WCL. Section 50(3-a) (6) further directs the Chair to adopt reasonable rules relating to group self insurance. Chapter 139 of the Laws of 2008, effective June 30, 2008, amended the WCL with respect to private individual and group self-insureds. Section 3 of Chapter 139 amended the second paragraph

designated as (f) of subdivision (5) of WCL § 50 to renumber it as paragraph (g). Newly renumbered WCL § 50(5)(g) requires the Chair to assess and collect from all private self-insureds, including private group self-insurers, necessary funds to assure the prompt payment of workers' compensation benefits when they may be unpaid by reason of the default of an insolvent private self-insured employer.

2. Legislative Objectives: Employers in New York must provide workers' compensation coverage for their employees by either purchasing a policy from the State Insurance Fund or a private carrier, or by being authorized by the Chair to be individually self-insured, or by being a member of a group self-insured trust authorized by the Chair to provide coverage. Members of a group self-insured trust are jointly and severally liable for the claims and related costs incurred by the group self-insured trust. As additional security, former WCL § 50(5)(f) now WCL § 50(5)(g) provides that if a private self-insurer is insolvent and may default on the payment of benefits, the Chair may assess all private self-insurers for the funds to pay the claims. This is to ensure that claimants always receive their benefits. The proposed regulation defines insolvent to govern how the Chair determines that a private group self-insurer is insolvent and explains when the Chair shall levy an assessment to pay the claims of the insolvent private self-insurers.

3. Needs and Benefits: The Board is funded by assessments paid by the employers of New York. The assessment process requires the Chair to assess and collect the Board's administrative and special fund costs from the State Insurance Fund, private insurance carriers, and self-insurers (both individual and groups) including self-insured political subdivisions. In addition to the administrative and special fund assessments paid by all employers, public and private self-insurers, both individuals and groups, pay an assessment to cover the administrative costs of running the self-insurance program. Finally, private individual and group self-insurers pay another assessment to cover any unmet obligations of any insolvent group or individual private self-insurer that defaults on its payments.

In 2006 the first private group self-insurer became insolvent and defaulted. Since then another eight private group self-insurers have been deemed insolvent and defaulted. When a private self-insurer is insolvent and defaults on the payment of its obligations, the Chair is responsible for ensuring the claims continue to be paid. The Chair obtains the necessary funds to pay claims, pending any collection of funds from group members, by issuing assessments pursuant to WCL § 50(5) (g) [until June 20, 2008, WCL § 50(5)(f)] against all private individual and group self-insurers. Due to the number of insolvencies and defaults the Chair determined that approximately \$66 million was needed to pay claims in 2008, an amount many times greater than that needed in the past.

The Chair levies the assessments required by WCL § 50(5) (g) in accordance with WCL § 50(5) (e), and partial payments of the assessment are made on March 10th, June 10th, September 10th and December 10th of each year. In other words billing is made quarterly. In order for payments to be made on such dates and to provide private self-insureds with thirty days in which to make the payment, the Chair sends the invoices or bills for the quarterly assessments on or about February 10th, May 10th, August 10th and November 10th. Before each quarterly bill is sent, the amount needed is redetermined and then apportioned among the private self-insureds.

In response to the bills for the first quarter assessments 13 of the 58 group self-insurers refused to pay and commenced an Article 78 action seeking to annul the Chair's imposition of the assessments on them as invalid based upon a number of theories, chief amongst them was that the term "private self-insured employer" did not encompass a group self-insurer. (See, *Held, et. al. v. Workers' Compensation Board, et. al.*, Albany County Supreme Court, Index No.2957-08, July 7, 2008) While the petitioners did pay the portion of the assessment related to the administrative cost of the self-insurance office, they also refused to pay the portion of the second quarter assessment to cover the obligations of the insolvent and defaulted groups.

By decision issued May 2, 2008, the court granted the petitioners' request in *Held, et. al.* for a stay of the enforcement of the 2008 assessments. Three trusts were allowed to intervene in the action but they did not obtain the relief of the stay. Instead, like many other private group self-insurers, the intervening groups paid their assessments "under protest." In a Decision/Order/Judgment dated July 7, 2008, Judge O'Connor determined that the Chair's application of the provisions of WCL § 50(5)(f) [now renumbered as WCL § 50(5)(g) and amended] on all private group self-insurers was appropriate and proper, but annulled the assessments because the Chair did not meet the conditions precedent to levying the assessments. The court held that the Chair failed to establish that any of the private group self-insurers were actually insolvent as required by WCL § 50(5)(g) before issuing the assessments. Specifically, Judge O'Connor held that the statements of the Board's Director of Licensing were insufficient to establish the insolvency of the private group self-insurers. The Director of Licensing stated in her affidavit that the Board

was currently funding the compensation benefit payments of six of the nine private group self-insurers that had defaulted, that assessments had been levied to fund the payments for all nine defaulted private group self-insurers, and based upon the cash flow statements of the other three private group self-insurers, the Board would begin funding their compensation benefit payments before the end of the fiscal year. *Held, et. al.* at p.18.

This rule sets forth the definition of insolvent for purposes of meeting the condition precedent to issue assessments pursuant to WCL § 50(5)(g). The definition of insolvent in the rule makes clear the information the Chair must have and how he must make the determination that a private group self-insurer is insolvent. Such specificity requires a reasoned decision based upon the facts that a private group self-insurer is insolvent. Without this definition, any determination of insolvency by the Chair will not meet the standards required by statute as set forth in the July 7, 2008, *Held et. al.* decision. The rule also addresses the court's finding that insolvency must not be prospective or speculative but real and actual before imposing the assessment. In accordance with this finding the definition of insolvent provides that assets plus the security deposit must be less than the total of the private self-insurer's workers' compensation liabilities that will accrue within the next six months. Further, when stating when the Chair will levy an assessment, the rule requires the security deposit to be less than the total cost of the next six months of liabilities. It is not feasible to use a shorter period as the assessments are made on a quarterly basis, which must include time to perform the calculations and to collect the payments.

This rule provides a framework for making a determination of insolvency in light of the Court's decision in *Held et. al.*, so that the Chair may determine the appropriate assessments in light of that decision.

4. Costs: The imposition of the assessments to cover the claims of the insolvent and defaulted private group self-insurers is required by statute. See, *Held et. al.* at p.18. This rule codifies when a group trust is insolvent, the condition precedent in WCL § 50(5)(g) before the Chair is authorized levy an assessment. The amendments to § 317.20 codify the definition used since 2006 of the term "insolvent" for the purposes of issuing assessments on private self-insurers. The information that would be requested by the Chair to determine if a group is insolvent is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business, so the only cost to the private self-insurer is the cost of furnishing the information to the Chair. Therefore, any costs would be minimal.

The third quarter assessment bills will be sent on or about August 10, 2008. The amount billed is based on the quarterly determination of what is needed for the rest of the year and will be less than the estimated need reflected in the first two quarterly bills. The reduced assessment is due in part to ensuring the insolvency is real and not speculative. The Chair will apportion what is needed among the private self-insureds and bill over the remaining two quarters, crediting the private self-insureds for payments made in the first and second quarters. As private self-insureds, private group self-insured trusts will receive a third quarter bill for an assessment to cover the claims of defaulted groups. Upon receiving the bill the private group self-insureds will determine how to pay the assessment and if it needs to be immediately apportioned among the member employers. Some of the members of the group self-insured trusts are small businesses, who may incur this cost. The exact cost to members is unknown and will vary by group self-insured trust, as some groups will receive very small bills. The Board needs the funds from this assessment to pay the claims of the defaulted groups.

There is no cost to the Board in implementing this rule as it already engages in these activities.

5. Local Government Mandates: There are no local government mandates in this rule as it only applies to private self-insurers.

6. Paperwork: The Board's procedures for making the determinations involve the examination of financial information that private group self-insurers are already required to submit under existing regulations. There are no new paperwork requirements. The information requested by the Chair is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business.

7. Duplication: This rule does not duplicate any other New York State or Federal rule.

8. Alternatives: One alternative would be to take no action. However, in light of the need to clarify the Chair's determination of insolvency, so as to allow him to levy an assessment to ensure the payment of claims covered by the defaulted insolvent private group self-insurers, this was not a viable option. To determine the definition of insolvent to adopt by regulation, the Board reviewed the existing policy for making such determinations, the definition of insolvency used by Certified Public Accountants, the New York State Department of Taxation and Finance, Debtor Creditor Law and Insurance Law. Except for the definition in Insurance Law § 1309(a) and the Board's existing policy, the definitions were too imprecise and speculative in light of the decision in *Held et. al.* Therefore,

the decision was made to use the Board's policy and modify it to account for six months of liabilities instead of twelve months of liabilities.

9. Federal Standards: There are no federal standards that apply to these assessments.

10. Compliance Schedule: Private group self-insurers will be able to comply immediately.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: This rule codifies in regulation the definition of insolvent and policy regarding determining an assessment is necessary to pay claims covered by private group self-insured trusts. This rule only affects private self-insurers, both individual and group and does not affect insurance carriers, the State Insurance Fund or self-insured local governments. Private individual self-insurers are not small businesses because in order to be authorized to individually self-insure, an employer must have the financial ability to pay all claims and deposit with the Chair security worth 100% of its claims. Private group self-insurers contain small employers. There are approximately 58 trusts with a total of approximately 20000 active and inactive members.

2. Compliance requirements: These paragraphs do not impose any new reporting, recordkeeping or other affirmative act upon any private self-insurer. Workers' Compensation Law § 50(5)(g) sets forth a temporary funding mechanism for payment of the claims and their related expenses of insolvent defaulted private self-insurers, by way of an assessment on all private self-insurers. The recent court decision in *Held, et. al. v. Workers' Compensation Board, et. al.*, Albany County Supreme Court, Index No.2957-08, July 7, 2008, has questioned the Chair's determination of when a private group self-insured employer was insolvent and an assessment necessary. The Chair's procedures for making the determination involve the examination of financial information that group self-insurers are already required to submit pursuant to Part 317 of Title 12.

3. Professional services: Private self-insurers do not need any professional services in order to comply with the proposed regulation. The paragraphs merely set forth the Chair's procedures for making determinations of insolvency. Only the Chair needs to actually make the calculations. The amendments do not require the private self-insurers to submit any additional information they are not otherwise already required to submit.

4. Compliance costs: This rule imposes only minimal costs on private self-insurers. The amendments to § 317.20 define the term "insolvent" which is used in Workers' Compensation Law § 50(5) (g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather is a codification of existing policy modified to consider only the next six months of liabilities rather than the next twelve months. This rule only affects private self-insurers, both individual and group and has no affect on insurance carriers, the State Insurance Fund or self-insured local governments. The information that would be requested by the Chair is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business, so all that would be required is transmitting the information to the Chair. Any cost for such compliance would be minimal.

The third quarter assessment bills will be sent on or about August 10, 2008. The amount billed is based on the quarterly determination of what is needed for the rest of the year and will be less than the estimated need reflected in the first two quarterly bills. The reduced assessment is due in part to ensuring the insolvency is real and not speculative. The Chair will apportion what is needed among the private self-insureds and bill over the remaining two quarters, crediting the private self-insureds for payments made in the first and second quarters. As private self-insureds, private group self-insured trusts will receive a third quarter bill for an assessment to cover the claims of defaulted groups. Upon receiving the bill the private group self-insureds will determine how to pay the assessment and if it needs to be immediately apportioned among the member employers. Some of the members of the group self-insured trusts are small businesses, who may incur this cost. The exact cost to members is unknown and will vary by group self-insured trust, as some groups will receive very small bills. The Board needs the funds from this assessment to pay the claims of the defaulted groups.

5. Economic and technological feasibility: Private group self-insurers can easily comply with this rule. As stated above, the rule merely sets forth the Chair's procedures for determining of insolvency. Only the Chair needs to actually make the calculations. The rule does not require the private self-insurers to submit any additional information they are not otherwise already required to submit.

6. Minimizing adverse impact: As stated above, this rule only affects private self-insurers. It does not impact insurance carriers or SIF, so small businesses and local governments insured by them are not affected. It also does not affect any self-insured local government as they are largely exempted from the provisions of Part 317 and are not subject to the WCL § 50(5)(g) assessments. The proposed rule does not require any action on the part of private self-insurers. It merely defines the term "insolvent" as that term is used in Workers' Compensation Law § 50(5)(g) for the

purposes of issuing assessments on private self-insurers. This definition is not new but rather is a codification of existing Board policy. This rule is intended to clarify this term in light of a recent court decision.

7. Small business and local government participation: The rule only affects private self-insurers, both individual and groups. Private individual self-insureds are not small businesses or local governments so their participation is irrelevant. Local governments who are self-insured as municipalities are not subject to assessments pursuant to WCL § 50(5) (g), therefore their participation is not relevant. The only small businesses affected by this rule are those who are members of private group self-insured trusts or administer private group self-insured trusts. The rule codifies the existing policy regarding the definition of "insolvent" with a modification to limit consideration to six months of liabilities rather than twelve months. This policy has been used since the first private group self-insured trust was determined to be insolvent in 1996. Until recently, the Chair's definition of insolvent has not been challenged. While some of the group self-insurers and some of their members have recently challenged the Board's definition of insolvency, these challenges were made in the context of the Chair's authority to levy assessments in general and such authority has been specifically upheld by the court.

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

1. Types and estimated numbers of rural areas: This rule define the term "insolvent" as that term is used in Workers' Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather codifies existing policy. This rule only affects private self-insurers, both individual and group. It has no affect on insurance carriers, the State Insurance Fund or self-insured local governments. Private individual self-insurers and members of private group self-insurers are located in all areas of the State, including all rural areas. There are approximately 150 private individual self-insured employers and 58 private group self-insured trusts with approximately twenty thousand active and inactive members.

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule does not impose any new reporting, recordkeeping or other affirmative act upon any private self-insurer in rural areas. Workers' Compensation Law § 50(5)(g) sets forth a temporary funding mechanism for payment of the claims and their related expenses of insolvent defaulted private self-insurers, by way of assessments on all private self-insurers. A recent court decision in *Held et. al. v. Workers' Compensation Board, et. al.*, Albany County Supreme Court, Index No. 2957-08, July 7, 2008, has questioned the Chair's determination of when a private group self-insured employer was insolvent and an assessment necessary. The Chair's procedures for making the determination involve the examination of financial information that group self-insurers are already required to submit pursuant to Part 317 of Title 12.

Private individual self-insurers in rural areas or members of private group self-insured trusts who are located in rural areas do not need any professional services in order to comply with the proposed regulation. The rule merely sets forth the Chair's procedures for making determinations of insolvency. Only the Chair needs to actually make the calculations. The rule does not require the private self-insurers to submit any additional information beyond what they currently are required to submit.

3. Costs: This rule imposes only minimal new costs on private self-insurers. The amendments to § 317.20 define the term "insolvent" which is used in Workers' Compensation Law § 50(5) (g) for the purposes of issuing assessments on private self-insurers. This rule only affects private self-insurers, both individual and group and does not affect on insurance carriers, the State Insurance Fund or self-insured local governments. The information that would be requested by the Chair is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business, and all that would be required of the private self-insurer would be to furnish the information to the Chair. Any cost for such compliance by entities in rural areas would be minimal.

The third quarter assessment bills will be sent on or about August 10, 2008. The amount billed is based on the quarterly determination of what is needed for the rest of the year and will be less than the estimated need reflected in the first two quarterly bills. The reduced assessment is due in part to ensuring the insolvency is real and not speculative. The Chair will apportion what is needed among the private self-insureds and bill over the remaining two quarters, crediting the private self-insureds for payments made in the first and second quarters. As private self-insureds, private group self-insured trusts will receive a third quarter bill for an assessment to cover the claims of defaulted groups. Upon receiving the bill the private group self-insureds will determine how to pay the assessment and if it needs to be immediately apportioned among the member employers. Some of the members of the group self-insured trusts are small businesses, who may incur this cost. The exact cost to members is unknown and will vary by group self-insured trust, as some groups will receive very small bills. The Board needs the funds from this assessment to pay the claims of the defaulted groups.

4. Minimizing adverse impact: As stated above, this rule only affects private self-insurers. It does not impact insurance carriers or SIF, so businesses in rural areas insured by them are not affected. It also does not affect any self-insured local government as they are largely exempted from the provisions of this Part and are not subject to the WCL § 50(5)(g) assessments. The proposed rule does not require any action on the part of rurally located private self-insurers. It merely defines the term “insolvent” as that term is used in Workers’ Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather is a codification of existing policy modified to consider only the next six months of liabilities rather than the next twelve months. This rule is intended to clarify this term in light of the recent decision in *Held et. al.*

5. Rural area participation: This rule affects all private self-insurers, both individuals and groups, who are located all across New York, including rural areas. It codifies the existing policy regarding the definition of “insolvent” with a modification to limit consideration to six months of liabilities rather than twelve months. This policy has been used since the first private group self-insured trust was determined to be insolvent in 1996. Until recently, the Chair’s definition of insolvent has not been challenged. While some of the group self-insurers and some of their members have recently challenged the Board’s definition of insolvency, these challenges were made in the context of the Chair’s authority to levy assessments in general and such authority has been specifically upheld by the court. The individual self-insurers, including those located in rural areas, have not and do not challenge how the Chair has made these determinations.

***Job Impact Statement***

The proposed amendment will not have an adverse impact on jobs. This amendment defines the term “insolvent” as that term is used in Workers’ Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. Further this rule merely codifies existing policy and definition into regulation.